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ARTICLES

COMMENTS

RECENT DEVELOPMENTS

Judicial Review and Sexual Freedom

Ruthann Robson*

I. INTRODUCTION

Judicial review—the power of an often unelected judiciary to declare acts of a usually elected legislative body, or even a product of direct democracy, void as unconstitutional—remains a divisive subject despite its reputation as a cornerstone of democratic constitutionalism. Stated in very basic terms, one perspective is that judicial review is necessary to curb the excesses of democracy which can lead to "mob rule" and the oppression of minorities or even statistical majorities who are less powerful.[1] Phrased equally reductively, the opposing view is that judicial review is an elitist and aristocratic notion that thwarts democracy, imposing the unchecked views of an appointed oligarchy on the people.[2]

Sexual rights, such as equality for women and sexual minorities, reproductive rights, the decriminalization of sexual practices, and family rights for sexual minorities, serve as contemporary flashpoints for controversies about judicial review. Recent political debates about the proper role of the judiciary in a democracy focus on matters of sexuality, especially same-sex marriage. For example, the Presidential State of the Union addresses in 2004, 2005, and 2006 each contained a reference to "activist judges" who were redefining marriage to include same-sex couples.[3] Moreover, in the legal cases themselves there is often disagreement about the merits of judicial versus legislative decision.[4]

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* Professor of Law & University Distinguished Professor, City University of New York School of Law (robson@mail.law.cuny.edu; http://www.ruthannrobson.com). Versions of this article have been presented at the conferences Comparative Constitutionalism and Rights: Global Perspectives, University of KwaZulu-Natal, Durban, South Africa; Reflections on Rights Enforcement: Comparative Perspectives, University of Saskatchewan, Canada; The Fifth Annual Women and the Law Conference: The Global Impact of Feminist Legal Theory; and Contemporary Issues in Gender Jurisprudence Colloquium, Hofstra University School of Law. I am grateful to the participants at all of these events for their reactions. I am also grateful for the comments and support of my colleagues at City University of New York School of Law, especially Penelope Andrews, Janet Calvo, Stephen Loffredo, Jenny Rivera, and Steve Zeidman. Thanks to financial support from the City University of New York School of Law Professional Development Committee funds and to the wonderful students at the law school who have worked as research assistants, with and without financial reward. For continuous encouragement, I am indebted to Sarah Valentine.

[1] *See* discussion *infra* Part II.

[2] *See* discussion *infra* Part II.

[3] *See infra* notes 61-64 and accompanying text.

[4] *See infra* notes 45-57 and accompanying text.

Although the mainstream jurisprudential arguments regarding the "counter-majoritarian difficulty"[5] certainly use specific cases as examples, at times they proceed in abstract or historical terms, as if judicial review is (or should be) unrelated to particular contemporary politics and devoid of women or sexual minorities. Indeed, in arguing against judicial review, legal theorist Jeremy Waldron posits that what is necessary is "some general understanding, uncontaminated by the cultural, historical, and political preoccupations of each society."[6] Also arguing against judicial review, Larry Kramer notes that "bigger issues are at stake" in debates about what he terms "judicial supremacy" than whether "the liberal Warren Court or the centrist Burger Court or the conservative Rehnquist Court should be judged good or bad or deserve praise or condemnation."[7]

Further, even when jurisprudential theories would seem to be supportive of a case positively affecting women's sexual freedom, the resulting analysis may be disappointing. The classic neo-liberal defense of judicial review, such as John Hart Ely's representation-reinforcing theory of judicial review, posits that "courts should protect those who cannot protect themselves politically."[8] Such a theory has appeal for feminists and sexual minorities. The spectacular failure in the United States to democratically approve the Equal Rights Amendment[9] continues to serve as a reminder of the limits of democracy even on behalf of a statistical majority. Recent referenda approving amendments to state constitutions in order to limit the rights of sexual minorities demonstrate a marked level of political powerlessness. Yet John Hart Ely nevertheless found *Roe v. Wade*[10] "frightening" because he did not believe a right to abortion was "inferable from the language of the Constitution" or "the framers' thinking respecting the specific problem in issue."[11] His theory that the role of the judiciary was to correct the malfunctions of representative democracy by

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[5] *See generally* ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 16-23 (2d ed. 1986). Bickel notes "the essential reality that judicial review is a deviant institution in the American democracy" because it does not reflect the will of the popular majority. *Id.* at 18.

[6] Jeremy Waldron, *The Core of the Case Against Judicial Review*, 115 YALE L.J. 1346, 1352 (2006). Interestingly, however, Waldron begins his piece with a discussion of the Massachusetts Supreme Judicial Court's ruling that "the state's marriage licensing laws violated state constitutional rights to due process and equal protection by implicitly limiting marriage to a union between a man and a woman." *Id.* at 1348.

[7] LARRY D. KRAMER, THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW 233 (2004).

[8] JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 152 (1980) [hereinafter ELY, JUDICIAL REVIEW].

[9] H.J. Res. 208, 86 Stat. 1523 (1972).

[10] 410 U.S. 113 (1973).

[11] John Hart Ely, *The Wages Of Crying Wolf: A Comment On* Roe v. Wade, 82 YALE L.J. 920, 935-36 (1973) [hereinafter Ely, *Wolf*].

protecting those in the minority[12] did not extend to abortion as a constitutional right. He reasoned that fetuses were even more entitled to minority status than women,[13] ultimately stating that: "Compared with men, very few women sit in our legislatures . . . . But *no* fetuses sit in our legislatures . . . ."[14]

As John Hart Ely's argument illustrates, there has been a reflexive and extensive resort to textualism and originalism in the debates regarding judicial review. In the United States, this discussion can proceed with a marked "exceptionalism" premise, as if the United States is the only, or the only relevant, nation or even constitutional democracy worth considering.[15] Additionally, even when the debates concerning judicial review are not abstract and specifically focus on cases concerning the sexual freedom of women and sexual minorities, the perspectives of other nations are glaringly absent. The well-established notion that excluded voices, especially those who are the objects of the legal discourse,[16] need to be included remains an uncompleted project.

Thus, much of the existing debate regarding judicial review is deficient for at least one of three reasons. First, the debates regarding judicial review are abstracted from the controversy surrounding sexual freedom, and often imply that sexual freedom itself is of little, or less, consequence than the "larger" issues at stake. Second, the mainstream jurisprudential debates have mostly failed to incorporate the perspectives of feminist and queer legal theorists,

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[12] *See generally* ELY, JUDICIAL REVIEW, *supra* note 8, at 136.

[13] Ely, *Wolf*, *supra* note 11, at 934-35.

[14] *Id.* at 933.

[15] For a discussion of American exceptionalism, see Harold Hongju Koh, *On American Exceptionalism*, 55 STAN. L. REV. 1479 (2003). As Koh notes, the phrase is often used "far too loosely and without meaningful nuance." *Id.* at 1482. In seeking to untangle the meanings, Koh discusses an unpublished manuscript by the political scientist Michael Ignatieff. Koh discusses the three types of exceptionalism that Ignatieff mentions ("human-rights narcissism," "judicial exceptionalism," and "American exemptionalism"), then provides:

> While this trichotomy is intriguing, I find it both under- and overinclusive. It lumps together certain distinct forms of exceptionalism and misses others. Instead, I prefer to distinguish among four somewhat different faces of American exceptionalism, which I call, in order of ascending opprobrium: distinctive rights, different labels, the "flying buttress" mentality, and double standards. In my view, the fourth face—double standards —presents the most dangerous and destructive form of American exceptionalism.

Id. at 1482-83 (footnotes omitted).

[16] *See, e.g.*, Carrie Menkel-Meadow, *Excluded Voices: New Voices in the Legal Profession Making New Voices in the Law*, 42 U. MIAMI L. REV. 29 (1987) (arguing that the law should include the ideas and experiences of women and other excluded groups).

Importantly, this notion is not limited to legal scholarship or limited to single or even "representative" voices. As Jenny Rivera has noted in the context of combating intimate partner violence directed at Latinas, a variety of modes and organizations of community representation in the democratic processes are vital to fully reflect and address the priorities of persons affected by laws, even by laws aimed at "assisting" them such as the Violence Against Women Act. *See* Jenny Rivera, *Intimate Partner Violence Strategies: Models for Community Participation*, 50 ME. L. REV. 283 (1998).

even when such work has been directly relevant. Third, the debates in the United States regarding judicial review often proceed as if the United States is "exceptional" and *sui generis*, usually with a reflexive privileging of originalism and historical exegesis.

This article starts with the premise that sexual freedom, and most specifically lesbian sexual freedom, is a nonnegotiable goal of any legal process in any polity.[17] With regard to judicial review, the ultimate question this article confronts is whether judicial review is advantageous for female and lesbian sexual freedom. The practical consequences of such a query leads to a determination of whether feminist and lesbian work toward sexual freedom in democracies should advocate for judicial review to be defended and to be included in constitutions of nations, such as the United States, in which sexual freedom is being assaulted. Engaging in such an inquiry necessitates consideration and inclusion of works of feminist and queer legal theorists and global perspectives.

The presence or absence of judicial review is not positively correlated to legal guarantees of sexual freedom. However, this does not mean that advocates of sexual freedom can eschew debates regarding judicial review. Such debates, even when cloaked in the rhetoric of judicial review and democracy, are often directly targeted at sexual freedom. Instead, we must participate in these debates, even as we seek to reimagine them. Most importantly, we must be mindful, and insist that others be mindful, of what is at stake for women and sexual minorities in particular debates regarding judicial review.

Part II of this article considers the theories and politics of judicial review, highlighting the controversies surrounding sexual freedoms. Part III analyzes feminist and other perspectives on judicial review. Part IV explores specific instances of sexual freedom and particular processes of legislative action or judicial review, focusing on California, the Netherlands, and South Africa. Finally, Part V offers an outline of a lesbian legal theory of judicial review focused on the goal of procuring sexual freedom for lesbians, other sexual minorities, and women.

II. POLITICS AND THEORIES OF JUDICIAL REVIEW

At first glance, judicial review seems to be an inherent feature of constitutional democracy. Out of 193 independent nations, 164 have some form of

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[17] There are numerous controversies regarding precise definitions of "sexual freedom" and its necessary preconditions, but for purposes of this article, the judicial declarations implicated would include judgments of the unconstitutionality of criminal sanctions for sexual practices, of restrictions on reproductive freedoms such as abortion, and of limitations in family recognition, including same-sex marriage. *Cf.* Ruthann Robson, *Assimilation, Marriage, and Lesbian Liberation*, 75 TEMPLE L. REV. 709 (2002) (arguing that same-sex marriage will not guarantee sexual freedom for lesbians).

judicial review.[18] New constitutions in new democracies, influenced by the United States, generally contain provisions for judicial review that give the judiciary the power to declare democratically promulgated laws void as unconstitutional. For example, under Afghanistan's new constitution, the "Supreme Court, upon request of the Government or the Courts can review compliance with the Constitution of laws, legislative decrees, international treaties, and international conventions, and interpret them, in accordance with the law."[19] Similarly, the new constitution of Iraq announces that the constitution is the "Supreme Law of the land,"[20] that any legal provision that conflicts with it is void,[21] and grants the Federal Supreme Court original and exclusive jurisdiction to review claims that a law, regulation, or directive issued by the federal or regional governments is inconsistent with the constitution.[22] Likewise, new constitutions for nations from the former Soviet Union and on the continent of Africa favor provisions for judicial review.[23] Indeed, judicial review has been called one of the United States' "chief contributions to world thought,"[24] and "one of the U.S.A.'s best-selling (and least remunerative) exports,"[25] even as "adopting" nations have chosen to institutionalize judicial review through the different mechanism of specialized and designated constitutional courts.[26]

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[18] Francisco Ramos Romeu, *The Establishment of Constitutional Courts: A Study of 128 Democratic Constitutions*, 2 REV. L. & ECON. 103, 125 n.2 (2006).

[19] AFG. CONST. ch. 7, art. 6. Under Afghanistan's constitution, judicial power is vested in a Supreme Court, High Courts and Appeal Courts. Chapter 7, article 5 also extends judicial authority to all lawsuits involving real parties ("real individuals or incorporeal including the state"). Thus, judicial review of Afghani law may arise in the context of individual litigation, or on the basis of judicially initiated action or executive requested review.

[20] THE PERMANENT CONSTITUTION OF THE REPUBLIC OF IRAQ, § I, art. 13.

[21] *Id.*

[22] *Id.* § 3, ch. 3, art. 90.

[23] *See, e.g.*, Aharon Barak, *Foreword: A Judge on Judging: The Role of a Supreme Court in a Democracy*, 116 HARV. L. REV. 16, 128 (2002) ("[S]ince the end of World War II, most new constitutions have included express provisions about judicial review, thereby ending the legal debate over its legitimacy."); Stephen Gardbaum, *The New Commonwealth Model of Constitutionalism*, 49 AM. J. COMP. L. 707, 715-16 (2001). New constitutions with entrenched bills of rights and judicial review have been a "universal phenomenon," including the constitutions of Poland (1986), Hungary (1990), Russia (1991), Bulgaria (1991), Czech Republic (1992), Slovak Republic (1992), Romania (1992), and Slovenia (1993), as well as most of the at least twenty new constitutions adopted among African countries since 1989. Gardbaum, *supra*, at 715-16.

[24] Steven G. Calabresi, *The Virtues of Presidential Government: Why Professor Ackerman is Wrong to Prefer the German to the U.S. Constitution*, 18 CONST. COMMENT. 51, 53 (2001) (stating that "written constitutions, judicial review, and federalism" constitute America's "chief contributions to world thought").

[25] Steven G. Calabresi, *Thayer's Clear Mistake*, 88 NW. U.L. REV. 269, 269 (1993).

[26] Romeu, *supra* note 18, at 125 n.3 ("Out of the 164 countries that established the option of judicial review of legislation, 76 also created constitutional courts, while 90 did not.").

Meanwhile, in the United States, this very power of the judiciary is incessantly and continuously contested. Best selling books such as *Men in Black: How the Supreme Court is Destroying America*, stridently advance the thesis concisely articulated in the title.[27] The more historical and less conservative approaches of legal scholars such as Larry Kramer and Mark Tushnet similarly argue that "judicial supremacy" should yield to a "popular constitutionalism" in which "the Supreme Court is our servant and not our master."[28] Legal scholar Jeremy Waldron takes a similar view, articulating his "opposition to American-style judicial review"[29] and presenting a case against "strong judicial review" in which judges can declare legislative acts unconstitutional.[30] Certainly such concerns are not new. James Thayer's famous 1893 article sought to provide a guide to restrain courts from declaring acts unconstitutional.[31] The two-hundredth anniversary of the United States Supreme Court's 1803 opinion in *Marbury v. Madison*,[32] which reputedly[33]

Romeu notes that there are two different models of institutionalizing judicial review and analyzes their prevalence:

> Theorists typically distinguish two basic models of judicial review: the American model, so-called because of its prevalent use on the American continent, which attributes the power of review of legislation to all ordinary judges; and the European model, adopted by most European countries, which assigns the exclusive power of review of legislation to a special constitutional court. Looking at the existence of constitutional courts as a salient feature distinguishing the two models, some interesting patterns arise. Longitudinally, all of the experiences of the 19th century follow the American model of *Marbury vs. Madison*. The European model, conceived in its present format by Hans Kelsen, was first adopted by the constitutions of the disappeared Czechoslovakia and Austria in 1920, and then by other countries all over the world. Cross-sectionally, the regions of the world also differ widely: in Europe, of the 42 countries that have in their history adopted some model of judicial review, 76% have at some point chosen constitutional courts; in Asia and Africa, 57% and 51% respectively have done so; but only 33% in the Middle East, 20% in America, or even 0% in Oceania.

Id. at 104 (footnotes omitted). On this view, Calabresi is incorrect that American-style judicial review is a *popular* export. *See supra* notes 24-25. *See also* John Ferejohn, *Constitutional Review In The Global Context*, 6 N.Y.U. J. LEGIS. & PUB. POL'Y 49 (2002-2003) ("The United States is virtually unique in having judicial review, if judicial review means a system in which ordinary judges can review and strike down legislation.").

[27] MARK LEVIN, MEN IN BLACK: HOW THE SUPREME COURT IS DESTROYING AMERICA (2005).

[28] LARRY D. KRAMER, THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW 227-48 (2004); *accord* MARK TUSHNET, TAKING THE CONSTITUTION AWAY FROM THE COURTS (1999).

[29] JEREMY WALDRON, LAW AND DISAGREEMENT 15 (1999).

[30] Waldron, *supra* note 6, at 1353.

[31] James B. Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129, 129-56 (1893).

[32] 5 U.S. (1 Cranch) 137 (1803).

[33] Some have argued that judicial review was established prior to *Marbury v. Madison*. *See, e.g.*, William Michael Treanor, *Judicial Review Before* Marbury, 58 STAN. L. REV. 455, 457-58

established judicial review, occasioned several symposia issues of law reviews devoted to the problems of judicial review.[34]

Abroad, Americans may not be promulgating judicial review as enthusiastically as it might appear. For example, regarding the drafting of the Iraqi constitution, at least one advisor from the George W. Bush administration argued that Iraq's constitution limit the power of judicial review, lest Iraq be faced with a situation of unacceptable judicial decisions comparable to those in the United States, such as those granting the right of abortion.[35] Further, the distrust of judicial review is not solely a preoccupation in the United States. Robert Martin's *The Most Dangerous Branch: How the Supreme Court of Canada has Undermined Our Law and Our Democracy* differs in its details and doctrine, but not in its ultimate conclusions.[36]

There does not seem to be a critic in the United States who has been as explicit as the Canadian professor who has argued that "feminists and feminist ideology have come to dominate" the legal system and the Canadian Supreme Court to the extent that there is a "matriarchy in charge."[37] Yet an anti-feminist perspective is apparent in the United States debates. The power of judicial review is most often and most virulently attacked in the context of sexual freedoms. As the Iraqi anecdote previously mentioned illustrates, there is a continued preoccupation with abortion in the criticisms of judicial review. Indeed, the Court's 1973 decision in *Roe v. Wade* has become a symbol of judicial activism, joining the previous paradigmatic example of judicial activism attributed to *Brown v. Board of Education*,[38] in which the Court in 1954 declared racial segregation and separatism, however "equal," unconstitutional. Interestingly, the scholarship and rhetoric castigating the Court are startlingly similar. Compare this statement:

(2005) (arguing that judicial review in the United States was well-established before *Marbury v. Madison* was decided in 1803 and examining "thirty-one cases in which a statute was invalidated and seven additional cases in which, although the statute was upheld, one judge concluded that the statute was unconstitutional").

[34] *See, e.g.*, Symposium, Marbury *at 200: A Bicentennial Celebration of* Marbury v. Madison, 20 CONST. COMM. 205 (2003); James Crawford, Marbury v. Madison *at the International Level*, 36 GEO. WASH. INT'L L. REV. 505 (2003); Symposium, Marbury v. Madison *and Judicial Review: Legitimacy, Tyranny, and Democracy*, 37 JOHN MARSHALL LAW REV. 317 (2004); Symposium, Marbury v. Madison: *200 Years of Judicial Review in America*, 71 TENN. L. REV. 241 (2004); Symposium, Marbury v. Madison: *A Bicentennial Symposium*, 89 VA. L. REV. 1105 (2003); Symposium, *Judicial Review: Blessing or Curse? Or Both? A Symposium in Commemoration of the Bicentennial of* Marbury v. Madison, 28 WAKE FOREST L. REV. 313 (2003).

[35] LARRY DIAMOND, SQUANDERED VICTORY 148 (2005).

[36] ROBERT IVAN MARTIN, THE MOST DANGEROUS BRANCH: HOW THE SUPREME COURT OF CANADA HAS UNDERMINED OUR LAW AND OUR DEMOCRACY (2003).

[37] *Id.* at 124.

[38] 347 U.S. 483 (1954).

> [T]he Supreme Court of the United States, with no legal basis for such action, undertook to exercise their naked judicial power and substituted their personal political and social ideas for the established law of the land;

with this statement:

> [T]he Supreme Court created a new right that is not inferable from the Constitution, in any values derived from provisions in it or in the intent of its Framers . . . never had their reasoning been so spurious, so lacking in careful scholarship, or so overtly based on a philosophy of relativism.

The first statement is from the Southern Manifesto, a statement by members of Congress[39] rejecting the Court's decision in *Brown v. Board of Education*, while the second is a statement by a United States Senator introducing a bill to amend the United States Constitution to provide that "a right to abortion is not secured by this Constitution."[40]

The coupling of accusations of "judicial activism" with "intent of the Framers" is a hallmark of conservative rhetoric; the reference to "original intent" is meant to serve as the proper leash on the judiciary. This means that the equality and liberty interests articulated in the Fourteenth Amendment are "time-dated" at the year 1868, when the Amendment was passed.[41]

Or perhaps earlier. In a 2005 speech before the conservative Federalist Society, presidential advisor Karl Rove extolled the Founders who gathered "in the 1770s" as "the greatest assemblage of political philosophers since ancient Athens."[42] This display of what Justice Kirby of Australia's High Court would label "ancestor worship,"[43] is joined to a lambaste of four recent court cases, two of which concern sexual matters.[44]

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[39] 102 CONG. REC. 4515-16 (1956) (signed March 1956 by nineteen Senators and eighty-one Representatives).

[40] 129 CONG. REC. 17326-27 (1983) (statement of Senator Hatfield, in support of Constitutional Amendment on Abortion).

[41] ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 149 (1997).

[42] KARL ROVE, AGAINST JUDICIAL IMPERIALISM, ADDRESS TO THE FEDERALIST SOCIETY (Nov. 11, 2005), *available at* http://www.opinionjournal.com/extra/?id=110007537.

[43] Michael Kirby, *Constitutional Interpretation and Original Intent: A Form of Ancestor Worship?*, 24 MELB. U.L. REV. 1 (2000).

[44] The first case regarding sexuality is *Goodridge v. Dep't of Public Health*, 798 N.E. 2d 941 (Mass. 2003), the same-sex marriage case decided by the Massachusetts Supreme Court. The second case undoubtedly refers to *United States v. Extreme Associates, Inc.*, 352 F. Supp. 2d 578 (W.D. Pa. 2005).

The third case, unnamed in Rove's speech, refers to *Newdow v. U.S. Congress*, 292 F.3d 597 (9th Cir. 2002) (declaring "under God" in the Pledge unconstitutional), *rev'd on other grounds, sub nom.* Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1 (2004). The fourth case, also unnamed, refers to *Roper v. Simmons*, 543 U.S. 551 (2005) (holding that "'national consensus' prohibited the use of the death penalty for murderers committed under the age of 18").

Accusations of judicial activism, accompanied by references to the Constitution's silence and the intent of the framers, are voiced from within the judiciary itself. In the abortion cases, several Justices have argued that "abortion" is not in the text of the Constitution,[45] that it has been criminalized and therefore was not recognized by the framers as a protected right,[46] and that the issue should be left to the democratic process.[47]

In *Lawrence v. Texas*,[48] the 2003 Supreme Court decision declaring a state statute criminalizing homosexual sodomy unconstitutional, Justice Scalia, dissenting, stated that "it is the premise of our system" that judgments regarding sexual and other types of morality are to be made through "normal democratic means" and not "imposed by a governing caste."[49] He argued that the state's choice to criminalize homosexual sodomy "is well within the range of traditional democratic action, and its hand should not be stayed through the invention of a brand-new 'constitutional right' by a Court that is impatient of democratic change."[50] Justice Scalia seems to attribute the Court's impatience to the fact that the "Court has taken sides in the culture war, departing from its role of assuring, as neutral observer, that the democratic rules of engagement are observed."[51] He views the Court as a "product of a law-profession culture" that has "largely signed on to the so-called homosexual agenda."[52]

Several years earlier, Justice Scalia's dissenting opinion in *Romer v. Evans*[53] was equally rancorous. In *Romer*, the Court declared unconstitutional Colorado's Amendment Two, which had barred anti-discrimination laws that protected "homosexuals, lesbians, and bisexuals."[54] Justice Scalia again stressed the democratic quality of the state law, which in the case of Amendment Two might be viewed as democracy in its purest form because it resulted from a voter referendum rather than from a representative legislative

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[45] Roe v. Wade, 410 U.S. 113, 221 (White, J., dissenting); Ohio v. Akron Ctr. for Reprod. Health, 497 U.S. 502, 521 (1990) (Scalia, J., concurring); Gonzales v. Carhart, 127 S.Ct. 1610, 1639 (2007) (Thomas, J., concurring).

[46] Planned Parenthood of Southeastern Penn. v. Casey, 505 U.S. 833, 980 (1992) (Scalia, J., concurring in the judgment in part and dissenting in part).

[47] *See* Webster v. Reprod. Health Services, 492 U.S. 490, 535 (1989) (Scalia, J., concurring in part and concurring in the judgment); *Roe*, 410 U.S. at 222 (White, J., dissenting).

[48] 539 U.S. 558 (2003).

[49] *Id.* at 603-04 (Scalia, J., dissenting).

[50] *Id.* at 603.

[51] *Id.* at 602.

[52] *Id.*

[53] 517 U.S. 620, 636 (1996) (Scalia, J., dissenting).

[54] *Id.* at 635. For some of the many discussions of Amendment Two, see Sharon E. Debbage Alexander, Romer v. Evans *and the Amendment 2 Controversy: The Rhetoric and Reality of Sexual Orientation Discrimination in America*, 6 TEX. F. ON C.L. & C.R. 261 (2002); Jane S. Schacter, Romer v. Evans *and Democracy's Domain*, 50 VAND. L. REV. 361, 365 (1997).

process.[55] In the dissenting opinion, Justice Scalia declared that because the Constitution of the United States is silent on the issue, "it is left to be resolved by normal democratic means" and the "Court has no business imposing upon all Americans the resolution favored by the elite class from which the Members of this institution are selected."[56] That Amendment Two had resulted from the success of "homosexuals" on the local level using the democratic process to enact anti-discrimination laws was characterized by Justice Scalia as attributable to "the geographic concentration and the disproportionate political power of homosexuals."[57] Importantly, these criticisms are not mere disagreements about the outcome, but impugn the power of the courts to decide the issue at all.

In the United States, the exercise of judicial review by the federal courts of democratically promulgated state legislation also implicates the problem of federalism and so-called "states rights." In both *Lawrence v. Texas* and *Romer v. Evans*, the United States Supreme Court was reviewing democratic enactments by states. Yet the problem of federalism in the United States is not neatly mapped onto the judicial review landscape. For example, the decision of the Supreme Judicial Court of Massachusetts in *Goodridge v. Department of Public Health*,[58] holding that the Commonwealth of Massachusetts may not "deny the protections, benefits, and obligations conferred by civil marriage to two individuals of the same sex who wish to marry,"[59] is the product of a state's highest court reviewing its own state laws and applying its own state constitution.[60] Despite previously articulated preferences for states' rights and local control, this decision was condemned by President Bush in his State of the Union Address in 2004 as a product of "[a]ctivist judges" who have "begun redefining marriage by court order, without regard for the will of the people and their elected representatives," and who "insist on forcing their

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[55] *Cf.* Christopher J. Peters, *Assessing the New Judicial Minimalism*, 100 COLUM. L. REV. 1454, 1491 n.176 (2000) (arguing that although the Court's decision in *Romer v. Evans* was "more saliently counter-majoritarian than the typical exercise of judicial review," it is the product of a "more deliberative decisionmaking process than the enactment of Amendment Two is likely to have been").

[56] *Romer*, 517 U.S. at 636 (Scalia, J., dissenting).

[57] *Id.* at 647. Lest he be accused of criticizing democratic processes, he noted, "I do not mean to be critical of these legislative successes; homosexuals are as entitled to use the legal system for reinforcement of their moral sentiments as is the rest of society. But they are subject to being countered by lawful, democratic countermeasures as well." *Id.* at 646.

[58] 798 N.E.2d 941 (Mass. 2003).

[59] *Id.* at 948.

[60] As the Supreme Judicial Court of Massachusetts phrased it, "[t]he genius of our Federal system is that each State's Constitution has vitality specific to its own traditions, and that, subject to the minimum requirements of the Fourteenth Amendment, each State is free to address difficult issues of individual liberty in the manner its own Constitution demands." *Id.* at 967.

arbitrary will upon the people."[61] The support for a constitutional amendment which would define marriage as limited to one man and one woman is justified, by President Bush and others, as responsive to "[a]ctivist judges."[62] In his 2005 State of the Union Address, President Bush reiterated his position: "Because marriage is a sacred institution and the foundation of society, it should not be redefined by activist judges. For the good of families, children and society, I support a constitutional amendment to protect the institution of marriage."[63] Again, in 2006, President Bush included "activist courts that try to redefine marriage," as one of the major concerns facing Americans.[64] The judicial review in this scenario is accomplished by state court judges interpreting their own state constitution, yet the invocation of "judicial activism" cured through a constitutional amendment, trumps any fealty to states rights.[65] In 2007, President Bush's State of the Union Address was considerably milder on the issue of judicial power.[66]

In addition to this type of political inconsistency, judicial review preferences for "activism" or "restraint" are not consistent. Even those who argue against judicial review most stridently and most expressly, including Justice Scalia, are more accurately quarreling with the results in particular cases rather than judicial review generally. In the instance of Justice Scalia, such a conclusion is buoyed by his resort to judicial review to declare other democratically promulgated legislation unconstitutional. During the 1994-2000 terms, Justice Scalia voted to declare unconstitutional federal, state or local acts twenty-five times, a statistic that bears comparison to Justices Souter, Ginsburg, and

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[61] George W. Bush, President, United States of America, 2004 State of the Union Address (Jan. 20, 2004), *in* WASH. POST, Jan. 21, 2004, at A18.

[62] *Id.* ("If judges insist on forcing their arbitrary will upon the people, the only alternative left to the people would be the constitutional process. Our nation must defend the sanctity of marriage.").

[63] George W. Bush, President, United States of America, 2005 State of the Union Address (Feb. 2, 2005), *in* WASH. POST, Feb. 3, 2005, at A14.

[64] George W. Bush, President, United States of America, 2006 State of the Union Address (Jan. 31, 2006), *in* WASH. POST, Feb. 1, 2006, at A14 ("Yet many Americans, especially parents . . . are concerned about unethical conduct by public officials and discouraged by activist courts that try to redefine marriage.").

[65] *See generally* Joan Schaffner, *The Federal Marriage Amendment: To Protect The Sanctity Of Marriage Or Destroy Constitutional Democracy?*, 54 AM. U.L. REV. 1487 (2005); Edward Stein, *Past And Present Proposed Amendments To The United States Constitution Regarding Marriage*, 82 WASH. U.L.Q. 611 (2004).

[66] George W. Bush, President, United States of America, 2007 State of the Union Address (Jan. 23, 2007), *in* WASH. POST, Jan. 24, 2007, at A16 ("The lives of citizens across our nation are affected by the outcome of cases pending in our federal courts. And we have a shared obligation to ensure that the federal courts have enough judges to hear those cases and deliver timely rulings.").

Breyer, with seventeen, fourteen, and fourteen votes respectively to declare legislation unconstitutional.[67]

Certainly, it is a mistake to view judicial review as co-extensive with a progressive political agenda. One of the most prolonged and vigorous exercises of judicial review by the United States Supreme Court was directed at declaring unconstitutional federal and state statutes granting economic rights to workers. During the so-called *Lochner* era, derived from the 1905 case of *Lochner v. New York*,[68] the Court declared unconstitutional a New York statute limiting the working hours of bakers to sixty hours per week. The Court invalidated numerous other laws[69] that were part of the progressive effort to curb the excesses of capitalism. This era, now widely discredited,[70] ended with Franklin D. Roosevelt's "New Deal" and his threat to confront the power of the United States Supreme Court itself, through what has become known as his "court-packing plan" among other strategies.[71]

Moreover, the more recent Rehnquist Court, 1986-2005, is unarguably an activist Court, especially in relation to Congress, declaring almost twice as many Congressional statutes unconstitutional than the Warren Court, 1954-1969, and more than Burger Court, 1969-1986.[72] The federal statutes voided by the Court included a federal law providing a civil remedy for violence against women,[73] two regulating the possession of guns,[74] and two prohibiting discrimination.[75] As legal scholars noted, the Rehnquist Court showed little deference, or perhaps even respect, for Congress.[76]

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[67] THOMAS M. KECK, THE MOST ACTIVIST SUPREME COURT IN HISTORY: THE ROAD TO MODERN JUDICIAL CONSERVATISM 251 (2004). This statistic is not an anomaly, and a comparison of Justice Scalia's decisions from his appointment to the Court in 1986, with other Justices, shows a similar pattern. LEE EPSTEIN ET AL., THE SUPREME COURT COMPENDIUM: DATA, DECISIONS, AND DEVELOPMENTS 588-90 tbl. 6-8 (3d ed. 2003). A manual review by the author of the cases decided in subsequent terms reveals a consistent result.

[68] 198 U.S. 45 (1905).

[69] *See, e.g.*, Hammer v. Dagenhart, 247 U.S. 251 (1918) (invalidating child labor legislation); Adkins v. Childrens Hospital, 261 U.S. 525 (1923) (invalidating minimum wage legislation for women and children).

[70] *See* Cass Sunstein, *Lochner's Legacy*, 87 COLUM. L. REV. 873 (1987); *cf.* David Bernstein, *Lochner's Legacy's Legacy*, 82 TEX. L. REV. 1 (2003).

[71] See G. EDWARD WHITE, THE CONSTITUTION AND THE NEW DEAL (2000), and William G. Ross, *When Did The "Switch In Time" Actually Occur? Re-Discovering The Supreme Court's "Forgotten" Decisions Of 1936-1937*, 37 ARIZ. ST. L.J. 1153 (2005), for a discussion of whether FDR's plan caused the demise of Lochner-era activism.

[72] KECK, *supra* note 67, at 40.

[73] United States v. Morrison, 529 U.S. 598 (2000).

[74] Printz v. United States, 521 U.S. 898 (1997); United States v. Lopez, 514 U.S. 549 (1995) (superseded by 18 U.S.C. §922(g)(2)(A)).

[75] Bd. of Tr. of Univ. of Ala. v. Garrett, 531 U.S. 356 (2001); Kimel v. Fla. Bd. of Regents, 528 U.S. 62 (2000).

[76] *See, e.g.*, Ruth Colker & James Brudney, *Dissing Congress*, 100 MICH. L. REV. 80 (2001)

Regarding the enforcement of state laws and judgments, the Rehnquist Court, from 1986-2003, invalidated 128 state or local laws.[77] Such invalidations included two state anti-discrimination laws with protections for sexual minorities. In *Hurley v. Irish-American Gay Group*[78] and *Boy Scouts v. Dale*,[79] the Court concluded that state anti-discrimination laws were overridden by the First Amendment rights of private organizations that professed homophobia as a part of their claim. Certainly, an accurate or nuanced portrait of the practice of judicial review cannot be reduced to statistics. For instance, *Bush v. Gore*,[80] which effectively determined the outcome of the 2000 presidential election, did not result in any laws being declared unconstitutional. Further, the generally available statistics capture only a prevailing activist stance. One could calculate the times a Justice voted to declare a government act unconstitutional but was part of the minority dissent. Nevertheless, it is impossible to refute the fact that the Rehnquist Court has declared many federal and state statutes unconstitutional, which satisfies the basic definition of an activist court.[81]

Despite such realities, it remains true that in the political realm, "activism" is generally an accusation hurled at judges rendering liberal decisions and that liberals and neo-liberals tend to support judicial review in a strategy of defensiveness. "Ideological drift"[82] and similar concepts attempt to explain the tendency of most progressives to continue to support judicial review. On this view, judicial review on the whole once benefited progressive causes such as racial equality and reproductive rights, symbolized by the cases of *Brown v. Board of Education* and *Roe v. Wade*. That era has long since ended, despite

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(analyzing two methodologies employed by the Rehnquist Court that have resulted in growing disrespect for Congress: the "crystal ball" approach, which effectively penalizes the enacting Congress for failing to create a detailed legislative record, even though such a record requirement could not reasonably have been anticipated, and the "phantom legislative history," which established and applied a legal standard for review that even a detailed legislative record could not possibly satisfy); Robert Post & Reva Siegel, *Protecting the Constitution from the People: Juricentric Restrictions on Section Five Power*, 78 IND. L.J. 1 (2003) (stating that "[i]n a recent string of decisions invalidating federal civil rights legislation, the Supreme Court has repeated the simple but powerful message" that the "Constitution belongs to the courts").

[77] KECK, *supra* note 67, at 41. For comparison, this is less than the "activist" Warren Court, in which 186 state and local laws were invalidated, and significantly less than the "moderate" Burger Court, in which 309 state and local laws were invalidated. *Id.*

[78] 515 U.S. 557 (1995).

[79] 530 U.S. 640 (2000).

[80] 531 U.S. 98 (2000).

[81] RICHARD A. POSNER, THE FEDERAL COURTS: CHALLENGE AND REFORM 320 (1996) (defining judicial activism as courts "acting contrary to the will of the other branches of government").

[82] J. M. Balkin, *Ideological Drift and the Struggle Over Meaning*, 25 CONN. L. REV. 869, 870 (1993).

some successes to convince one that the trend persists.[83] One might intellectually realize that theories of constitutional interpretation including judicial review "do not have a fixed normative or political valence"[84] but vary over time, yet might be stuck in the past remaining comfortable with old positions,[85] or convinced that the underlying structure is sound despite a superficial "tilt on the surface."[86]

In this light, the search for "neutral principles" seems warranted, although the neutral principles themselves are outcome-driven, or, as the legal philosopher John Rawls might term it, "substantive."[87] Ronald Dworkin, interpreting and extending Rawls, argues that the basic political liberties which must be maintained are themselves quasi-instrumental, in that they are necessary for the development of "moral powers," such as the power to form and to act on conceptions of "justice" and "the good."[88] Yet as almost all legal philosophers agree, there are sincere and profound disagreements over what constitutes "justice" or "the good," or what should happen if conceptions of "justice" and "the good" conflict with each other. To remove such controversies from "the people" and place them in the courts, even when such controversies involve constitutional issues, is asserted to be making the courts "our master" rather than more appropriately "our servant."[89]

As Jeremy Waldron makes explicit, his "core" case against judicial review rests upon four assumptions regarding democratic processes.[90] His first assumption is that there is "a broadly democratic political system with universal adult suffrage, and it has a representative legislature, to which elections are held on a fair and regular basis."[91] Second, that there is "a well-established and politically independent judiciary," that is "mostly *not* an

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[83] *E.g.*, Lawrence v. Texas, 539 U.S. 558 (2003) (declaring the Texas sodomy statute unconstitutional).

[84] Balkin, *supra* note 82, at 870.

[85] TUSHNET, *supra* note 28, at 131.

[86] *Id.* at 132.

[87] In his posthumously published "restatement," Rawls confronts the "long-standing objection to liberalism" that it "favors the values of autonomy and individuality and opposes those of community and of associational allegiance." JOHN RAWLS, JUSTICE AS FAIRNESS: A RESTATEMENT 153 (2001). He states that "[j]ustice as fairness is not procedurally neutral. Clearly, its principles are substantive and express far more than procedural values, as does its political conceptions of society and person . . . ." *Id.* at 153 n.27. He additionally clarifies that "any reasonable political conception must impose restrictions on permissible comprehensive views," and that "social influences favoring some doctrines over others cannot be avoided on any view of political justice." *Id.* at 153-54.

[88] RONALD DWORKIN, JUSTICE IN ROBES 255 (2006).

[89] *See, e.g.*, KRAMER, *supra* note 7, at 248 (arguing that "we" should insist "that the Supreme Court is our servant and not our master").

[90] Waldron, *supra* note 6.

[91] *Id.* at 1361.

elective or representative institution . . . permeated with an ethos of elections, representation, and electoral accountability in the way that the legislature is."[92] Third, he assumes that "there is a strong commitment on the part of most members of the society . . . to the idea of individual and minority rights," so that people "take rights seriously."[93] Fourth, Waldron assumes that "the consensus about rights is not exempt from the incidence of general disagreement about all major political issues."[94]

Waldron concedes that these assumptions are "demanding."[95] Indeed, although Waldron does not confront them, there are strong arguments that the first three of these assumptions do not hold in the case of the United States. For example, "universal adult suffrage" does not obtain, as persons are denied the right to vote based upon previous criminal convictions,[96] citizenship status,[97] or residency.[98] Further, there continue to be serious questions about

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[92] *Id.* at 1363 (emphasis added).

[93] *Id.* at 1364 ("They [the people] care about [individual and minority rights], they keep their own and others' views on rights under constant consideration and lively debate, and they are alert to issues of rights in regard to all the social decisions that are canvassed or discussed in their midst.").

[94] *Id.* at 1366.

[95] *Id.* at 1401.

[96] MARC MAUER & TUSHAR KANSAL, THE SENTENCING PROJECT, BARRED FOR LIFE: VOTING RIGHTS RESTORATION IN PERMANENT DISENFRANCHISEMENT STATES (2005), *available at* http://www.sentencingproject.org/pdfs/ barredforlife.pdf. Mauer and Kansal report:

> An estimated 4.7 million Americans are not eligible to vote as a result of felony disenfranchisement laws that apply in 48 states and the District of Columbia. Election laws are determined by each state, and so disenfranchisement laws vary significantly across the country . . . . In all 14 states, some or all persons convicted of a felony can be considered to be permanently disenfranchised. In some states, for example, this can include an 18-year old convicted of a first-time non-violent offense and sentenced to probation.
>
> The only means by which these persons can have their voting rights restored is through action by the state, variously by a pardon or restoration of rights from the governor or board or pardons, or by legislative action.

Id. at 3.

See also Leonard E. Birdsong, *Drug Decriminalization and Felony Disenfranchisement: The New Civil Rights Causes*, 2 BARRY L. REV. 73 (2001) (arguing that the decriminalization of nonviolent possession of illegal drugs and an end of disfranchisement for concomitant felony convictions must become a twenty-first century civil rights issue); Eric J. Miller, *Foundering Democracy: Felony Disenfranchisement in the American Tradition of Voter Exclusion*, 19 NAT'L BLACK L.J. 32 (2005) (arguing that felony disenfranchisement is a "national scandal," and that "felony disenfranchisement is a form of elitism that reserves political participation for a privileged social and intellectual class"); Jessie Allen, *Symposium on Race, Crime, and Voting: Social, Political, and Philosophical Perspectives on Felony Disenfranchisement in America*, 36 COLUM. HUM. RTS. L. REV. 1 (2004) (exploring various perspectives on felony disenfranchisement).

[97] *See generally* Gabriela Evia, Note, *Consent by All the Governed: Refranchising Noncitizens as Partners in America's Democracy*, 77 S. CAL. L. REV. 151 (2003); Virginia

the accuracy of voting counts[99] and the reality of representation given practices of redistricting[100] and campaign finance.[101] Regarding Waldron's second assumption, members of the judiciary are often elected,[102] and an electioneering

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Harper-Ho, *Noncitizen Voting Rights: The History, the Law and Current Prospects for Change*, 18 LAW & INEQ. 271 (2000); Tara Kini, *Sharing The Vote: Noncitizen Voting Rights In Local School Board Elections*, 93 CAL. L. REV. 271 (2005); Jamin B. Raskin, *Legal Aliens, Local Citizens: The Historical, Constitutional and Theoretical Meanings of Alien Suffrage*, 141 U. PA. L. REV. 1391 (1993); Gerald M. Rosberg, *Aliens and Equal Protection: Why Not the Right to Vote?*, 75 MICH. L. REV. 1092, 1093-1100 (1977).

[98] For example, citizens of the U.S. territories of Puerto Rico and the U.S. Virgin Islands cannot vote in presidential elections. *See* Igartúa de la Rosa v. United States, 229 F.3d 80 (1st Cir. 2000) (reversing a District Court for the District of Puerto Rico decision that U.S. citizens residing in Puerto Rico had the right to vote in Presidential elections); Romeu v. Cohen, 265 F.3d 118 (2nd Cir. 2001) (upholding the denial of an absentee ballot to U.S. citizen who had previously voted in New York but then moved to Puerto Rico, even though had he moved to a foreign nation he would have been entitled to an absentee ballot); Amber L. Cottle, Comment, *Silent Citizens: United States Territorial Residents and the Right to Vote in Presidential Elections*, 1995 U. Chi. Legal F. 315 (1995); Aaron E. Price, Comment, *Civil Rights in the 21st Century: A Representative Democracy: An Unfulfilled Ideal for Citizens of the District of Columbia*, 7 UDC/DCSL L. REV. 77 (2003) (residents of the District of Columbia, also citizens, cannot vote in presidential elections); Jamin B. Raskin, *Is This America? The District of Columbia and the Right to Vote*, 34 HARV. C.R.-C.L. L. REV. 39 (1999).

[99] *See, e.g.*, Michael A. Carrier, *Vote Counting, Technology, and Unintended Consequences*, 79 ST. JOHN'S L. REV. 645, 627 (2005) (examining direct recording electronic devices and vote counting flaws in the 2004 presidential election, "including machine breakdowns, vote totals that exceeded or underrepresented the number of voters who cast ballots, and incidents in which the machines switched votes from one candidate to another," with ninety-eight of ninety-nine reported incidents involving switches favoring George Bush); Paul M. Schwartz, *Voting Technology and Democracy*, 77 N.Y.U. L. REV. 625, 627 (2002) (analyzing the Florida election system of the 2000 presidential election and concluding that "the deployment of election technologies created a voting-technology divide in Florida" where "technological differences guaranteed unequal access to voting"); Daniel P. Tokaji, *The Paperless Chase: Electronic Voting and Democratic Values*, 73 FORDHAM L. REV. 1711, 1716-17 (2005) (arguing that "election reform [can] no longer be thought of as a once-in-a-generation occurrence" and urging scholars to "consider the improvement of voting systems an ongoing process, one in which the judicial, legislative, executive, and administrative components of government all have important responsibilities"); Daniel P. Tokaji, *Early Returns on Election Reform: Discretion, Disenfranchisement, and the Help America Vote Act*, 73 GEO. WASH. L. REV. 1206, 1207 (2005) (asserting that "the process now commonly referred to as 'election reform' contributed to the problems that emerged in the 2004 election," and noting that "the exceptionally broad discretion permitted under some states' challenge procedures led to the prospect of racially discriminatory challenges").

[100] *See* League of United Latin Am. Citizens v. Perry, ___U.S.___, 126 S. Ct. 2594 (2006) (considering the notorious Texas redistricting plans, holding that it could not formulate reliable judicial standards for impermissible political gerrymandering, but holding the redistricting plan violated the minority dilution provisions of the Voting Rights Act).

[101] *See* Randall v. Sorrell, 548 U.S. 230 (2006).

[102] A majority of all cases in the United States are decided by judges whose continued tenure is contingent upon elections. This fact is attributable to another: most judgeships in the United

ethos has prompted some judges to challenge ethics rules regarding their campaigns.[103]

Waldron's assumption that there is a strong commitment to minority rights, especially in the context of sexual minorities, is problematic. In this regard, Waldron takes up the "representation-reinforcement" defense of judicial review[104] and links it to the famous footnote four of *United States v. Carolene Products Co.* that questioned whether "prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry."[105] Waldron warns, however, that "not every minority deserves this special treatment," for a discrete and insular minority is a minority that "exists apart from political decisionmaking" and "whose members are isolated from the rest of the community in the sense that they do not share many interests with non-members that would enable them to build a series of coalitions to promote their interests."[106] Moreover, he clarifies "prejudice" in a way that provides an escape hatch for any arguable application to sexual minorities:

> It is important also to distinguish between prejudices and views held strongly on religious or ethical grounds. We should not regard the views of pro-life advocates as prejudices simply because we do not share the religious convictions that support them. Almost all views about rights—including pro-choice views—

States are elective offices. More than surprising, these two facts are curious, even anomalous, for judges are elected on a similar scale in no other constitutional democracy in the world. In thirty-nine of our fifty states, judges must face the electorate in some form, either through competitive or retention elections. Of the nation's more than 1200 state appellate judges, forty-seven percent are appointed, forty percent face partisan elections, and thirteen percent face non-partisan elections. Of nearly 8500 state trial court judges in courts of general jurisdiction, just twenty-four percent are appointed, with forty-three percent facing partisan elections and thirty-three percent involved in non-partisan elections.

See generally Torres v. New York State Bd. of Elections, 462 F.3d 161 (2d Cir. 2006) (declaring New York City's system for electing judges unconstitutional), *rev'd* No. 06-766, 2008 WL 140755 (U.S. Jan. 16, 2008); Steven Zeidman, *To Elect or Not to Elect: A Case Study of Judicial Selection in New York City, 1977-2002*, 37 U. MICH. J.L. REFORM 791, 791-92 (2004) (footnotes omitted); *see also* Judith L. Maute, *Selecting Justice in State Courts: The Ballot Box or the Backroom?*, 41 S. Tex. L. Rev. 1197, 1226 (2000); Stephen Zeidman, *Judicial Politics: Making the Case for Merit Selection*, 68 Alb. L. Rev. 713 (2005).

[103] Republican Party of Minn. v. White, 536 U.S. 765 (2002) (holding that a provision of the code of judicial conduct, which prohibited a candidate for judicial office in an election from announcing his or her views on disputed legal or political subjects, violated the First Amendment).

[104] Waldron, *supra* note 6, at 1402-04.

[105] 304 U.S. 144, 153 n.4 (1938).

[106] Waldron, *supra* note 6, at 1403-04.

> are deeply felt and rest in the final analysis on firm and deep-seated convictions of value.[107]

With such reasoning, sexual minorities are not worthy or "real" minorities meriting consideration in a democracy. This eviscerates Waldron's otherwise promising, and outcome-driven, penultimate point that the aim should not be to defend or attack judicial review but to do "whatever best secures the rights of the minorities affected."[108]

That the judiciary might not "best" secure the rights of minorities, including sexual minorities and statistical but disempowered majorities such as women, is by now a safe assertion. Waldron, however, argues that contentions that the judiciary is better suited to protect such rights than democratic processes is based on a belief that "elites" are more sympathetic to minority rights.[109] Other theorists extend their analysis of those who advocate judicial review into a diagnosis of a personality disorder: a preference for judicial review arises from a "sensibility"[110] of paternalism, elitism, and a mistrust of the masses who are "emotional, ignorant, fuzzy-headed, and simple-minded,"[111] even if one would prefer these traits be described with "kinder, gentler adjectives."[112]

Yet this theorizing itself might be described with any number of "kinder, gentler adjectives" that portray it as "elitist" with a "sensibility" of "paternalism" evincing mistrust of the "emotional." By failing to incorporate the articulations of the "minorities affected," mainstream critiques of judicial review replicate the criticisms they offer. Instead, it is important to explore the views of feminist and queer theorists regarding the protection of their rights in any discussion of the merits of judicial review.

III. FEMINIST AND QUEER INTERVENTIONS

In 1993, feminist legal scholar Mary Becker sought to "start a discussion within the feminist community about the extent to which we should continue to focus on the Supreme Court and binding judicial review."[113] Becker argued that women must be considered in any deliberation of judicial review and democratic legitimacy,[114] a point which continues to be ignored. Her

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[107] *Id.* at 1404 n.141.

[108] *Id.* at 1406.

[109] *Id.* at 1405.

[110] RICHARD PARKER, HERE, THE PEOPLE RULE: A CONSTITUTIONAL POPULIST MANIFESTO (1994).

[111] KRAMER, *supra* note 7, at 242.

[112] *Id.* at 243.

[113] Mary Becker, *Conservative Free Speech and the Uneasy Case For Judicial Review*, 64 U. COLO. L. REV. 975, 979 (1993).

[114] *Id.* at 985.

consideration of women in the United States led her to conclude that the "uneasy case" for judicial review in a constitutional democracy becomes "even uneasier."[115] Much of Becker's analysis rests upon her view of women as a "majority group," excluded from the process that produced the United States Constitution, and never "achiev[ing] its share of democratic or judicial power."[116]

Becker identifies four problems with judicial review in the constitutional democracy of the United States from the perspective of women, using the jurisprudence of sex equality, free speech, and abortion as examples. First, she points to the overwhelmingly male bias in the judiciary given its gender-skewed composition.[117] Becker insightfully notes that more female judges is not necessarily a solution because "deference to precedent would give an overwhelming edge to the men for a considerable time to come."[118] She contrasts this to legislatures, which although also primarily composed of men, are subject to direct pressure from women and do not operate in a system bound by past precedent.[119]

Second, and somewhat more abstractly, Becker argues that judicial review prevents needed "experimentation" and imposes "top-down theories" in the form of judicial standards, even if such standards are inappropriate.[120] While Becker does not specifically connect this critique to feminist theories, she seems not to simply be arguing that such a structure is undemocratic, but that it might also be unfeminist. Third, Becker contends that judicial review interferes with democratic deliberations, emphasizing again that women are a majority.[121] Becker views judicial review as serving to legitimate the status quo, removing important issues from the democratic process, and interfering with political movements such as feminism. For Becker, this is true even if the outcome of a litigation is successful. Thus, it seems as if seeking judicial review to secure rights can be an infantilizing process, like asking "Daddy" for a dispensation. She also points to the tendency of favorable judicial decisions, such as *Roe v. Wade*, to mobilize the opposition. Moreover, she contends that the process of litigation can interfere with coalition building.[122]

Fourth and finally, Becker identifies "futility" as a problem.[123] She argues that the courts are not capable of accepting "real social change," contending

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[115] *Id.*
[116] *Id.* at 976.
[117] *Id.*
[118] *Id.* at 987.
[119] *Id.* at 989.
[120] *Id.* at 990.
[121] *Id.* at 992.
[122] *Id.* at 992-97.
[123] *Id.* at 998.

that even successful outcomes are generally trivial victories which forestall more meaningful change.[124] In this, Becker seems to accept the divide between positive rights and negative rights, assuming that the courts have limited power to make systemic change. Yet part of Becker's critique here is more of a criticism of the Constitution rather than judicial review: "[T]he rights enshrined in the Bill of Rights are conservative; they are most valuable to the powerful, and often buttress . . . the power of those who hold them."[125]

Becker's work remains one of the few feminist interventions into the problem of judicial review in a constitutional democracy and the sole argument unequivocally against judicial review. A few years after Becker's piece appeared, feminist legal scholar Tracy Higgins published an article *Democracy and Feminism*, a mitigated defense of democratic constitutionalism in the United States as it includes judicial review.[126] Higgins refracts her theorizing through the case of *United States v. Virginia (VMI)*,[127] in which a majority of the Court, in an opinion authored by Justice Ruth Bader Ginsburg, held unconstitutional the military academy's all-male admissions policy. Higgins implicitly refutes Becker's preference for democratic interventions by using the arguments of Justice Scalia dissenting in *VMI*. As Higgins accurately relates, Justice Scalia "excoriated the Court for reading into the Constitution the biases of our age and thereby limiting the scope of democratic evolution of social norms,"[128] a strategy of argument Scalia had similarly employed in cases involving sexual minorities such as *Romer v. Evans* and *Lawrence v. Texas*.[129] In *VMI*, Scalia "championed the workings of democracy and noted that women, in fact, are in a position to exercise considerable power," and reasoned that the continued state support for VMI's all-male admissions policy "must be presumed to reflect" women's democratic power.[130] Thus, Scalia's refusal to find a constitutional right for women to be admitted into a state educational institution becomes "a matter of respecting women's rights as citizens" in a democracy.[131]

Yet Higgins concludes that women are failed both by "fundamental rights" (as Constitutional rights to be guaranteed through judicial review) and by "democracy."[132] She argues that if judicial construction of the Constitution does not protect women's rights, then women are lesser citizens than men in

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[124] *Id.* at 998-1010, 1048.

[125] *Id.* at 1000.

[126] Tracy E. Higgins, *Democracy and Feminism*, 110 HARV. L. REV. 1657 (1997).

[127] 518 U.S. 515 (1996).

[128] Higgins, *supra* note 126, at 1681.

[129] *See supra* note 57 and accompanying text.

[130] Higgins, *supra* note 126, at 1681.

[131] *Id.*

[132] *Id.*

the democracy, and therefore "less capable of protecting their interests through the democratic process."[133] More specifically, Higgins argues that "existing inequality shapes democratic choices."[134] Using empirical data, Ilya Somin has demonstrated that the political knowledge base of women, necessary for participating in democratic processes in any meaningful way, is substantially less than that of men, even on issues of particular interest to women such as abortion and the identity of female government officials.[135]

Feminist legal theorist Robin West has integrated her analysis of judicial review into her project of "progressive constitutionalism" which focuses on the Fourteenth Amendment, arguing that its history, language, logic, and spirit demand a more expansive interpretation including positive rights.[136] West argues that the "adjudicated Constitution," by which she means the "Constitution [as it] has been construed and applied by the courts," has "proven to be a markedly conservative foundational document."[137] Consistent with Mary Becker, and to some extent Tracy Higgins, Robin West observes that although judicial review of constitutional issues has "from time to time been used to effectuate progressive gains and to solidify progressive victories, those moments have been rare, anomalous, and often fleeting," and are quickly "soured by [the] near instantaneous conservative reconstruction."[138] West addresses the problem of positive versus negative rights in judicial review, seeming to agree with Becker that federal courts in the United States logically protect only negative rights since their role in the constitutional democratic scheme is to constrain and limit the other branches of government.[139] This leads West to the conclusion that the institution of Congress is defined by a goal of more distributive justice, which would allow Congress to read the Constitution as "requiring, not simply permitting, quite different, and far more progressive, interpretations of our constitutional guarantees than those reached by the Court."[140]

Writing from critical queer and race legal theory perspectives, Darren Lenard Hutchinson expresses similar concerns to those of feminist legal scholars such as Becker, Higgins, and West. Hutchinson challenges the conception that the judicial review is counter-majoritarian and anti-democratic,

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[133] *Id.*

[134] *Id.* at 1701.

[135] Ilya Somin, *Political Ignorance and the Countermajoritarian Difficulty: A New Perspective on the Central Obsession of Constitutional Theory*, 89 IOWA L. REV. 1287, 1357-59 (2004).

[136] ROBIN WEST, PROGRESSIVE CONSTITUTIONALISM 2-3 (Rodney A. Smolla & Neal Devins eds., Duke Univ. Press 1994).

[137] *Id.* at 296.

[138] *Id.* at 297 (footnote omitted).

[139] *Id.* at 315.

[140] *Id.*

instead arguing that the courts reflect majoritarian views.[141] Hutchinson roots his theorizing in the so-called liberal successes of the United State's Supreme Court 2003 term, including *Lawrence v. Texas*[142] and *Grutter v. Bollinger*,[143] concluding that these decisions "fortify, rather than aim to dismantle, social hierarchies of race, sexuality, class, and gender."[144] While many other progressive legal scholars have criticized these seemingly positive decisions,[145] Hutchinson uses them not only to demonstrate the limits of judicial review but also to argue that both legal theorists and social movement activists need to "free themselves from efforts to legitimize judicial review in a 'democracy' and make their claims about the law more normative."[146] As others have done, Hutchinson points out that outcomes of judicial review are shaped by many

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[141] Darren Lenard Hutchinson, *The Majoritarian Difficulty: Affirmative Action, Sodomy, and Supreme Court Politics*, 23 LAW & INEQ. 1, 4 (2005).

[142] 539 U.S. 558 (2003).

[143] 539 U.S. 306 (2003).

[144] Hutchinson, *supra* note 141, at 4.

[145] Various authors have critiqued *Lawrence*. *See, e.g.*, Belkys Garcia, *Reimagining The Right To Commercial Sex: The Impact of* Lawrence v. Texas *on Prostitution Statutes*, 9 N.Y. CITY L. REV. 161 (2005) (arguing that the Court's argument for bodily integrity and privacy limited the rights of "homosexual" people in traditionally recognized relationships, and that by invoking the language of rational basis review and having an exclusionary paragraph, the Court limited the reach of the opinion); Berta E. Hernández-Truyol, *Querying* Lawrence, 65 OHIO ST. L.J. 1151, 1242, 1244, 1246 (2004) (critiquing the sameness approach taken by the majority in *Lawrence* as "promoting the idea that [homosexual sexual conduct] is acceptable so long as it is mimetic of [heterosexual sexual conduct]" and thus "reinforces heteronormativity as the status quo, and both normalizes and perpetuates the destructive in/justice paradox").

Grutter has been criticized as well. *See, e.g.*, Bryan K. Fair, *Re(Caste)ing Equality Theory: Will* Grutter *Survive Itself by 2028?*, 7 U. PA. J. CONST. L. 721, 727-28 (2005) (critiquing the *Grutter* promise "in light of the anticaste principle [and] explaining why it will not likely effect much change in educational caste" by "postpon[ing] for another day the taking of racial caste seriously"); Cecil Hunt II, *The Color of Perspective: Affirmative Action and the Constitutional Rhetoric of White Innocence*, 11 MICH. J. RACE & L. 477, 525 (2006) (taking a critical view of O'Connor's opinion in *Grutter*, which "suggests that the primary unifying characteristics of the members of the non-favored racial group are their Whiteness, innocence, and victimization from race-conscious affirmative action programs"); Rhonda V. Magee Andrews, *Affirmative Action After* Grutter*: Reflections on a Tortured Death, Imagining a Humanity-Affirming Reincarnation*, 63 LA. L. REV. 705, 706-07 (2003) (arguing "that the standard 'diversity' rationale for affirmative action, though of obvious appeal, is not a remedial or corrective justice-based rationale, and hence, fails to address the central concerns of traditionally disadvantaged groups" and therefore must be "revised and broadened"); Daria Roithmayr, *Tacking Left: A Radical Critique of* Grutter, 21 CONST. COMMENT. 191, 194 (2004) (arguing that the Court's timetable for eliminating race-conscious affirmative action, as delineated in the *Grutter* opinion, is unrealistic and critiquing the decision as "provid[ing] little material benefit for communities of color [yet] materially and symbolically privileg[ing] white interests [by] prioritiz[ing] the interests of white students in breaking down their stereotypes about minorities and in adding diverse perspectives to classroom conversations").

[146] Hutchinson, *supra* note 141, at 82.

forces outside the law;[147] as the adage has it: "th' supreme court follows th' election returns."[148] He argues that because majoritarian views influence specific outcomes when judicial review is exercised, progressive social movements should engage in coalition politics to enhance their political voice.[149] The majoritarian solution available to women as advanced by Mary Becker[150] is implicitly adapted by Hutchinson for groups, unlike women, who are not a statistical majority. In short, Hutchinson argues that by forming coalitions, sexual and racial minorities could become majorities, or at least influence the outcomes of judicial review through social and democratic processes.

Lesbian legal scholar Nancy Knauer adds an important dimension to any debate that constructs judicial review and democratic processes as oppositional choices.[151] Relying on and refining comparative institutional analysis theory,[152] which adds the "market" to the judicial and political processes as important and rejects "the conceit of single institutionalism," given that each institutional process is limited by design and therefore imperfect,[153] Knauer takes up the topic of legal recognition of same-sex relationships.[154] She argues that advocates, unlike theorists, strategize how to achieve their goals not by simply identifying the optimal institution, but by simultaneously pursuing the goals in "a variety of complementary institutional settings."[155] Yet in assessing the likelihood that an institution will be amenable to the achievement of one's goals, Knauer correctly includes the non-institutional oppositional forces, such as the "traditional values movement" which opposes legal recognition for same-sex relationships specifically, and sexual freedom more generally.[156] In

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[147] *Id.*

[148] FINLEY PETER DUNNE, *The Supreme Court's Decisions*, *in* MR. DOOLEY'S OPINIONS 19, 26 (1900).

[149] Hutchinson, *supra* note 141, at 90.

[150] *See supra* notes 113-125 and accompanying text.

[151] Nancy J. Knauer, *The Recognition of Same-Sex Relationships: Comparative Institutional Analysis, Contested Social Goals, and Strategic Institutional Choice*, 28 U. HAW. L. REV. 23 (2005).

[152] *See generally* NEIL K. KOMESAR, LAW'S LIMITS: THE RULE OF LAW AND THE SUPPLY AND DEMAND OF RIGHTS (2001); NEIL K. KOMESAR, IMPERFECT ALTERNATIVES: CHOOSING INSTITUTIONS IN LAW, ECONOMICS, AND PUBLIC POLICY (1994).

[153] Knauer, *supra* note 151, at 23-24.

[154] *Id.* at 24-25 (arguing that a specific controversy is much more necessarily considered than "vague exogenous conceptions of the good, such as equality, strong property rights, or resource allocation efficiency").

[155] *Id.* at 25.

[156] *Id.* at 54-55. Although Knauer does not use the term "sexual freedom," she notes that the "traditional values movement considers homosexuality, along with abortion, no-fault divorce, and the separation of church and state, as symptomatic of a general decline in morals which threatens the health of the nation." *Id.* at 54.

so doing, she elucidates an important rationale for the conservative attack on judicial review in the arena of sexual freedom.[157]

Although Knauer stresses market forces throughout her essay, even stating that "arguably" some of the "greatest gains in the recognition of same-sex relationships have come from the market,"[158] she ultimately concludes that the path to "minority recognition does not lie in deciphering the best institutional alternative or mounting a flawless litigation strategy," but with "atomistic forces that drive the institutions," such as a neighbor across the street.[159]

As Knauer notes, and is implicit in most of the theorizing regarding judicial review, the power of the judicial decisions to shape social change, and not merely respond to it, is an important consideration.[160] The work of feminist social theorists has demonstrated that *Roe v. Wade* had a "galvaniz[ing]" effect

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[157] Knauer states:

> The traditional values movement typically does not have standing to challenge the individual unscripted victories that occur from time to time when same-sex partners demand recognition in the courts . . . . In these individual cases, the traditional values movement is consigned to comment from the sidelines, occasionally making an appearance as amici. . . .
>
> The lack of standing to challenge individual cases underscores a puzzling feature of the traditional values movement. Unlike same-sex couples who have an obvious personal stake in the debate, it is not clear what motivates the core participants in the traditional value movement. It is one thing for an individual to work toward formal and social recognition of her family, but it is quite a different thing to work toward the erasure of a stranger's family. Therefore, as a practical matter, it makes sense that the movement concentrates its efforts on legislative action or constitutional amendments that can undo or forestall the individual court victory or grant of benefits. Locating its demand in the political process or direct democracy may be necessary because the benefits of participation are arguably so diffuse, and success depends on reaching the broadest possible base.

Id. at 56-57 (footnotes omitted).

[158] *Id.* at 26.

[159] *Id.* at 80.

[160] The view that courts cannot produce social change was most effectively argued in GERALD N. ROSENBERG, THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE? (1991). Rosenberg recently applied his thesis to the Massachusetts Supreme Court's decision in *Goodridge v. Department of Public Health*, 798 N.E.2d 941 (Mass. 2003). Rosenberg concluded that the result of this (and similar) judicial victories have been "nothing short of disastrous":

> Same-sex marriage proponents had not built a successful movement that could persuade their fellow citizens to support their cause and pressure political leaders to change the law. Without such a movement behind them, winning these court cases sparked an enormous backlash. They confused a judicial pronouncement of rights with the attainment of those rights.

Gerald N. Rosenberg, *Courting Disaster: Looking for Change in All the Wrong Places*, 54 DRAKE L. REV. 795, 812-13 (2006).

leading to the creation of the so-called "right to life" movement,[161] yet the judicial enforcement of sexual rights for women has also had many positive consequences. "Backlash" and "positive change" are not mutually exclusive. Likewise, in the area of sexual minority issues, the role of the courts in social change is not capable of simplistic equations.[162]

Thus, although there are certainly differences amongst the feminist and sexual minority perspectives elucidated above, there are several similarities that would seem to underlie queer and feminist legal theories of judicial review. First, unlike many of the other legal theories interrogating judicial review, the emphasis is on current controversies rather than historical problems and pronouncements. The framers of the Constitution, *Marbury v. Madison* "establishing" judicial review,[163] and previous practices of judicial review are not subject to the type of scriptural exegesis prominent in liberal, progressive, and conservative discourse. Second, again unlike non-feminist legal theories of judicial review, the conclusions are much less likely to firmly defend judicial review or to argue for its demise in favor of popular democracy. Even in the work of Mary Becker, the feminist legal scholar arguing most strenuously against judicial review, her arguments are qualified and nuanced.[164]

Lastly, and most importantly, feminist theorizing about judicial review is refreshingly instrumental and utilitarian, as such terms are more commonly and less philosophically understood. Specifically, feminist legal theorizing presumes that the purpose of any interrogation of judicial review in a constitutional democracy is focused on achieving the "liberation" of women and others, whether it is phrased in terms of equality, citizenship, or as this

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[161] *See, e.g.*, Christopher P. Keleher, *Double Standards: The Suppression of Abortion Protesters' Free Speech Rights*, 51 DEPAUL L. REV. 825, 838 (2002) (summarizing news articles in the weeks immediately following the *Roe v. Wade* decision and finding that the decision did not discourage the pro-life movement but instead "actually galvanized the pro-life movement").

[162] As Jane Schacter recently noted:

> The question whether courts can, or do, produce social change on sexual orientation issues is a question that is, on closer analysis, too crude to be all that useful. I will suggest that rather than staking out broad claims or pursuing unbroken causal arrows, scholars ought to bring into focus the variability, contingency, and complexity that presents itself as we try to map the relationship between courts and social change in the area of gay rights. True, any romanticized picture of judges as countermajoritarian revolutionaries, single-handedly making public policy more progressive, is empirically unsustainable. But we should not replace one piece of mythology with another. The notion that the institutional properties of courts disable them from ever driving social change in a significant way has its own caricatured qualities.

Jane S. Schacter, *Sexual Orientation, Social Change, and the Courts*, 54 DRAKE L. REV. 861, 863 (2006).

[163] 5 U.S. (1 Cranch) 137 (1803). *See supra* notes 32-34 and accompanying text.

[164] *See supra* notes 113-125 and accompanying text.

piece is attempting, sexual freedom. This is a stark contrast to some of the legal theorizing about judicial review which adopts a pose of neutrality.

Although Tracy Higgins observes that "mainstream constitutional theory rests on a conception of citizenship but lacks a critique of power, [while] feminist legal theory presents a critique of power but lacks an affirmative conception of citizenship,"[165] it must be remembered that judicial review in a constitutional democracy is specifically about power and the allocation of power. The framers of the Constitution were not engaged in an abstract enterprise, but were concerned about particular issues, although women's sexual freedom barely surfaced as a concern[166] and human slavery had been accommodated.[167] Thus, feminist interventions into the counter-majoritarian difficulty of judicial review in a democracy are grounded, and should be, in exercises of power regarding the lives of women.

From that perspective, neither judicial review nor democratic processes are sufficient to secure rights for women. As Mary Becker points out, the institution of judicial review is overwhelmingly implemented by men and bound to conservative precedent constructed by men of previous generations.[168] Further, even when judicial review results in a successful outcome for women, it is circumscribed,[169] perhaps unavoidably so, given the Constitution's limita-

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[165] Higgins, *supra* note 126, at 1670.

[166] Abigail Adams famously wrote to her husband, "founding father" John Adams, to consider rights for women: "[I]n the new Code of Laws which I suppose it will be necessary for you to make I desire you would Remember the Ladies, and be more generous and favourable to them than your ancestors." Letter from Abigail Adams to John Adams (Mar. 31, 1776), *in* 1 ADAMS FAMILY CORRESPONDENCE 370 (L.H. Butterfield et al. eds., 1963). Despite this, the Constitution was silent about gender until the Fourteenth Amendment, which introduced the word "male" into the Constitution. *See* U.S. CONST. amend. XIV, § 2. The Constitution did not include an explicit recognition of rights for women until the Nineteenth Amendment, which prohibits using sex as a basis for depriving the right to vote. *See* U.S. CONST. amend. XIX.

[167] *E.g.*, U.S. CONST. art. I, § 9, cl. 1.

Accommodation of slavery appears in the Constitutional text in the so-called importation clause:

> The Migration or Importation of such Persons as any of the States now existing shall think proper to admit, shall not be prohibited by the Congress prior to the Year one thousand eight hundred and eight, but a Tax or duty may be imposed on such Importation, not exceeding ten dollars for each Person[.]

Id.

The accommodation also appears in the "fugitive slave" clause:

> No Person held to Service or Labour in one State, under the Laws thereof, escaping into another, shall, in Consequence of any Law or Regulation therein, be discharged from such Service or Labour, but shall be delivered up on Claim of the Party to whom such Service or Labour may be due.

Id. art. IV, § 2, cl. 3.

[168] *See supra* notes 117-18 and accompanying text.

[169] *Id.* at 992-97.

tion to addressing negative rights.[170] On the other hand, democratic processes are shaped by inequality,[171] especially given that women continue to be less politically aware.[172]

Yet an understanding that neither judicial review nor democratic processes are necessary or capable of securing freedom for women in the constitutional democracy of the United States does not provide guidance about whether feminist or lesbian legal theorists should promote or eschew judicial review as part of a constitutional democracy. This is an important and immediate issue for those involved in drafting constitutions in new democracies or transnational entities, in constitutional revision, and in political debates.

IV. GLOBAL PERSPECTIVES

Within the United States and globally, sexual freedom for lesbians, other sexual minorities, and women has been procured both through judicial review and through democratic processes, and both processes have yielded disappointments. In order to explore specifically some of the controversial issues and relationships between judicial review and the legislative process, this section analyzes three jurisdictions that are generally considered to be at the forefront of sexual freedom: California, the Netherlands, and South Africa.

A. California

The situation in California confounds much of the conservative rhetoric blaming "activist judges" for subverting the legislative democratic process in the area of same-sex marriage. On September 7, 2005, the California legislature passed a bill that provided that "marriage is a personal relation arising out of a civil contract between two persons,"[173] thus allowing same-sex marriage. California Governor Schwarzenegger vetoed the bill, saying that the "matter should not be determined by legislative action," but by "court decision" or a direct vote of the people.[174] Certainly, the governor's action is complicated by the fact that there had been a successful ballot initiative restricting marriage to opposite sex couples in 2000,[175] that the initiative had

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[170] *See* WEST, *supra* note 136, at 315.

[171] Higgins, *supra* note 126, at 1701.

[172] Somin, *supra* note 135, at 1357-59.

[173] Religious Freedom and Civil Marriage Protection Act, Assemb. B. 849, 2005-2006 Sess. (Cal. 2005) (as amended June 28, 2005).

[174] Dean E. Murphy, *Schwarzenegger to Veto Same-Sex Marriage Bill*, N.Y. TIMES, September 8, 2005, at A18 (quoting Schwarzenegger's spokeswoman, Margita Thompson).

[175] California Proposition 22, Limit on Marriages (2000), codified at CAL. FAM. CODE §§ 300, 308 (West 2007).

been declared unconstitutional by a lower California court,[176] and was (and currently is) making its way through the California judicial courts.[177] The veto demonstrates the contradictory positions regarding judicial review amongst those who do not advocate same-sex marriage.[178] As one conservative opined, the California law sought to impose same-sex marriage by "legislative snub," comparable to the Massachusetts court's "judicial fiat," as well as to the "executive decree" of mayors performing same-sex marriages in San Francisco and New York.[179] Such rhetoric seems to suggest that no governmental entity can decide the issue.

In late 2006, a California appellate court issued a lengthy opinion holding that the state's failure to recognize same-sex marriages is constitutional,[180] a decision the California Supreme Court has decided to review.[181] Like other recent decisions in New York and Washington, the California appellate court stressed that the decision was one for the legislature rather than the judicial branch.[182] In July 2006, New York's highest court held that "the New York Constitution does not compel recognition of marriages between members of the same sex," and in the opinion's second sentence proclaimed that "whether such marriages should be recognized is a question to be addressed by the Legislature."[183] Later that same month, the Supreme Court of Washington reached the same conclusion, again stressing that the court has a "limited role" and should thus defer to the legislative branch.[184] The court went on to say that "personal views must not interfere with a judge's responsibility to decide

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[176] Marriage Cases, Case No. CJC-04-004365 (San Francisco Super. Ct. 2005) (coordination proceeding consolidating six cases concerning whether California Family Code provisions limiting state recognition to opposite-sex marriages violates the state constitution: Woo/Martin v. California (San Francisco Super. Ct. No. 504038); City & County of San Francisco v. California (San Francisco Super. Ct. No. 429539); Clinton v. California (San Francisco Super. Ct. No.); Proposition 22 Legal Defense and Education Fund v. City & County of San Francisco (San Francisco Super. Ct. No. 503943); Thomasson v. Newsom (San Francisco Super. Ct. No. 428794); Tyler v. County of Los Angeles (Los Angeles Super. Ct. No. 088506)).

[177] *In re* Marriage Cases, 49 Cal. Rptr. 3d 675 (2006).

[178] Press Release, Statement by Gubernatorial Press Secretary Margita Thompson on AB 849 (Sept. 7, 2005), *available at* http://gov.ca.gov/index.php?/press-release/1443/. The Press Release, however, began: "In Governor Schwarzenegger's personal life and work in public service, he has considered no undertaking more noble than the cause of civil rights. He believes that gay couples are entitled to full protection under the law and should not be discriminated against based upon their relationship." *Id.*

[179] Jeff Jacoby, *The People's Voice on Gay Marriage*, BOSTON GLOBE, Oct. 5, 2005, at A19.

[180] *In re* Marriage Cases, 49 Cal. Rptr. 3d 675.

[181] *In re* Marriage Cases, 149 P.3d 737 (Cal. 2006).

[182] *In re* Marriage Cases, 49 Cal. Rptr. 3d at 726.

[183] Hernandez v. Robles, 855 N.E.2d 1, 1 (N.Y. 2006).

[184] Andersen v. King County, 138 P.3d 963 (Wash. 2006).

cases as a judge and not as a legislator."[185] However, the California appellate court had to consider a more complicated legislative and executive landscape[186] that directly implicates the proper role of the judiciary to protect minority rights in a democracy. After noting that "of course" majoritarian wishes, whims or prejudices are not necessarily conclusive on the question of constitutionality,[187] the court attempted to refute any possible arguments based upon the lack of a legislative remedy in the context of the governor's veto.[188]

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[185] *Id.* at 968.

[186] The court discussed the legislative domestic partnership act, but then added:

Our review of domestic partnership laws would not be complete without a discussion of the Legislature's recent attempt to extend marriage rights to same-sex couples. In 2005, Assemblyman Mark Leno introduced a bill to enact the Religious Freedom and Civil Marriage Protection Act. Assembly Bill No. 849 recited legislative findings that (1) gender-specific language added by the 1977 amendments to the marriage laws discriminates against same-sex couples; (2) the exclusion of same-sex couples from marriage violates the rights of gays and lesbians under the California Constitution; (3) California's same-sex couples are harmed in various ways by their exclusion from marriage; and (4) "[t]he Legislature has an interest in encouraging stable relationships regardless of the gender or sexual orientation of the partners. The benefits that accrue to the general community when couples undertake the mutual obligations of marriage accrue regardless of the gender or sexual orientation of the partners." With a declared intent to "correct the constitutional infirmities" of the marriage laws, the bill would have amended Family Code, sections 300 through 302 to remove all gender-specific terms. Recognizing its inability to correct any such problems in Family Code, section 308.5, due to its enactment by initiative, the Legislature declared Assembly Bill No. 849 was not intended to alter or amend the prohibition in section 308.5 against recognizing same-sex marriages entered outside California. Finally, the bill provided that no clergy or religious official would be required to solemnize a marriage in violation of his or her constitutional right to free exercise of religion.

Although Assembly Bill No. 849 passed both houses of the Legislature in September 2005, it was vetoed by the Governor. In his veto message, Governor Schwarzenegger explained that while he supported domestic partnerships for gay and lesbian couples, he did not believe the Legislature could amend Family Code, section 308.5 without submitting the provision for voter approval. Moreover, because the constitutionality of the marriage laws was pending before this appellate court at the time, the Governor believed Assembly Bill No. 849 would add "confusion" to the constitutional issues under review. He remarked, "If the ban of same-sex marriage is unconstitutional, this bill is not necessary. If the ban is constitutional, this bill is ineffective."

In re Marriage Cases, 49 Cal. Rptr. 3d at 696-97 (internal citations omitted).

[187] *Id.* at 724.

[188] The court stated:

[O]ne should not oversimplify what the Governor's veto message [of Assembly Bill No. 849] actually said. In exercising his veto power, the Governor expressed doubts about the Legislature's ability to amend Family Code section 308.5 without submitting the matter to voters, because section 308.5 was enacted by initiative, and appropriately urged restraint while constitutional issues concerning same-sex marriage were determined by the courts. As his press release explained, the proposed legislation risked adding

Without specifically invoking *Romer v. Evans*[189] or theorist Jeremy Waldron's "exceptions"[190] in this context, the majority nevertheless demonstrates its cognizance of the importance of the option of resort to democratic action by those seeking judicial action.

For the dissenting judge Anthony Kline, however, the specificities of the California legislative process are not important in the context of protecting the rights of sexual minorities.[191] Furthermore, the role of the referendum is equally irrelevant: "[V]oters may no more violate the Constitution" than a "legislative body" may violate the constitution.[192] Quoting dissenting Judge Saxe in the New York opinion, Judge Kline states that one cannot "expect" the legislature which "represent[s] majoritarian interests, to act to protect the rights of the homosexual minority."[193]

The California Supreme Court has accepted review of the appellate court decision, with an opinion likely in late 2007.[194] To decide the case, the court will grapple with questions of judicial review, probably making pronouncements on its own legitimacy in the California constitutional and political landscape. Certainly, it will be cognizant of not only California, but of the upheavals in sister states.[195]

B. The Netherlands

The Netherlands, well known for its sexual and other freedoms, has been called a "kind of Berkeley [California] writ large."[196] The Netherlands has been in the vanguard of providing legal protections for sexual minorities, and

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confusion to the issues on appeal and, depending on the appeal's outcome, could have proven unnecessary.

Id. at 726 n.35 (citing Governor's veto message to Assem. on Assem. Bill No. 849 (Sept. 29, 2005) Recess J. No. 4 (2005-206 Reg. Sess.) 3737-38).

[189] 517 U.S. 620 (1996). *See supra* notes 53-57 and accompanying text.

[190] *See supra* notes 90-95 and accompanying text.

[191] *In re* Marriage Cases, 49 Cal. Rptr. 3d at 731 (Kline, J., dissenting in part).

[192] *Id.* at 750 n.8 (quoting Citizens Against Rent Control v. Berkeley, 454 U.S. 290, 295 (1981)).

[193] *Id.* at 750 (quoting Hernandez v. Robles, 805 N.Y.S.2d 354, 383 (N.Y. App. Div. 2005) (Saxe, J., dissenting)).

[194] *In re* Marriage Cases, 149 P.3d 737 (Cal. 2006).

[195] Any state court considering the issue of same-sex marriage occurs in the shadow of the early 1990s Hawai'i experience, which erupted into a political dispute between the court and the legislature, and resulted in an amendment to the state constitution that gave the power to decide on the issue to the state legislature. For further discussion of the controversies in Hawai'i, as well as elsewhere, see Ruthann Robson, *Assimilation, Marriage, and Lesbian Liberation*, 75 TEMPLE L. REV. 709, 737-45 (2002).

[196] Ian Buruma, *Final Cut: After a Filmmaker's Murder, the Dutch Creed of Tolerance Has Come Under Siege*, THE NEW YORKER, Jan. 3, 2005, at 26.

it is a nation in which the judiciary does not have the power of judicial review.[197]

The Constitution of the Kingdom of the Netherlands (*Grondwet voor het Koninkrijk der Netherlanden*) specifically limits judicial power over legislative acts: Article 120 provides that "[t]he constitutionality of Acts of Parliament and treaties shall not be reviewed by the courts."[198] The Constitution, however, does specify rights, including positive rights and rights as against private parties. Article 1 states that "[a]ll persons in the Netherlands shall be treated equally in equal circumstances. Discrimination on the grounds of religion, belief, political opinion, race, or sex or on any other grounds whatsoever shall not be permitted."[199] Subsequent articles provide for rights of expression, association, privacy, "inviolability of the person," work, aid from the government for subsistence, health, and education.[200] Thus, although the rights enumerated and entrenched in the Netherlands Constitution are expansive, they are judicially unenforceable. Given this structure, it is predictable that any advancement for sexual minorities has not been accomplished through the judicial branch.

Because Netherlands' Constitution also provides for a monarchy,[201] any advances have also been given the imprimatur of the reigning royal head of state. In late 2000, when Netherlands became the first nation to provide for same-sex marriage, Queen Beatrix signed what is usually translated as the "Act on the Opening Up of Marriage." The Act amended the marriage laws to provide that "[a] marriage can be contracted by two persons of different sex or of the same sex."[202] Thus, as scholar Nancy Maxwell makes clear, the Dutch legislation "does not create a parallel relationship with heterosexual marriage, but changes the definition of marriage to include same-gender couples."[203] Companion acts amended language in other laws to change the

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[197] *See* discussion *infra*.

[198] GW. art. 120.

[199] *Id.* at art. 1.

[200] *Id.* at arts. 7, 8, 10, 11, 19, 22, 23.

[201] *Id.* at arts. 24-49.

[202] For discussions of the Act in English, refer to Nancy Maxwell, *Opening Civil Marriage to Same-Gender Couples: A Netherlands-United States Comparison*, 18 ARIZ. J. INT'L & COMP. L. 142 (2001) [hereinafter Maxwell, *Opening Civil Marriage*] and Kees Waaldijk, *Others May Follow: The Introduction of Marriage, Quasi-Marriage, and Semi-Marriage for Same-Sex Couples in European Countries*, 38 NEW ENG. L. REV. 569 (2004).

Like many other scholars not fluent in Dutch, the author relies on the expert translations and work of Dutch legal scholar Kees Waaldijk of the Universiteit Leiden in the Netherlands. *See* Universiteit Leider, Text of Dutch law, http://athena.leidenuniv.nl/rechten/meijers/index.php3?m=10&c=86 (last visited Oct. 15, 2007) (providing a translation of the Act).

[203] Maxwell, *Opening Civil Marriage*, *supra* note 202, at 155.

adoption laws,[204] to address presumptions of parenthood when a child is born to a same-sex couple,[205] and to replace gender-specific language in other laws referencing marital relations.[206]

These acts of parliament followed a previous pattern in which the Netherlands had enacted a series of laws recognizing non-married partners, notably with a tenancy protection law in 1979[207] and thereafter with a registered partnership scheme that had gradually become more similar to marriage.[208]

In the nonmarital realm, the Dutch Parliament had enacted the General Equal Treatment Act in 1994, which protected both sexual orientation and marital status.[209] Sodomy had been decriminalized since 1811.[210] Addition-

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[204] Act of 21 December 2000 amending of Book 1 of the Civil Code (adoption by persons of the same sex). Stb. 1002, nr.10, 2001, nr. 10 (11 January). *See* Universiteit Leiden, Text of Dutch law, http://athena.leidenuniv.nl/rechten/meijers/index.php3?m=10&c=87 (last visited Oct. 15, 2007). For those fluent in Dutch, Waaldijk cites the original version in Dutch. Overheid.nl, http://wetten.overheid.nl (last visited Oct. 15, 2007). *See* Nancy Maxwell & Caroline Forder, *The Inadequacies in U.S. and Dutch Adoption Law to Establish Same-Sex Couples as Legal Parents: A Call for Recognizing Intentional Parenthood*, 38 FAM. L.Q. 623, 638-40 (2004); Waaldijk, *supra* note 202, at 573.

[205] Waaldijk, *supra* note 202, at 573-74 (citing Stb. 2001, 468).

[206] *Id.* at 573 (citing Stb. 2001, 128).

[207] *Id.* at 570 n.2. (citing Stb. 1979, 330). As Waaldijk explicates, this legislative provision allowed a tenant's partner to become a co-tenant after two years of cohabitation in a "lasting joint household." *Id.*

Compare this to a New York case decided a decade later. Braschi v. Stahl Assocs. Co., 543 N.E.2d 49, 50 (N.Y. 1989) (holding that Miguel Braschi was not excluded as a matter of law from seeking noneviction protection through a regulation that ensured that landlords, upon the death of a rent-control tenant, would not dispossess "either the surviving spouse of the deceased tenant or some other member of the deceased tenant's *family* who has been living with the tenant"). The court interpreted the word "family" expansively:

> Family members, whether or not related by blood, or law who have always treated the apartment as their family home will be protected against the hardship of eviction following the death of the named tenant, thereby furthering the Legislature's goals of preventing dislocation and preserving family units which might otherwise be broken apart upon eviction. This approach will foster the transition from rent control to rent stabilization by drawing a distinction between those individuals who are, in fact, genuine family members, and those who are mere roommates or newly discovered relatives hoping to inherit the rent-controlled apartment after the existing tenant's death.

Id. at 54 (citations omitted). An important point of comparison is not only the decade difference, but also the Dutch legislation and the American judicial action in state court.

[208] *See* Waaldijk, *supra* note 202, at 578-80 (citing Stb. 1994, 230); Maxwell, *Opening Civil Marriage*, *supra* note 202, at 149-52 (discussing process of legislation).

[209] *See* Waaldijk, *supra* note 202, at 578 (citing Stb. 1997, 324).

[210] *See id.* at 578.

ally, other activities have been decriminalized, such as prostitution (although pimping continues to be criminalized),[211] some drug use,[212] and euthanasia.[213]

From such a portrait, it might seem that the legislative process has not only been paramount, but exclusive. However, there has been some invocation of judicial power. The Dutch Supreme Court, the Hoge Raad, heard a case regarding same-sex marriage in 1990, as did a lower court in Amsterdam.[214] The Court declined to protect same-sex marriage.[215] Scholar Nancy Maxwell

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[211] *See* Jessica Drexler, Note, *Governments' Role in Turning Tricks: The World's Oldest Profession in the Netherlands and the United States*, 15 DICK. J. INT'L. L. 201 (1996) (discussing prostitution in the Netherlands).

[212] For discussions of Dutch drug policies, see C. W. Maris, *The Disasters of War: American Repression Versus Dutch Tolerance in Drug Policy*, 29 J. DRUG ISSUES 493 (1999); Tim Boekhout van Solinge, *Dutch Drug Policy in a European Context*, 29 J. DRUG ISSUES 511 (1999); Henk Jan VanViliet, *Separation of Drug Markets and the Normalization of Drug Problems in the Netherlands: An Example for Other Nations?* 20 J. DRUG ISSUES 463 (1990).

[213] For discussions of euthanasia in the Netherlands, refer to Ubaldus deVries, *A Dutch Perspective: The Limits of Lawful Euthanasia*, 13 ANNALS HEALTH L. 365 (2004), and Neil M. Gorush, *The Legalization of Assisted Suicide and the Law of Unintended Consequences: A Review of the Dutch and Oregon Experiments and Leading Utilitarian Arguments for Legal Change*, 2004 WISC. L. REV. 1347, 1353-70 (2004).

Interestingly, the Supreme Court discussed the "Dutch experience" in *Washington v. Glucksberg*, 521 U.S. 702, 732, 734 (1997), to support its holding that a terminally ill patient does not have a constitutionally recognized right to euthanasia. Specifically, the Court referenced a Dutch report finding that:

> [D]espite the existence of various reporting procedures, euthanasia in the Netherlands has not been limited to competent, terminally ill adults who are enduring physical suffering, and that regulation of the practice may not have prevented abuses in cases involving vulnerable persons, including severely disabled neonates and elderly persons suffering from dementia.

Id. at 734. The Court used this Dutch report to support its own finding that the state had a legitimate interest in protecting vulnerable persons. *Id.*

[214] See Maxwell, *Opening Civil Marriage*, *supra* note 202, at 142-48.

[215] The petitioners argued that the court could interpret the law to include same-sex partners, an argument rejected by the courts based on interpretations of legislative intent. *Id.* at 143. The petitioners also made several right-based arguments. One was based upon the equality clause of the Netherlands Constitution, article I. The Netherlands Supreme Court rejected the claim, holding that the Constitution "cannot change" the legislative intent of the statute. Maxwell, *Opening Civil Marriage*, *supra* note 202, at 145 & n.20 (citing HR 19 oktober 1990, NJ 1992, 192, m.nt. EAAL en EAA (homohuwelijk; trans. Duck Obbink)). The petitioners based their other arguments on provisions of the European Convention on Human Rights, the International Covenant on Civil and Political Rights. *See also id.* at 143-47. Although the Court did seem to understand it had the power under the international instruments to invalidate an act of Parliament, it reasoned that it was limited by precedents of international judicial bodies, and also interpreted marriage in a manner that limited relief. The Court did, however, note that the "benefits" of marriage, as opposed to marriage itself, might raise a valid claim, but again deferred to the legislature. *Id.* at 147 (citing HR 19 oktober 1990, NJ 1992, 192, m.nt. EAAL en EAA (homohuwelijk; trans. Caroline Forder)).

astutely points out that the Netherlands Supreme Court did not make a pronouncement that Parliament should address any inequalities as it had several years earlier in cases involving the unequal treatment of married and unmarried parents.[216] Nevertheless, the legislative body of the Netherlands would institute such reforms shortly thereafter.

The groundbreaking role of the Dutch Parliament in promoting sexual freedoms, including same-sex marriage, prompts explanations. A typical account might begin with a description of Dutch culture as liberal, tolerant, and secular, and its elective representatives being responsive.[217] More sophisticated explanations stress the incremental nature of the changes[218] (though certainly that strategy has not been uniformly successful in other nations)[219] and the particular political configurations and relationships.[220] The lack—or apparent lack—of religious conservatism in the Netherlands is often highlighted.[221] Indeed, the Netherlands might be argued to be an exemplary example of theorist Jeremy Waldron's four assumptions necessary to sustain

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[216] *Id.* at 148 n.28. Maxwell states: "For example, the Netherlands Supreme Court instructed the Parliament to remedy the unequal treatment involving the exercise of joint parental authority, because the legislation was not treating divorced and unmarried parents the same as married parents." *Id.*; *see* HR 4 mei 1984, NJ 1985, 510 (involving the unequal treatment of divorced parents); HR 21 maart 1986, NJ 1986, 585 (involving unmarried parents).

[217] *E.g.*, Marilyn Sanchez-Osorio, *The Road to Recognition and Application of the Fundamental Constitutional Right to Marry of Sexual Minorities in the United States, The Netherlands, and Hungary: A Comparative Legal Study*, 8 ILSA J. INT'L & COMP. L. 131 (2001). Sanchez-Osorio states:

> The Dutch Parliament, has proven time and again how the intense social conscience that prevails in the Netherlands on the subject of minority rights, non-discriminatory legislation in the area of sexual orientation, equal rights for same-sex partners, and general human rights laws, will find fertile ground in a legal system that works to fully reflect the society it represents and not only the personal and conservative views of a few of its members.

Id. at 141.

[218] Kees Waaldijk, *Standard Sequences in the Legal Recognition of Homosexuality: Europe's Past, Present and Future*, 4 AUSTRALASIAN GAY & LESBIAN L.J. 50-52 (1994).

[219] *See* Jason Montgomery, *An Examination of Same-Sex Marriage and the Ramifications of* Lawrence v. Texas, 14 KAN. J.L. & PUB. POL'Y 687, 697-98 (2005) (critiquing the incremental approach in the United States).

[220] *See, e.g.*, Cece Cox, *To Have and to Hold—Or Not: The Influence of the Christian Right on Gay Marriage Laws in The Netherlands, Canada, and The United States*, 14 L. & SEXUALITY 1, 9 (2005) (noting that when the same-sex marriage legislation was passed, it was "the first time in more than eighty years" that the Christian Democrats, the leading political party opposing same-sex marriage, were not part of the government coalition).

[221] *See, e.g.*, *id.* at 7 (discussing the absence of any significant Christian right movement within the Netherlands as a usual explanation for the recognition of full marriage rights for sexual minorities).

his case against judicial review, including most especially a commitment by the populace to "the idea of individual and minority rights."[222]

However, events subsequent to the passage of the 2000 Opening Up of Marriage Act[223] complicate the picture of the Netherlands as a tolerant society with no need for any political institution such as the judiciary to protect minorities from majoritarian impulses. At first, the rise of openly gay politician Pim Fortuyn seems consistent with the depiction of Dutch politics as tolerant and progressive.[224] Yet Pim Fortuyn, running for Parliament and poised to become Prime Minister,[225] famously argued that "he would not mind abolishing the prohibition to discriminate as embedded in article I of the Dutch constitution"[226] in favor of the unrestricted freedom of expression,[227] because the Dutch "culture of political correctness had resulted in a hush-up of the problems caused by immigration."[228] By "immigration," Fortuyn undoubtedly meant the predominantly Muslim immigrants and their descendants from nations such as Morocco, Turkey, and the former Dutch colony of Surinam.[229] The Netherlands is the most densely populated nation in Europe,[230] and

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[222] Waldron, *supra* note 6, at 1364. *See supra* notes 90-94 and accompanying text.

[223] *See supra* note 202 and accompanying text.

[224] Several excellent sources discuss Dutch politics post 2001 and the life and death of Pim Fortuyn. *See* IAN BURUMA, MURDER IN AMSTERDAM: THE DEATH OF THEO VAN GOGH AND THE LIMITS OF TOLERANCE (2006); Tjitske Akkerman, *Anti-immigration Parties and the Defence of Liberal Values: The Exceptional Case of the List Pim Fortuyn*, 10 J. POL. IDEOLOGIES 337 (2005); Elizabeth Kolbert, *Beyond Tolerance: What Did the Dutch See in Pim Fortuyn?*, THE NEW YORKER, Sept. 9, 2002, at 106; Wim Lunsing, *Islam Versus Homosexuality?: Some Reflections on the Assassination of Pim Fortuyn*, 19 ANTHROPOLOGY TODAY 19 (2003); Joop Van Holsteyn and Galen Irwin, *Never a Dull Moment: Pim Fortuyn and the Dutch Parlimentary Election of 2002*, 26 WEST EUROPEAN POL. 41 (2003); Peter van der Veer, *Pim Fortuyn, Theo van Gogh, and the Politics of Tolerance in the Netherlands*, 18 PUB. CULTURE 111 (2006).

[225] *See* Marlise Simons, *Proudly Gay, and Marching the Dutch to the Right*, N.Y. TIMES, Mar. 22, 2002, at A4 [hereinafter Simons, *Proudly Gay*] (discussing Pim's chances of becoming prime minister, published several weeks before his death).

[226] *See* GW. art. 1; Akkerman, *supra* note 224, at 349.

[227] Akkerman, *supra* note 224, at 349. The freedom of "speech" to which Fortuyn referred is presumably contained in Article 7 of the constitution, which prohibits requiring prior permission to publish thoughts or opinions through the press. *See* Gw. art. 7.

[228] Akkerman, *supra* note 224, at 349.

[229] *See* BURUMA, *supra* note 224, at 18-23 (discussing the recent history of immigration to the Netherlands). Such "non-native Dutch" comprised almost fifty percent of the population of Amsterdam. *Id.* at 23. That population comprised forty-five percent of the Netherlands' second largest city, Rotterdam. Simons, *Proudly Gay*, *supra* note 225, at A4. Percentages increased in smaller cities and more rural locations. BURUMA, *supra* note 224, at 118-19.

[230] Marlise Simons, *More Dutch Plan to Emigrate As Muslim Influx Tips Scales*, N.Y. TIMES, Feb. 27, 2005, at 16 [hereinafter Simons, *More Dutch Plan to Emigrate*] (describing the Netherlands as "Europe's most densely populated nation, where 16.3 million people live in an area roughly the size of Maryland").

Fortuyn pronounced the Netherlands "full up."[231] But Fortuyn's complaints were not primarily spatial. Instead, Fortuyn decried the Muslim immigrants for their lack of tolerance for tolerance.[232]

As a very outspoken gay man with a "flamboyant"[233] and charismatic[234] media presence, Fortuyn was well-positioned to articulate "a form of xenophobia ideally suited to a nation that prides itself on its tolerance."[235] The national culture of tolerance needed defense because it was not inherent, but hard-won. It is the "popular narrative" of Dutch history that during the "silent revolution" of the 1960s, Dutch cultural politics freed itself from the restrictions of the religious twin pillars of Catholicism and Calvinism.[236] For Fortuyn, Islam presented the threat of a return to moral strictures.[237]

Fortuyn's assassination in May 2002, the first political assassination in the Netherlands in several hundred years,[238] was committed by an animal rights

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[231] Simons, *Proudly Gay*, *supra* note 225.

[232] Fortuyn was often quoted for his statement that "Islam is backward," which relied upon his construction of the religion's attitudes toward women and sexual minorities. In addition to "values," however, Fortuyn's views included "anti-welfare" and "pro-law and order." *See* Simons, *Proudly Gay*, *supra* note 225, at A4.

[233] *See, e.g.*, BURUMA, *supra* note 224, at 39, 54 (describing Fortuyn as "proudly, even flamboyantly, homosexual," and stating "Fortuyn was often described as a *relnicht*, a 'screaming queen'"); van der Veer, *supra* note 224, at 114 (describing Fortuyn's "flamboyant media performance," his dress as a "dandy," and comparing his performance to that of popular "[c]ampy, extroverted gay entertainers").

[234] *See* Paul Lucardie, *Populism, Polder and Prairie: The Rapid Rise and Fall of Pim Fortuyn*, 15 INROADS: A J. OPINION 55 (2004).

[235] Kolbert, *supra* note 224. A similar sentiment is phrased by Peter van der Veer: "Fortuyn was vocal especially in the defense of individual sexual freedom, and his public gay identity enabled him perfectly to take up the defense of Dutch progressive politics against Islamic traditions." van der Veer, *supra* note 224, at 115. Indeed, Fortuyn's retort to accusations of racism was to state that he did not hate Arab men because he had sexual relations with them. *Id.* at 120.

[236] van der Veer, *supra* note 224, at 118. The Dutch notion of "pillars" is that different groups, such as Catholics, Calvinists, and secularists, can live separately together, each group tolerating the others but coming together only when necessary, as in Parliament. *See* Jane Kramer, *The Dutch Model: Multiculturalism and Muslim Immigrants*, THE NEW YORKER, April 3, 2006, at 63.

[237] BURUMA, *supra* note 224, at 56-57 (quoting Fortuyn as responding to a reporter who asked him why he felt so strongly about Islam by saying: "I have no desire, to have to go through the emancipation of women and homosexuals all over again"). Peter van der Veer argues that the strict Muslim mores about sexuality remind the Dutch of the strict Christian mores of sexuality that the Dutch "have so recently left behind." van der Veer, *supra* note 224, at 119.

[238] BURUMA, *supra* note 224, at 38 (describing Fortuyn's assassination as the most sensational political murder in the Netherlands since 1672, when the brothers Jan and Cornelius de Witt were literally ripped to pieces by a lynch mob in The Hague); Kolbert, *supra* note 224; Lucardie, *supra* note 234.

activist.[239] The murder only increased Fortuyn's popularity,[240] resulting in an outpouring of public emotion[241] and the electoral success of his namesake political party, the List Pim Fortuyn.[242] Fortuyn's assassination is also linked to the November 2004 murder of Theo van Gogh, Fortuyn's friend and sometime collaborator, who was finishing a film about Pim Fortuyn at the time.[243]

Both of these crimes resulted in findings of guilt and sentencings.[244] Yet there was little role for the judiciary in the underlying contentious questions raised by Pim Fortuyn about sexual freedom and minority rights. Even a cursory examination of a "populist"[245] politician such as Pim Fortuyn complicates assertions that the "Opening Up of Marriage Act"[246] rests on an idyllic atmosphere of liberal tolerance particular to the Netherlands in which protections for minorities are not necessary.

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[239] At his sentencing, Mr. van der Graaf stated that Fortuyn was a dangerous man "who abused democracy by picking on vulnerable groups" and who had awful ideas "about immigrants, asylum seekers, Muslims, animals and the environment." Marlise Simons, *Dutch Court Sentences Killer of Politician to 18 Year Term*, N.Y. TIMES, April 16, 2003, at A3 [hereinafter Simons, *Dutch Court Sentences Killer*]. *See also* Kolbert, *supra* note 224; Lunsig, *supra* note 224, at 20-21 (noting that Fortuyn's pro-business stance included an end to restrictions on the production and trade in fur, which "Fortuyn loved to wear," and that Fortuyn had alienated environmentalists by "provocatively wearing fur and through his cynical denigration of their arguments").

[240] A few weeks after Fortuyn's murder, Fortuyn took top honors in a television poll to determine the greatest figure in Dutch history, exceeding Rembrandt, Erasmus, Spinoza, and William the Silent. BURUMA, *supra* note 224, at 45.

[241] *See, e.g., id.* at 43-45, 64-65 (describing, among other things, "tens of thousands cheering and throwing flowers at funeral cortege" and stating that the funeral has been compared to that of Princess Diana); van der Veer, *supra* note 224, at 113 (characterizing the response to Fortuyn's death "not unlike the public outpouring of grief at Princess Diana's violent death"). *See also* Palazzo Di Pietro, http://www.palazzodipietro.nl/html/ site.html (last visited Oct. 15, 2007) (documenting flowers, the grave, and Fortuyn's life).

[242] See Van Holsteyn & Irwin, *supra* note 224, for an extended discussion of the post-assassination election.

[243] For a description of van Gogh's film, *06/05*, a conspiracy thriller about the assassination of Fortuyn, and a description of their relationship, see BURUMA, *supra* note 224, at 37-39. The twenty-six-year-old Muslim man convicted of murdering van Gogh was reported to have shot him several times, slashed his throat, and knife-pinned his body with an "open letter" written in Dutch and calling for a holy war against unbelievers. *Id.* at 1-5.

[244] *See* Simons, *Dutch Court Sentences Killer*, *supra* note 239 (Volkert van der Graaf received a sentence of eighteen years for the murder of Pim Fortuyn); Gregory Crouch, *Van Gogh Killer Jailed for Life*, N.Y. TIMES, July 27, 2005, at A8 (Muhammad Bouyeri received life in prison without possibility of parole, the harshest sentence possible).

[245] For a trenchant discussion of Fortuyn as a populist and the relationship to right-wing ideologies, see Akkerman, *supra* note 224, at 338-40.

[246] *See supra* note 202 and accompanying text.

C. South Africa

The Netherlands and South Africa are linked historically[247] and legally,[248] but unlike the Dutch Constitution, the South Africa Constitution, adopted in its final form in 1996,[249] provides for a robust judicial review. Supremacy of the constitution is proclaimed as a value of the democratic state of South Africa in the first section of the Constitution.[250] Section 167 of the Constitution establishes the Constitutional Court, which "makes the final decision whether an Act of Parliament, a provincial Act or conduct of the President is constitutional,"[251] and even "decide[s] on the constitutionality of any amendment to the Constitution" and "decide[s] that Parliament or the President has failed to fulfill a constitutional obligation."[252]

The Constitutional Court enforces a vigorous Bill of Rights, similar to that of the Dutch Constitution but much more expansive.[253] The South Africa Constitution specifically guarantees equality to sexual minorities. Section 9, entitled "Equality," provides that "[t]he state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth."[254] These protections extend to private conduct, and the Constitution further imposes a duty on the national government to enact legislation to "prevent or prohibit unfair discrimination."[255]

Several cases have come before the Constitutional Court of South Africa relating to sexual freedom. In 1998, the Court ruled the crime of sodomy (which applied only to males), the common law crime of unnatural sexual acts, and an array of accompanying criminal laws unconstitutional as inconsistent

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[247] *See generally* FRANK WELSH, A HISTORY OF SOUTH AFRICA (2000) (discussing the Dutch colonization of South Africa and continuing Dutch influence).

[248] *See, e.g.*, Derek van der Merwe, *Roman-Dutch Law: From Virtual Reality to Constitutional Resource*, 1998 ACTA JURIDICA 117 (1998) (discussing the history of Roman-Dutch law in South Africa and arguing for its constituted relevance in the new constitutional era).

[249] S. AFR. CONST. 1996. See THE POST-APARTHEID CONSTITUTIONS: PERSPECTIVES ON SOUTH AFRICA'S BASIC LAW (Penelope Andrews & Stephen Ellman eds., 2001), for discussions regarding the South Africa Constitution.

[250] S. AFR. CONST. 1996 ch. 1, § 1. This is in addition to "[h]uman dignity, the achievement of equality and the advancement of human rights and freedoms," "[n]on-racialism and non-sexism," and universal adult suffrage. *Id.*

[251] *Id.* at ch. 8, § 167(5).

[252] *Id.* at ch. 8, § 167(4)(d)-(e).

[253] *Id.* at ch. 2; *see generally* Gw. arts. 7, 8, 10, 11, 19, 22, 23.

[254] S. AFR. CONST. 1996 ch. 2, § 9(3).

[255] *Id.* at ch. 2, § 9(4). Moreover, under subsection 2, such legislation may be in the form of positive promotion of equality, or as it is generally known in the United States, "affirmative action." *Id.* at ch. 2, § 9(2).

with the Constitution's equality sections.[256] The Constitutional Court has also applied the equality provisions protecting sexual orientation to require that same-sex partners be accorded equal treatment in the consideration of residence permits,[257] in the award of benefits provided to married partners under the Judges Remuneration Act,[258] by allowing same-sex couples to adopt as joint parents,[259] and by allowing same-sex couples to both be named as parents in cases of "artificial insemination."[260]

Undoubtedly, judicial review in South Africa, coupled with the inclusion of "sexual orientation" in the Constitution's Bill of Rights, has furthered the legal protection of sexual freedom in the nation. Yet the Constitutional Court has not been a solitary force. Indeed, in most of the cases mentioned above, the Constitutional Court has been affirming judgments of other courts, and importantly, these judgments have been largely unopposed by the executive branch members named as opposing parties. Moreover, legislative action has provided protections for sexual minorities in areas such as employment, medical benefits, rental housing, and domestic violence.[261]

In such a context, perhaps it was not surprising that the Constitutional Court of South Africa invoked the legislative branch when it rendered its decision in December 2005 in the consolidated same-sex marriage cases, *Minister of Home Affairs and Another v. Fourie and Another*; *Lesbian and Gay Equality Project and Others v. Minister of Home Affairs and Others*.[262] After finding

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[256] National Coalition for Gay and Lesbian Equality v. Minister of Justice 1999 (1) SA 6 (CC) (S. Afr.).

[257] National Coalition for Gay and Lesbian Equality v. Minister of Home Affairs 2000 (2) SA 1 (CC) (S. Afr.).

[258] Satchwell v. President of South Africa and the Minister of Justice 2002 (6) SA 1 (CC) (S. Afr.).

[259] Du Toit and De Vos v. Minister for Welfare and Population Development 2003 (2) SA 198 (CC) (S. Afr.).

[260] J and B v. Director General of the Department of Home Affairs 2003 (5) SA 621 (CC) (S. Afr.).

[261] Employment Equity Act 55 of 1998 ch. 2 § 6 (1), *available at* http://www.info.gov.za/gazette/acts/1998/a55-98.pdf; Medical Schemes Act 131 of 1998 ch.4 (24)(2)(e), *available at* http://www.info.gov.za/gazette/acts/1998/a131-98.pdf; Rental Housing Act 50 of 1999 ch.3 § 4 (1), *available at* http://www.info.gov.za/gazette/acts/1999/a50-99.pdf; Domestic Violence Act 116 of 1998 § 1 (vii), *available at* http://www.info.gov.za/gazette/acts/1998/a116-98.pdf.

The Parliament promulgated The Choice on Termination of Pregnancy Act of 1996 which provides a trimester scheme in which a woman may terminate a pregnancy in the first 12 weeks, may terminate only with the advice of a doctor from weeks 13 until 20, and afterwards only if there is risk to the woman or the fetus. The Choice on Termination of Pregnancy Act 92 of 1996 § 2 (1), *available at* http://www.info.gov.za/acts/1996/a92-96.pdf.

[262] 2005 (__) SA ___, 2006 (3) BCLR 355 (CC) (S. Afr.). *See* Beth Goldblatt, Note, *Same-Sex Marriage in South Africa—The Constitutional Court's Judgment*, 14 FEMINIST LEG. STUD. 261 (2006) (providing an excellent discussion of *Minister of Home Affairs*).

that the limitation of marriage to opposite sex couples violated South Africa's Constitution, Justice Albie Sachs, writing for the Court, noted that "[o]rdinarily a successful litigant should receive at least some practical relief," but that this "is not an absolute rule."[263] In supporting the Court's conclusion to allow Parliament "to cure the defect within twelve months,"[264] the Court relied upon the need for security for a "section of society that has known protracted and bitter oppression."[265] Justice Sachs reasoned that Parliament might later choose a remedy other than a simple "reading-in of the words 'or spouse'" in legislation which was sex-specific, as the Court would do,[266] and the Court's "temporary remedial measure would be far less likely to achieve the enjoyment of equality as promised by the Constitution than would lasting legislative action compliant with the Constitution."[267] This somewhat co-operative model is similar to the process that occurred in Vermont, which resulted in the legislature passing a civil union statute available only for same-sex couples,[268] a regime which has been criticized.[269] Interestingly, however, the South Africa Constitutional Court maintained judicial supremacy, holding that should the South Africa Parliament fail to remedy the situation within twelve months, the Court's remedy would be instated.[270] Furthermore, before Parliament acted, the Constitutional Court decided another case regarding the legal rights of same-sex partners, *Gory v. Klover*, and held that intestate succession cannot constitutionally exclude same-sex partners.[271]

The sole dissenting opinion in the same-sex marriage consolidated cases of *Minister of Home Affairs and Another v. Fourie and Another; Lesbian and*

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[263] *Minister of Home Affairs*, 2005 (__) SA ___, 2006 (3) BCLR 355 (CC) ¶ 133 (S. Afr.).

[264] *Id.* ¶ 161.

[265] *Id.* ¶ 136.

[266] *Id.* ¶ 135.

[267] *Id.* ¶ 136.

[268] In *Baker v. State*, 744 A.2d 864 (Vt. 1999), Vermont's highest court held that the state marriage laws excluding same-sex couples violated the state constitution yet noted that the remedy should be fashioned by the state legislature. The decision in *Baker* thus led to the passage of Vermont's Civil Union statute. *See* VT. STAT. ANN. tit. 15, §§ 1201-06 (2002). The statute reserves marriage to "one man and one woman," but provides for a "civil union" in which "two eligible persons" may establish a relationship to "receive the benefits and protections and be subject to the responsibilities of spouses." *Id.* To be "eligible" under the act, the parties must be of the same sex and "therefore excluded from the marriage laws of this state." *Id.*

[269] *See, e.g.*, Barbara Cox, *But Why Not Marriage: An Essay on Vermont's Civil Unions Law, Same-Sex Marriage, and Separate but (Un)Equal*, 25 VT. L. REV. 113, 132-33 (2000).

[270] Minister of Home Affairs v. Fourie and Another, 2005 (__) SA ___, 2006 (3) BCLR ___, ¶ 2(e).

[271] Gory v. Klover No and Others 2007 (__) SA ___, 2007 (3) BCLR 249 (CC) (S. Afr.) (declaring section 1(1) of the Intestate Succession Act 81 of 1987 to be unconstitutional insofar as it does not provide for a permanent same-sex life partner to inherit automatically, as a spouse would, when the other partner dies without a will).

Gay Equality Project and Others v. Minister of Home Affairs and Others implicates the problem of judicial review. Justice O'Regan wrote separately to disagree with the choice to "leave it to Parliament" and to craft a remedy within the limited "range of options."[272] Justice O'Regan stressed that the definition of marriage as a "rule of common law developed by the courts," "lies, in the first place, with the courts."[273] Further, she emphasized the Constitutional duties of the court to provide appropriate relief that is just and equitable.[274] Addressing the argument that an act of Parliament might "carry greater democratic legitimacy" than an order by the Court, O'Regan opined that the legitimacy of a Court order "does not flow from the status of the institution itself, but from the fact that it gives effect to the provisions of our Constitution."[275]

The role of the courts in South Africa's constitutional scheme, and the constitutional scheme itself, occur in the shadow of South Africa's recent apartheid past. The Truth and Reconciliation Commission ("TRC") was part of the effort to achieve "national unity and reconciliation" and to "bridge the past of a deeply divided society characterised by strife, conflict, untold suffering and injustice, and a future founded on the recognition of human rights."[276] Much of the work of the TRC predictably concerned human rights abuses involving violence, but the TRC also concerned the role of the judiciary and the legal profession in maintaining apartheid. In its voluminous report,[277] the TRC concluded that the courts "connived in the legislative and executive pursuit of injustice."[278] The TRC specifically rejected the assertion some judges made in the written submissions to the TRC[279] that the judiciary had a

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[272] 2005 (__) SA ___, 2006 (3) BCLR ___, ¶¶ 163-68 (O'Regan, J., concurring in part and dissenting in part).

[273] *Id.* ¶ 167.

[274] *Id.* ¶ 170, n.5-6 (quoting sections 38 and 172 of the South Africa Constitution).

[275] *Id.* ¶ 171.

[276] S. AFR. (Interim) CONST. 1993 § 255 (postscript). *See* Promotion of National Unity and Reconciliation Bill, 1995, Bill 30 (1993) (establishing the Truth and Reconciliation Commission).

[277] 4 TRUTH AND RECONCILIATION COMMISSION OF SOUTH AFRICA REPORT ch. 4 (1998) [hereinafter TRC REPORT], *available at* http://www.doj.gov.za/trc/trc_frameset.htm (follow "the TRC report" hyperlink).

[278] *Id.* ¶ 33.

[279] *See, e.g., The Truth and Reconciliation Commission, and the Bench, Legal Practitioners and Legal Academics: The Written Presentations*, 115 S. AFR. L.J. 15-106 (1998). Those judges who made presentations included: M.M. Corbett, Chief Justice of South Africa, judges Chasklason, Mohamed, Langa, vanHeerden & MM Corbett, P Langa, Justice of the Constitutional Court, members of the Supreme Court of Appeal (the highest court prior to the post-apartheid constitutions), Justices Smalberger, Howie, Marais, and Scott, Justice Schutz of the Supreme Court of Appeal, Justice Ackerman of the Constitutional Court, Justice Goldstone of the Constitutional Court, G. Friedman, Judge President of the Cape High Court, Justice C F Eloff, Judge President of the Transvaal High Court, and Justice White regarding the judiciary

role limited by the doctrine of parliamentary sovereignty,[280] noting that the South Africa Parliament had been far from representative.[281] Yet the TRC's assessment of the judiciary does not rest solely on judicial duties in light of a defect in democracy. Indeed, the TRC criticized judges who "too easily made sense of the illogical and unjust in legislative language,"[282] and "unthinkingly allowed judicial policy to be influenced by executive dictate or white male prejudice"[283] and was intent on "maintaining the status quo."[284] Such an assessment flows from the first issue that the TRC had invited respondents to address: "the relationship between law and justice,"[285] a relationship about which the TRC proffered its own opinion distinguishing "promulgated rules

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in the Republic of Transkei. *Id.* at 17-67.

The submission of Edwin Cameron, inadvertently omitted from the original section, appears in another publication. *See* 115 S. AFR. L.J. 436–38 (1998).

[280] TRC REPORT, *supra* note 277, ¶ 41. A typical example might be:

> Prior to the coming into effect of the Interim Constitution on 27 April 1994, Parliament was supreme. For practical purposes, it could pass any law it liked; and it did so. The courts had no power to question the validity of the laws Parliament made. Still less could they declare them invalid. The courts had no option but to apply the law as they found it, however unjust it may appear to be.

Id. (quoting M. M. Corbett, Chief Justice of South Africa, *The Truth and Reconciliation Commission, and the Bench, Legal Practitioners and Legal Academics: The Written Presentations*, 115 S. AFR. L.J. at 18 ¶ 15).

[281] As the Truth and Reconciliation Report noted:

> Much was made . . . of their relative impotence in the face of the exercise of legislative power by a sovereign Parliament. . . . As argued so impressively by Dicey more than a century ago, parliamentary sovereignty and the rule of law work hand in hand and are premised on a political system that is fundamentally representative of all the people subject to that Parliament. This situation never applied in South Africa: not only was representative (and responsible) government conferred effectively only on the white inhabitants of the Union in 1910 (at maximum less than 20 per cent of the population), but South African political and legal life was never characterised by that unwritten sense of 'fair play' which is so much a part of the native Westminster tradition.
>
> In other words, it is not enough for South African lawyers to parade the sovereignty of Parliament as if that alone explained (and excused) their conduct. The social contract which has for so long been the foundation for such sovereignty in the United Kingdom . . . was absent in South Africa, therefore requiring something more by way of response . . . from the judiciary and the legal profession. The point has been made that judges had a choice, and it has been suggested that it was feasible for them to have heightened their alertness as to government abuse of powers in the power vacuum created by the partially-representative legislature and the absence of basic fairness in the citizen-state relationship.

TRC REPORT, *supra* note 277, ¶¶ 41-42.

[282] *Id.* ¶ 33(h).

[283] *Id.* ¶ 34(i).

[284] *Id.* ¶ 33(i).

[285] *Id.* ¶ 3(a).

of law [from] justice."[286] It is inescapable from the TRC's findings that the judiciary in particular and the legal system as a whole (including academia) were complicit in maintaining apartheid. Such a conclusion, although perhaps not intended to "imply the ascription of guilt,"[287] predictably proved painful, controversial, and divisive, generating much commentary.[288] Thus, the role of the Constitutional Court and of all individual justices and judges at every level has been shaped by recent discussions that highlight the role of the judiciary.

In the instance of same-sex marriage, the Constitutional Court's deferral of the matter to the South Africa Parliament provoked relatively little conflict regarding the relative roles of the judiciary and the legislature. The South Africa Parliament duly passed the Civil Union Act of 2006, signed by the President.[289] The Act provides for civil unions "of two persons who are both 18 years of age or older" to be "solemnized and registered by way of either a marriage or a civil partnership."[290] Its preamble quotes the South Africa

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[286] *Id.* ¶ 30. The TRC Report stated:

> Law and justice are by no means co-extensive although, at a fundamental level, their interests and constituent elements are likely to coincide, and although the ultimate objective of a legal system (to endure) must be a quest for justice. An uncritical acceptance of promulgated rules of law is unlikely to contribute to the achievement of justice in any more than a formal sense.

Id.

[287] *Id.* ¶ 31.

[288] *Compare* DAVID DYZENHAUS, JUDGING THE JUDGES, JUDGING OURSELVES 1 (1998) (presenting an account of the three days of hearings of the Truth and Reconciliation Commission, looking into "the legal order during the apartheid order and those who sustained it"), *with* David Zeffertt, *Book Review*, 116 S. AFR. J. 665, 670, 676-78 (1999) (criticizing Dyzenhaus's books for being "flawed in some instances by over-emotionality," engaging in "insulting, and possibly defamatory" statement about judges with whom the author disagreed, "bludgeoning of people who think differently from him," and using a "selective eye"). Zeffertt's review prompted a response by South African Judge Dennis Davis, in which Davis describes his own "increasing amazement" as he "worked his way through the unbridled anger that exploded from every page" of Zeffertt's review. Dennis Davis, *Looking Back in Anger: A Reply to David Zeffertt*, 117 S. AFR. L.J. 125, 125 (2000).

The most well-balanced review can be found in Penelope Andrews, *A Grand Exercise in Forgiveness, or Justice Held Hostage to Truth? South Africa's Truth and Reconciliation Commission*, 24 MELB. U. L. REV. 236, 237 (2000).

As is apparent from these texts, several issues cause special discomfort. First is the comparison of the South Africa regime to the Nazi regime. Second, there are the respective positions of those who stayed in South Africa and those who left, as did Dyzenhaus, who states that he may be judged harshly for leaving and now writing a book in judgment "from the comfort of Toronto." DYZENHAUS, *supra*, at xiv. Third, there are evident loyalties and relationships amongst people who know each other quite well.

[289] CIVIL UNION ACT 17 of 2006.

[290] *Id.* § 1.

Constitution's prohibition against discrimination on the grounds of sexual orientation as well as the inherent right to dignity.[291]

D. Comparative Conclusions

Comparing the legal schemes governing sexual freedoms in South Africa, the Netherlands, and California, even in a cursory manner, warrants several conclusions.

First, it is clear that specific legal protection of sexual freedom does not require it be achieved solely by either judicial review or representative democratic processes. Further, even in legal systems with definite positions on judicial review, there is interplay with the supposedly non-dominant branches of government. Moreover, the achievements of legal guarantees for sexual freedom are exceedingly contextual, and provisions for judicial review are only one of the conditions. For example, the status of the Netherlands in the vanguard of sexual freedoms is often linked to its secularism and the lack of organized religious fundamentalism. On the other hand, the status of South Africa as a vanguard in rights generally and the inclusion of sexual minority rights specifically is often explained by historical contingencies and coalition work, accomplished despite organized religious and cultural fundamentalism largely attributable to the abiding influence amongst the now minority Afrikaners of the Dutch Reformed Church, as well as the popular portrayal of homosexuality as un-African.[292]

Further, even if from the perspective of the United States the legal protections appear relatively positive, there remain gaps and lacunae. For example, in South Africa, the Civil Union Act includes an "opt-out" clause for marriage officers who "object[] on the ground of conscience, religion, and belief to solemnising a civil union between persons of the same sex,"[293] and the Constitutional Court has not extended protections to either sex-workers[294] or unmarried heterosexual cohabitants.[295] In the Netherlands, the status of sexual minority parents is convoluted and not necessarily equal.[296]

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[291] *Id.* at Preamble.

[292] *See* CARL F. STYCHIN, A NATION BY RIGHTS: NATIONAL CULTURES, SEXUAL IDENTITY POLITICS, AND THE DISCOURSE OF RIGHTS 52-88 (1998).

[293] CIVIL UNION ACT 17 of 2006 s. 6.

[294] *See* Jordan v. State 2002 (6) SA 642 (CC) (S. Afr.). See Nicole Fritz, *Crossing Jordan: Constitutional Space for (Un)Civil Sex*, 20 S. AFR. J. HUM. RTS. 230 (2004), for an excellent commentary on this case.

[295] *See* Volks NO v. Robinson and Others 2005 ___ SA ___, (5) BCLR 446 (CC) (S. Afr.) (upholding the constitutionality of the exclusion of permanent life partners in the Maintenance of Surviving Spouses Act 27 of 1990 because the distinction between married and unmarried people is not unfair discrimination and does not violate dignity).

[296] *See* Maxwell & Forder, *supra* note 204, at 635-49.

Lastly, and perhaps more implicitly, an examination of the legal structures provides a partial and superficial portrait of sexual freedom and the realities of sexual minorities and women in the respective societies. It is important to remember that however liberatory, neither a high court opinion nor a legislative act is sufficient to guarantee sexual freedom to individual members of sexual minorities. Nevertheless, the law remains an important site of such struggles.

V. CONCLUSIONS: TOWARD A LESBIAN LEGAL THEORY OF JUDICIAL REVIEW

It is tempting to succumb to an unbounded contextualism admitting of no general principles regarding the place of judicial review in lesbian, feminist, or queer legal theories with a goal of achieving sexual freedom. Legal structures, civil societies, and cultural conditions might be simply too diverse to support any sort of general theorizing. In the United States, neither the history of judicial review nor contemporary practices provide clear conclusions. Comparing the two nations that have been in the forefront of the protection of sexual freedom, the Netherlands and South Africa, reveals two constitutional democracies with very distinct approaches toward judicial review.

Yet I continue to believe that specifically lesbian legal theorizing is necessary to ensure the particular sexual freedom of lesbians, although certainly such an enterprise occurs in coalition with queer and feminist projects. Judicial review must be an important aspect of that enterprise. Without developing theories about judicial review, we are sidelined in the vociferous debates around sexual freedom, including the rights of sexual minorities, the rights regarding reproductive choices, and even the criminalization of sexual practices. Further, we are marginalized in other controversies regarding equality, including racial and economic equalities, in which feminists must participate. These controversies occur in an arena that includes the judiciary. The example from the Netherlands, in which there was a resort to judicial review even when its was presumably precluded, illustrates the necessity of not simply disregarding judicial review.

Thus it is important to articulate a few principles which might shape a continuing inquiry regarding feminist, queer and lesbian theorizing regarding judicial review in constitutional democracies.

First, it is important to reaffirm that our legal theorizing about judicial review in constitutional democracies includes among its primary goals the realization of sexual freedom for women and sexual minorities. This is not merely a desirable outcome, but one of the underpinnings of democratic and political institutions.

Second, and relatedly, it is necessary to debunk the neutral stance assumed by conservatives arguing against sexual freedom, whether such principles are

advanced as "judicial activism" or "legislative snub." The argument regarding judicial review in constitutional democracies is not abstractable from the specific controversies at stake.

Third, although our theorizing should not surrender to infinite contextualizing, context is a dominant consideration. The provision of judicial review in the Iraqi and Afghanistan constitutions does not appear to be likely to secure sexual freedom for lesbians in light of other political and cultural conditions, but the voiced concern of a conservative American advisor that it should be omitted lest it engender reproductive freedom for women does give one pause. Certainly, those participating in constitution drafting in the "new democracies" are in the best position to make such judgments. The problem, however, is that the framers of such constitutions may not privilege, or even consider, sexual freedom for lesbians, other sexual minorities, and women as a valuable goal.

In the context of the United States, not only must appeals to neutrality be confronted, so must the resort to original intent as an interpretative mandate for the judiciary. The United States was not founded on universal suffrage, principles of inclusion for women and sexual minorities, or positive rights to be secured by the government. The recourse to the framers, all white, all presumptively heterosexual, all propertied, and all male, should be unequivocally opposed.

Fourth, it is vital to assert that framing judicial review in contrast to democracy presents a false dichotomy. It remains true that the judiciary is informed by popular will and sentiment and by actions of various types and levels of legislatures. It is also true that popular sentiment is informed by judicial pronouncements. This does not occur only as a "backlash," but can be a positive acceptance of declarations of rights.

Fifth, neither judicial review nor unbridled democracy alone is sufficient to procure sexual freedom. Both have severe shortcomings, especially given the entrenchment of biases against sexual minorities and women, and the ability of such biases to be manipulated by powerful interests. As Mary Becker correctly notes, the judiciary in the United States is predominantly male, and this is the case in virtually every nation. Additionally, as Becker also points out, the principle of stare decisis requiring in most cases an adherence to precedent operates to enshrine historical prejudices. Yet Becker's faith in majority rule may be overly optimistic. Inequality is part of popular opinion and women remain more politically uninformed, even apart from the problems such as essentialism and identity politics. Moreover, even if Becker's claims to majoritarian supremacy were true in the case of women, sexual minorities can make no claim to majoritarian status.

Sixth, even if it is true that feminist legal theory has been better at presenting critiques of power than of citizenship,[297] an understanding of power is integral to debates about judicial review in a constitutional democracy. Feminist critiques of power not only combat the pretenses to neutrality but also address the accusations regarding elitism and counter-majoritarian impositions of will. The dissection of private as well as state power has been a hallmark of feminist legal theorizing, and it is pertinent to glorifications of direct democracy. Regarding judicial review, feminist critiques of power can provide principles to bind judicial predilections and impositions of mere formal equality.

Finally, imaginative interventions are necessary. If there is an "ideological drift"[298] that might explain continued support by progressives for judicial review, there is also an educational "drift" for legal theorists educated in the United States under a regime that valorizes both judicial review and direct democracy. At one time, feminist and lesbian theorists dreamed that we might "invent" a world of sexual freedom.[299] Working within the frameworks of constitutional democracies should not hobble such desires.

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[297] Higgins, *supra* note 126, at 1670.

[298] Balkin, *supra* note 82, at 870.

[299] *See, e.g.*, NICOLE BROSSARD, THE AERIAL LETTER 136 (Malene Wildeman trans., 1985) ("[A] lesbian who does not reinvent the world is a lesbian in the process of disappearing.").

Note also the famous instruction to "[m]ake an effort to remember. Or, failing that, invent." MONIQUE WITTIG, LES GUÉRILLÈRES 89 (David LeVay trans., Viking Press 1971) (1969).

Water Regulation, Land Use and the Environment[1]

David L. Callies* and Calvert G. Chipchase**

I. INTRODUCTION

Water is an important element in planning for the use of land. But it is only *one* element. Problems arise in the planning process when water and non-economic uses of water are given a sacrosanct status that abjures private use for the benefit of "the public." This is increasingly happening under flawed interpretations of the public trust doctrine.[2]

Many courts have forgotten that the *jus privatem* is as much a part of the public trust doctrine as the *jus publicum*. Certainly water should be available for future use, but it also should be readily available for current use. When the balance between current private and abstract or future public needs is distorted, water use and availability of water becomes the primary, or even sole, consideration in the process. This leads to the *preservation* of water for such uses as "minimum stream flows" and non-beneficial use by selected segments of the public and, ultimately, an elitist, communitarian regime that bears no relationship to either traditional notions of water rights or constitutionally protected rights in property.

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* Kudo Professor of Law, the William S. Richardson School of Law, The University of Hawai'i at Manoa. College of Fellows, American Institute of Planners; American College of Real Estate Lawyers. B.A., DePauw University, J.D., The University of Michigan, LL.M. Nottingham University, Life Member, Clare Hall, Cambridge University. The authors acknowledge with thanks the research assistance of former University of Hawai'i law students Mason Yamaki, Rebecca L. Anderson and Glenn H. Sonoda, and Harvard University law student Stanley Chang, in the preparation of this article, and the resources provided by James M. Holway, University of Arizona, and Scott Coulson, University of Colorado.

** B.A., *cum laude*, Phi Beta Kappa, Colorado State University; J.D., *summa cum laude*, the William S. Richardson School of Law, The University of Hawai'i at Manoa; attorney, Cades Schutte LLP; adjunct professor of law, William S. Richardson School of Law; former law clerk for the Honorable Richard R. Clifton, United States Court of Appeals for the Ninth Circuit, and the Honorable Alan C. Kay, United States District Court for the District of Hawai'i.

[2] *See In re* Water Use Permit Applications (*Waiahole*), 94 Hawai'i 97, 9 P.3d 409 (2000); *In re* Water Use Permit Applications, 105 Hawai'i 1, 93 P.3d 643 (2004) (affirming in part, and vacating in part, the Water Commission's decision after remand from *Waiahole*); *In re* Water Use Permit Applications, 113 Hawai'i 52, 147 P.3d 836 (2006) (appeal after second remand to Water Commission).

Part II of this article discusses land use planning in Hawai'i and demonstrates where, under both governing law and common sense, water should fit in the planning process. Part III discusses the relationship between the State Water Code, the General Plan, and Oahu's Development Plan, in regard to water allocation for development. Parts IV and V analyze the skewed consequences which follow after the Hawai'i Supreme Court's decision in *In re Water Use Permit Applications (Waiahole)*[3] upset the balance between land use and water law set forth in statutes and common law. To demonstrate that the need for common sense water use planning is not unique to Hawai'i and to facilitate further discussion, Parts VI, VII, and VIII present the regulatory schemes in Arizona, Colorado, and New Mexico, respectively. Part IX ends where we began: with a warning that although water is an important consideration in planning for land use, it cannot become the only consideration.

II. LAND USE PLANNING IN HAWAI'I

What follows are summaries of the sophisticated system of land use planning and controls in Hawai'i and the pertinent parts of the state Water Code, which sets out the importance and precedence of plans. This Part concludes by discussing the elements of the planning system that in theory govern land use—and thus water allocation—on Oahu.

A. Hawai'i's Land Use Law[4]

It is axiomatic that zoning, at either the state or county level, governs the use and development of land. Zoning decisions are in turn made according to comprehensive plans, which create parameters and guidelines for zoning laws. As the New York Court of Appeals observed:

> [T]he comprehensive plan is the essence of zoning. Without it, there can be no rational allocation of land use. It is the insurance that the public welfare is being served and that zoning does not become nothing more than just a Gallup poll.[5]

Charles Haar makes the same point in his seminal article linking land use law and planning:

> The basic instrument of city planning is the "master plan." This master plan, a "comprehensive, long-term general plan" for the physical development of the community, embodies information, judgments, and objectives collected and formulated by experts to serve as both a guiding and predictive force. . . .

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[3] 94 Hawai'i 97 (2000).

[4] *See generally* DAVID L. CALLIES, PRESERVING PARADISE (1994).

[5] Udell v. Haas, 235 N.E.2d 897, 900-01 (N.Y. 1968).

> The city master plan is a long-term general outline of projected development; zoning is but one of the many tools which may be used to implement the plan.[6]

So it is in Hawai'i. Hawai'i's cases, statutes and county charter provisions make it clear that the fundamental decisions regarding the use of land, for whatever purpose, should be preceded by a careful and deliberate planning process, the end result of which is a county land use plan. As a mainland commentator familiar with Hawai'i has observed, "[r]ecent years have seen the sudden emergence of a planning requirement as a necessary condition to the exercise of land controls .... [T]he state policy plan does commit the state to a comprehensive planning policy as the basis for land management by state and county governments."[7]

Hawai'i's land use law consists of four principle parts: a state plan, a statewide zoning system, local general and development plans, and local zoning. Of particular importance are the state and county plans.[8] Hawai'i courts have often struck down any land use decision that "is inconsistent with the goal of long range comprehensive planning."[9]

1. The state plan

Act 100,[10] the state plan, summarizes Hawai'i's statewide planning system.[11] More specifically, the goals, objectives, and policies of the state plan provide broad guidelines for the state,[12] and "[t]he priority guidelines established in this chapter ... provide guidelines for decision-making by the State and the counties for the immediate future *and set priorities for the allocation of resources.*"[13] The plan explains that

> [s]tate programs shall further define, implement *and be in conformance with* the overall theme, goals, objectives, and policies, and shall utilize as guidelines the priority guidelines contained within this chapter.[14]

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[6] Charles M. Haar, *In Accordance With a Comprehensive Plan*, 68 HARV. L. REV. 1154, 1154-56 (1955).

[7] Daniel R. Mandelker & Annette B. Kolis, *Whither Hawaii? Land Use Management in an Island State*, 1 U. HAW. L. REV. 48, 49, 51 (1979).

[8] "[T]he language of the Zoning Enabling Act clearly indicates the legislature's emphasis on comprehensive planning for reasoned and orderly land use development." Kaiser Hawaii Kai Dev. Co. v. City & County of Honolulu, 70 Haw. 480, 484, 777 P.2d 244, 246-47 (1989). *See infra*.

[9] *Kaiser Hawai'i Kai*, 70 Haw. at 484, 777 P.2d at 247.

[10] Act 100, § 2, 9th Leg., Reg. Sess. (1978), *reprinted in* 1978 Haw. Sess. Laws. 136-63.

[11] HAW. REV. STAT. § 226-52 (2001). *See* discussion *infra* Part II.B.

[12] HAW. REV. STAT. § 226-52(a)(1) (2001).

[13] *Id.* § 226-52(a)(2) (emphasis added).

[14] *Id.* § 226-52(a)(5) (emphasis added).

The state programs referred to in the plan include, but are not limited to, those involving coordination and review and those involving "regulatory powers."[15] Regulatory powers include, but are not limited to, "the land use and management programs administered by the land use commission and the board of land and natural resources."[16]

The Commission on Water Resource Management ("Water Commission" or "Commission"), which administers water as part of the Department of Land and Natural Resources, has a hand in regulation through its permitting process. Accordingly, the requirements of the state plan govern the Commission. Indeed, land use decision-making processes, including those carried out by the Water Commission, are particularly singled out for "conformance to the overall themes, goals, objectives, and policies" of the state plan. Even if those provisions did not apply to the Commission, there is a catch-all provision, that requires "[a]ll other regulatory and administrative decision-making processes of state agencies," including their rules, to conform to the state plan.[17] It is therefore clear that the Water Commission must conform to Act 100 and its themes, policies, goals, and objectives.

The state themes, policies, goals, and objectives of Act 100 provide mainly for economic development and agriculture. While the thematic and goals statements are general and often lack specific guidance,[18] the objectives and policies are by comparison very specific. There are eighteen such goals and objectives relating to economic development generally,[19] fourteen relating to agriculture,[20] and only a scant half-dozen relating to culture and the natural environment.[21]

The objective for water is particularly instructive: "Planning for the State's facility systems with regard to water shall be directed towards achievement of the objective of the provision of water to adequately accommodate domestic, agricultural, commercial, industrial, recreational, and other needs within resource capacities."[22] This objective demonstrates that conservation and preservation uses are inferior to the clearly economic needs listed in the statute. Under the state plan, water is for commercial use, not preservation.

Moving to the priority guidelines, there is a similar emphasis on economic development and agriculture. The state plan lists some thirty economic

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[15] *Id.*

[16] *Id.*

[17] *Id.* §§ 226-52(b)(2)(D), (b)(2)(E).

[18] *See id.* §§ 226-3 to -4.

[19] *Id.* §§ 226-5 to -6.

[20] *Id.* § 226-7.

[21] *See id.* §§ 226-12 to -13.

[22] *Id.* § 226-16(a).

priority guidelines, including ten to promote the growth and development of diversified agriculture and aquaculture. These include:

> (1) Identify, conserve, and protect agricultural and aquacultural lands of importance and initiate affirmative and comprehensive programs to promote economically productive agricultural and aquacultural uses of such lands.
> (2) Assist in providing adequate, reasonably priced water for agricultural activities.
> (3) Encourage public and private investment to increase water supply and to improve transmission, storage, and irrigation facilities in support of diversified agriculture and aquaculture.
> . . . .
> (7) Encourage the development and expansion of agricultural and aquacultural activities which offer long-term economic growth potential and employment opportunities.[23]

Through these objectives and priority guidelines, the Hawai'i Legislature has manifested a clear intent to promote and support the use of water for economically beneficial activities, especially agriculture.

2. *The county plans*

Regulating development is, in the main, a county function in Hawai'i.[24] The City and County of Honolulu, with jurisdiction over the island of Oahu, provides a good example of the relationship between the state plan and county land use decision-making. The county's principal method of regulating the use of land is the zoning ordinance, which is authorized by the Zoning Enabling Act.[25] On Oahu, that act is implemented through the Land Use Ordinance.[26] The Land Use Ordinance and the county's land use decision-making processes (including subdivision control and location of public facilities) are tied to the county development and general plans through the county charter. The Charter for the City and County of Honolulu requires conformity: "Public improvement projects and subdivision and zoning ordinances shall be consistent with the development plan for that area . . . ."[27]

The present development plans for the Leeward[28] side of the island (Honolulu, Waikiki, Pearl Harbor, etc.) show much of land use in urban

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[23] *Id.* § 226-103(d).

[24] *See* discussion *infra*.

[25] HAW. REV. STAT. § 46-4 (1993 & Supp. 2006).

[26] HONOLULU, HAW., REV. ORDINANCES ch. 21 (1990); *see also* CALLIES, *supra* note 4, at 24.

[27] HONOLULU, HAW., REV. CHARTER § 6-1511(3) (2000 & Supp. 2003).

[28] "Leeward" refers to the dry side of the island. MARY KAWENA PUKUI & SAMUEL H. ELBERT, HAWAIIAN DICTIONARY 473 (rev. ed. 1986) (describing "leeward," or "lalo," as referring to the "lee," or "sheltered," side of the island).

development and agricultural uses.[29] The present development plans for the rural Windward[30] side, on the other hand, show most of land use in conservation and agricultural uses, with only small pockets of urban development of the sort which has high priority under the state Water Code.[31] In addition, the General Plan for Oahu, to which the development plans and local land use controls must conform, similarly provides for development principally on the Leeward side, and not the Windward side, of Oahu.[32]

B. Hawai'i Caselaw Requires Planning to Precede Land Use Decision-Making at Every Level

Hawai'i courts have consistently held that planning is a required precedent to zoning, to which all zoning and other land use controls must conform. Perhaps the strongest statement of the priority of planning comes from the Hawai'i Supreme Court's decision in *Kaiser Hawaii Kai Development Co. v. City & County of Honolulu.*[33]

The issue in *Kaiser Hawaii Kai* arose when Kaiser Hawaii Kai Development Company ("Kaiser") began to develop a residential housing project on a parcel of land located in east Honolulu.[34] The proposed development was an allowed use of the parcel, which had been zoned for residential purposes since 1954.[35] Kaiser applied for and received the requisite special area management use permit.[36]

A group opposed to the development spearheaded an initiative to downzone the property from residential to preservation.[37] When the initiative was placed on the ballot, Kaiser sued for injunctive relief.[38] The circuit court agreed with Kaiser and enjoined the initiative.[39] The supreme court stayed the injunction and allowed the initiative to go forward.[40] The measure was approved at the general election.[41]

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[29] *See infra* Part III.C-D.

[30] "Windward" refers to the wet side of the island. PUKUI & ELBERT, *supra* note 28, at 561 (explaining that "windward," or "ao'ao makani," refers to the exposed side of the island).

[31] *See* HAW. REV. STAT. § 174C-2 (1993 & Supp. 2006); *infra* Part III.C-D.

[32] CITY AND COUNTY OF HONOLULU DEP'T. OF GEN. PLANNING, GENERAL PLAN OBJECTIVES AND POLICIES (1992); *see infra* Part III.C-D.

[33] 70 Haw. 480, 777 P.2d 244 (1989).

[34] *Id.* at 481–82, 777 P.2d at 245.

[35] *Id.* at 481, 777 P.2d at 245.

[36] *Id.* at 482, 777 P.2d at 246.

[37] *Id.*

[38] *Id.*

[39] *Id.*

[40] *Id.*

[41] *Id.* at 483, 777 P.2d at 246.

On review following the election, the supreme court overturned the initiative. The court began its analysis by examining the Zoning Enabling Act, codified as section 46-4(a) of the Hawai'i Revised Statutes ("HRS"), from which the counties "derive their zoning powers."[42] According to the court, section 46-4 expresses the legislature's intent that "[z]oning in all counties shall be accomplished within the framework of a long range, comprehensive general plan prepared . . . to guide the overall future development of the county."[43] Summarizing the planning structure, the court observed that the legislature had reaffirmed

> its aim of having *long range comprehensive land use planning by the state and counties* . . . by enact[ing] the State General Plan, [HRS] chapter 226, in 1978. County general plans under chapter 226 are defined as comprehensive long-range plans. Those county general plans and the more detailed development plans are to be
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> (1) formulated with input from the state and county agencies as well as the general public, (2) take into consideration the state functional plans, and (3) be formulated on the basis of sound rationale, data, analyses, and input from the state and county agencies and the general public.[44]

Turning to the initiative, the court recognized that the measure presented a "'piecemeal'" attack on an established zoning classification, which, if allowed, would "'conflict with the general scheme'" established by HRS section 46-4 for "'fixing the uses of property in designated areas'" pursuant to comprehensive plans.[45] The court refused to carve such an exception into section 46-4. Because section 46-4 involved a matter of statewide concern, the court determined that the statute was superior to the initiative provision of the city charter.[46] Accordingly, the court invalidated the initiative and vote as contrary to the Zoning Enabling Act.

The opinion in *Kaiser Hawaii Kai* was not the first to place such emphasis on planning preceding zoning. In fact, *Kaiser Hawaii Kai* referred repeatedly to an earlier decision, *Lum Yip Kee v. City & County of Honolulu*,[47] in which the court set out in detail and with approval the content and process by which Honolulu in 1973 adopted eight development plans to guide the use of land on

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[42] *Id.*

[43] *Id.*

[44] *Id.* at 486-87, 777 P.2d at 248 (citing Lum Yip Kee Ltd. v. City & County of Honolulu, 70 Haw. 179, 186, 767 P.2d 815, 820 (1989)) (emphasis added) (citations omitted).

[45] *See id.* at 484, 777 P.2d at 247 (quoting Township of Sparta v. Spillane, 312 A.2d 154, 157 (N.J. Super. Ct. App. Div. 1973) and Leonard v. City of Bothell, 557 P.2d 1306, 1309–10 (Wash. 1976)).

[46] *Id.* at 489–90, 777 P.2d at 249–50.

[47] 70 Haw. 179, 767 P.2d 815 (1989).

Oahu, as required by the Charter of the City and County of Honolulu and the general plan. As the court observed:

> While the *General Plan guides development* by expressing overall general goals to be sought in the planning process, the actual *physical development* of a site is controlled by the *development plan* for the area in which the site is located, and its zoning.[48]

After further enumerating in detail the elements of the development plans, the court held that

> [t]he charter requires zoning ordinances to conform to and implement the development plan for that area. . . . In order to meet this conformance requirement, it is frequently necessary for a landowner first to seek a development plan amendment from the City before requesting a zoning change.[49]

In setting out the requirements for planning and its relationship to zoning, the court in *Lum Yip Kee* drew on the reasoning of the Intermediate Court of Appeals in *Protect Ala Wai Skyline v. Land Use & Controls Committee*.[50] There, in deciding that a major hotel development was consistent with the General Plan and Development Plan for Waikiki, the court explained that

> [w]hile the General Plan guides development by expressing overall general goals to be sought in the planning process, *see* 1 McQuillin, *Municipal Corporations*, §1.72 (1971), the actual physical development of a site is controlled by the development plan for the area in which the site is located, *see* D.L. Callies, *Regulating Paradise, Land Use Controls in Hawaii*, chapter 3 (1984), and its zoning. McQuillin, *supra*, §§ 1.72, 1.75.[51]

III. The Hawai'i State Water Code and Its Required Four-Part Plan

The Hawai'i State Water Code ("Water Code," also referred to as HRS chapter 174C) and the four-part plan, which govern the actions of the Water Commission, both clearly favor the promotion and protection of land uses of an economic, developmental nature. It is not the function of the Commission under the Code to extensively plan the distribution of water in the State, but

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[48] *Id.* at 182, 767 P.2d at 817 (quoting Protect Ala Wai Skyline v. Land Use & Controls Comm., 6 Haw. App. 540, 548, 735 P.2d 950, 955 (Haw. Ct. App. 1987), *overruled in part by* GATRI v. Blane, 88 Hawai'i 108, 962 P.2d 367 (1998)) (emphasis added).

[49] *Id.* at 183, 767 P.2d at 818 (citing D. Callies, Regulating Paradise: Land Use Controls in Hawaii 27 (1984)).

[50] 6 Haw. App. 540, 735 P.2d 950 (Haw. Ct. App. 1987), *overruled in part by* GATRI v. Blane, 88 Hawai'i 108, 962 P.2d 367 (1998).

[51] *Id.* at 548, 735 P.2d at 955.

rather to perform specific duties, which are governed by the network of state and local plans, zoning regulations and ordinances, the language of the Water Code, and the Hawai'i Water Plan called for by the Water Code.

A. The Water Code Clearly Contemplates Maximum Beneficial Uses of a Commercial and Developmental Nature Before Protection of the Environment and Traditional and Customary Native Hawaiian Rights

The State Water Code[52] was created to implement article XI, section 7 of the Hawai'i Constitution.[53] The Water Commission was established within the Department of Land and Natural Resources ("DLNR") to administer the Water Code. "The Commission has broad powers and exclusive jurisdiction and final authority in all matters regarding the administration of the water code."[54]

The Commission is responsible for the drafting of the Water Resource Protection Plan ("WRPP"), which makes up a major part of the Hawai'i Water Plan, the elements of which are set forth in HRS section 174C-31. Among the responsibilities of the Commission with regard to the water plan are the following: "[S]tudy and inventory the existing water resources of the State and the means and methods of conserving and augmenting such water resources: *review existing and contemplated needs and uses of water* . . . study the quantity and quality of water needed for *existing and contemplated uses* . . . ."[55]

The emphasis of the Code is clear from its initial declaration of policy. "The state water code *shall be* liberally interpreted to obtain *maximum beneficial use* of the waters of the State for purposes such as domestic uses, aquaculture uses, irrigation and other agricultural uses, power development, and commercial and industrial uses."[56]

Only after setting out these specific "maximum beneficial use" areas does the section continue, requiring "adequate provision for the protection of traditional and customary Hawaiian rights, the protection and procreation of fish and wildlife, the maintenance of proper ecological balance and scenic beauty, and the preservation and enhancement of waters of the State for municipal uses, public recreation, public water supply, agriculture, and navigation."[57]

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[52] HAW. REV. STAT. §§ 174C-1 to -101 (1993 & Supp. 2006).

[53] HAW. CONST. art. XI, § 7.

[54] COMMISSION ON WATER RES. MGMT., DLNR, WATER RESOURCES PROTECTION PLAN, at II-1 (undated).

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

[56] HAW. REV. STAT. § 174C-2(c) (1993 & Supp. 2006) (emphasis added). The importance of this particular section of the Water Code is underscored by the frequency with which other sections of the Code refer to it.

[57] *Id.*

B. The Water Code Directs the Implementation of These Water Resource Policies Through the Four-Part Hawaiian Water Plan, Which the Code Requires to Be Consistent With County Planning and Zoning

The Water Code directs that "[n]othing in this chapter to the contrary shall restrict the planning or zoning power of any county under chapter 46 [the county Zoning Enabling Act]."[58] The Water Code also lists "[t]he implementation of the water resources policies expressed in section 174C-2" as one of the five objectives of the Hawai'i Water Plan.[59] Two of the four elements of the Hawai'i Water Plan are specifically directed to be consistent with county zoning and plans: "Each water use and development plan and the state water projects plan shall be consistent with the respective county land use plans and policies including general plan and zoning as determined by each respective county."[60] Moreover, the county water plans must also be consistent with the state policies and land use classifications.[61] Presumably, this means that county water plans must also conform to the land use classifications of the state Land Use Commission promulgated under HRS Chapter 205 (the Land Use Law) and the policies set out in the state plan, Act 100.

That the county planning and zoning takes precedence over the part of the Hawai'i Water Plan that covers use and development at the county level is clear from that part of the Code which directs that "[e]ach county shall update and modify its water use and development plans as necessary to maintain consistency *with its zoning and land use policies*."[62] In other words, it is the county water use and development plan that must conform to county zoning and land use policies, and not the modification of zoning and land use policies to conform to the county water use and development plan. Once again, water allocation is secondary to overall land use planning and implementation through zoning at the county level.

C. Honolulu's General and Development Plans Provide for Development of Central Oahu and Ewa in Leeward Oahu

Even a cursory review of the General and Development Plans for the City and County of Honolulu in existence at the time of the Water Commission's hearings on Oahu water allocation demonstrates the County's intent that major

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[58] *Id.* § 174C-4(a).
[59] *Id.* § 174C-31(g)(5).
[60] *Id.* § 174C-31(b)(2).
[61] *Id.* § 174C-31(b)(3).
[62] *Id.* § 174C-31 (emphasis added).

development and the accompanying need for water occur in Ewa and other parts of Leeward Oahu and not Windward Oahu.

1. The Oahu general plan directs development to Ewa and Oahu's primary urban center

The second policy under the population distribution objective of the Oahu General Plan states that it is the policy of the County to "[e]ncourage development within the secondary urban center at Kapolei and the Ewa and Central Oahu urban-fringe areas to relieve developmental pressures in the remaining urban-fringe and rural areas and to meet housing needs not readily provided in the primary urban center."[63]

The following table,[64] showing distribution of residential population for the period from 1990 to 2010, projected a population increase in the Primary Urban Center ("PUC") from 18,777 to 65,777 residents, and a population increase in the secondary urban center (Ewa-Makakilo) from 76,917 to 89,917 residents, for a total increase of approximately 100,000 people in the urban centers on Oahu alone.[65] But projections for the same time frame for "rural" areas (Koolaupoko, Koolauloa, North Shore, and Waianae Coast) contemplate a comparatively miniscule population growth.[66]

Table 1:

Location	1990 Population	1990 % of Total	2010 Estimated Population	2010 Estimated % of Total
Primary Urban Center	432,023	51.6	450,800 - 497,800	45.1 - 49.8
Ewa	42,983	5.1	119,900 - 132,900	12.0 - 13.3
Central Oahu	130,474	15.6	148,900 - 164,900	14.9 - 16.5
East Honolulu	45,654	5.5	53,000 - 58,000	5.3 - 5.8
Koolaupoko	117,694	14.1	109,900 - 121,900	11.0 - 12.2
Koolauloa	14,263	1.7	13,000 - 14,000	1.3 - 1.4
North Shore	15,729	1.9	16,000 - 18,000	1.6 - 1.8
Waianae	37,411	4.5	38,000 - 42,000	3.8 - 4.2
OAHU TOTAL	836,231	100.0	949,500 - 1,049,500	95.0 - 105.0

It is consistent with these policies and projections that the physical development objectives in the General Plan also provide first and foremost for Ewa and the PUC, rather than the rural North Shore:

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[63] CITY AND COUNTY OF HONOLULU DEP'T OF GEN. PLANNING, *supra* note 32, at 15.

[64] *Id.* at 47 (supplying data reproduced in Table 1).

[65] *Id.*

[66] *Id.*

> Objective A
> To coordinate changes in the physical environment of Oahu to ensure that all new developments are timely, well-designed, and appropriate for the areas in which they will be located.
> *Policy 1*
> Plan for the construction of new public facilities and utilities in the various parts of the island according to the following order of priority: *first*, in the primary urban center; *second*, in the secondary urban center in Kapolei; and *third*, in the urban-fringe and *rural areas [north shore/Windward]*. . . .
> Objective B
> To develop Honolulu (Waialae-Kahala to Halawa), Aiea, and Pearl City as the island's primary urban center . . . .
> Objective C
> To develop a secondary urban center in Ewa with its nucleus in the Kapolei area . . . .
> *Policy 2*
> Encourage the development of a major residential, commercial, and employment center within the secondary urban center at Kapolei.[67]

As demonstrated above, the general plan clearly provides for development on Leeward Oahu and not on Windward Oahu.

2. The applicable development plans also provide for population increase and development on the Leeward side of Oahu

Both the county development plans adopted by ordinance at the time of the Water Commission's water allocation hearings and the current, revised plans for Oahu, Koolauloa, and Koolaupoko (comprising virtually all of the North Shore) demonstrate the county's intent that land use and development patterns remain relatively stable and rural. For example, the 1983 Koolaupoko plan determined to manage physical growth and development in the urban-fringe and rural areas so that: "(1) *[a]n undesirable spreading of development is prevented*, and (2) *[t]heir proportion of the islandwide resident population remains unchanged.*"[68]

The general plan population distribution guidelines for Koolaupoko provide for a population range of 12.4% to 13.6% of the island wide total.[69] The 2000 Koolaupoko Sustainable Communities Plan explained that

> *[b]etween 1995 and 2020, Koolaupoko is projected to experience minimal population growth.* According to projections prepared in 1995 by the Planning

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[67] *Id.* at 32-34 (emphasis added).

[68] HONOLULU, HAW., REV. ORDINANCES No. 83-8 (1983), as amended by Ordinances Nos. 84-60 (1984) and 85-49 (1985), Article 6 (emphasis added).

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

> Department, Koolaupoko's population might be expected to increase from about 117,700 in 1995 to approximately 122,100 by 2020, or by less than one half of one percent per year. Population growth of this magnitude is not expected to generate significant demand for additional residential or commercial development in the region.
> The preservation, continuation and potential expansion of agricultural land use is important to Koolaupoko's future as a means to provide jobs and economic activity; offers the choice of a rural lifestyle proximate to a major metropolitan area; and maintains open space and a rural ambience in a section of the island that is famed for its natural beauty.[70]

The foregoing development plan contemplates *no* development on the Windward side. The contrasting intention for the Leeward, Ewa, Central Oahu, and PUC planning districts could not be more stark. For example, the 1983 Ewa Development Plan contained the following description:

> The Ewa area's population of 5,585 in 1980 constituted 4.7 percent of the island's total population. Relevant general plan policies for Ewa *encourage the gradual development of a secondary urban center in order to relieve development pressures in the urban-fringe and rural areas.*
> It is the intent of the Ewa Development Plan to provide a guide for orderly and coordinated public and private development in a manner that is consistent with general plan provisions.
> *A new secondary urban center shall be gradually developed in the West Beach-Makakilo area in order to accommodate most of the expected influx of population into the area between 1980 and the year 2000.*[71]

The 1997 Ewa Development Plan provided that

> [b]y 2020, the Ewa Development Plan Area . . . *will have experienced tremendous growth*, and will have made significant progress toward providing a Secondary Urban Center for Oahu. Population will have grown from 43,000 people in 1990 to almost 125,000. Nearly 28,000 new housing units will have been built in a series of master planned communities.
> Job growth will be equally impressive, rising from 17,000 jobs to over 64,000 in 2020. Oahu residents and visitors will be attracted to Ewa by a new university campus, the Ko Olina resort, ocean and waterfront activities at Ewa Marina, a major super regional park, and a thriving City of Kapolei which has retail and commercial establishments and private and government offices.[72]

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[70] PLANNING DEP'T, CITY AND COUNTY OF HONOLULU, KOOLAUPOKO SUSTAINABLE COMMUNITIES PLAN, ch. 2, at 2-1, 2-6 (2000), *available at* http://honoluludpp.org/planning/koolaupoko/KP2.pdf (emphasis added).

[71] HONOLULU, HAW., REV. ORDINANCES No. 81-80 (1981), as amended by Ordinances Nos. 83-26 (1983), 84-57 (1984) and 85-61 (1985), Article 3 (emphasis added).

[72] PLANNING DEP'T, CITY AND COUNTY OF HONOLULU, EWA DEVELOPMENT PLAN, ch. 2, at 2 (rev. ed. 2000) (emphasis added), *available at* http://honoluludpp.org/planning/Ewa/Ewa2.pdf.

The Ewa Development Plan revision also provided for water allocation: "*Use of Waiahole Ditch Water.* Waiahole Ditch Water is needed for diversified agricultural purposes in Central Oahu and Ewa and for recharge of the Pearl Harbor Aquifer. Water pumped from the Pearl Harbor aquifer is needed to serve the existing and future development of the region."[73]

In sum, the development plans call for minimal growth on the Windward side and North Shore of Oahu, contrasted with spectacular growth on the Leeward side of the island. These development plans conform to Oahu's General Plan, as required by law. Decisions regarding water resources must, in turn, reflect the policies, goals, and projections of these various plans.

3. 1983 Central Oahu development plan

In Central Oahu, the existing development plans provide for both urban use expansion and major agricultural uses of land. For central Oahu,

> *[t]he dominant land use . . . is agriculture*, followed by military activities at Wheeler Air Force Base, Schofield Barracks, and the Naval Reservation on Waipio Peninsula. Although *increased development of lands for residential use is projected for the area, especially in Waipahu, Waipio, and Mililani, the major contribution Central Oahu makes toward sustaining the State's agricultural industry dictates that the present level of agricultural activity in the district be substantially maintained.* This is supported by the general plan policy that identifies Ewa, the North Shore, and Central Oahu as areas for the provision of sufficient agricultural lands "to encourage the continuation of sugar and pineapple as viable industries."[74]

Compare the foregoing with the 2003 Central Oahu *Sustainable* Communities Plan, which provides that

> [b]y 2025, the Central Oahu *Sustainable* Communities Plan Area . . . is expected to experience moderate growth as existing areas zoned for residential development are built out. Population will have grown from almost 149,000 people in 2000 to over 173,000 in 2025. Over 11,000 new housing units will have been built since 2000 in master-planned communities.
>
> Significant job growth is also expected, rising from almost 39,000 jobs in 2000 to over 65,000 in 2025 (almost 10% of Oahu total projected). The bulk of the private non-construction job growth is projected to be in services, retail, or transportation/communications/utilities (70%) with another 20% in industrial occupations.[75]

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[73] HONOLULU, HAW., REV. ORDINANCES § 24-36.88 (1997).

[74] HONOLULU, HAW., REV. ORDINANCES NO. 83-7 (1983), as amended by Ordinances Nos. 84-59 (1984) and 85-48 (1985), Article 5 (emphasis added).

[75] HONOLULU, HAW., REV. ORDINANCES § 24-48.17, *reprinted in* DEP'T OF PLANNING AND PERMITTING, CENTRAL OAHU DEVELOPMENT & SUSTAINABLE COMMUNITIES PLANS, pt. 2, 1 (2003), *available at* http://www.honolulu.gov/refs/roh/central/coch2.htm.

The Central Oahu Development Plan revision also proposed additional residential development, the promotion of diversified agriculture, and new employment opportunities in Central Oahu.

Hand in hand with this increased future growth is the need for water, primarily Waiahole Ditch water. These new development plans for Oahu, mandated by the referendum on the Honolulu Charter Revision Recommendations of the Charter Revision Commission, recognized the need for Waiahole Ditch water to serve the needs stated in this and the aforementioned county plans:

7.1.4 Irrigation and Aquifer Recharge Needs:

> Water *transported by Waiahole Ditch* from water sources on the Windward side to the Leeward side of the Koolau ridge will be needed to irrigate agricultural lands in the region and for recharge of the Pearl Harbor aquifer which supports the existing and future population in the region.
> Water needs for irrigation will continue despite the closing of Oahu Sugar Company in 1995. The State Department of Agriculture has identified approximately 13,000 acres of agricultural zoned land and 1,300 acres of golf courses that would be serviced by Waiahole Ditch water and water pumped in Central Oahu. Large landowners in the area are pursuing diversified agricultural opportunities to replace sugar. The State Department of Land and Natural Resources is also proposing the temporary leasing to farmers of 1,300 acres in Kapolei on land previously used by sugar. The Waiahole water provides the only opportunity for economical irrigation water for new farmers. Where urban development replaces sugar, irrigation water will be needed for landscaping and the new golf courses being developed.
> According to BWS [(the Board of Water Supply)], the proposed growth policy for the region will require an additional 30 mgd [(million gallons per day)] of water for the additional 137,000 people expected in the region by the year 2020. Water from the Pearl Harbor aquifer which supplies more than half of the Primary Urban Center's demand of 45 mgd will also be needed to support this urban growth.
> An estimated 20-25 percent of the Waiahole Ditch water from drip irrigation of sugar also served to recharge the Pear[l] Harbor aquifer. The return of Waiahole Ditch water to Windward Oahu would reduce the sustainable yield of the Pearl Harbor aquifer due to the loss of this recharge. . . .
> *Waiahole Ditch water will be needed on the Leeward side* for direct support of agricultural uses and indirect support, through aquifer recharge of urban land uses. The water will sustain the emerging diversified agriculture industry in the area and the existing and future master planned communities intended to accommodate much of the growth of Oahu.[76]

In sum, both the superseded and current development plans for Oahu clearly direct growth to the Leeward side and away from the Windward side.

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[76] EWA DEVELOPMENT PLAN REPORT 7-3 to -4 (1995) (emphasis added).

D. The Oahu Water Plan Also Provides for Water-Intensive Use and Development of Land Primarily on the Leeward Side of Oahu

The Oahu Water Management Plan, as adopted by the Honolulu City Council in 1990, "sets forth the policies for water use and development within each development plan area. These are established in recognition of the vital role of water in supporting land use activities on the island of Oahu."[77] Its first policy declaration mandates that

> [f]acilities for the provision of water shall be based on the General Plan population projections and the land use policies contained in the Development Plans as depicted on the Development Plan Land Use Maps.[78]

The Board of Water Supply's most recent draft update to the Oahu Water Management Plan demonstrates that population and demand for water will increase rapidly on the Leeward, and not the Windward, side of Oahu, as illustrated in Table 2.[79]

Table 2:

	PUC	Ewa	North Shore	Koolau-poko	Koolau-loa
2000 Population (1000s)	419.4	68.7	18.4	117.9	14.5
2000 Water Demand (mgd)	76.45	15.3	2.82	19.84	1.48
2030 Projected Population (1000s)	489.4	184.6	19.9	115.4	16.7
2030 Projected Water Demand (mgd)	90.04	42.5	3.35	19.62	2.05

The foregoing projections show that, while the demand for water in Ewa and the PUC is projected to increase by over forty million gallons per day ("mgd")—as a result of a projected population increase of 186,000—the needs of the *entire* Windward side are projected to increase by less than one mgd, driven by a projected population increase of *only* 1,200.

IV. PRESERVATION TRUMPS ALL: THE MESSAGE FROM THE HAWAI'I SUPREME COURT

As the preceding sections demonstrate, Hawai'i has a comprehensive land use planning scheme, which includes a detailed analysis of projected future

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[77] HONOLULU, HAW., REV. ORDINANCES No. 90-62 art. II, § 2.2 (Jul. 25, 1990), *reprinted in* DEP'T OF GEN. PLANNING, CITY & COUNTY OF HONOLULU, OAHU WATER MANAGEMENT PLAN x (1990), *available at* http://www.hawaii.gov/dlnr/cwrm/planning/plans/wudpoa1990.pdf.

[78] *Id.*

[79] *Id.* (supplying data reproduced in Table 2).

growth and allocation of water resources. Part IV discusses the mischief that occurs when exhaustive planning and conservation for future needs give way to contrived preservationism and allocations to favored uses that are unsupported by statute.

A. The Common Law Background

As the Hawai'i Territorial Court understood it, common law gave an overlying owner the right to pump

> all of the water that naturally flows from the well or that can be drawn therefrom by any pump, however powerful, and . . . he [may] use the water as he pleases and may conduct it to supply lands and communities at any distance from his own piece or parcel of land and may even waste it.[80]

This "absolute ownership" rule finds support in early Hawai'i case law.[81]

In the 1929 case of *City Mill Co. v. Honolulu Sewer & Water Commission*,[82] the court abandoned the absolute ownership rule as applied to "artesian waters which are known to flow freely and rapidly through broken rock or other materials permitting of easy passage" in favor of "correlative rights."[83] Under the latter system, a landowner may use as much groundwater as needed for the benefit of the overlying property, provided that he does not interfere with the relative rights of other surface owners.[84] Landowners become, in effect, owners of the right to use coequally the underlying water:

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[80] City Mill Co. v. Honolulu Sewer & Water Comm'n, 30 Haw. 912, 922 (1929), *overruled by In re* Water Use Permit Applications (*Waiahole*), 94 Hawai'i 97, 9 P.3d 409 (2000); *see also* Wright v. Goleta, 219 Cal. Rptr. 740, 746 (Cal. Ct. App. 1985).

[81] *See* Leong v. Irwin, 10 Haw. 265, 270 (1896); Davis v. Afong, 5 Haw. 216, 222-24 (1884), *overruled in part by Waiahole*, 94 Hawai'i 97, 9 P.3d 409.

[82] *City Mill*, 30 Haw. 912.

[83] *Id.* at 924, 934. The court left open the possibility that the absolute ownership rule applied to waters "merely oozing or seeping through the soil." *Id.* at 924.

[84] *Id.* at 923-28; *accord* Sorensen v. Lower Niobrara Nat'l Res., 376 N.W.2d 539, 546 (Neb. 1985).

> [T]he owner of land is entitled to appropriate subterranean waters found under his land, but he cannot extract and appropriate them in excess of a reasonable and beneficial use upon the land which he owns, especially if such use is injurious to others who have substantial rights to the waters, and if the natural underground supply is insufficient for all owners, each is entitled to a reasonable proportion of the whole . . . .

Sorensen, 376 N.W.2d at 546 (quoting Olson v. City of Wahoo, 248 N.W. 304, 308 (Neb. 1933)). *See also* State v. Michels Pipeline Const., Inc., 217 N.W.2d 339, 349 (Wis. 1974) ("Under the rule of correlative rights, the rights of all landowners over a common basin, saturated strata, or underground reservoir are coequal or correlative, and one cannot extract more than his share of the water, even for use on his own land, where others' rights are injured thereby.") (citations omitted).

> If a person or other entity should purchase all of a large tract of land under which an artesian basis exists, it would be easy to take the view . . . that that owner of the land would be the sole owner of the water underneath it. If two persons or other entities should purchase each a half of that tract it would seem to be equally fair and rational to regard the two owners of the land as owners in equal shares of all of the waters. Why not, upon the same reasoning, regard all the owners of all the many portions of such an area as co-owners of the waters of the basin? We think that they should be so regarded and that this is the view that most nearly effectuates justice and coincides with early concepts of the law as to the ownership of the soil and all within it. Their rights are correlative.[85]

Correlative rights, like other property rights, are protected by the Constitution.[86]

The opinion in *City Mill* and the doctrine of correlative rights remained the cornerstone of Hawai'i groundwater law for over seventy years. That changed in August 2000, when the Hawai'i Supreme Court issued its opinion in *In re Water Use Permit Applications*,[87] commonly known as *Waiahole*.

B. The Water Commission Decision

The *Waiahole* case arose out of disagreement between Windward and Leeward parties about how water originating in the Koolau mountains on the Windward side of Oahu should be used. The Waiahole Ditch System, located on the Island of Oahu, develops surface and groundwater from the Windward

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[85] *City Mill*, 30 Haw. at 924-25.

[86] In *City Mill*, the Honolulu City Sewer and Water Commission ("CSWC") rejected City Mill's application for a permit to tap a common underlying artesian basin. The CSWC denied the application because it "believed that from the artesian basin which the proposed well would tap more water is already being drawn by existing artesian wells than is filtering into the basin by natural processes." *Id.* at 921. City Mill challenged the denial as an unconstitutional taking of property. *Id.* at 947. The court phrased the issue as "whether [the Territory] may, without compensation to the applicants, prohibit the boring of any new well while at the same time leaving all users of existing wells at liberty to draw water therefrom." *Id.* at 922. The court reasoned that the government may not so restrict property rights and held that the statute allowing the CSWC "to wholly deprive any co-owner of the waters of the basin under consideration, without due compensation, of his right to share in the artesian waters of that basin, violate[d] the provision of the Constitution and [was] invalid." *Id.* at 947. The remedy for any threat to the water supply, the court concluded, was instead

> by a lessening of the use already being had and not by wholly preventing the appellant from having his reasonable share of the water. . . . [I]t would be abhorrent to a sense of justice and violative of the appellant's rights as a co-owner of the waters in the artesian basin to prevent him from using any of the waters of that basin while at the same time to permit an unrestrained use of the same waters by others of his co-owners.

Id. at 946-47.

[87] 94 Hawai'i 97, 9 P.3d 409 (2000).

mountains and transfers it to the central plains at a rate of twenty-seven mgd.[88] The system was designed in 1916 and used by Oahu Sugar Company, an island sugar plantation, until 1993 when the plantation announced that it would soon cease operations.

Following the announcement, a collection of surface owners, Leeward farmers, Windward community associations and other interested parties applied to the Commission for various allocation permits to capture the water beneath their property, to reserve and withdraw water from the ditch, or to release the water into Windward streams.[89]

The Commission consolidated the applications of twenty-five parties into a single contested case hearing. The hearing began on November 9, 1995 and closed ten months later on September 20, 1996.[90] The Commission heard testimony from 161 witnesses and admitted 567 exhibits.[91] Deliberations lasted for fourteen months, and the Commission issued its final 250-page decision on December 24, 1997, more than four years after the first applications were submitted.[92]

The Commission's decision rested on 1109 findings of fact and two key legal conclusions. First, the Commission determined that the "State's *first duty* is to protect fresh water resources (surface and ground) which are part of the public trust *res*."[93] Second, the "duty to protect public water resources" was, according to the Commission, "a categorical imperative and the precondition to all subsequent considerations."[94] All water use decisions followed from these principles. From there, the Commission allocated water for uses it believed to be in the public interest, without regard to surface ownership.

The county plans and zoning to which the Commission is required to conform[95] notwithstanding, the Commission determined that stream restoration was of paramount importance, agricultural uses followed second, and nonagricultural—including land development—uses were considered only if sufficient water was otherwise available. Water flowing into the Waiahole

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[88] Susan Kreifels, *A State Commission Decision on Waiahole Ditch Will Divert Millions of Gallons*, HONOLULU STAR-BULL., http://starbulletin.com/97/12/24/news/story1.html (last visited Sept. 28, 2007).

[89] The five underground aquifers feeding the system were included in a designated water management area in 1992. *Waiahole*, 94 Hawai'i at 111, 9 P.3d at 424. A "'[w]ater management area' means a geographic area which has been designated pursuant to [Hawai'i Revised Statute] section 174C-41 as requiring management of the ground or surface water resource, or both." HAW. REV. STAT. § 174C-3 (1993).

[90] *Waiahole*, 94 Hawai'i at 113, 9 P.3d at 425.

[91] *Id.*

[92] *Id.*

[93] *Id.* at 113-14, 9 P.3d at 425-26 (emphasis added) (citation omitted).

[94] *Id.* (citation omitted).

[95] *See* discussion *supra* Part III.

Ditch from these aquifers and other sources was allocated in accordance with the Commission's protection imperative. Of the twenty-seven million mgd available, the Commission allocated only 14.03 mgd for productive use on Leeward Oahu.[96] The balance—nearly 13 mgd—was set aside for Windward streams.[97] As Rae Loui, deputy director of the Commission explained, "[i]n the immediate future more water will remain in Windward streams than will be diverted to the Leeward side."[98] The bulk of that water flowing to the Windward side was reserved for preservation, with 2.10 mgd allocated for Kahana surface flow to offset losses within that ditch system, 1.58 mgd "reserved" for future Leeward agricultural expansion, and 5.39 mgd set aside as "unpermitted groundwater" to be allocated in the future.[99]

Aggrieved parties, representing both applicants for water use on the Leeward side and applicants seeking to release water into windward streams, appealed to the Hawai'i Supreme Court.

C. Waiahole: *The Trumping of Statutory and Common Law by the "Public Trust"*

In *Waiahole*, the Hawai'i Supreme Court affirmed in part and vacated in part the Commission's decision and remanded for further proceedings.[100] The court affirmed the Commission's construction of the public trust—extending it to surface and ground water without regard to navigability—but shied away from establishing preservation as the essential function of water use management. The court instead viewed the state's obligations under the public trust and section 174C as imposing a "dual mandate of protection and 'conservation'-minded use, under which resource 'protection,' 'maintenance,' and 'preservation [] enhancement' receive special consideration or scrutiny, but not a categorical [imperative]."[101]

In addition, the court was critical of the evidence and methodology the Commission relied upon and vacated a number of water allocations. Accordingly, the court remanded for "additional findings and conclusions, with further hearings if necessary," regarding: (1) "the designation of an interim instream flow standard for Windward streams"; (2) the interim flow standards for Waikane stream; (3) the actual need for water allocated to several applicants; and (4) other factual matters, including the availability of

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[96] *See* Kreifels, *supra* note 88.

[97] *See id.*

[98] *See id.*

[99] *See id.*

[100] *In re* Water Use Permit Applications *(Waiahole)*, 94 Hawai'i 97, 189-90, 9 P.3d 409, 501-02 (2000).

[101] *Id.* at 146, 9 P.3d at 458.

alternative water sources for certain applicants.[102] The court affirmed the balance of the Commission's decision.

While the effect of the allocation decisions on individual applicants may have little lasting impact in the state as a whole, the court's public trust discussion deserves careful review. The court began its foray into the public trust by acknowledging the "[s]ubstantial controversy" arising from the Commission's interpretation of the public trust.[103] Unmoved by the criticism,[104] the court endorsed the Commission's views in large part and held that the public trust doctrine applied to all "water resources" within the state, without regard to type or navigability.[105]

The court relied upon two distinct sources of law for support. First, the court noted that in 1978 the state had extended the public trust to underground water through two constitutional amendments, article XI, section 1 and article XI, section 7.[106] Section 1 provides that "for the benefit of present and future generations, the State and its political subdivisions shall protect and conserve . . . all natural resources, including . . . water."[107] Section 7 explains that "[t]he State has an obligation to protect, control, and regulate the use of Hawaii's water resources for the benefit of its people."[108] The court reasoned that the drafters (and apparently the voters) intended the term "water resources" to include not only navigable water within the public trust but also ground and non-navigable surface water.[109] Subterranean waters were thus brought within the purview of the public trust doctrine upon passage of the amendments.[110]

Second, the court determined that when land in Hawai'i passed from the kingdom to private owners, the kingdom reserved title to all water to itself.[111] Accordingly, groundwater rights did not pass with the transfer of ownership

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[102] *Id.* at 189-90, 9 P.3d at 501-02.

[103] *Id.* at 127, 9 P.3d at 439.

[104] *See, e.g., id.* at 130, 9 P.3d at 442.

[105] *See id.* at 128-35, 9 P.3d at 440-47.

[106] *Id.* at 131, 9 P.3d at 443.

[107] HAW. CONST. art. XI, § 1.

[108] *Id.* § 7. This amendment also required the legislature to establish a water resources agency to "protect ground and surface water." *Id.* The legislature passed what became HRS chapter 174C to fulfill the mandate of section 7.

[109] *Waiahole*, 94 Hawai'i at 133, 9 P.3d at 445.

[110] *See id.* The court relied upon a single statement from a delegate to the 1978 constitutional convention to support this conclusion. *See id.*

[111] *Id.* at 129, 9 P.3d at 441. The court relied on *Robinson v. Ariyoshi*, 65 Haw. 641, 658 P.2d 287 (1982), which held that when land passed from the Kingdom of Hawai'i to private owners, the Kingdom reserved for itself title to all waters. *Id.* at 674-75, 658 P.2d at 310. The *Waiahole* court referred to this as the "sovereign reservation." 94 Hawai'i at 133, 9 P.3d at 445.

of the overlying land; they remained with the kingdom and now rested with the state as its successor in interest.[112] For those reasons, and

> given the vital importance of all waters to the public welfare, [the court] decline[d] to carve out a groundwater exception to the water resources trust. Based on the plain language of [Hawai'i's] constitution and a reasoned modern view of the sovereign reservation . . . the *public trust doctrine applies to all water resources, unlimited by any surface-ground distinction.*[113]

Having defined the *res* of the public trust, the court extended the purposes of the public trust beyond navigation and commerce[114] and held that the public trust required not only the preservation of water as an end in itself,[115] but also "encompasse[d] a duty to promote the reasonable and beneficial use of water resources in order to maximize their social and economic benefits to the people of this state."[116] This maximization of social and economic benefits entailed consideration of domestic water use needs (drinking water) and the original intent of the sovereign reservation, that is, preservation of "the rights of native tenants during the transition to a western system of private property."[117] The court therefore committed itself to "uphold the exercise of Native Hawaiian and traditional and customary rights as a public trust purpose."[118] Private commercial use was absent from this list of public trust purposes.[119]

In determining whether a particular use comports with the new public trust purposes, the court reasoned that "any balancing between public and private purposes begin[s] with a presumption in favor of public use, access, and enjoyment,"[120] with consideration for the interests and needs "of present and future generations."[121] Accordingly, the court directed the Commission, "the primary guardian of public rights under the trust," to "take the initiative in considering, protecting, and advancing public rights in the resource at every stage of the planning and decision-making process"[122] but reserved for itself "the ultimate authority to interpret and defend the public trust in Hawai'i."[123]

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[112] *See Waiahole*, 94 Hawai'i at 133-44, 9 P.3d at 445-56.

[113] *Id.* at 135, 9 P.3d at 447 (emphasis added).

[114] *See, e.g.*, Ill. Cent. R.R. Co. v. Illinois, 146 U.S. 387, 452 (1892).

[115] *See Waiahole*, 94 Hawai'i at 136, 9 P.3d at 448.

[116] *Id.* at 139, 9 P.3d at 451. The court tacitly acknowledged that its view of the public trust was unconventional. *See id.* at 140, 9 P.3d at 452.

[117] *Id.* at 137, 9 P.3d at 449.

[118] *Id.*

[119] *Cf.* Nat'l Audubon Soc'y v. Superior Court, 658 P.2d 709, 712 (Cal. 1983).

[120] *Waiahole*, 94 Hawai'i at 142, 9 P.3d at 454.

[121] *Id.* at 141, 9 P.3d at 453.

[122] *Id.* at 143, 9 P.3d at 455.

[123] *Id.*

The court then vacated a number of the Commission's parsimonious allocations to Leeward Oahu—where all growth is projected by Oahu's general and development plans—as unsupported by the record. The court remanded those aspects of the contested case for more detailed findings.[124] The court concluded that, notwithstanding months of hearings and deliberation, volumes of testimony and over 500 exhibits, the permit applicants had not adequately proven their need for the water allocated.[125]

Under the court's public trust rubric, the failure to demonstrate the need for a specific quantity of water means that the water must remain unused to safeguard the public's interest in preservation. Indeed, the court reasoned that the public trust required the Commission to take precautionary action to preserve an appropriate level of instream flow,[126] notwithstanding the lack of scientific data regarding the level of water necessary to prevent environmental degradation.[127] The court even vacated the instream flow buffer imposed by the Commission and ordered it to establish permanent instream flow standards "with utmost haste and purpose" in a manner consistent with the opinion.[128]

The expansion of the public trust and increased roles for the Commission and the courts in overseeing water use required the court to eliminate correlative rights. Ironically, the court accomplished this by first affirming that "th[e] state continues to recognize the 'correlative rights rule'" and then extending that rule "to all ground waters of the state."[129]

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[124] *See id.* at 189, 9 P.3d at 501-02.

[125] *See id.* at 158, 163-64, 171-72, 9 P.3d at 470, 475-76, 483-84.

[126] *Id.* at 156, 9 P.3d at 468.

[127] *See id.* at 154-56, 9 P.3d at 466-68. The Hawai'i Supreme Court stated:

> Where scientific evidence is preliminary and not yet conclusive regarding the management of fresh water resources which are part of the public trust, it is prudent to adopt "*precautionary principles*" in protecting the resource. That is, where there are present or potential threats of serious damage, lack of full scientific certainty should not be a basis for postponing effective measures to prevent environmental degradation.

Id. at 154, 9 P.3d at 466.

[128] *Id.* at 155-57, 9 P.3d at 467-69.

[129] *Id.* at 177-78, 9 P.3d at 489-90. The court took this step only to close the door left open by *City Mill*. *See id.* Taken at face value, this would seem to dispel the notion that surface owners have no rights in the underlying water. But the court seized upon ambiguities needlessly created in *Reppun v. Board of Water Supply*, 65 Haw. 531, 656 P.2d 57 (1982), to reshape the correlative rights doctrine in Hawai'i. *See Waiahole*, 94 Hawai'i at 177-78, 9 P.3d at 489-90. In *Reppun*, the Court held that "where surface water and groundwater can be demonstrated to be physically interrelated as parts of a single system, established surface water rights may be protected against diversions that injure those rights, whether the diversion involves surface water or groundwater." *Reppun*, 65 Haw. at 555, 656 P.2d at 73. The court went on to inject confusion into settled law, stating that groundwater rights "have never been defined with exactness and the precise scope of those rights have always remained subject to development." *Id.* at 555 n.16, 656 P.2d at 73 n.16.

The *Waiahole* court's vision of correlative rights bore little resemblance to the rule as it was established in *City Mill*. Under *Waiahole*, surface water owners in non-designated areas must obtain the Commission's approval that the requested withdrawal is "necessary for reasonable use," which, according to the court, cannot be determined until the owner first receives the requisite state and county land use approvals.[130] Without a certificate of use, non-overlying applicants may appropriate and transfer groundwater to distant lands.[131] And all water uses in designated areas must conform to chapter 174C, which effectively eliminates correlative rights in those areas.[132] In this water-management system, surface owners are in no better position than any other applicant before the Commission.[133]

D. The Result: Water Trumps All

The court's analysis of the public trust and correlative rights is appealing in many ways but ultimately suffers from a two fundamental analytical errors. The first error arises from the nature of the public trust doctrine. The public trust is

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[130] *Waiahole*, 94 Hawai'i at 178, 9 P.3d at 490.

[131] *Id.*

[132] Overlying owners in designated areas now have no superior rights to the waters beneath their lands in relation to any other permit holder. *See id.* at 179, 9 P.3d at 491. Accordingly, a permit holder may appropriate underground waters if the Commission finds such appropriation is "consistent with the public interest and the general plans and land use policies of the State and counties." *Id.* Chapter 174C allows an overlying owner to gain priority over new permit holders only if he can establish that the intended use is one that existed before July 1, 1987, and that such use is reasonable and beneficial. *See id.* This, too, is inconsistent with *City Mill* because correlative rights "are not lost by nonuse." *See, e.g.*, Kevin L. Patrick & Kelly E. Archer, *A Comparison of State Groundwater Laws*, 30 TULSA L.J. 123, 141 (1994). Furthermore, *City Mill* held that the government could not prohibit a new correlative rights holder from tapping a common underlying aquifer while allowing existing users to continue drawing water. *See* City Mill v. Honolulu Sewer & Water Comm'n, 30 Haw. 912, 946-47 (1929), *overruled by Waiahole*, 94 Hawai'i 97, 9 P.3d 409 (2000).

[133] Recall that *City Mill* held that overlying owners have protectable interests in waters beneath their property. In reliance on this rule, the surface owners argued that their correlative rights could not be taken without compensation. The *Waiahole* court rejected their claims. *City Mill* notwithstanding, the court reasoned that landowners never had cognizable rights in underlying water because "[u]sufructuary water rights . . . have always been incomplete property rights." *Waiahole*, 94 Hawai'i at 181, 9 P.3d at 493 (citation and internal quotation marks omitted). This dismissive statement transformed what were definable correlative rights (meaning coequal to other surface owners) into mere usufructuary rights (meaning the right to the benefits of another's property). *Compare* State v. Michels Pipeline Const., Inc., 217 N.W.2d 339, 349 (Wis. 1974), *with* BLACK'S LAW DICTIONARY 1543 (7th ed. 1999). The court also brought its analysis back to the public trust and held that chapter 174C "rests on the further principle that the state holds all waters of the state in trust for the benefit of its people" and, therefore, the right to own or use underlying water was never one of the "bundle of rights" in fee simple ownership. *Waiahole*, 94 Hawai'i at 182, 9 P.3d at 494.

a principle of law that necessarily preceded the creation of property rights in Hawai'i.[134] The Court acknowledged as much in the opinion.[135] Accordingly, when real property rights were first recognized in the Great Mahele in 1848,[136] any limitation on the concomitant water rights was established and vested at the same time. The natural resources amendments, debated and approved in 1978, cannot inform private property rights established over a hundred years earlier. In other words, the effect of the natural resources amendments, if any, is prospective and subsequent to their enactment. The titles that passed to private owners from the Kingdom of Hawai'i cannot be rewritten to exclude what at the time of transfer was an appurtenance of real property.

Furthermore, even if the constitutional amendments applied retroactively, the state has no more power to declare that recognized water rights never really existed than it does to claim that title to all real property is now and always has been with the state. Water rights are property rights and cannot be taken except for a public use and upon the payment of compensation.[137] This is true whether the taking is by regulation, statute, or constitutional amendment because all state

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[134] *See, e.g., Waiahole*, 94 Hawai'i at 182, 9 P.3d at 494.

[135] *Id.*

[136] *See* Pub. Access Shoreline Haw. v. Planning Comm., 79 Hawai'i 425, 443-47, 903 P.2d 1246, 1263-68 (1995).

[137] Water rights are property rights and compensation is owed when water rights are taken for a public use. Dugan v. Rank, 372 U.S. 609, 625 (1963) ("[W]hen the Government acted . . . 'with the purpose and effect of subordinating' the respondents' water rights to the Project's uses . . . with the result of depriving the owner of its profitable use[,] the imposition of such a servitude would constitute an appropriation of property for which compensation should be made.") (citations omitted); United States v. Gerlach Livestock Co., 339 U.S. 725 (1950) (holding that riparian owners were entitled to compensation for the loss of their riparian rights to traditional seasonal inundation, notwithstanding California's water resources amendment); Int'l Paper Co. v. United States, 282 U.S. 399, 407 (1931) ("The petitioner's right was to the use of the water; and when all the water that it used was withdrawn from the petitioner's mill and turned elsewhere by government requisition . . . it is hard to see what more the Government could do to take the use."); Hage v. United States, 51 Fed. Cl. 570, 576 (2002) ("The plaintiffs proved they have vested water rights in the ditches, wells, creeks, and pipelines . . . ."); Tulare Lake Water Storage Dist. v. United States, 49 Fed. Cl. 313 (2001) ("[B]y limiting plaintiffs' ability to use an amount of water to which they would otherwise be entitled, the government has essentially substituted itself as the beneficiary . . . ."); Fallini v. Hodel, 725 F. Supp. 1113 (D. Nev. 1989), *aff'd*, 963 F.2d 275 (9th Cir. 1992) (holding that by preventing the full exercise of the plaintiff's water use rights acquired under state and federal permits, the government had effected a taking); Sorensen v. Lower Niobrara Nat'l Res., 376 N.W.2d 539, 550 (Neb. 1985) ("[A] landowner's right to use ground water is a proprietary appurtenance inseparable from the land benefited, and, therefore, a right protected by the Constitution . . . ."); *In re* A-B Cattle Co. v. United States, No. 27714, 1978 Colo. LEXIS 572 (Aug. 21, 1978) (holding that Colorado appropriation permit holders are entitled to the quantity and quality of water as it existed at the time of appropriation); City Mill Co. v. Honolulu Sewer & Water Comm'n, 30 Haw. 912, 934, 947 (1929), *overruled by Waiahole*, 94 Hawai'i 97, 9 P.3d 409 (2000) (holding that denial of a well permit effected a taking of property).

actions are subject to the Fifth Amendment.[138] This is federal law. State constitutions do not trump the federal Constitution. And a state cannot provide more limited protection of individual rights through its own constitution than is guaranteed by the federal Constitution.

The second error centers on the sovereign reservation. Hawai'i territorial decisions plainly held that the kingdom did not retain ownership of groundwater when real property was transferred to private hands.[139] Indeed, *City Mill* addressed this precise question and held that although "'all mineral or metallic mines' were reserved to the Hawaiian government, . . . *there was no reservation whatever of the subterranean waters.*"[140] Accordingly, groundwater passed to and was owned by private individuals, and correlative rights have been the rule since the establishment of private titles.[141] This "conception of the law cannot now be altered simply because there is danger" to the water supply, at least not without compensation to the individuals who are made to bear the loss for the benefit of society at large.[142]

Because the public trust doctrine did not extend to groundwater until *Waiahole*, "owners of lands under which lies an artesian basin ha[d] rights to the waters of that basin."[143] That is, every surface owner had the right to "use water therefrom as long as he d[id] not injure thereby the rights of other [correlative rights holders] and that in times when there is not sufficient water for all each . . . [was] limited to a reasonable share of the water."[144] Government interference with these rights, even if done for the good of the community, was an unconstitutional taking of property.[145]

A court cannot by judicial decision take property rights without compensation.[146] Nor should an otherwise unsupported opinion be saved by the observa-

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[138] When ratified, the Takings Clause—like the other provisions of the Bill of Rights—applied only to the federal government. Scott v. City of Toledo, 36 F. 385, 395 (Ohio C.C. 1888). The clause has since been made applicable to the states through the Due Process Clause of the Fourteenth Amendment. *See, e.g.*, Webb's Fabulous Pharmacies, Inc. v. Beckwith, 449 U.S. 155, 160 (1980).

[139] *City Mill*, 30 Haw. at 934 ("[N]o reason occurs to us which would sustain the view that the Territory is, or that its predecessors were, the owners of all artesian waters in the Territory."); *see also* King v. Oahu Ry. & Land Co., 11 Haw. 717, 725 (1899) ("[T]he people of Hawaii hold the absolute rights to all its *navigable waters* and the soils under them for their own common use.") (emphasis added).

[140] *City Mill*, 30 Haw. at 934 (emphasis added).

[141] *Id.*

[142] *Id.* at 934-35. The *Waiahole* court acknowledged that *City Mill* explicitly excluded groundwater from the public trust but, disagreeing with that result, simply overruled it. *Waiahole*, 94 Hawai'i at 133-34, 9 P.3d. at 445-46.

[143] *City Mill*, 30 Haw. at 923.

[144] *Id.*

[145] *Id.* at 947.

[146] Hughes v. Washington, 389 U.S. 290, 296-97 (1967) (Stewart, J., concurring); Sotomura v. County of Hawai'i, 460 F. Supp. 473, 482-83 (D. Haw. 1978); Robinson v. Ariyoshi, 441 F.

tion that the court has only now discovered that the claimed right never really existed. While the law is subject to change, such change cannot be at the expense of constitutionally protected interests. Property law in particular requires stability because money is invested, plans are made, and deals are structured based upon existing principles. Some prudence is therefore required when courts depart from long-held rules or eliminate established rights, as noted in our conclusion.

The opinion in *Waiahole* was not prudent. The court fundamentally altered the legal landscape by bringing groundwater within the public trust and dramatically reducing a surface owner's ability to make reasonable use of underlying water. Under *City Mill*, surface owners had the right to use underlying water, subject only to the limitation that such use not injure the relative interests of other overlying owners.[147] This right was not lost by nonuse and remained with the property and passed from owner to owner as title to the land was transferred.[148] Under *Waiahole*, however, correlative rights in non-designated areas essentially rise or fall with land use permits and Commission approval.[149] In designated water management areas, no correlative rights remain. A surface owner has no greater interest in underlying waters than any other permit holder and therefore, groundwater may be appropriated and transferred over the surface owner's objections.[150]

It is difficult to escape the conclusion that valuable rights were lost in *Waiahole*. This is one of the problems with the remaking of private property law of the sort proposed by water preservationists: property rights, "one of the trinity of fundamental values that has defined our Nation's commitment to the integrity of the person since its founding,"[151] are invariably sacrificed for what happens just to be one of many conceptions of the public good.

It is also clear that water use is necessary to sustain commercial and residential growth, which are in turn critical to the economy and Hawai'i's ever-

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Supp. 559 (D. Haw. 1977), *aff'd*, 753 F.2d 1468, 1474 (9th Cir. 1985), *vacated*, 477 U.S. 902 (1986); Bott v. Dept. of Natural Res., 327 N.W.2d 838, 849-53 (Mich. 1982).

[147] *City Mill*, 30 Haw. at 923.

[148] *See, e.g.*, Patrick & Archer, *supra* note 132, at 141.

[149] *In re* Water Use Permit Applications (*Waiahole*), 94 Hawai'i 97, 178-79, 9 P.3d 409, 490-91 (2000).

[150] *Id.*

[151] Cooley v. United States, 46 Fed. Cl. 538, 546 (2000); *accord* San Remo Hotel L.P. v. City & County of San Francisco, 41 P.3d 87, 120 (Cal. 2002) (Brown, J., dissenting) ("The idea that 'property ownership is the essential prerequisite of liberty has long been a fundamental tenet of Anglo-American constitutional thought.'" (quoting JAMES W. ELY, JR., THE GUARDIAN OF EVERY OTHER RIGHT 43 (1998))); David L. Callies, *Regulatory Takings and the Supreme Court: How Perspectives on Property Rights Have Changed from* Penn Central *to* Dolan, *and What State and Federal Courts are Doing About It*, 28 STETSON L. REV. 523, 526 (1999) ("Property rights, and in particular rights in land, have always been fundamental to and part of the preservation of liberty and personal freedom in the United States.").

growing housing needs. Conservation of water and other natural resources is wise planning. But preservation for the sake of preservation, as mandated by *Waiahole*, serves neither this nor the next generation. One reason is that planning for the development of private commercial uses becomes impracticable in a preservationist system. Water use rights, which previously rested on a predictable system of property ownership, are made captive to the allocation decisions of an unelected commission. Under *Waiahole*'s public trust formulation, private commercial uses invariably take a backseat to preservation, domestic needs, and agriculture. This makes it difficult for landowners to plan for or to proceed with future uses. In Hawai'i, where affordable housing is scarce and new development is necessary to meet demand, this preservation-minded system will certainly mean that fewer homes (and the necessary accompanying commercial projects) will be built, and those that are built will cost more. This is not consistent with either Hawai'i's planning regime or the public interest.

V. AFTER *WAIAHOLE*: WATER WILL DISRUPT PLANNING

Planning and the use of plans at the state and county levels are critical steps to land use decisions in Hawai'i. The careful and prolonged planning process of the past twenty years has resulted in consensus on the level and direction of growth and development on Oahu: away from the Windward side and towards the Leeward side. To adversely affect that direction in proceedings dealing with water allocation, which is important but only one part of the planning puzzle, is contrary to the law expressed in case, statute, and charter, and the policies expressed in the plans.[152] The tail of water use allocation simply cannot wag the dog of land use decision-making by the Hawai'i state and county plans and planning processes. This concept is confirmed not only by Hawai'i's courts, but also by the courts of virtually every jurisdiction that have considered the place of planning in land use decision-making. The Commission's role is to follow that planning process and the requirements of those plans; it is not to undertake land use planning itself by means of regulating stream flows or allocating water use. The Commission, like all state and county agencies, is bound by state and county plans, and these plans direct growth—and the water to serve it—to the Leeward side.

The following sections explore the water use regulatory schemes in Arizona, Colorado, and New Mexico. These regulatory schemes demonstrate

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[152] *See* Douglas W. MacDougal, *Private Hopes and Public Values in the "Reasonable Beneficial Use" of Hawai'i's Water: Is Balance Possible?*, 18 U. HAW. L. REV. 1, 2 (1996) (noting that, in enacting a state water code, "the Legislature intended that the Water Commission strike a balance between and among" demands for private, economically-oriented allocations and instream flows).

that the need for sound water use planning and management is not unique to Hawai'i. Moreover, these examples may help in facilitating discussion as to how Hawai'i can better prepare for current and future water use needs.

VI. INTEGRATION OF WATER RIGHTS POLICY WITH LAND USE CONTROLS IN ARIZONA

A. Water Sources in Arizona

Arizona is an arid state.[153] "The principal sources of surface water [in Arizona] are the Colorado River and the Salt River."[154] The Colorado River, "the [longest] river in the southwest United States at 1450 miles in length, drains approximately 250,000 square miles with a drainage area extending over [seven] states . . . [and] northwestern Mexico."[155] Sixteen and a half million acre-feet ("MAF")[156] are allocated for use, of which 1.5 MAF is allocated to Mexico.[157]

The first multi-purpose federal reclamation project, "the Salt River Project [("SRP")] has been delivering water to central Phoenix since 1903. . . . [It] currently delivers more than one million acre-feet of water to its water service area of 240,000 acres. Initially designed for agricultural irrigation, SRP now primarily delivers wholesale untreated water to municipal water providers."[158] The Central Arizona Project ("CAP") system, managed and operated by the Central Arizona Water Conservation District,[159] is connected to the SRP system.[160]

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[153] James Holway & Katharine Jacobs, *Managing for Sustainability in Arizona, USA: Linking Climate, Water Management and Growth, in* WATER RESOURCES SUSTAINABILITY (Larry W. Mays ed., forthcoming Aug. 2006) (manuscript at 4, on file with authors). "Conditions are generally dry (ranging from 3 to 11 inches of rainfall annually) and warm (average daytime temperatures of almost 90 degrees Fahrenheit, with daytime summer temperatures commonly above 100 degrees) in the southern and central basins." *Id.* at 5.

[154] *Id.* at 4.

[155] *Id.*

[156] "An acre-foot is the amount of water required to cover an acre of land with one foot of water. It is about 325,851 gallons." Linley Erin Hall, *Simple Solution*, ARIZ. ST. U. RES. MAG., Winter 2004, at 38, *available at* http://www.asu.edu/research/researchmagazine/2004Winter/Wnt04p38-41.pdf.

[157] Holway & Jacobs, *supra* note 153, at 4.

[158] *Id.* at 4-5.

[159] "CAWCD is a municipal corporation, also known as a public improvement district. This quasi-governmental entity was formed to repay the federal government for the reimbursable costs of construction and to operate, maintain, and manage CAP." Central Arizona Project, Management, http://www.cap-az.com/contacts/ (last visited Oct. 27, 2007).

[160] *See* Katharine L. Jacobs & James M. Holway, *Managing for Sustainability in an Arid Climate: Lessons Learned from 20 Years of Groundwater Management in Arizona, USA*, 12 HYDROGEOLOGY J. 52, 54 (2004).

B. Demand for Water in Arizona

Arizona is experiencing rapid population growth.[161] Arizona's characteristics—that it is a very arid state, is dependant on a limited water source, and is quickly growing in population—have led to the development of significant water rights regulations in the form of strict land use controls. In addition to the CAP and SRP, which are specifically integrated with the Colorado and Salt River water usages, Arizona has implemented programs which, while respecting federal authority, implement statewide water rights policies through its Groundwater Management Act and more specifically, use of its Active Management Areas.

C. Development of Arizona Regulatory Programs

"One key component of Arizona's approach to conservation was the quantification of grandfathered groundwater rights, which allows existing groundwater users to aggressively pursue conservation opportunities without fearing that they will forfeit water rights due to the 'use it or lose it' standard which applies in many prior appropriation systems."[162] Another characteristic of prior appropriation, described as "first in time, first in right," authorizes that "the first user to put water to beneficial use has the highest priority right, and can divert [the user's] full allocation without regard for more junior users in the event of shortages in surface water flows."[163] Prior to 1980, Arizona rejected this formulation of the prior appropriation doctrine in favor of the "reasonable use" doctrine, which provides prior users "with little or no protection from new withdrawals."[164]

1. Groundwater Management Act of 1980

Arizona's Groundwater Management Act of 1980 ("GMA")[165] "focused almost exclusively on groundwater and did not affect the pre-existing surface water management code, which remains a separate body of law."[166]

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[161] Central Arizona is currently home to 4.7 million people and is projected to reach eleven million residents by 2050. *See* Jim Holway, *Urban Growth and Water Supply*, *in* ARIZONA WATER POLICY: MANAGEMENT INNOVATIONS IN AN URBANIZING, ARID REGION (B. Colby & K. Jacobs eds., forthcoming 2006) [hereinafter Holway, *Urban Growth*].

[162] *Id.* at 8-9.

[163] Holway & Jacobs, *supra* note 153, at 12.

[164] *Id.*

[165] ARIZ. REV. STAT. §§ 45-401 to -407 (LexisNexis 2006).

[166] Holway & Jacobs, *supra* note 153, at 12 (citing Robert Glennon & T. Maddock, *The Concept of Capture: The Hydrogeology and Law of Stream/Aquifer Interactions*, 43 ROCKY MTN. MIN. L. INST. 22 (1997)).

> The three primary goals of the GMA are (1) to control the severe overdraft currently occurring in many parts of the state, (2) to provide a means to allocate the state's limited groundwater resources to most effectively meet the changing needs of the state, and (3) to augment Arizona's groundwater through water supply development.[167] To accomplish these goals, the GMA set up a comprehensive management framework and established the Arizona Department of Water Resources [("ADWR")] to administer the GMA's provisions.[168]

"Through rule-making procedures, criteria have been specified that clarify the requirements of the GMA."[169] "The GMA established three levels of water management to respond to different groundwater conditions."[170]

The first level, provisions applicable statewide,

> are relatively limited, focusing on licensing of well drillers, well registration, notifications of supply adequacy for new residential developments and prohibitions on transportation of groundwater between most sub-basins in the state. The next level of management applies to Irrigation Non-Expansion Areas . . . , where no new land can be brought into agricultural production, but there are no limits on nonirrigation uses of water.[171]

2. *Active Management Areas*

"The most extensive management provisions are applied to Active Management Areas [("AMAs")], where groundwater overdraft was most severe."[172] "The objective of Arizona's AMA demand management programs is to reduce overdraft by improving the efficiency with which all sources of water are used, and by prohibiting certain high water use activities."[173]

The ADWR "is required to prepare a series of water management plans for each AMA, containing enforceable conservation requirements for all large water users, a plan for augmentation of groundwater supplies, a conservation

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[167] Jacobs & Holway, *supra* note 160, at 55; *see* ARIZ. REV. STAT. § 45-401 (LexisNexis 2006).

[168] Jacobs & Holway, *supra* note 160, at 55.

[169] *Id.* at 58.

[170] *Id.* at 55.

[171] *Id.* at 55 (footnote omitted); *see* ARIZ. REV. STAT. §§ 45-431 to -440, -543, -544, -578, -595 (LexisNexis 2006).

[172] Jacobs & Holway, *supra* note 160, at 55.

[173] *Id.* at 61. Over eighty percent of Arizona's population lives in AMAs, and "over 50% of total water use in the state and 70% of the state's groundwater overdraft" occurs in AMAs, "but only 23% of the [state's] land area" is covered by an AMA. *Id.* at 56. "Within the AMAs, total demand in 1998 was 3,718,500 acre-feet, of which 53% was used for agriculture. Overdraft in 1998 was estimated at 627,000 acre-feet." *Id.*

assistance program, and information regarding water quality."[174] These five plans must be "adopted at specified dates between 1980 and 2025 to move the AMAs incrementally towards their management goals through demand management and supply enhancement."[175]

Arizona's strategy to achieving these various goals "is to regulate the municipal water provider (city, town, or private water company serving water) by setting conservation targets (per capita use rates) for the water providers or by requiring the water providers to adopt best management practices."[176] The hope is that this indirect regulatory approach will "lead[] the water providers, who are closer to their customers, to implement effective educational [programs/initiatives/policies] and financial incentives" to influence the decisions of individual homeowners.[177]

For the First Management Plan, covering the period from 1985 to 1990, "water providers were required to reduce their per capita use by a fixed percentage (0 to 11 percent) based on the" 1985 per capita use rate.[178] "The GMA required additional reductions in per capita use rates for both the second and third management periods," 1990 to 2000 and 2000 to 2010, respectively.[179] "The AMAs are currently in the middle of the Third Management Plan," covering 2000 to 2010.[180] "For the Third Management Plan, individual per capita use targets were calculated for each water provider based on [its] historic uses, conservation potential of existing uses, and assigned model use rates for new development that assume a high level of efficiency."[181]

3. Regulation outside AMAs

> [A] number of efforts have been made to strengthen water planning requirements for areas outside of the [AMAs]. In 2000, Arizona's Growing Smarter requirements were modified to require a water resources element as part of the county and municipality comprehensive planning requirements. The water resources

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[174] *Id.* at 58 (citing ARIZ. REV. STAT. § 45-564 (LexisNexis 2006)).

[175] Jacobs & Holway, *supra* note 160, at 58; *see* ARIZ. REV. STAT. § 45-562 (LexisNexis 2006).

[176] Jacobs & Holway, *supra* note 160, at 61.

[177] *Id.*

[178] Holway, *Urban Growth*, *supra* note 161, at 7; *see* ARIZ. REV. STAT. § 45-564(B)(2) (LexisNexis 2006).

[179] Holway, *Urban Growth*, *supra* note 161, at 7; *see* ARIZ. REV. STAT. §§ 45-565(A)(2), 45-566(A)(2) (LexisNexis 2006).

[180] Holway, *Urban Growth*, *supra* note 161, at 7; *see* ARIZ. REV. STAT. § 45-566 (LexisNexis 2006).

[181] Holway, *Urban Growth*, *supra* note 161, at 7; *see* ARIZ. REV. STAT. § 45-566(A)(2) (LexisNexis 2006).

> element is required for counties with a population greater than 125,000; and for municipalities with a population of more than 2,500 . . . unless they have fewer than 10,000 residents and are growing at a rate of less than 2 percent per year. This comprises 4 of 15 counties and 23 municipalities situated outside of the [AMAs].[182]

The water resources element must identify:

> [(1)] known legally and physically available supplies, [(2)] . . . demand resulting from growth projected in the general plan (generally 20 years of growth), and [(3)] . . . how demand will be served by currently available supplies, or prepare a plan to obtain additional necessary water supplies.[183] Communities are specifically not required to go beyond the existing available information in preparing these comprehensive plan elements.[184] Additional water resources planning requirements were adopted by the state legislature in 2005.[185] All community water systems outside of AMAs must prepare: [(1)] a water supply plan; [(2)] a drought preparedness plan; and [(3)] a water conservation plan.[186] This legislation also required water providers outside of AMAs to begin reporting their annual water use.[187] These plans will be due for large providers beginning in 2007 and for small providers one year later.[188]

Other regulatory programs established in Arizona that deserve mention include: the Underground Water Storage and Recovery Program established in 1986;[189] the Central Arizona Groundwater Replenishment District;[190] the Arizona Water Banking Authority of 1996;[191] and the Non-Per Capita Conservation Program implemented in 1995.[192]

D. What to Take Away From the Arizona Experience

The most important facet of Arizona's approach to water use regulation is that it is designed to sustain the economic health of the state through creative

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[182] Holway & Jacobs, *supra* note 153, at 24.

[183] *Id.* (citing ARIZ. REV. STAT. § 45-342 (LexisNexis 2007) and ARIZ. REV. STAT. § 11-821 (LexisNexis 2006)).

[184] *Id.*; *see* ARIZ. REV. STAT. § 11-821(E) (LexisNexis 2006).

[185] Holway & Jacobs, *supra* note 153, at 24 (citing ARIZ. REV. STAT. § 45-342 (LexisNexis 2006)).

[186] *Id.*; *see* ARIZ. REV. STAT. § 45-342(A) (LexisNexis 2006).

[187] Holway & Jacobs, *supra* note 153, at 24.

[188] *Id.*; *see* ARIZ. REV. STAT. § 45-342(B) (LexisNexis 2006).

[189] *See* Jacobs & Holway, *supra* note 160, at 59; ARIZ. REV. STAT. § 45-801.01 (LexisNexis 2007).

[190] *See* Jacobs & Holway, *supra* note 160, at 59.

[191] *See id.*; ARIZ. REV. STAT. §§ 45-2401 to -2472 (West 2003 & Supp. 2006).

[192] *See* Holway, *Urban Growth*, *supra* note 161, at 8.

conservation efforts. There are two useful examples. The first is the Assured Water Supply Program, which is designed to sustain growth by conserving

> groundwater resources and promoting long-term water[]supply planning within the state's five [AMAs]. This is accomplished through regulations that mandate the demonstration of sufficient (primarily renewable) water supplies for 100 years for new subdivisions. The supplies must be physically and legally available and of adequate quality; the developer or water provider must also show financial feasibility and compliance with the conservation requirements and the management goal[s] for the AMA.[193]

The second example of creativity is the use of effluent water. "Effluent water" is essentially treated sewage. Approximately seven percent of the water used in Arizona is effluent, "with [the] power plant cooling water at Palo Verde nuclear generating station west of Phoenix being the largest single user."[194] The Palo Verde plant is the only nuclear energy facility in the world that uses effluent for cooling water.[195] This coupling of effective water use and power generation has greatly benefited Arizona and its rapidly growing population. Even apart from the Palo Verde plant, "effluent is becoming an increasingly significant component of municipal water supplies" in Arizona.[196]

VII. INTEGRATION OF WATER RIGHTS POLICY WITH LAND USE CONTROLS IN COLORADO

Colorado's water rights policy has been heavily influenced by several factors: the numerous rivers that cross Colorado state lines, water rights jurisprudence developed in common law, and a traditional state deference to municipal authority.

A. Regulating Interstate Waters

Interstate waters are allocated among the states through which they cross by Supreme Court decree,[197] act of Congress[198] and interstate compact. Only

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[193] Jacobs & Holway, *supra* note 160, at 59; *see also* ARIZ. ADMIN. CODE § R12-15-701 to -730 (2007).

[194] Holway & Jacobs, *supra* note 153, at 5.

[195] Palo Verde Nuclear Generating Station, http://www.pnm.com/systems/pv.htm (last visited Oct. 27, 2007).

[196] Holway & Jacobs, *supra* note 153, at 5 ("[S]ubstantial investments have been made in advanced treatment and delivery systems to use reclaimed water for turf irrigation and aquifer recharge in many parts of Arizona.").

[197] *E.g.*, Colorado v. New Mexico, 459 U.S. 176 (1982).

[198] *E.g.*, Truckee-Carson-Pyramid Lake Water Rights Settlement Act of 1990, Pub. L. No. 101-618, §§ 201-210, 104 Stat. 3289 (1990).

this last means of allocation—compacts—effects the state's regulation of water rights that could serve as a model for Hawai'i.

Because Colorado has many rivers that originate within its borders and extend outward into other lands, Colorado has participated in numerous interstate compacts. These compacts quantify the water rights between states and countries that are tied to various bodies of water.[199] Colorado has also divided itself into Water Conservation Districts which allows for appropriation, regulation, and adjudication at a regional level.[200]

B. Colorado's Law of Prior Appropriation

Colorado water law has been heavily influenced by

> the state's history, and has evolved over time to adapt to the changing needs of the state's population.[201] Although Colorado's rules for the use of water emerged during the 1859 Colorado gold rush, the first [recognized] water right was an 1852 appropriation for irrigation. Even before Colorado attained statehood, its courts held that Colorado water law arises from necessity in an arid climate and that it includes the right to cross public or private lands to build water diversion and conveyance structures. This doctrine was subsequently adopted by the Colorado Constitution, which mandates that "[t]he water of every natural stream, *not heretofore appropriated*, within the state of Colorado, is hereby declared to be the property of the public, and the same is dedicated to the use of the people of the state, *subject to appropriation* . . . ."[202] The constitution also guarantees that "the right to divert the unappropriated waters of any natural stream to beneficial uses shall never be denied."[203] . . . Colorado's adoption of the prior appropriation doctrine, illustrated by the phrase "first in time, first in right," grants water rights prioritized by the chronological order in which they were [obtained]. The doctrine of prior appropriation generally consists of three requirements for obtaining a water right: (1) intent to make an appropriation; (2) taking or diverting the water from the stream; and (3)

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[199] *See generally* Upper Colorado River Compact, COLO. REV. STAT. § 37-62-101 (2006); La Plata River Compact, COLO. REV. STAT. § 37-63-101 (2006); Animas La Plata Project Compact, COLO. REV. STAT. § 37-64-101 (2006); South Platte River Compact, COLO. REV. STAT. § 37-65-101 (2006); Rio Grande River Compact, COLO. REV. STAT. § 37-66-101 (2006); Republican River Compact, COLO. REV. STAT. § 37-67-101 (2006); Costilla Creek Compact, COLO. REV. STAT. § 37-68-101 (2006); Arkansas River Compact, COLO. REV. STAT. § 37-69-101 (2006).

[200] *See generally* Colorado River Water Conservation District, COLO. REV. STAT. § 37-46-101 (2006); Southwest Water Conservation District, COLO. REV. STAT. § 37-47-101 (2006); Rio Grande Water Conservation District, COLO. REV. STAT. § 37-48-101 (2006); Republican River Water Conservation District, COLO. REV. STAT. § 37-50-101 (2006).

[201] Julia S. Walters, Comment, *Safeguarding Colorado's Water Supply: The New Confluence of Title Insurance and Water Rights Conveyances*, 77 U. COLO. L. REV. 491, 493 (2006).

[202] *Id.* at 493-94 (quoting COLO. CONST. art. XVI, § 5) (emphasis added).

[203] *Id.* (quoting COLO. CONST. art. XVI, § 6).

application of the water to beneficial use.[204]

Although the right to appropriate water in Colorado is constitutionally guaranteed, appropriators must use the statutory procedures prescribed in the Water Rights Determination and Administration Act of 1969[205] to receive a judicial decree from the proper water court in their district. The adjudication of the water right establishes the source and amount of the water supply, the point of diversion, the type and place of use, and the priority date of the water right.[206] The State Engineer is responsible for administering water rights in priority and preventing injury to other water users.[207]

Water rights do not . . . [convey] complete ownership of water but rather give the holder the right to use water for a particular beneficial use.[208] The Colorado Supreme Court defines a water right as "a right to use beneficially a specified amount of water, from the available supply of surface water or tributary ground water, that can be captured, possessed, and controlled in priority under a decree, to the exclusion of all others not then in priority under a decreed water right."[209] Despite variation in the requirement for a diversion, water must always be applied to beneficial use in order to establish an appropriation, and the beneficial use becomes the "basis, measure, and limit" of the appropriation.[210] Water rights are prioritized in the order each right was applied to beneficial use and adjudicated, and the priority list is used to distribute available water during times of shortage.[211]

C. *Deference to Local Authority*

Colorado has a "tradition of state deference to local authority and control in matters of both land[ ]use and water supply."[212] "In this type of governance hierarchy, it is becoming ever more apparent that the majority of decisions about land and water use are being made" by municipal decision-making bodies.[213]

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[204] *Id.* at 494-95 (citing A. Dan Tarlock, *Law of Water Rights and Resources*, § 5:71, at 5-72 (2005) and Farmers' High Line Canal & Reservoir Co. v. Southworth, 21 P. 1028, 1030 (Colo. 1889)).

[205] *Id.* at 495 (citing COLO. REV. STAT. ANN. §§ 37-92-101 to -103 (West 2005)).

[206] *Id.* (citing COLO. FOUND. FOR WATER EDUC., CITIZEN'S GUIDE TO COLORADO WATER LAW 6 (2003)).

[207] *Id.* (citing COLO. REV. STAT. ANN. § 37-92-301(1), (3) (West 2005)).

[208] *Id.* (citing COLO. REV. STAT. ANN. §§ 37-92-101 to -602 (West 1998)) (citations omitted).

[209] *Id.* (quoting Santa Fe Trail Ranches Prop. Owners Ass'n v. Simpson, 990 P.2d 46, 53 (Colo. 1999)).

[210] *Id.* at 495-96 (citing *Santa Fe Trail Ranches Prop. Owners Ass'n*, 990 P.2d at 53).

[211] *Id.* (citing A. Dan Tarlock, *Law of Water Rights and Resources*, § 5:30, at 5-49 (2005)) (citations omitted) (footnote call numbers omitted).

[212] Scott E. Coulson, Locally Integrated Management of Land-Use and Water Supply: Can Water Continue to Follow the Plow 16 (2005) (unpublished M.A. thesis, University of Colorado, on file with authors).

[213] *Id.*

> Moreover, the actual process of supplying water to new growth is predominantly carried out by large municipalities, stemming from two specific functions of these entities: (a) large municipalities are the primary purveyors of water supply in the state, and (b) they are also the principal regulators of land-use. Planners recognize that local governments are the only entities that are granted with widespread capabilities for managing private lands.[214]

At the local level, land use planning and water resource management are tied together through the comprehensive plan and the assured water supply requirements. The comprehensive plan serves as a central policy framework for making water supply considerations:[215] "Because the comprehensive plan is viewed by the courts as justification for land-use decisions, it effectively adds a defensible rationale [for] implementing the plan policies [through] land-use controls."[216]

Equally "important are the products associated with the plan that are utilized in the daily activities of planning practitioners as instruments for guiding development. The first of these products are future population projections which can be translated into future water demands."[217] The second of these products is the inclusion of a water supply element that addresses infrastructure and acquisitions: "[A]lternative policy scenarios for obtaining the necessary water supplies are not subject to broad evaluation and public participation."[218]

D. What to Take Away From the Colorado Experience

Local governments matter:

> Colorado has a long history of bottom-up control and delegation to local governments in matters of both land and water use. This history is visible in legislation such as the Areas and Activities of State Interest Act (1974),[219] the Local Government Land Use Control Enabling Act (1974),[220] the Colorado

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[214] *Id.* at 16-17 (citation omitted).

[215] *Id.* at 19.

[216] *Id.*

[217] *Id.*

[218] *Id.* at 20.

[219] *Id.* at 33; *see* COLO. REV. STAT. §§ 24-65.1-101 to -108 (2006). The counties first gained control of these issues in 1974 when the Colorado General Assembly enacted House Bill 1041, the Areas and Activities of State Interest Act. *See* City & County of Denver v. Bd. of Comm'rs, 760 P.2d 656 (Colo. Ct. App. 1988). The Areas and Activities of State Interest Act delegates to the counties the power to supervise "land use with regard to areas and activities of 'state interest,' or those [areas and activities] which may have an impact on the people of the state . . . beyond the immediate scope of the project." Coulson, *supra* note 212, at 28.

[220] Coulson, *supra* note 212, at 33; *see* COLO. REV. STAT. §§ 29-20-101 to -205 (West 2002 & Supp. 2006).

> Subdivision Act,[221] and more recently in the [Statewide Water Supply Initiative ("SWSI")] project.[222]

"[C]ounties are even granted statutory review and approval authorit[y] over the sit[e], design, and construction of water project facilities . . . [and] a host of other development actions."[223]

As the Colorado example shows, respect for and deference to local government in matters of water use and regulation is consistent and compatible with sound planning and conservation of water resources. If deference to local government works in a state like Colorado, which is burdened with vast water demands both internally and externally by other states, then deference to local government and the county plan can work in Hawai'i.

> [T]he Local Government Land Use Control Enabling Act of 1974 mandates the creation of county planning commissions and the adoption of a "master plan for the physical development of the unincorporated territory of the county." Section (3)(a)(IV) advises that the master plan include a water supply element "showing the general location and extent of an adequate and suitable supply of water."

Coulson, *supra* note 212, at 34 (quoting Johnson v. Bd. of Comm'rs, 523 P.2d 157, 161 (Colo. Ct. App. 1974)); COLO. REV. STAT. § 30-28-106 (2006).

[221] Coulson, *supra* note 212, at 35; *see* COLO. REV STAT. § 30-28-133 (2006).

> The Colorado Subdivision Act of 1974 is the key[] component of Colorado's land and water use mandate. This . . . legislation requires all counties to promulgate subdivision regulations. Section (6)(a) makes county subdivision approval contingent upon proof of available water supply. Specifically, it requires that subdividers submit to the county "adequate evidence that a water supply that is sufficient in terms of quality, quantity, and dependability will be available to ensure an *adequate* supply of water for the type of subdivision proposed."

Coulson, *supra* note 212, at 35 (quoting COLO. REV. STAT. §§ 30-28-133; -133-1; -133-6(a); -133-3(d) (2006)).

One "county had defined 'adequate' as sufficient water to meet project needs for a period of 300 years, regardless of the water source." *Id.* at 38 (explaining El Paso County Land Development Code, § 51.2 (1986)). "The planning commission's determination of adequacy is [informed] by a set of established criteria for use when reviewing water supply proposals." *Id.* "The last components of the water availability mandate are the referral and review requirements of the Colorado Subdivision Act (1974), which order consultation with the state engineer prior to county subdivision approval . . . ." *Id.* at 36-37. "The SWSI is an 18-month watershed-based study to inventory existing water supplies, projections of future water needs, and to compile the solutions which local water providers intend to use in meeting identified shortages . . . ." *Id.* at 32. The SWSI will give planners the data necessary to comply with the other planning laws discussed in this section.

[222] Coulson, *supra* note 212, at 33-34; *see* COLO. REV. STAT. § 37-95-107.5 (2006).

[223] Coulson, *supra* note 212, at 28.

VIII. INTEGRATION OF WATER RIGHTS POLICY WITH LAND USE CONTROLS IN NEW MEXICO

Lora Lucero and Dan Tarlock observed that "New Mexicans have known for years that the day of reckoning was coming but they . . . repressed this unpleasant reality . . . . [T]here is increasingly visible evidence of the collision between explosive population growth and diminishing water supplies. The state's population has almost doubled since 1960 . . . ."[224] Furthermore,

> [d]omestic wells have gone dry in Placitas, north of Albuquerque, where the National Guard was called to truck water into area residents. Building permits issued in the City of Santa Fe have jumped from 400 (2000-2001) to over 700 (2001-2002) in just a year, while pinon trees are dying from lack of water.[225]

In response, federal, state, regional, and local governments have attempted to address the water supply issue, and New Mexico has maintained a common law water rights jurisprudence based on "beneficial use" while continuing use of its "law of prior appropriations."

A. The Federal Response

In May 2003, Secretary of the Interior Gale Norton announced the new Water 2025 initiative.[226] This initiative focuses resources on the Middle Rio Grande Valley, considered one of the ten Western "hot spots" where water rights conflict can be expected.[227] Specifically,

> the Department of the Interior looked at growth projections, water availability, storage capacity, and environmental demands in order to focus on areas most vulnerable to water conflicts.
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> The Water 2025 plan identifies five challenges that need to be addressed to prevent crises and conflict in the West: (1) explosive population growth in areas of the West where water is already scarce, (2) frequent water shortages, (3) over-allocated watersheds, (4) aging water supply facilities, and (5) crisis management's ineffectiveness in dealing with water conflicts. . . .[228]
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> The Water 2025 initiative . . . [uses] four main tools: (1) improved water efficiency, conservation, and water banks; (2) collaboration on a local level to "emphasize action and answers to avoid needless impasse"; (3) research to

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[224] Lora Lucero & A. Dan Tarlock, *Water Supply and Urban Growth in New Mexico: Same Old, Same Old or a New Era?*, 43 NAT. RESOURCES J. 803, 817 (2003).

[225] *Id.* at 817-18 (citation omitted).

[226] *Id.* at 818.

[227] *Id.*

[228] *Id.* at 818-19 (citation omitted).

> improve desalination and other technologies; and (4) increased interagency cooperation.[229]

"A number of New Mexico water planners and decision-makers concur" with the federal government's assessment of the water situation, including Governor Richardson, and have modeled many state initiatives on those of the federal government.[230]

B. The State and Regional Response

Before taking office, "Governor Richardson shared with the public his seven-point platform for managing the state's water resources, which he called 'H2O New Mexico—A Plan for Water Security.'"[231] First, Richardson called for

> statewide, regional, and community water plans, which were to be completed by December 31, 2003 and submitted to the 2004 session of the New Mexico Legislature. Second, [Richardson] called for an end to the "indiscriminate permitting of domestic wells in New Mexico."[232] The [S]tate [E]ngineer estimate[d] that it [would] take another [600] years to complete the adjudication of water rights[,] . . . [so] Richardson proposed the creation of the New Mexico Water Court, with judges, mediators, and clerks to handle the [judicial] backlog . . . . Third, . . . the governor proposed a negotiation strategy to coordinate ongoing water issues with other states, Mexico, and Native American tribes and pueblos. Fourth, [Richardson proposed] phreatophyte removal [,] a favorite low-tech water conservation strategy[,] . . . remov[al] [of] the salt cedars from the river valleys[,] and restor[ation] [of] the watersheds. Fifth, [Richardson] embraced the creation of water banks to provide a mechanism where[by] an owner of water rights can lease conserved water for other beneficial uses without losing [or] []forfeiting[] those rights. Sixth, [the Governor] suggested that New Mexico use . . . national labs and state universities to research the latest water technology and conservation programs including desalinization, arsenic removal, security of water supplies, quality monitoring systems, and advanced irrigation technology. Finally, Richardson vowed to continue the effort . . . to upgrade [a] water rights file database . . . to track [one hundred] years of water rights ownership in the state.[233]

The Comprehensive State Water Plan Act of 2003[234] authorized production of "a comprehensive state water plan containing measures for integrating the

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[229] *Id.* (citations omitted) (footnote call numbers omitted).

[230] *Id.* at 819.

[231] *Id.*

[232] *Id.* (citation omitted).

[233] *Id.* at 819-20 (citations omitted) (footnote call numbers omitted).

[234] N.M. STAT. ANN. §§ 72-14-3 to -3.2 (West 2007).

state and regional-level water plans."[235] One commentator remarked that "implementation of the state plan may be hampered by its own conflicting objectives."[236] "The legislation directs the Interstate Stream Commission [("ISC"),] . . . with the Office of the State Engineer and the Water Trust Board[,] to prepare and implement the plan, which is envisioned as a 'strategic management tool.'"[237] "[R]egional water plans are prepared by groups of area water users under supervision by the . . . [ISC]."[238] "Regional planning areas are delineated by the water user group based on 'hydrological and political common interests.'"[239] The Comprehensive State Water Plan Act requires everything that might normally be expected in a state water plan.[240]

The regional water plans are nevertheless plagued by the

> lack of regulatory potency. There has been "no statutory guidance for connecting the regional water plans with local land use and development decisions made by city councilors and county commissioners."[241] Moreover, "the regional water plans are not tied to local comprehensive plans and have no relationship to the development permitting process undertaken by local government of the issuance of water right permits at the state level. . . . [This] gap between water and land-use planning is the Achilles Heel in the process."[242]

Following a 1994 meeting, the ISC and others designed a New Mexico Interstate Stream Commission Regional Water Planning Handbook ("Hand-

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[235] Coulson, *supra* note 212, at 14.

[236] *Id.* at 15 (citing Marilyn C. O'Leary, *Water Planning in New Mexico: Enigma, Paradox or Pattern?*, 24 J. LAND RESOURCES & ENVTL. L. 343, 343-47 (2004)).

[237] Lucero & Tarlock, *supra* note 224, at 821.

[238] Coulson, *supra* note 212, at 15.

[239] *Id.* (citation omitted).

[240] Lucero & Tarlock, *supra* note 224, at 821.

> [I].e., an inventory of the quantity and quality of the water resources, population projections and other water resource demands, water conservation strategies, a drought management component, restoration of riparian and watersheds . . . the preparation of water budgets for the state and all major river basins and aquifer systems, "recognition" of the relationship between water availability and land use decisions, strategies to coordinate all levels of government, identification of water-related infrastructure and management investment needs, opportunities to leverage federal and other funding, and integration of regional water plans with the state water plan. The ISC and the [S]tate [E]ngineer are directed to consult with the Indian nations, tribes, and pueblos; while the ISC is to ensure that public participation and public input are integrated throughout the planning process.

Id.

[241] Coulson, *supra* note 212, at 15 (quoting Lucero & Tarlock, *supra* note 224, at 823).

[242] *Id.* (quoting Lora A. Lucero, *Water and the Disconnects in Growth Management*, 31 URB. LAW. 871, 879 (1999)).

book").[243] Although specific provisions of the template of elements required to be in all regional water plans "are still [the] subjects of some dispute, from an institutional analysis perspective, the Handbook is significant in several respects. . . . The Handbook recognized . . . 'rules-in-use' and built flexible but extensive requirements for stakeholder participation into the planning requirements."[244]

> A key feature of the Handbook is a template of elements to be included in all regional water plans.
>
> . . . .
>
> The template requires that regional planners gather and assimilate several sorts of information about the physical, economic, demographic, and historical characteristics of the region and its water uses; that they understand and document the legal and institutional constraints affecting the region; that they assess the water resources available in terms of the sources and amounts of water supply and its quality for both surface and ground water; and that they document current uses and project future demand by a [forty]-year planning horizon. The requirement to develop shared time-and-place-specific information about these matters was explicitly designed to contribute to a common knowledge and understanding among participants of the collective action required of everyone in the region.[245]

C. Local Initiatives

In New Mexico, as in most states, "land use decisions have traditionally been exclusively local ones . . . . New Mexicans thus expect that land and water issues will be linked, if at all, at the local rather than the regional, state, or federal level."[246] For instance, Santa Fe

> now requires that developers install low flush toilets in new construction and retrofit between eight to twelve toilets per project depending on the size of the new construction. The city also publishes a weekly online water report about the condition of the city's public wells, consumption, demand, and reservoir levels.[247]

Recently, Santa Fe declared a "Stage 3 Drought Emergency" that increased water restrictions, including prohibiting car washing at residences and restricting washes to once a month at commercial car washes; limiting outdoor watering to one irrigation per week; prohibiting the planting of new grass

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[243] John R. Brown, *"Whisky's fer Drinkin'; Water's fer Fightin'!" Is It? Resolving a Collective Action Dilemma in New Mexico*, 43 NAT. RESOURCES J. 185, 197-98 (2003).

[244] *Id.*

[245] *Id.* at 198 (footnote omitted).

[246] *Id.*

[247] Lucero & Tarlock, *supra* note 224, at 824.

seed; and requiring that swimming pools be covered when not in use.[248] Similarly, "Albuquerque is also moving to consider direct ties between water supply and growth" by forming "[t]he New Mexico Public Interest Group . . . [that, among others, has] asked public officials to consider a conservation ordinance that includes a water budget to tie new developments to wet (as opposed to paper) water supplies."[249] "[T]he New Mexico Subdivision Act of 1978 requires land developers to demonstrate an adequate water supply prior to subdivision approval."[250] In addition, "the Planned Growth Strategy . . . requires the city to step into the driver's seat and provide incentives and inducements to encourage the public sector to build where it is most efficient and fiscally-prudent for the community to serve" the water needs of the new development.[251]

D. Beneficial Use and Prior Appropriation

> The New Mexico Constitution requires that "[b]eneficial use shall be the basis, the measure and the limit of the right to the use of water."[252] In New Mexico, as in other Western states, "it is only by the application of the water to a beneficial use that the perfected right to the use is acquired," and consequently, "an appropriator can only acquire a perfected right to so much water as he applies to a beneficial use."[253]

"The rule . . . rewarded persons who put water to 'beneficial use,' by giving them a protectable property right . . . . [T]he majority of western state constitutions embody this principle."[254]

> The words "basis," "measure," and "limit," each of which is used in New Mexico's Constitution, have different meanings or they would not all have been included in the same sentence. A simple interpretation of their meanings is that (1) one can only acquire a property right in water if he "bases" that right on the beneficial use of water, (2) the size of the right is to be "measured" by the

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[248] *Id.*

[249] *Id.* at 824-25 (citation omitted).

[250] Coulson, *supra* note 212, at 15; *see* N.M. STAT. ANN. § 47-6-11 (West 2007).

[251] Lucero & Tarlock, *supra* note 224, at 825 (internal citation omitted); *see* N.M. STAT. ANN. § 72-14-3.2 (West 2007).

[252] Martha E. Mulvany, State ex rel. Martinez v. City of Las Vegas*: The Misuse of History and Precedent in the Abolition of the Pueblo Water Rights Doctrine in New Mexico*, 45 NAT. RESOURCES J. 1089, 1096-97 (2005) (citing N.M. CONST. art. XVI, § 3).

[253] *Id.* at 1096 (citing State *ex rel.* Martinez v. City of Las Vegas, 89 P.3d 47, 58 (N.M. 2004) and State *ex rel.* Cmty. Ditches v. Tularosa Cmty. Ditch, 143 P. 207, 213 (N.M. 1914)).

[254] Charles T. Dumars, *Changing Interpretations of New Mexico's Constitutional Provisions Allocating Water Resources: Integrating Private Property Rights and Public Values*, 26 N.M. L. REV. 367, 368 (1996) (quoting State *ex rel.* Martinez v. McDermett, 901 P.2d 745, 743 (N.M. Ct. App. 1995)) (footnote omitted).

> quantity beneficially used, and (3) the right will be "limited" if one fails to beneficially use it—the right is subject to loss for non-productive use and is, therefore, conditionally limited . . . .[255]

Despite a trend toward private water rights and capitol improvement,

> the Constitution of New Mexico declares that the *unappropriated* waters of the state "belong to the public." This expression of public ownership has been construed to mean that the members of the public have the right to appropriate water for their private use, but it has also been construed to vest the state with ownership of the resource. . . .
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> . . . .
>
> [W]ater rights available to the public are "subject to [prior] appropriation for beneficial use, in accordance with the laws of the state. Priority of appropriation shall give the better right."[256]

"These provisions have been described as placing water in a unique" status "because '[the] entire state has only enough water to supply its most urgent needs. Water conservation and preservation is of utmost importance and its utilization for maximum benefits is a requirement second to none, not only for progress, but for survival.'"[257] Furthermore, "[e]ven though the New Mexico Constitution does not mention groundwater, New Mexico's traditions, political needs, and exigent circumstances have also made groundwater subject to the prior appropriation doctrine."[258]

Despite the passage of eighty-six years since the New Mexico Constitution was drafted,

> the fundamental principles of conservation—full utilization for the benefit of the public and prior appropriation—have remained constant. Throughout this period, New Mexico has never attempted a formal definition of beneficial use. Therefore, any use which is not wasteful has been accepted. The term "beneficial use" provides the flexibility necessary to meet the needs of a changing society.[259]

IX. CONCLUSION

As the experiences of other states with water concerns clearly demonstrate, it is unnecessary—and disruptive to sound land use planning—for water issues to dominate all else in making decisions about the appropriate use of

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[255] *Id.* at 368-69 (citing N.M. CONST. art. XVI, § 3 and N.M. STAT. ANN. § 72-12-8 (Repl. Pamp. 1985 & Supp. 1995) (forfeiture of water rights for nonuse)).

[256] *Id.* at 368 (quoting N.M. CONST. art. XVI, § 2) (emphasis added) (footnote omitted).

[257] *Id.* (quoting Kaiser Steel Corp. v. W.S. Ranch Co., 467 P.2d 986, 989 (N.M. 1970)) (alteration in original).

[258] *Id.* (citing United States v. New Mexico, 438 U.S. 696 (1978)).

[259] *Id.* at 369 (citing N.M. STAT. ANN. § 72-41-9 (Repl. Pamp. 1985 & Supp. 1995)).

land. It is one thing to be environmentally sensitive about such uses and to take special care of an important—indeed, critical—natural resource such as water. It is altogether something else to elevate water to a position before which all other considerations must bow. This is what Hawai'i's State Supreme Court has done, without regard for the painstaking, lengthy policy deliberations which resulted in the comprehensive Water Code. The court ignored both the intent and the letter of the Water Code and instead actively and mistakenly seized upon a common law doctrine—the public trust—to redefine and virtually eliminate most private rights in water and its allocation.[260] In the process, the court may have saddled the state and its citizens with a broad definition of public trust that will come back to haunt the state, its citizens, and its public and private planners for decades.

What should the court (and the Commission) have done? First, the court should have explicitly recognized (and confined its holdings within) the carefully and clearly crafted and prioritized public purpose limits in the water code. Those purposes clearly provide for the primacy of commercial and economic use of water. Protection of the environment, conservation and native Hawaiian practices comes second. Whether this is in fact the appropriate ordering of priorities is not the point. That is the way the Hawai'i State Legislature wrote the statute. Second, the court should have restored county general and development plans to the place and priority required by the Water Code. The relevant statutory language provides for water plans to conform to state and county plans and zoning. The Commission reversed this priority and elevated water plans and allocation decisions over state and county plans. The Court barely mentioned the issue. Whether county general and development plans and state plans should take precedence over state water plans and allocations is, again, beside the point. That is the way the

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[260] *See* George P. Smith, II & Michael W. Sweeney, *The Public Trust Doctrine and Natural Law: Emanations Within a Penumbra*, 33 B.C. ENVTL. AFF. L. REV. 307 (2006).

> Judicial activism has the effect of preempting a full and balanced discourse both to test and to shape society's relationship with the natural environment. Instead of continuing to broaden the base of judicial latitude for intervening, and thereby second-guessing the administrative decisionmaking process, technically incompetent courts should despise efforts to make themselves balancing artists that are intent on finding balancing points of environmental protection with competing societal values. . . .
>
> Expansion of the public trust doctrine for no other reason than to protect the environment simply ignores the economic precedent established by the original doctrine itself. . . . As this Article has discussed, the most principled approach to advancing the common good is balancing the legitimate economic interests of individual property owners against public resource preservation. When this is executed, rarely can it be shown that the benefits of resource preservation outweigh the economic concerns of property owners. Thus, any expansion of the doctrine should be slow and scrutinized to the highest degree and with a spirit of judicial restraint.

Id. at 342-43 (footnotes and citations omitted).

Legislature wrote the Water Code. Third, the court should not have invoked public trust principles in its decision and certainly should not have adopted such a broad definition of the public trust. Public trust doctrines have no place in water rights decision-making where a state has a modern and comprehensive water code dealing explicitly with water allocation, planning and public use and purpose. The experiences in other states with water resource issues, like Arizona, Colorado, and New Mexico, clearly demonstrate that another path, based largely on statute and common law without undue reliance on the public trust doctrine, is possible and effective.

The consequence of ignoring these three points was to: (1) elevate preservation and native Hawaiian rights over the commercial and economic use of water; (2) minimize such economic and commercial uses of water on the Leeward side of Oahu, where county plans had determined that growth and development should occur, in favor of preserving minimum stream flows on the Windward side, which county plans had determined should remain undeveloped; and (3) radically expand the public trust doctrine, which in turn reduces, nearly to the point of extinction, private, commercial, and economic rights in water and its use. Whither legislative deference?

ADDENDUM

In an opinion filed as this article went to press—*In re Water Use Permit Application (Kukui (Molokai), Inc.)*[261]—the court continued to overstate both the place of the public trust doctrine in disputes governed by statute and the preeminence of native Hawaiian rights in water allocation matters. First, the court continues pell-mell down the path that it unaccountably took in *Waiahole* by elevating the default common law doctrine of public trust over the clearly articulated purposes set out by our state legislature in the state Water Code. Indeed, in the court's words, the public trust doctrine "permeate[s] the State Water Code."[262] Whatever unarticulated ideas may pass through the hidden interstices of the Water Code, the plain and unambiguous text of the Code, as set out earlier in this article, clearly places commercially economic uses of water in a superior position over native Hawaiian and conservation rights and uses.[263]

Second, the court continued to read that part of the state constitution providing for native Hawaiian rights in absolute and unregulated terms, despite language in the provision that clearly and unequivocally gives the legislature the authority to regulate those rights. To the extent that the state Water Code expresses a clear preference for commercial economic sues over native Hawaiian uses—as it certainly does—the legislature has in fact constitutionally exercised that regulatory authority. The court's decision in this case in effect reads that provision out of the state constitution.

Finally, the court confirmed that correlative rights have been read out of Hawai'i law. Defending its water allocations, the Commission argued that "this court continues to recognize the correlative rights rule articulated in *City Mill Co. v. Honolulu Sewer & Water Commission*."[264] The Hawai'i Supreme

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[261] (*In re KMI*), 116 Hawai'i 481, 174 P.3d 320 (2007).

[262] *Id.* at 490, 174 P.3d at 329.

[263] To take a simple but revealing example, the Court correctly recounted that the Water Code defines "reasonable beneficial use" as a "use of water in such a quantity as is necessary for economic and efficient utilization, for a purpose, and in a manner which is both reasonable and consistent with the state and county land use plans and public interest." *Id.* at 490, 174 P.3d at 329 (quoting HAW. REV. STAT. § 174C-3 (1993)) (emphasis removed). But the court's analysis emphasized the word "necessary," both literally and practically, to the exclusion of the rest of the definition. The Code does not require proposed uses that are "necessary" in the abstract sense or necessary according to the court's order of priorities. The Code authorizes uses in "such a quantity as is necessary for *economic and efficient* utilization, for a purpose, and in a manner which is both reasonable and *consistent with the state and county land use plans* and the public interest." HAW. REV. STAT. § 174C-3 (1993) (emphasis added). A statutory text cannot be given its "plain and obvious meaning" unless the text is read in context. *See In re KMI*, 116 Hawai'i at 489, 174 P.3d at 328.

[264] *In re KMI*, 116 Hawai'i at 503, 174 P.3d at 342.

Court quickly dismissed the idea that there is anything left of correlative rights. According to the court, because "'the *entire* island of Moloka[]i has been designated a [water management area], the common law doctrine of correlative rights is inapplicable to the present matter.'"[265] Instead, the transport of water by overlying owners is contingent on their "satisfaction of the statutory requirements enumerated" in the State Water Code.[266]

Yet again, whither legislative deference? Whither property rights and constitutional protections?

[265] *Id.* (quoting *In re* Waiola O Molokai, Inc., 103 Hawai'i 401, 447, 83 P.3d 664, 711 (2004)) (emphasis added).

[266] *Id.*

Ocean Tuna Fisheries, East Asian Rivalries, and International Regulation: Japanese Policies and the Overcapacity/IUU Fishing Conundrum

Harry N. Scheiber,* Kathryn J. Mengerink,** and Yann-huei Song***

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* M.A., Ph.D., Cornell University, D.Jur. Hon., Uppsala University (Sweden). The Riesenfeld Chair Professor of Law and History; Director, Institute for Legal Research, and Director, The Sho Sato Program in Japanese and US Law; Co-director, Law of the Sea Institute, Boalt Hall School of Law, University of California, Berkeley. The research project for this study was directed by Harry N. Scheiber. It was supported by a grant from the University of California's Pacific Rim Research Program, with supplemental support from the Sho Sato Program in Japanese and U.S. Law at Boalt Hall School of Law, University of California, Berkeley. The authors acknowledge with gratitude the pioneering scholarly work on problems of illegal, unregulated and unreported ("IUU") fishing done by Moritaka Hayashi (Waseda University, Japan), the work done by Davor Vidas and Olav Schram Stokke (Fridtjhof Nansen Institute, Norway), and the many studies by Jon Van Dyke (University of Hawai'i) on Pacific Ocean area resource issues and ocean law. The authors thank Marcus Haward (University of Tasmania) for his thoughtful comments and review of the manuscript. Professor Scheiber is indebted to the California Sea Grant College Program, University of California, for grant support of earlier research that is essential background to this project; and to the OECD secretariat for his inclusion as a participant in its 2004 international conference on IUU fishing held in Paris. We also thank the Food and Agriculture Organization of the United Nations for cooperation extended in course of the research, including granting to Dr. Mengerink observer status for an important FAO conference on IUU fishing, held in Rome. Management officers in several RFMOs and in national fisheries agencies were generous in granting interviews to coauthor Song for this research. The presentation of facts and the interpretations offered here, however, are entirely our own responsibility. Finally, we extend thanks to Jordan Diamond, a Boalt Hall student, for dedicated assistance in bibliographic searching and cite-checking.

** Ph.D., Marine Biology, Scripps Institution of Oceanography, University of California, San Diego; J.D., Boalt Hall School of Law, University of California, Berkeley. Director of the Ocean Program, Environmental Law Institute.

*** Ph.D., International Relations, Kent State University; L.L.M., J.S.D., Boalt Hall School of Law, University of California, Berkeley. Research Fellow, Academia Sinica, Taiwan.

Despite national and international efforts, fish piracy continues to thrive worldwide. Illegal, unreported and unregulated ("IUU") fishing is a problem that affects both territorial and international waters, and involves all types of fishing vessels, regardless of their registration, size or state of repair. IUU fishing depletes global fish stocks and undermines efforts to secure and rebuild those stocks for the future. In doing so, IUU fishing activities generate harmful effects on the economic and social welfare of those involved in legal fishing, and reduces incentives to play by the rules.[1]

I. INTRODUCTION

Some of the most pressing issues in international environmental law today concern the fate of fishery stocks in international waters, stocks that are now under severe pressure globally. These pressures arise from rising technological efficiencies and scale in harvesting, use of gear and deployment techniques destructive of both fish and their ecosystems, the expansion of fleet tonnage and capacity, and the constantly rising global demand for fish and fish products. In the last fifteen years, a leveling off of high-seas fishery production globally, in the face of continuous demand pressures from rising world population for both food fishes and fish byproducts, has made ever more urgent the question of how best to achieve sustainability of our ocean fisheries resources. United Nations Food and Agricultural Organization ("FAO") scientists estimated that in 2004: half the fish stocks being monitored were close to, or already at, full exploitation levels; seventeen percent of the fish stocks were overexploited; seven percent were actually depleted; and another one percent were recovering from depletion.[2]

Scientists, fishery managers, diplomats, and environmental organizations have given special attention to the current problems of protecting world tuna

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[1] ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT [OECD], WHY FISH PIRACY PERSISTS: THE ECONOMICS OF ILLEGAL UNREPORTED AND UNREGULATED FISHING 13 (2005).

[2] Press Release, U.N. Office of Legal Affairs, United Nations Conference to Address Law for High Seas Fishing, 22-26 May, as Overfishing Causes Dramatic Decline in Stocks, U.N. Doc. SEA/1852 (May 18, 2006), http://www.un.org/news/press/docs/2006/sea1852.doc.htm (last visited Oct. 26, 2007); *see generally* Harry N. Scheiber, *Ocean Governance and the Marine Fisheries Crisis: Two Decades of Innovation—and Frustration*, 20 VA. ENVTL. L.J. 119, 119-25 (2001) (discussing the global decline as reported in statistical compilations by the UN Food and Agricultural Organization investigations) [hereinafter Scheiber, *Ocean Governance*]; *see also* Daniel Pauly et al., *Towards Sustainability in World Fisheries*, 418 NATURE 689-95 (2002) (contending that "real, drastic reduction of overcapacity will have to occur if fisheries are to acquire some semblance of sustainability" and expressing special concern for the drastic fishing effects that have produced a trend "leading, globally, to the gradual elimination of large, long-lived fisheries (including many species of tuna) from marine ecosystems").

stocks. Tuna are highly migratory species, and fishing for tuna takes place both within and beyond the 200-mile Exclusive Economic Zone ("EEZ") of individual coastal states. The distant water fleets ("DWFs") that fish for tuna in Atlantic and Pacific Ocean waters, including the so-called South Pacific or South Seas area, have long been engaged in intense competition with one another. This competition has generated a succession of high-stakes, often-protracted, diplomatic confrontations and negotiations designed to accomplish a rational legal ordering of fishing operations in high seas waters.[3]

Tuna stocks are now widely acknowledged to be at risk in all the world's ocean areas.[4] To be sure, most stocks are not yet at the edge of depletion—that is, not yet declined to the point where commercial fishing is no longer profitable or a stock is faced with collapse—unlike the notorious collapse of the cod fishery in the Northwest Atlantic. Nevertheless, tuna stocks, like numerous other high-value species of fish, are at serious risk in the Pacific region, as evidenced by ominous changes in age-structure of available stocks, by diminishing returns on inputs of fishing vessels, gear, and labor, and by other measures of fish abundance levels.[5]

Since 1982, when the U.N. Law of the Sea Convention ("UNCLOS") was signed,[6] the nations with a presence in distant water fishing (fishing on the high seas and within the boundaries of other nations' EEZs) have faced

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[3] WILLIAM T. BURKE, THE NEW INTERNATIONAL LAW OF FISHERIES: UNCLOS 1982 AND BEYOND (1994); Christopher J. Carr, *Transformations in the Law Governing Highly Migratory Species: 1970 to the Present, in* BRINGING NEW LAW TO OCEAN WATERS 55-94 (David C. Caron & Harry N. Scheiber eds., 2004).

[4] *See infra* notes 161-62 and accompanying text; *but see* John Sibert et al., *Biomass, Size and Trophic Status of Top Predators in the Pacific Ocean*, 314 SCIENCE 1773 (2006) (finding that while fisheries impacts on top predators such as tunas in the Pacific Ocean are substantial, they are not yet catastrophic for most species examined).

[5] *See generally* Scheiber, *Ocean Governance, supra* note 2 (discussing the global decline); *see also* Food and Agric. Org. of the United Nations [FAO], Fisheries and Aquaculture Dep't, HISTORICAL TRENDS OF TUNA CATCHES IN THE WORLD, Part 5, Development of Southern Bluefin Tuna Fisheries, *available at* http://www.fao.org/docrep/007/y5428e/y5428e07.htm (noting the drop of Southern Bluefin tuna stocks to dangerously low levels in the Southern Ocean, where although fishing effort rose sharply the catch in 2000 was only one fourth the volume in 1960); COMMONWEALTH OF AUSTL. DEP'T AGRIC., FISHERIES AND FORESTRY, BUREAU OF RURAL SCI., SOUTHERN BLUEFIN TUNA FISHERY, http://www.affashop.gov.au/pdffiles/08_sbtf.pdf (last visited Oct. 26, 2007) ("spawning stock severely depleted and current catches severely limit probability of rebuilding"); Inter-American Tropical Tuna Comm'n [IATTC], Resolution on the Capacity of the Tuna Fleet Operating in the Eastern Pacific Ocean (Revised), 69th mtg., June 26-28, 2002, *available at* http://www.intfish.net/doc (seeking reduction of capacity in the tuna purse-seine fleet of the Eastern Pacific Ocean so as to "ensure that tuna fisheries in the region are conducted at a sustainable level," and referring to the fact that "the issue of excess fishing capacity is of concern worldwide").

[6] Third U.N. Convention on the Law of the Sea: Final Act, Oct. 21, 1982, 21 I.L.M. 1261 (entered into force Nov. 16, 1994).

increasing political pressures to accept the formal regime of international law. This legal regime is still evolving, but is clearly moving in the direction of developing new "hard law." The general obligations of signatories are specified in UNCLOS itself. Today, the regime embraces other international agreements under which fishing nations cooperate multilaterally to promote the sustainability of marine fisheries.[7] Individually, many of these nations have also undertaken important unilateral initiatives.[8] However, the "constitution for the oceans," as the UNCLOS instrument is commonly called,[9] has proven to be a frail regulatory structure. This is evidenced by events in many areas of ocean law and management. To cite a particularly striking example, UNCLOS contains no provision, nor even a set of guidelines, regulating the exploitation of marine genetic materials.[10] Nor do the regime rules in UNCLOS regulate offshore aquaculture, offshore ocean-wave generation of power, or liquefied natural gas transport at sea.[11] An equally serious failure is the absence in UNCLOS of a scheme for significant protection of highly migratory species and straddling stocks on the high seas and in EEZs.[12]

To deal with this unfinished UNCLOS business, there has been a recent proliferation of new multilateral agreements concerning high-seas fisheries, straddling stocks, and sustainable management. One important agreement regarding high-seas fishing came from the United Nations 1993-94 initiative designed to place strong international limits on the use of giant drift nets by the distant water fleets.[13]

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[7] *See generally* Ellen Hey, *Reviewing Implementation of the LOS Convention and Emerging International Public Law*, *in* STABILITY AND CHANGE IN THE LAW OF THE SEA: THE ROLE OF THE LOS CONVENTION 75-88 (Alex G. Oude Elferink ed., 2005).

[8] *Id.*

[9] *E.g.*, Davor Vidas & Willy Østreng, *Contemporary Trends in Ocean Law and Politics: An Overview*, *in* ORDER FOR THE OCEANS AT THE TURN OF THE CENTURY 5 (Davor Vidas & Willy Østreng eds., 1999); Shirley V. Scott, *The Law of the Sea Convention as a Constitutional Regime for the Oceans*, *in* STABILITY AND CHANGE 9-38 (Alex G. Oude Elferink ed., 2005).

[10] The exploitation of marine genetic materials is now addressed by the Convention on Biological Diversity, June 5, 1992, 31 I.C.M. 818.

[11] Harry N. Scheiber, *The Biodiversity Convention and Access to Genetic Materials in Ocean Law*, *in* ORDER FOR THE OCEANS AT THE TURN OF THE CENTURY 187-201 (Davor Vidas & Willy Østreng eds., 1999); Oran Young, *Commentary on Shirley V. Scott*, *in* STABILITY AND CHANGE IN THE LAW OF THE SEA 39, 43 (Alex G. Oude Elferink ed., 2005) (also stating that illegal, unreported, and unregulated fishing, like piracy at sea, is out of control).

[12] "Straddling stocks" are fish stocks in a region encompassing both high seas waters and the waters of one or more EEZs, or between or among more than one EEZ. The major "highly migratory" stocks, in terms of today's commercial value and international market demand, are the great tuna fisheries of the Atlantic and Pacific ocean regions.

[13] Yann-huei Song, *United States Ocean Policy: High Seas Driftnet Fisheries in the North Pacific*, CHINESE TAIWAN Y.B. INT'L L. & AFF. 64-137 (1993); *see also* David Balton & Dorothy C. Zbicz, *Managing Deep-Sea Fisheries: Some Threshold Questions*, 19 INT'L J.

Especially pertinent to the present study, however, is the effort to make the framework of regulations over high-seas fishing activity more effective by the de novo establishment of regional fishery management organizations ("RFMOs") in many areas of the world oceans, together with a parallel movement for the restructuring and strengthening of existing RFMOs. In several instances, RFMOs have very ambitious research and implementation agendas, and some of the most prominent efforts today are concerned specifically with the question of sustainability for the highly migratory species.[14] Results have been mixed at best, with considerable variation evident in the terms of the RFMO agreements, the scope of their powers, the degree of inclusion of relevant fishing states, and the efficacy of their scientific research and management regimes.[15]

In recognition of the increasing exploitation of world fish stocks and unregulated high-seas fishing, the FAO adopted the Code of Conduct for Responsible Fisheries ("Code" or "Code of Conduct").[16] The Code is an aspirational document that sets out the principles for environmentally responsible and sustainable fishing. Following the adoption of the Code, the FAO developed International Plans of Action ("IPOAs") geared at elaborating particularly important concepts within the Code.

In the late 1990s, the FAO addressed the need to reduce tuna fishing overcapacity in the Atlantic, Indian, Eastern Pacific, Western, and Central Pacific Oceans in the International Plan of Action for the Management of Fishing Capacity ("IPOA-Capacity").[17] The IPOA-Capacity is a voluntary plan that calls upon States and regional fisheries bodies to create and implement plans that will address the problem of fishing overcapacity by taking actions such as monitoring fishing capacity, reducing subsidies that affect capacity, and cooperating in regional forums to reduce capacity by actually retiring vessels from service or even dismantling them when necessary. Since 2001, in an unprecedented change of emphasis in the organization's orientation, the World Trade Organization's ("WTO") ministerial policy regarding global trade and

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MARINE & COASTAL L. 247, 253 (2004) (emphasizing that the General Assembly resolution calling for a moratorium on driftnet fishing on the high seas was "a non-binding instrument" and yet "has been as effective as any treaty in changing fishing behavior").

[14] *See generally* GOVERNING HIGH SEAS FISHERIES: THE INTERPLAY OF GLOBAL AND REGIONAL REGIMES (Olav Schram Stokke ed., 2001).

[15] *See generally* Moritaka Hayashi, *Illegal, Unreported, and Unregulated (IUU) Fishing: Global and Regional Responses*, *in* BRINGING NEW LAW TO OCEAN WATERS 95, 123 (David C. Caron & Harry N. Scheiber eds., 2004).

[16] FAO, CODE OF CONDUCT FOR RESPONSIBLE FISHERIES (1995), *available at* http://www.fao.org/DOCREp/005/V9878E/V9878e00.htm.

[17] FAO, 23rd Session of the FAO Committee on Fisheries, INTERNATIONAL PLAN OF ACTION FOR THE MANAGEMENT OF FISHING CAPACITY (1999) [hereinafter IPOA-Capacity], *available at* http://www.fao.org/docrep/ 006/x3170e/x3170e04.htm.

the needs of developing countries has moved strongly toward a general commitment to encourage cutbacks in subsidies for the fishing industry globally.[18]

In 2001, the FAO adopted its International Plan of Action to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing ("IPOA-IUU").[19] This voluntary agreement attempts to tackle illegal, unreported, and unregulated ("IUU") fishing, a growing international problem, "by providing all States with comprehensive, effective and transparent measures by which to act, including through appropriate regional fisheries management organizations established in accordance with international law."[20] The FAO and its member states have increasingly recognized the importance of the link between IUU fishing and fleet overcapacity. For example, at the 2005 FAO Ministerial Meeting on Fisheries, participating fisheries ministers and their representatives adopted a declaration that explicitly identifies the relationship between fleet overcapacity and IUU fishing, referring to the economic incentives that drive these phenomena. The declaration also notes the harmful and worldwide consequences of IUU fishing on the sustainability of fisheries, on the conservation of marine living resources, and on marine biodiversity as a whole. The declaration also cites the harmful effects of IUU fishing on the economies of developing countries and their efforts to develop sustainable fisheries management.[21]

Long-line fishing for tuna is one fishing sector prominently targeted for capacity reduction and IUU fishing curtailment through action by international and regional bodies.[22] At international meetings of various RFMOs, and at the

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[18] *Id.*; *see also* Alice L. Mattice, *The Fisheries Subsidies Negotiations in the World Trade Organization: A 'Win-Win-Win' for Trade, the Environment and Sustainable Development*, 34 GOLDEN GATE U.L. REV. 573, 574-86 (2004) (discussing the WTO ministers' commitment).

[19] FAO, International Plan of Action to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing (June 23, 2001) [hereinafter IPOA-IUU], *available at* http://www.fao.org/figis/servlet/static?dom=org&xml=ipoa_IUU.xml.

[20] *Id.* ¶ 8.

[21] Rome Declaration on Illegal, Unreported and Unregulated Fishing, FAO Ministerial Meeting on Fisheries (March 12, 2005), *available at* ftp://ftp.fao.org/fi/DOCUMENT/ministerial/2005/iuu/declaration.pdf.

[22] Long-line fishing is a method of fishing that uses multiple baited hooks on short lines that are attached to a long central fishing line. The main line of a long-line gear can be tens of miles in length, with its attached shorter lines extending deep into the water column with thousands of hooks. This method of fishing for tuna is particularly important to Japan, because the long-line fish catch is higher quality sashimi-grade tuna than the fish caught by methods such as purse-seine fishing. *See* Katsuma Hanafusa & Nobuyuki Yagi, *Effort of Elimination of IUU Large-Scale Tuna Long-line Vessels*, OECD Doc. AGR/FI/IUU(2004)17 at 2 (Apr. 16, 2004). For a recent legal analysis of procedures and commercial operation in the giant Tokyo fish market, with photographic illustrations, see Eric Feldman, *The Tuna Court, Law, and Norms in the World's Premiere Fish Market*, 94 CAL. L. REV. 313 (2006). Rich detail and insightful

FAO meetings, other States have exerted pressure upon Japan (a major distant water fishing nation) to reduce its fleet capacity. In accord with the IPOA-Capacity policy and in response to these international pressures, Japan has voluntarily reduced its large-scale tuna long-line vessel ("LSTLV") fleet by 132 vessels (approximately twenty percent of its fleet).[23] In addition, Japan has recently become a leading advocate of capacity reduction, and has criticized Taiwan, in particular, for failing to take measures to reduce its own capacity.[24] In its foreign relations, Japan has sought more generally to prevent IUU and flag of convenience ("FOC") fishing, and has pursued these objectives in a number of RFMOs that govern tuna fishing activities in the Atlantic, Indian, and Eastern Pacific Oceans,[25] as well as in the Commission for the Conservation of Southern Bluefin Tuna ("CCSBT") and in the newly established Western and Central Pacific Fishery Commission ("WCPFC").

In the present study, we focus attention upon the role of Japan in the worldwide effort to reduce excess fishing vessel fleet capacity and to combat IUU fishing, especially as these efforts relate to Taiwan, the country that is Japan's great rival in Pacific fishing waters. The larger context of Japanese policy on conservation and use of marine resources through international management regimes—that is, the policy matrix in which Japan's responses to IUU issues are embedded—is also given attention. The issues considered include: the implications of the actions that have been taken in the international arena to halt IUU fishing; and more generally, the efforts to reduce fleet tonnage and harvesting capacity in the Atlantic under International Commission for the Conservation of Atlantic Tuna ("ICCAT"), and in the Western and Central Pacific under the WCPFC. Our analysis illustrates the complex interplay among IUU fishing, ship-flagging practices under international law, and the problem of excess fleet capacity. It also illustrates the prominence in oceans diplomacy of the rivalries between fishing nations that are seeking to gain access to a larger part of the international resource and

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analysis of the Tokyo market and the larger social and economic contexts of Japan's fish trade are provided in THEODORE C. BESTOR, TSUKIJI: THE FISH MARKET AT THE CENTER OF THE WORLD (2004).

[23] Large-scale tuna long-line vessels ("LSTLVs") are considered to be greater than twenty-four meters in length and have freezing capacity. *See* IATTC, Working Group on Stock Assessments, *Target Size for the Tuna Fleet in the Eastern Pacific Ocean*, Doc. SAR-5-08 (2004), *available at* http://www.iattc.org/PDFFiles2/SAR-5-08%20Target%20fleet%20capacity.pdf.

[24] *See infra* notes 82-91 and accompanying text. The Taiwanese government has similarly pledged to reduce its tuna fishing capacity. Nonetheless, there has been an increase in the number of long-line and purse seine tuna fishing vessels owned and operated by the Taiwanese fishers.

[25] These RFMOs include the International Commission for the Conservation of Atlantic Tunas ("ICCAT"), the Inter-American Tropical Tuna Commission ("IATTC"), and the Indian Ocean Tuna Commission ("IOTC").

the nations that instead are seeking to protect their historical allocation fisheries, against the background of the global problems of IUU fishing and fishing fleet overcapacity.

Part II discusses the comprehensive role played by Japan in regard to international high-seas tuna management. Part III is a discussion of Japanese and Taiwanese efforts to reduce fishing fleet capacity, with special attention to their policies with respect to the newly-created WCPFC. Part IV discusses capacity-reduction efforts in the context of Japan's initiatives in the broader diplomatic and policy arenas that address the operation of regimes for conservation and management of marine living resources. In Part V we consider important evidence of continuities in efforts since 1945—and the difficulties they have encountered in achieving their objectives—to bring workable sustainability policies into international marine fisheries.

We conclude in Part VI that although Japan's fleet reduction efforts are a necessary step in protection of tuna stocks, the larger international efforts represented by the WCPFC and other regional fisheries regimes are crucial for the future. A single fishing state's reduction of fleet capacity cannot itself serve to assure sustainability of stocks, because rival states in the fishery would remain uncontrolled in capacity or activity. Hence, a coordinated international effort is necessary. Furthermore, fleet reduction does not necessarily equate to capacity reduction if the efficiency of the fleet is maintained with newer vessels with greater capacity. Moreover, as shown in Part V, an international agreement can be designed or manipulated in a way that is as much a *protectionist* mechanism—designed to enhance a state's competitive position against other fishing states, or to keep non-signatory competitor states out of the fishing grounds—as it is a *conservationist* mechanism.

In addition, our analysis demonstrates that no matter how desirable one state's fleet reduction may be, such action must be recognized as only one element of that state's posture regarding sustainable management of ocean fishery resources. For example, in assessing the part that Japan has played in fleet reduction and IUU control in the tuna grounds of the Central Pacific, one must also place the impacts of Japan's other policies onto the balance sheet. Most notable among them are: Japan's continued taking of whales in opposition to the 1986 whaling moratorium promulgated by the International Whaling Commission; Japan's disregard for the southern bluefin tuna regime; and Japan's opposition to using the Convention on International Trade in Endangered Species to help fisheries management organizations curb trade in fish taken by IUU operators.[26]

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[26] *See infra* text accompanying notes 283-94, 295-305 (discussing Japanese whaling policy and its fleet's violation of Bluefin tuna regulations with drastic overfishing as a result); *see also*, Marcus Haward, *IUU Fishing: Contemporary Practice*, *in* OCEANS MANAGEMENT IN THE

II. BACKGROUND

A. The Role of Japan in International Tuna Fisheries

Japan has been a major player in Pacific tuna fishing since the 1930s. Indeed, its fleets operated in the island regions of the Western and South Pacific long before other distant water fishing vessels began to exploit those tuna resources in the 1950s. The Occupation Authority in Japan made restoration of Japan's fishing industry a top priority of its economic policies from 1945 to 1951.[27] By 1949, the tonnage of the Japanese fishing fleets and their annual harvest were restored above prewar levels, making Japan once again the leading marine fishing nation in the world.[28]

When the Occupation era ended and Japan regained full sovereignty in 1952, its government continued to encourage re-expansion of its fisheries industries. Japan proved especially dedicated to expansion of the distant water sector of the fishing fleets, whose main target and product was initially Pacific tuna. Within a few years Japan's tuna vessels were working tuna waters of the Indian Ocean and the Atlantic coast of Africa. From 1951 to 1954, the Japanese DWF's tonnage increased more than 150%, while the number of vessels rose from 272 to 436. Japan emerged in the 1950s as a formidable competitor to the United States tuna fleet, which also had expanded rapidly after the war until leveling off in the early 1950s. The American tuna vessels then fished largely in the Eastern Pacific region, leaving the Western and West-Central Pacific to the Japanese fleets. Meanwhile, Japan also became a major exporter of tuna products to a rapidly expanding American consumer market, making tuna export earnings an important element in Japanese commercial and diplomatic strategies in those years. Illustrating this buoyant increase in Pacific Rim tuna fishing in the postwar years, imports to the American domestic market rose from 117 million pounds in 1950 to 260 million pounds in 1957.[29]

21ST CENTURY: INSTITUTIONAL FRAMEWORKS AND RESPONSES 87, 102-03 (Alex G. Oude Elferink & Donald R. Rothswell eds., 2004) (describing opposition by Japan and Norway to Convention on International Trade in Endangered Species listing of fishery species).

[27] HARRY N. SCHEIBER, INTER-ALLIED CONFLICT AND OCEAN LAW, 1945-53: THE OCCUPATION COMMAND'S REVIVAL OF JAPANESE WHALING AND MARINE FISHERIES 51-100 (2001) [hereinafter SCHEIBER, INTER-ALLIED CONFLICT]; Harry N. Scheiber, *Pacific Ocean Resources, Science, and Law of the Sea: Wilbert M. Chapman and the Pacific Fisheries, 1945-1970*, 13 ECOLOGY L.Q. 381, 504 (1986) [hereinafter Scheiber, *Pacific Ocean Resources*].

[28] SCHEIBER, INTER-ALLIED CONFLICT, *supra* note 27, at 51-100; Scheiber, *Pacific Ocean Resources*, *supra* note 27, at 504.

[29] Scheiber, *Pacific Ocean Resources*, *supra* note 27, at 502-03.

The profits from Japan's tuna export trade fueled a continuous expansion of the country's Pacific DWF fleet. This development was initially given impetus by the Allied Occupation policies under General MacArthur. Several factors further impelled Japan's policy of support for expanded tuna fishing in high-seas waters of the Pacific. First, Japanese trawler fishing in the China Sea had been curtailed through a boat retirement policy, beginning during the Occupation and continuing afterward, in response to depletion of stocks through Japan's overly-intensive fishing in the trawling areas. Second, the Soviet Union's refusal to negotiate a peace treaty with Japan represented a serious obstacle to full use of Japan's salmon fishing fleet in the Northwest Pacific, both by denying Japan use of shore stations and by keeping Japanese vessels out of the USSR's coastal waters. Third was the effect of a United States-Canadian-Japanese fishery treaty in 1952 (the International North Pacific Fisheries Convention), which was ratified almost concurrently with restoration of Japan's sovereignty. Under terms of this Convention, Japan accepted a provision calling for its voluntary "abstention" from fishing salmon and other species in the Northeast Pacific area. This provision of the Convention protected the Canadian and American fishing interests in that region, especially their salmon fleets. Japan was thus effectively barred from much of the Northeast Pacific's salmon waters, hundreds of miles offshore of British Columbia, Alaska, and Washington State.[30]

With the Northeast Pacific thus ruled off bounds for Japan by the "abstention" principle that was written into the Convention, Japanese fishing investment, entrepreneurial effort, and governmental policy efforts looked to growth of its DWF tuna fishing industry as a focus of policy for expansion. Included in those efforts were various licensing strategies for both fishing and export, augmented by significant governmental subsidies for the construction of vessels destined to join the long-line tuna fishing fleet.[31] Consequently, by the late 1960s Japanese long-line tuna vessels had expanded the outer eastward limits of their operations well into the central Pacific. By then, they had already begun exploratory fishing in the deep waters off the Pacific coast in Latin America, which had been largely exploited by the United States

[30] Scheiber, INTER-ALLIED CONFLICT, *supra* note 27, *passim*; *see also* Marcus Haward & Anthony Bergin, *The Political Economy of Japanese Distant Water Tuna Fisheries*, 25 MARINE POL'Y 91 (2001) (discussing the Japanese government's historic subsidies policies).

[31] Haward & Bergin, *supra* note 30, at 95-96.

flagged vessels.[32] In the mid-1950s, Japanese tuna fishing operations moved into the Hebrides, South Pacific, the Indian Ocean, and even the Atlantic.[33]

Progressive modernization of the Japanese fleet and the introduction of on-board freezing and refrigerated storage on its vessels in the early 1960s gave the tuna fleets greater range, expediting the tuna sector's expansion. As wages and incomes rose in the 1960s and 1970s, the demand at home for sashimi tuna gave a further boost to the industry.[34] These developments helped Japan to maintain its competitive position *vis-à-vis* the American tuna fleet, which enhanced its productivity by introducing the power seiner and expanding the average tuna vessel's size and capacity.[35] Within the Japanese industry, there were growing problems that exerted downward pressure on profitability. The Japanese government made an important decision in 1959 to authorize expanded tuna fishing in order to accommodate the Hokkaido salmon industry's laborers, who were displaced by an agreement with the Soviet Union reducing the scope of Japanese fishing in the northern salmon grounds.[36]

A serious threat to the entire Japanese tuna industry was the emergence in the 1980s of strong competition from Taiwan and South Korea's low-wage fishing fleets. Already experiencing a steady rise in wages in their tuna operations, the Japanese fleet had faced yet another ominous threat in the early 1970s when the Law of the Sea talks were pointing in the direction of agreement on "enclosure" by coastal states—a major turning point in the history of global fishing consummated in 1982 with the signature of UNCLOS and acceptance of its provision for the 200-mile EEZ for coastal states.[37] As a

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[32] *See generally* 2004: WHAT ARE RESPONSIBLE FISHERIES? PROCEEDINGS OF THE TWELFTH BIENNIAL CONFERENCE OF THE INTERNATIONAL INSTITUTE OF FISHERIES ECONOMICS & TRADE (Yoshiaki Matsuda & Tadashi Yamamoto eds., 2004) [hereinafter RESPONSIBLE FISHERIES]; *see also*, Yosiaki Matsuda and Kazuomi Ouchi, *Legal, Political, and Economic Constraints on Japanese Strategies for Distant-Water Tuna and Skipjack Fisheries in Southeast Asian Seas and the Western Central Pacific*, 5 MEMOIRS KAGOSHIMA UNIV. RES. CENTER S. PAC. 163, 170-71 (1984) (depicting maps of Japanese fishing operations areas during 1945-50, and Japanese tuna long-liner fishing operations during 1965-82).

[33] PACIFIC FISHERMAN, Aug. 1957, at 13; PACIFIC FISHERMAN, May 1959, at 9 (reporting that some seventeen percent of the more than 17,000 tons of Japanese tuna exports to California alone were from the Atlantic area); Wilbert M. Chapman, *Recent Trends in World Tuna Production and Some Problems Arising Therefrom* (1961) (unpublished manuscript, copy on file with the U.S. National Marine Fisheries Service, Southwest Fisheries Center, La Jolla, Cal.).

[34] Haward & Bergin, *supra* note 30, at 91.

[35] MICHAEL ORBACH, HUNTERS, SEAMEN AND ENTREPRENEURS: THE TUNA SEINERMEN OF SAN DIEGO 3-4 (1977).

[36] *Political Shift is Key in Japan's Tuna Troubles*, PACIFIC FISHERMAN, June 1956, at 11.

[37] Even as the international talks proceeded, many of the coastal nations with important fishing grounds worked by DWF fleets, including Japan's fleets, were extending the seaward limits of their claims to exclusive fishing zones. *See, e.g.*, Harry N. Scheiber & Christopher Carr, *Constitutionalism and the Territorial Sea: An Historical Study*, 2 TERRITORIAL SEA J. 67

leading DWF nation, although also having a large coastal fishing industry, Japan consistently opposed the global ocean enclosure movement that culminated with the UNCLOS and the 200-mile EEZ. Indeed, Japan's entire oceans diplomacy strategy, which proved to be a failed strategy, was a campaign to head off the acceptance of extended EEZ offshore boundaries of any distance beyond the long-traditional limits (usually three miles), let alone what was finally agreed as the 200-mile limit.[38]

Once the 200-mile zones were declared, Japanese fishing operators and the government of Japan were forced to accept costly licensing arrangements in order to maintain their existing tuna fishery areas, as in the ocean regions surrounding the island nations in the western and southwest Pacific. This meant that the Japanese felt still further pressure on the profitability of their fishing operations. As Professors Marcus Haward and Anthony Bergin have observed, from that time forward, the nature of competition in the high-seas tuna industry and international tuna markets created for Japan the key problem of "how to maintain a Japanese presence in a fishery which they by and large [had] created."[39] Urging his government to provide even greater financial and diplomatic support to the country's tuna fishing industry, one Japanese scientist referred to the industry as "the last jewel in a disintegrating crown."[40]

Japan's tuna production from high-seas operations peaked in the mid 1980s, having risen from 636,439 tons in 1975 to reach 863,510 in 1984, then moving to levels ranging from 420,702 to 757,307 in the early 1990s.[41] Increased labor and operating costs interacted with the rise of still more sources of intense competition in the fishing grounds of the Pacific from the Philippines and Indonesia. All the while, the South Korean and Taiwanese fleet expansions continued to have a telling effect on Japanese fleet earnings.[42]

The Japanese government's responses to the tuna situation on the high seas continue to be pursued with a special ardor, impelled by the cultural significance of high-seas fishing to many citizens of that country. This cultural

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(1992) (describing United States measures extending fishing protection offshore in this period). Japanese fishing interests were already under economic pressures prior to the advent of the creation of EEZs from which their fleets were suddenly, or gradually, excluded. *See* Olav Schram Stokke, *Transnational Fishing: Japan's Changing Strategy*, 15 MARINE POL'Y 231 (1991).

[38] *See generally* JAPAN AND THE NEW OCEAN REGIME (Robert F. Friedman ed., 1984) (discussing Japanese ocean diplomacy in this period). The canonical text was written by Shigeru Oda, one of the world's leading authorities on marine resources law and a judge on the International Court of Justice.

[39] Haward & Bergin, *supra* note 30, at 92.

[40] *Id.* at 95 n.12.

[41] *Id.* at 92.

[42] *Id.* at 93, 95 (delineating the number of fishing vessels of Japan and its Asian competitors).

aspect gave further legitimacy to the economic interests associated with the DWF industry, as new competition and diplomatic moves affected Japanese fishing workers on the vessels, and as they impacted the communities that depended on fishing income from high seas operations. As noted earlier, the Japanese government did successfully conclude access agreements for licensing tuna fishing in Pacific EEZ areas. More recently, as will be discussed further below, Japan has joined multilateral international agreements designed to establish sustainable regimes for southern bluefin and other species. Other measures pursued by Japan include a policy of subsidization and scrapping vessels contributing to excess capacity.[43] At the same time, however, Japan has resisted scientific-management implementation policies of several RFMOs.[44]

The problem of supporting its DWF tuna industry continues to trouble Japan's domestic politics and profoundly impacts the industry interests that are most immediately touched by the new competitive situation. No issue in Japan's policy debates or in that country's ocean diplomacy on the matter of high seas tuna fishing has had more intensive attention in recent years than the question of competition in the fishing grounds from IUU operators. Both the Japanese government and industry organizations have taken many initiatives to reduce pressure from IUU vessels on the fishery resource, and these efforts are examined in detail in later sections of this study. It does not follow, however, that Japan has indicated an equal interest to willingly accept further inroads on the traditional "freedom of the seas" by agreeing to the more radical measures that have been advocated for RMFO management in the interest of sustainability. That is, Japan has been at the forefront in seeking to reduce capacity and to curb the IUU fishing that depletes stocks of tuna and means serious competition for its flag vessels in the fishing grounds; yet Japan has resisted techniques exercised by RMFOs that would authorize measures such as boarding of Japanese vessels in the enforcement of agreed catch quotas or enforcement of specific limits on size or character of the catch in Japanese cargo holds. Although Japan finally did accept the WCPFC policy on boarding, Japan favors policies assuring "freedom of the seas" for its own flagged fishing vessels while excluding or limiting the capacity of vessels under other flags or in FOC status. Japan is prominent, though by no means alone, in the classic international game of blaming others when it comes to explaining why certain fish stocks are in decline.

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[43] *See infra* notes 82-91 and accompanying text. The scrapping program was initially designed only to diminish tonnage in the long-liner fleet, whereas the more efficient and larger-scale seiner vessels of the Pacific fleet were not affected. *See* Haward & Bergin, *supra* note 30, at 94.

[44] *See infra* Part IV.C.

It is necessary to distinguish measures designated to relieve pressure on the fishery resources from measures designed to advance protectionist objectives. This issue is a prominent one in the debates of Atlantic and Pacific tuna regimes, as well as with respect to Antarctic and other regional fishery resource regimes, in today's global oceans diplomacy.[45] Fleet reduction also may achieve domestic objectives to maintain stability in the competitive situation among the fishing fleets and fisheries sectors in their domestic economy.[46]

Today, Japan's position in international tuna markets is important not only for its fishing industry but also for its unique role as a consumer market. Fish and fish products accounted for thirty-nine percent of Japan's total animal protein supply in 2003.[47] Japan is the largest fish importer worldwide,[48] and more than ninety percent of the world's sashimi tuna goes to the Japanese market.[49] The annual consumption of sashimi tuna in Japan is approximately 450,000 tons.[50]

Japan remains one of the top fish capture producing countries worldwide, and is a leader in the global tuna fishery. The Japanese LSTLVs capture approximately 200,000 tons of sashimi tuna annually.[51] In 2003, Japanese DWFs caught 602,000 tons of fish worldwide.[52] In 1998, Japan and Taiwan-flagged LSTLVs together comprised seventy-two percent of the total LSTLVs

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[45] Jean-Pierre Plé, *Responding to Non-Member Fishing in the Atlantic*, *in* LAW OF THE SEA: THE COMMON HERITAGE AND EMERGING CHALLENGES 197-208 (Harry N. Scheiber ed., 2000) (providing an example of these conflicting objectives and related enforcement problems).

[46] *See, e.g.*, Japan Fisheries Agency, Res. Mgmt. Dep't, http://www.jfa.maff.go.jp/jfapanf/englishi/ (last visited Nov. 10, 2007) (describing the need to plan for fisheries development in the face reduced production and deteriorating fisheries through mechanisms such as control of fisheries and authorization for building vessels).

[47] FAO, FISHERY COUNTRY PROFILE—JAPAN, Oct. 2005, *available at* http://www.fao.org/fi/fcp/en/JPN/profile.htm.

[48] FAO, THE STATE OF WORLD FISHERIES & AQUACULTURE, 2002, PART I: WORLD REVIEW OF FISHERIES & AQUACULTURE 34 (2002) [hereinafter, FAO, STATE OF WORLD FISHERIES], *available at* http://www.fao.org/docrep/005/47300c/ 47300E05.htm#.

[49] Japanese Ministry for Agriculture, Forest, and Fishing [MAFF], *The 21st General Assembly of the Association of Pacific Island Legislatures Held*, MAFF Update No. 462 (July 19, 2002) [hereinafter MAFF, *Pacific Island Legislatures*], *available at* http://www.maff.go.jp/mud/462.html

[50] FAO, STATE OF WORLD FISHERIES, *supra* note 48, at 32.

An emerging crisis in the Japanese domestic tuna market received front page attention in the New York Times, as international controls tightened and the stocks faced serious declines, with concomitant shortages of supply and rising prices for sashimi-quality tuna. Martin Fackler, *Waiter, There's Deer in My Sushi*, N.Y. TIMES, June 28, 2007, *available at* http://www.nytimes.com/2007/06/25/business/worldbusiness/25sushi.html?_r=1&oref=slogin.

[51] Comment, *A Label For Tuna?*, 33 SAMUDRA 1 (2002).

[52] FAO, FISHERY COUNTRY PROFILE—JAPAN, *supra* note 47 (noting that catch was down from 1.139 million tons caught ten years earlier, in 1993).

worldwide.[53] Japan's DWF was then and remains especially dominant in the Western and Central Pacific Ocean—the area comprising the WCPFC.[54] In all these waters, Japanese fishing operations are maintained under the regimes of individual states[55] or the regimes of regional RFMOs. Overall, Japan's DWF accounts for over twenty-five percent of the fishing vessels in the Pacific region,[56] so it is especially important for Japan to commit to sustainable fishing practices and to agree to the newly created fisheries management regime of the WCPFC.

In addition to its activity in the Pacific Island States, Japan's tuna fleet is also active in ocean areas under management by the Inter-American Tropical

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[53] *Id.* An important point on capacity is that while Japan reduced its overall long-line fishing fleet—from 773 in 1985 to 529 in 2000, these numbers may not accurately indicate a reduction in overall fishing capacity. *See* Hanafusa & Yagi, *supra* note 22, at 1; *see also infra* note 73 and accompanying text. Prior to 1999, Japan had the largest LSTLV fleet, with, for example, 663 vessels in 1998. *See* Masayuki Komatsu, *The Importance of Taking Cooperative Action Against Specific Fishing Vessels that Are Diminishing Effectiveness of Tuna Conservation and Management Measures, at* app. 1, FAO Doc. AUS:IUU/2000/5 (May 15-19, 2000), *available at* http://www.fao.org/DOCREP/005/Y3274E/y3274e07.htm.

[54] For example, in the Solomon Islands, DWF vessels are a major part of the offshore fishery, and Japan has been fishing in the area since 1962. The Solomon Islands itself has a substantial tuna fishery fleet, established mainly by joint ventures with the Japanese-based company, Taiyo Gyogio Fishing Company of Japan. However, due to social unrest, the Japanese company has severed ties to the joint venture, and the Solomon Islands tuna fishery has declined. In 1999, the following States fished for tuna in the Solomon Islands EEZ: Fiji, Federated States of Micronesia, Japan, Kiribati, Korea, Papua New Guinea, Solomon Islands, Taiwan, and the United States. *See* FAO, FISHERY COUNTRY PROFILE—SOLOMON ISLANDS (2002), *available at* http://www.fao.org/fi/fcp/en/SLB/profile.htm.

In the less-developed island state of Tuvalu, Japanese and United States vessels' catch account for ninety-nine percent of the foreign fishing tuna catch. *See* FAO, FISHERY COUNTRY PROFILE—TUVALU (2002), *available at* http://www.fao.org/fi/fcp/en/TUV/profile.htm. Also, Japan's DWF operates in the Marshall Islands, Palau, and Kiribati. *See* FAO, FISHERY COUNTRY PROFILE—MARSHALL ISLANDS (2002), *available at* http://www.fao.org/fi/fcp/en/MHL/profile.htm. Foreign vessels fishing in the Marshall Island EEZs include tuna purse-seine vessels from the United States, Japan, Korea, and Taiwan, which in 1999 captured 23,000 tons. *See* FAO, FISHERY COUNTRY PROFILE—PALAU (2002), *available at* http://www.fao.org/fi/fcp/en/PLW/profile.htm. DWF tuna fleets are also common in the EEZ of Palau, where in 1999, vessels from China, Japan, Kiribati, Papua New Guinea, and Taiwan took a reported 2,368 tons of fish. *See* FAO, FISHERY COUNTRY PROFILE—KIRIBATI (April, 2002), *available at* http://www.fao.org/fi/fcp/en/KIR/profile.htm. In Kiribati's EEZ distant water fishing nations ("DWF nations"), including Japan, Taiwan, Korea, the United States and Spain caught 132,391 metric tons of tuna in 1999 primarily using purse seine gear. *Id.* In early 2001 the licensed fleet consisted of about 260 long-liners, ninety-five purse seiners, and thirty-seven pole/line vessels. *Id.*

[55] That is to say, the regimes in their EEZs, with license-type fees or royalties paid in agreed formulae or at specified levels.

[56] MAFF, *Pacific Island Legislators, supra* note 49.

Tuna Commission ("IATTC"), which manages the Eastern Pacific tuna fishery, the Commission for the Conservation of Southern Bluefin Tuna ("CCSBT"), and the Indian Ocean Tuna Commission ("IOTC").

RFMOs have allocated to Japan a substantial proportion of the tuna long-line catch in many areas of the world. For example, Japan's annual long-line catch quota for bigeye tuna in the Eastern Pacific Ocean during 2004, 2005, and 2006 was set at 34,076 metric tons, in comparison with China's 2639 metric tons, Korea's 12,576 metric tons, and Taiwan's 7953 metric tons.[57] For 2004-2005, Japan was allocated 6065 metric tons out of the total allowable catch ("TAC") of 14,930 metric tons set by CCSBT, in comparison with Australia's 5265 metric tons, South Korea's 1140, and Taiwan's 1140; subsequently, however, Japan accepted a punitive reduction to a maximum catch of 3000 metric tons after its violation of fishing quotas over many years had been discovered and denounced.[58] Japan's total allowable catch will remain at 3000 metric tons until 2011.[59]

Despite Japan's dominant role in the global tuna fisheries, there has been a decline in the Japanese tuna fishing industry. Since the middle of the 1980s, and increasingly in the 1990s, the Japanese tuna sector was transformed into a net importing industry because of rising competition from Taiwan, Korea, and other fleets and also because of soaring labor and fuel costs, declining catch rates, and shortage of labor supply.[60] It may be that this decline in the size of the Japanese tuna fishing sector (and that sector's competitive position internationally) paved the way for Japan's capacity reduction program, making the voluntary cutbacks less painful economically than would have been the case earlier.

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[57] IATTC Resolution for A Multi-Annual Program on the Conservation of Tuna in the Eastern Pacific Ocean for 2004, 2005 and 2006, Res. C-04-09, IATTC 72d mtg. (June 14-18, 2004), *available at* http://www.iattc.org/ResolutionsactiveENG.htm.

[58] COMM'N FOR THE CONSERVATION OF SOUTHERN BLUEFIN TUNA [CCSBT], MANAGEMENT OF SOUTHERN BLUEFIN TUNA—CATCH LEVELS, http://www.ccsbt.org/docs/management.html (last visited Nov. 10, 2007); *see also infra* text accompanying notes 292-94 (on the punitive action by the CCSBT).

[59] CCSBT, *supra* note 58. The total allowable catch will not be reviewed again until 2009 unless exceptional circumstances require it. *Id.*

[60] *See* Makoto Peter Miyake, *Extracts from "Brief Review of World Tuna Fisheries,"* Standing Comm. On Tuna and Billfish, SCTB17 Working Paper, INF-FTWG-1a, Aug. 9-18, 2004, *available at* http://www.spc.int/oceanfish/html/SCTB/index.htm; *see also* Seiichiro Ono, *Development of the Japanese Tuna Fisheries: After the Reduction in the Number of Fishing Vessels (GENSEN) in 1998*, *in* RESPONSIBLE FISHERIES, *supra* note 32.

B. The Interrelated Problems of IUU Fishing and of Overcapacity

The problem of IUU fishing became increasingly apparent in the early 1990s, and in 1994 the United Nations General Assembly adopted its first resolution to address unauthorized fishing within states' EEZ jurisdictions.[61] The resolution called upon flag states to prevent their vessels from engaging in unauthorized fishing in other states' waters and asked development assistance organizations to assist developing countries in improving monitoring, control and surveillance within their EEZs.[62] The General Assembly reiterated its concern in subsequent resolutions throughout the late 1990s and into the current decade.[63] In 2000, the General Assembly expanded its concerns about IUU fishing to include reference to unauthorized fishing on the high seas, in addition to the concerns raised in previous resolutions about unauthorized fishing within national jurisdictions.[64] Meanwhile, the IUU problem was growing worse in all the world's oceans.

In 2001, as part of its effort to implement the Code of Conduct, the FAO adopted the voluntary IPOA-IUU.[65] The IPOA-IUU guiding principles fall under the headings participation and coordination, phased implementation, comprehensive and integrated approach, conservation, transparency, and non-discrimination.[66] The IPOA-IUU delineates state responsibilities, flag state responsibilities, coastal state measures, port state measures, market related measures, research, regional fisheries management organizations measures, special requirements of developing countries, reporting, and the FAO's role in combating the growing IUU fishing problem.[67] It also calls upon states to

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[61] Unauthorized Fishing in Zones of National Jurisdiction & Its Impact on the Living Marine Resources of the World's Oceans & Seas, G.A. Res. 49/116, U.N. GAOR, U.N. Doc. A/RES/49/116 (Dec. 19, 1994) [hereinafter Unauthorized Fishing]; *see also* David J. Doulman, Illegal, Unreported & Unregulated Fishing: Mandate for an International Plan of Action, Doc. AUS: IUU/2000/4 (May 15-19, 2000).

[62] Unauthorized Fishing, *supra* note 61, ¶¶ 1-2.

[63] *See* Doulman, *supra* note 61, at 13; G.A. Res. 50/25, U.N. GAOR, 50th Sess., U.N. Doc. A/RES/50/25 (Dec. 5, 1995); G.A. Res. 51/36, U.N. GAOR, 51st Sess., U.N. Doc. A/RES/51/36 (Dec. 9, 1996); G.A. Res. 52/29, U.N. GAOR, 52d Sess., U.N. Doc. A/RES/52/29 (Nov. 26, 1997); G.A. Res. 53/33, U.N. GAOR, 53d Sess., U.N. Doc. A/RES/53/33 (Nov. 24, 1998); G.A. Res. 55/8, U.N. GAOR, 55th Sess., U.N. Doc. A/RES/55/8 (Oct. 30, 2000); G.A. Res. 57/142, U.N. GAOR, 57th Sess., U.N. Doc. A/RES/57/142 (Dec. 12, 2002).

[64] G.A. Res. 55/8, U.N. GAOR, 55th Sess., U.N. Doc. A/RES/55/8 (Oct. 30, 2000). UNGA recognized FAO's efforts and explicitly utilized the phrase "illegal, unreported and unregulated fishing." *Id.*

[65] IPOA-IUU, *supra* note 19.

[66] *Id.* ¶ 9.

[67] *Id.* ¶¶ 10-93.

develop national plans of action to implement the IPOA-IUU.[68] The target date for implementation—2004—has come and gone, and experts agree that "the problem of [IUU] fishing is growing both in scope and intensity."[69]

There are several components to IUU fishing, including: evasion of national, regional, and international laws; refusal to report fish catch; and fishing in the absence of a regulatory regime with reporting requirements. One of the most serious issues is the threat posed by IUU vessels registered under flags of convenience ("FOC vessels"). Under international law, a vessel is required to fly the flag of the country of its registry. A vessel owner desiring to evade national or RFMO regulations can easily re-register that vessel to a nation with few restrictions or else to one that is not party to RFMO agreements. The new flag indicating country of registry is the flag of convenience; the practice is often called "flag-hopping;" and the nations that register FOC vessels are known as open-access countries. There are many instances on record of vessels apprehended with several FOC flags and registrations on board, and also of vessels that have sequentially reflagged in more than two countries. Both techniques avoid compliance with fishing regulations by foiling efforts at bringing them under national or RFMO regulation.[70]

In response to the IUU problem, in 2005 the States represented at an FAO meeting in Rome committed themselves to adopt, review and revise relevant national legislation and regulations to deter further IUU fishing and to ensure that measures to adopt IUU fishing or fleet overcapacity in one fishery or area do not result in the creation of fleet overcapacity in another fishery or area. At the meeting, participating states committed to supplement existing fisheries monitoring, control and surveillance ("MCS") schemes through measures such

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[68] *Id.* ¶ 25. See Michael W. Lodge, *Improving International Governance in the Deep Sea*, 19 INT'L J. MARINE & COASTAL L. 299, 304-5, 315 (table) (2004), for a brief analysis.

[69] FAO Newsroom, *Shutting the Door on Illegal Fishing*, Sept. 10, 2004, http://www.fao.org/newsroom/en/news/2004/50167/index.html (last visited Oct. 27, 2007) ("[T]he FAO has been informed that IUU fishing accounts for up to 30% of total catches in some important fisheries and that IUU catches, in one particular case, could be as high as three times the permitted catch level."); OECD, *supra* note 1, at 126; *see generally* Deidre Warner-Kramer, *Control Begins at Home: Tackling Flags of Convenience and IUU Fishing*, 34 GOLDEN GATE U.L. REV. 497 (2004); *see also* MATTHEW GIANNI & WALT SIMPSON, THE CHANGING NATURE OF HIGH SEAS FISHING: HOW FLAGS OF CONVENIENCE PROVIDE COVER FOR ILLEGAL, UNREPORTED AND UNREGULATED (IUU) FISHING (2005), *available at* http://www.daff.gov.au/fisheries/iuu/high-seas; Press Release, World Wildlife Federation, Report Warning: Pirate Fishing Thrives under Flag of Convenience (Nov. 2, 2005), *available at* http://worldwildlife.org/news/display/pr.cfm?prID=217.

[70] Interview with Glenn Sulmasy, Commander, U.S. Coast Guard, in Berkeley, Cal. (April 20, 2007); discussion by Australian enforcement officials in course of discussion at OECD Paris conference on IUU issues, April 2004 (on file with authors). "In practice, it takes only a click on a mouse [see http://www.flagsofconvenience.com] to move fishing vessels from one register to another." OECD, *supra* note 1, at 40.

as: (1) encouraging the fishing fleets to report any suspected IUU fishing activities they observe; (2) exchanging information on suspected IUU fishing in collaboration with FAO, RFMOs, and other relevant arrangements; (3) seeking to eliminate IUU/FOC vessels by requiring that a "genuine link" be established between states and fishing vessels flying their flags; and (4) advocating measures to strengthen RFMOs to ensure that they are more effective in combating IUU fishing.[71]

In the 1990s, overcapacity—the phenomenon of "too many boats chasing too few fish"—also attracted international attention.[72] Fishing capacity is a function of vessel numbers and tonnage, of the efficiency of gear and other equipment affecting ability to catch and preserve fish, and the support network for the vessels at sea.[73] The United Nations Conference on Environment and Development recognized the overcapacity problem in 1992 in its *Agenda 21: Programme of Action for Sustainable Development,* and called upon nations, regional organizations, and international bodies to take action.[74] In 1998, the FAO adopted the IPOA-Capacity. This plan asks states and regional fisheries organizations to limit or reduce fishing capacity in fisheries with unsustainable fishing practices.[75] States are called to act in every arena—nationally, bilaterally, and multilaterally—to reduce capacity to reach sustainable fishing

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[71] Food and Agric. Org. of the United Nations, 2005 Rome Declaration on Illegal, Unreported and Unregulated Fishing (March 12, 2005), *available at* ftp://ftp.fao.org/fi/document/ministerial/2005/iuu/declaration.pdf; Erik Jaap Molenaar, *The Concept of 'Real Interest' and Other Aspects of Co-operation through Regional Fisheries Management Mechanisms*, 15 INT'L J. MARINE & COASTAL L. 475-531 (2000).

[72] The phrase "too many boats chasing too few fish" has been commonly used to describe the problem of overcapacity. *See, e.g.*, Christopher O. Stone, *Too Many Fishing Boats, Too Few Fish: Can Trade Laws Trim Subsidies and Restore the Balance in Global Fisheries?*, 24 ECOLOGY L. Q. 505 (1997); Polly Ghazi, Frank Smith & Claire Trevena, *The Rape of the Ocean*, THE OBSERVER, Apr. 1995, at 23; David R. Teece, *Global Overfishing and the Spanish-Canadian Turbot War: Can International Law Protect the High Seas Environment?*, 8 COLO. J. INT'L ENVTL. L. & POL'Y 89, 91 (1997); Julian O'Halloran, *Files on Four*, BBC, May 16, 1995.

[73] The IPOA-Capacity does not define fishing capacity. However, at a previous technical conference, the definition was proposed as follows: "[T]he ability of a stock of inputs (capital) to produce output (measured as either effort or catch). Fishing capacity is the ability of a vessel or fleet of vessels to catch fish." FOOD AND AGRICULTURE ORGANIZATION OF THE UNITED NATIONS, REPORT OF THE FAO TECHNICAL WORKING GROUP ON THE MANAGEMENT OF FISHING CAPACITY ¶ 10 (1998). As technology advances, fewer boats may be needed to catch the same number of fish. A reduction in fleet *number or tonnage* does not necessarily represent an equivalent decrease in the overall fleet ability to exploit the resource.

[74] U.N. Conference on Environment and Development (Earth Summit), June 3-14, 1992, ¶ 17.45, U.N. Doc. A/Conf.151/26 (Aug. 12, 1992).

[75] *See* IPOA-Capacity, *supra* note 17, ¶ 7. Paragraph 39 of the IPOA-Capacity urges states to take immediate action to reduce capacity in overfished fisheries including transboundary, straddling and highly migratory stocks, such as tuna. Id. ¶ 39.

levels.[76] The required reduction would vary from fishery to fishery. However, a twenty to thirty percent reduction was proposed for the LSTLV fleets.[77]

III. JAPAN, TAIWAN, AND THE ISSUES OF IUU FISHING AND OVERCAPACITY

Tuna links Japan and Taiwan in many ways. The fishing industries of the two nations compete for the same resources. Taiwan's DWF supplies Japan with large quantities of tuna annually. In the past, retired Japanese vessels were sold and reflagged to Taiwan. Because Taiwan and Japan have the two largest long-line fleets, and have a multifaceted trade and harvesting relationship, solutions to the overcapacity problem have called for joint and coordinated fleet reduction and IUU prevention efforts. The following section traces these efforts to demonstrate the intricate multinational nature of the overcapacity problem.

Prior to fleet reduction, of the 1706 LSTLVs operating worldwide, Japan flagged 663 (thirty-nine percent of the total), and Taiwan 569 (about thirty-three percent of the total).[78] Taiwan's flagged tuna fleet was particularly large in the late 1990s, and approximately eighty percent of tuna FOC vessels were Taiwanese-owned. Taiwan currently has the largest tuna fleet in the world. In 2005-2006, before government-ordered reductions had removed 160 vessels from operations, Taiwan had 614 LSTLVs and thirty-four large-scale purse seine vessels working in the Atlantic, Indian, and Pacific Oceans, with a total annual tuna catch between 480,000 and 560,000 metric tons.[79] Taiwan exports tuna mainly to Japan, because of historical and geographical reasons, traditional Japan-Taiwan fishery relations,[80] and more importantly, the high demand and high selling price of tuna in the Japanese sashimi market. In 1994, under pressure from the Japanese tuna industry, Taiwan agreed to limit its frozen tuna export to Japan to no more than 99,000 metric tons a year. But trade records show that Taiwan's tuna exporting industry exceeded those

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[76] *Id.* ¶ 40.

[77] FAO Technical Working Group on the Management of Fishing Capacity, *FAO Fisheries Report No. 586* (April 15-18, 1998), *available at* http://www.fao.org/docrep/006/x0488e/x0488e00.htm.

[78] *See* Komatsu, *supra* note 53, at Appendix 1.

[79] Fisheries Administration, Council of Agriculture, Executive Yuan, YEARBOOK OF FISHERIES STATISTICS IN TAIWAN AND FUJEN AREAS—2003, at 127-28 (May 2004); 2006 TAIWAN FISHERIES YEARBOOK, Table 12, *available at* http://fa.gov.tw/eng/statistics/yearbooks/2006ybe.php.

[80] Because Taiwan was under Japan's occupation as a colony between 1895 and 1945, development of Taiwan's fishery had been influenced profoundly by the Japanese fishing industry.

limits. In 2004, for instance, Taiwan exported 127,000 tons of frozen tuna to Japan.[81]

It is against this background that Japan and Taiwan signed an Action Plan in February 1999.[82] In accordance with the Plan for large scale tuna long-line vessels, Taiwan agreed to build new vessels only if old vessels of equivalent tonnage were scrapped. Taiwan set a tentative goal of reducing sixty large-scale long-line vessels by the end of 2000 as the initial stage of its fleet reduction program. Taiwan also agreed to start preparation for re-flagging Taiwanese-owned FOC vessels back to Taiwan.[83]

Under the Plan, Japan agreed to reduce its licensed LSTLVs by approximately twenty percent (132 vessels).[84] Japan agreed to take necessary measures to freeze approved LSTLV permits so as not to increase the number of its licensed vessels. Japan's 1999 vessel reduction program was different from prior Japanese capacity reduction programs in one important way. Vessels were actually ordered to be scrapped, thereby effectively reducing world fishing fleet capacity. In contrast, a prior vessel reduction scheme resulted in the removal of Japanese fishing licenses from 300 vessels, but with no scrapping.[85] These vessels were sold and reflagged to other states.[86] By June 1999, Japan would, in consultation and cooperation with Taiwan, work out a series of specific countermeasures to cope with the FOC problems.

These efforts met with criticism. It was reported that some of those Japanese second-handed FOC LSTLVs that joined the 1999 scrapping program had not actually been scrapped but were instead only partially dismantled at the Japanese shipyards. They were later shipped to foreign countries such as China, the Philippines, and Singapore to be re-assembled, and then exported again, becoming new FOC LSTLVs. In other cases, the main engines and important parts of the scrapped vessels were sold overseas. One report indicates that the vessels being scrapped were those that were in

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[81] Lin Chia Yi, *Negotiating Outcome of the Non-governmental Taiwan-Japan Tuna Conference*, INTERNATIONAL FISHERY INFORMATION, No. 149, April 2005, p. 3 (in Chinese).

[82] The Action Plan encompasses two parts: the Taiwanese Action Plan and the Japanese Action Plan. A copy of the Action Plan is on file with authors.

[83] Taiwan is currently in the process of considering new legislation that would regulate its nationals who invest in or operate fishing vessels under flags other than its own. A draft law was submitted by the executive branch to the Legislative Yuan in May 2007. Information is on file with coauthor Song.

[84] This was the same commitment made by Japan to the FAO Committee on Fisheries in February 1999. *See* Japan Fisheries Association, Japan Reduced Tuna Fishing Capacity as a Conservation Measure, http://www.suisankai.or.jp/iken_e/iken99_e/ik003_e.html (last visited Oct. 20, 2007); MAFF Update No. 352, http://www.maff.go.jp/mud/352.html (last visited Oct. 20, 2007).

[85] *See* Komatsu, *supra* note 53, ¶ 5.

[86] *Id.*

any case likely to be sold to competing organizations that were gaining unfair advantage by evading national and RFMO regulations.[87] Many of the small Japanese trading companies disregarded the Japanese tuna trade regulations, continuing to import tuna products from the Taiwanese-owned IUU/FOC vessels, thus undermining the effectiveness of the Japan-Taiwan joint action plan.[88] This highlights the problem that laws on the books, soft-law promises, and policy statements may not accurately reflect the realities of implementation.

Under international pressure to reduce fleet capacity, Taiwanese vessel owners initially fled Taiwan's national jurisdiction[89] by re-registering their vessels to open access countries.[90] Approximately fourteen percent of large-scale fishing vessels built in 2001-2003 were operating under FOCs by the end of 2003. Of the fifty-one fishing vessels of over twenty-four meters (i.e. LSTLVs) built in Taiwan, fifty were flagged in FOC countries (including Belize, Bolivia, Cambodia, Georgia, Panama and Vanuatu) by the end of 2003.[91]

A. Multilateral Efforts to Reduce Fishing Capacity and Eliminate FOC Fishing Vessels

1. Atlantic fleet reduction efforts: The example of ICCAT

In the early 1990s, ICCAT[92] began passing resolutions and recommendations regarding IUU fishing for tuna and swordfish in the Atlantic Ocean.[93]

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[87] As one Taiwanese author states, Taiwan bought the second-hand vessels and expanded its own fleet to meet the increasing demand of the Japanese tuna market. David Chang, *Measures Taken by Taiwan in Combating FOC/IUU Fishing*, Proceedings of OECD Workshop of IUU Fishing (2004) (Paris, France, April 19-20, 2006).

[88] Interview with James Tsai, President, Fong Kuo Fishery Company, Ltd., in Kaohsiung, Taiwan (April 30, 2004).

[89] Under the Taiwanese fishery regulation enacted in 1989 and amended in 1995, no new fishing vessels can be built unless old vessels are scrapped, sunk, or exported. After 1995, no new vessel can be built to replace a vessel sold by export overseas. *See generally* Fisheries Administration, Council of Agriculture, Executive Yuan, http://www.fa.gov.tw/eng/laws/fisheries_laws.php (last visited Nov. 28, 2007).

[90] *See* Matthew Gianni & Walt Simpson, *Flags of Convenience, Transshipment, Re-Supply and At-Sea Infrastructure in Relation to IUU Fishing: Management Implications and Recommendations for International Action Arising from A Case Study Prepared for WWF* (2004), *available at* http://www.oecd.org/dataoecd/1/23/31593522.PDF.

[91] *Id.* at 7.

[92] ICCAT, established in 1969, is responsible for the conservation of tuna and tuna-like species in the Atlantic Ocean and adjacent seas. *See* Int'l Comm'n for the Conservation of Atlantic Tunas, http://www.iccat.int/introduction.htm (last visited Oct. 20, 2007).

[93] *See generally* Hayashi, *supra* note 15 (providing an overview of international and regional responses to IUU fishing).

Among these resolutions were one encouraging states to deter reflagging[94] and another creating the tuna statistical document program that required all bluefin tuna catch to be properly documented.[95] In 1994, ICCAT created a plan to identify non-compliance vessels, notify the flag state, and recommend ICCAT member countries take trade restrictive measures on Atlantic tuna products from those states.[96] In 1998, ICCAT expanded its actions regarding non-compliance when it passed a resolution to deal with "unreported and unregulated" tuna catches by long-line vessels in the Atlantic.[97] This resolution noted the problems of flag hopping from non-compliance states (where trade restrictive measures had been imposed) to contracting parties or other non-contract states.[98] ICCAT has continued to recommend trade restrictive measures and has recommended importation bans on any Atlantic catches from several open-access countries whose FOC vessels are engaged in IUU fishing.[99] As noted by the Australian scholar Marcus Haward, these actions by the ICCAT came at the very beginning of the international broad-front move against IUU fishing, and hence the specific measures taken by the Commission had an important influence in shaping the similar strategies of other regional management organizations, most notably at first with Convention on the Conservation of Antarctic Marine Living Resources.[100]

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[94] ICCAT Resolution Regarding the Reflagging of Vessels to Avoid Compliance with Internationally Agreed Conservation & Management Measures for Living Marine Resources, Doc. No. 92-3 (1992), *available at* http://www.iccat.int/RecsRegs.asp.

[95] ICCAT Resolution Regarding Interpretation and Application of the ICCAT Bluefin Tuna Statistical Document Program, Doc. No. 94-4 (1992), *available at* http://www.iccat.int/documents/recs/compendiopdf-e/1992-03-e.pdf.

[96] ICCAT Resolution Concerning an Action Plan to Ensure Effectiveness of the Conservation Program for Atlantic Bluefin Tuna, Doc. 94-3 (1994), *available at* http://www.iccat.int/RecsRegs.asp.

Moritaka Hayashi has pointed out that the fact that ICCAT's management area encompasses the entire Atlantic Ocean has enabled ICCAT members to take trade measures against any country found to be engaged in fishing for Atlantic Bluefin tuna in a manner out of compliance with ICCAT measures. This is not true in other RFMO regions where managed species occur both within and outside the management area, making it more difficult for other RFMOs to determine if a catch can be deemed a product of IUU fishing. *See* Hayashi, *supra* note 15, at 108.

[97] ICCAT Resolution Concerning the Unreported and Unregulated Catches of Tuna by Large-Scale Long-Line Vessels in the Convention Area, Doc. 98-18 (1998), *available at* http://www.iccat.int/RecsRegs.asp.

[98] *Id. See* Plé, *supra* note 45 (providing an analysis of ICCAT policies to 2000).

[99] ICCAT Recommendation Concerning the Ban on Landings & Transshipments of Vessels from Non-Contracting Parties Identified as Having Committed Serious Infringement, Doc. 98-11 (1998), *available at* http://www.iccat.int/RecsRegs.asp.

[100] Marcus Haward, *IUU Fishing: Contemporary Practice*, *in* OCEANS MANAGEMENT IN THE 21ST CENTURY: INSTITUTIONAL FRAMEWORKS AND RESPONSES 87, 91-95 (A. G. Oude Elferink & D. R. Rothswell eds., 2004).

ICCAT meanwhile had begun its efforts to reduce capacity in 1998, when it recommended that all parties limit their number of bigeye tuna fishing vessels to the average number of those fishing in the period of 1991-1992, and that the vessel number should be limited by Gross Registered Tonnage ("GRT") so that fishing capacity would not be increased.[101] The ICCAT requested that Taiwan limit its catch to 16,500 million tons and the number of its vessels to 125.[102]

At the 1999 annual ICCAT meeting, Japan noted the problem of FOC vessels.[103] Based on a prior decision, Japan and the United States submitted a list of FOC vessels to ICCAT.[104] Over 350 vessels were included on the list, of which eight non-contracting parties and three contracting parties were requested to eliminate FOC vessels-related activities.[105] ICCAT also called upon Taiwan and Japan to take remedial action to reduce IUU fishing.[106] Specifically, ICCAT was concerned about flag hopping from non-contract to contract states that were not in compliance.[107]

The 1999 ICCAT resolution urged Taiwan to continue to strengthen its effort to eliminate IUU fishing activities by large scale long-line vessels in the Convention Area and other areas.[108] The resolution called upon all parties to

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[101] ICCAT Recommendation on the Bigeye Tuna Conservation Measures for Fishing Vessels Larger than 24 m Length Overall, No. 98-3 (1998) (entered into force on June 21, 1999), *available at* http://www.iccat.int/RecsRegs.asp.

[102] *Id.* ¶ 6.

[103] *See* MAFF, *16th Regular Meeting of the ICCAT Held*, Update No. 339 (Dec. 10, 1999), *available at* http://www.maff.go.jp/mud/339.html.

[104] *Id.*

[105] *Id.*

[106] ICCAT Resolution Calling for Further Actions Against Illegal, Unregulated, and Unreported Fishing Activities by Large-Scale Long-Line Vessels in the Convention Area and Other Areas, Doc. 99-11 (1999), *available at* http://www.iccat.int/RecsRegs.asp.

[107] *Id.* The preamble to the resolution stated, *inter alia*:

> BEING INFORMED that most of these vessels are owned and operated by Chinese Taipei's [Taiwan's] business entities while almost all of their products are being exported to Japan,
>
> BEING AWARE that a majority of these vessels used to be Japanese vessels and were exported, whereas most of the remaining vessels were built in Chinese Taipei,
>
> SUPPORTING the joint effort by Japan and Chinese Taipei to eliminate large-scale tuna long-lining vessels engaged in illegal, unregulated, and unreported fishing, i.e. scrapping of Japanese origin vessels and reflagging of Chinese Taipei built vessels to Chinese Taipei under its own registration,
>
> RECOGNIZING with grave concern that a number of large-scale tuna long-line vessels which are currently under construction in the Chinese Taipei's shipping yards with equipment/devices largely supplied from Japan, have high potential of engaging in illegal, unregulated, and unreported unregulated [sic] fishing activities . . . .

Id.

[108] *See id.* ¶ 8.

not engage in IUU fishing activities, and asked their importers, transporters, consumers, and fishing gear producers not to do business with vessel owners who engaged in IUU fishing activities.[109] The parties agreed to import bans on Belize, Honduras and Equatorial Guinea, and a previous ban on Panamanian imports was lifted because of efforts at compliance.[110] Japan responded to ICCAT's resolution by banning port calls from all three states.[111]

At the 2000 ICCAT meeting, two supplemental resolutions focused on Japan and Taiwan's role in IUU fishing. ICCAT continued pressuring Taiwan and Japan to "take every possible action" to halt IUU fishing.[112] In 2000, after the Joint Action Plan, an ICCAT resolution stated that "a substantial number of owners of IUU large-scale long-line vessels, most of whom are Chinese Taipei's business entities, are still trying to continue IUU fishing by changing the flag of the vessels and vessel name and/or ownership."[113] It urged Japan and Taiwan to scrap IUU fishing vessels built in Japan and owned and flagged elsewhere and to re-register Taiwanese-built and owned FOC vessels back to Taiwan.[114]

The 2000 resolution included a list of the vessels destined for scrapping and re-registration.[115] The list demonstrates the international nature of IUU fishing vessels. The vessels were built in Japan and Taiwan, operated worldwide, and were flagged to FOC countries, including Honduras, Equatorial Guinea, Belize, and St. Vincent and the Grenadines. Also, the vessels listed for scrapping were considerably older and smaller than those listed for re-registration. The scrap vessel list comprised sixty-two vessels with an average tonnage of 510 that were between fifteen and twenty-six years old and were operating in all oceans.[116] In contrast, the sixty-seven Taiwanese-built and

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[109] *Id.* ¶ 7.

[110] *See* MAFF, *supra* note 103.

[111] *See* MAFF, *Japan Prohibits Port Call for Tuna Long-liners Registered in Equatorial Guinea*, Update No. 365 (June 30, 2000), *available at* http://www.maff.go.jp/mud/365.html.

[112] ICCAT Supplemental Resolution Concerning the Recommendation on the Bigeye Tuna Conservation Measures, Doc. 00-02 (2000), *available at* http://www.iccat.int/RecsRegs.asp. Parties adopted a supplemental resolution concerning the recommendation on the bigeye conservation measures, under which Japan and Taiwan were asked to "take every possible action, consistent with relevant laws, to urge their residents to refrain from engaging in and associating with activities that assist survival of IUU tuna long-line vessels and with any other activities that undermine the effectiveness of the ICCAT bigeye and other conservation and management measures." *Id.*

[113] ICCAT Supplemental Resolution to Enhance the Effectiveness of the ICCAT Measures to Eliminate Illegal, Unregulated and Unreported Fishing Activities by Large-Scale Tuna Long-line Vessels in the Convention Area and Other Areas, Doc. 00-19 (2000) (transmitted to parties on Dec. 27, 2000), *available at* http://www.iccat.int/RecsRegs.asp.

[114] *Id.* ¶ 1.

[115] *Id.* app. 1-2.

[116] *Id.* app. 1 (Scrap Vessel List).

owned FOC vessels to be re-registered were one to three years old and an average tonnage of 564.[117] The age of these vessels indicates that during the years that FAO, ICCAT and other international organizations were pushing for decreased capacity, Taiwanese ship builders continued fleet expansion. This lack of response could represent a time lag between international calls and national implementation or something more problematic like a lack of political will to pursue fleet reductions and ensure sustainable fisheries.

ICCAT adopted new measures in 2002, specifying that parties should take measures to ensure that: (1) nationals or residents do not support or engage in IUU fishing and to identify those who are the operators or beneficial owners of IUU fishing vessels; (2) licensed fishing vessels have prior authorization and obtain a validated Statistical Document prior to transshipment; (3) transporters that intend to land species subject to the Statistical Document Programs have the necessary documents before transshipment; and (4) transporters provide the Commission with the names and other appropriate information of their transport vessels in such a manner as required for large-scale fishing vessels.[118] It also recommended improving the current process for developing IUU vessel lists and to consider the development of a "positive" vessel list.[119]

Japan has voiced concerns about IUU fishing and overcapacity at several ICCAT meetings, especially focusing on Taiwan. At the 2000 ICCAT meeting, Japan reported that many of the owners of IUU vessels, most of whom are Taiwanese residents, changed flags and names of vessels and owner companies or concluded charter contracts to escape from the Japan-Taiwan joint program for elimination of IUU vessels.[120] At the 2001 meeting, Japan declared that the fundamental cause of the IUU fishing problem were the strategies of IUU business entities, asserting that parties to the convention should pursue trade sanctions, maintain an IUU/FOC vessel list, and refuse to

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[117] *Id.* app. 2 (Re-Registration Vessels List). Areas of operation are as follows: sixteen vessels in the Atlantic Ocean, twenty-three in the Indian Ocean, and twenty-eight in the Pacific Ocean. *Id.*

[118] ICCAT Recommendation to Establish A List of Vessels Presumed to Have Carried Out Illegal, Unreported and Unregulated Fishing Activities in the ICCAT Convention Area, Doc. 02-23 (2002), *available at* http://www.iccat.int; ICCAT Resolution Concerning the Measures to Prevent the Laundering of Catches by Illegal, Unreported and Unregulated (IUU) Large-Scale Tuna Long-Line Fishing Vessels, Doc. No. 02-25 (2002), *available at* http://www.iccat.int/RecsRegs.asp; ICCAT Resolution Regarding Process and Criteria for ICCAT IUU Trade Restrictive Measures, Doc. 02-27 (2002), *available at* http://www.iccat.int/RecsRegs.asp.

[119] ICCAT, REPORT OF THE ICCAT AD HOC WORKING GROUP ON MEASURES TO COMBAT IUU FISHING § 7.6 (2002).

[120] Press Release, MAFF, Seventeenth Regular Meeting of ICCAT Held (Dec. 21, 2001), http://www.maff.go.jp/mud/436.html (last visited Oct. 20, 2007).

purchase IUU/FOC products.[121] Japan reported that its evidence demonstrated that "fish laundering" was a serious problem.[122] At the 2001 meeting, the ICCAT parties supported the creation of a new IUU/FOC list, and encouraged non-purchase initiatives and the identification of Sierra Leone, Bolivia, Vanuatu, Indonesia, and Panama as countries accepting IUU/FOC vessels.[123]

In a meeting of ICCAT held in November 2004, Japan and other nations explicitly accused Taiwanese-owned FOC vessels of taking unreported tuna catches, and Taiwanese-flagged vessels of landing fish in excess of quotas and of prohibited size or age; Taiwan's exports to Japan exceeded the entire volume of the Taiwan quota under IATTC management.[124] In response, Taiwan promised that it would strengthen management and deduct 1600 metric tons annually between 2005 and 2009 to make up for the 8000 metric tons previously fished in excess of its quota.[125] ICCAT agreed to give Taiwan one year's probation and continue to give it a quota until a review the next year, holding out the threat of trade sanctions if Taiwan did not take effective action against violations.[126]

At the ICCAT's 2005 meeting, Japan proposed to cut Taiwan's allowable catch of bigeye tuna from 14,900 metric tons in 2005 to 4600 metric tons for 2006 to stem overfishing in the Atlantic Ocean and the Mediterranean. The Commission decided that of Taiwan's sixty bigeye tuna fishing vessels, only fifteen would be allowed to continue operations in the Atlantic Ocean in 2006. Consistent with ICCAT's practice of continuing implementation, the

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[121] *Id.*

[122] *Id.*

[123] *Id.* Japan also proposed holding a working group meeting in 2002 in Tokyo to consider and work out more effective measures to prevent, deter, and eliminate IUU fishing, particularly that by FOC vessels, which was accordingly held in Tokyo in May 2002. *See* ICCAT Resolution Concerning More Effective Measures to Prevent, Deter and Eliminate IUU Fishing by Tuna Long-line Vessels, 01-10, transmitted Feb. 22, 2002, *available at* http://www.iccat.int; Proposal by Japan, 2001 Commission Meeting, Compliance Committee: Res. Japan-Bus. Relations IUU Entities, Doc. No. COC-021-D (Nov. 18, 2001); Report of the ICCAT Ad Hoc Working Group on Measures to Combat IUU Fishing, Tokyo, Japan, Annex 5, 97-102 (2002).

[124] Bowun Jhu, *Government to Abide by ICCAT Order to Slash Bigeye Tuna Catch*, TAIWAN J., Dec. 19, 2005, http://taiwanjournal.nat.gov.tw/ct.asp?xItem=21685&CtNode=122 (last visited Dec. 24, 2007).

[125] It was believed that Taiwan exceeded its quota by 8000 metric tons in 2004, and therefore was required to deduct 1600 metric tons of its national quota annually, beginning in 2005 and ending in 2009, to return the overfished amount of tuna. *But see infra* text accompanying note 128 (noting ICAAT's restoration of Taiwan's older quota).

[126] *See* BBC Monitoring International Reports, Nov. 26, 2005 (describing a MAFF report that "[Taiwan] and China were severely criticized by other participating parties and as a result both accepted that they would compensate for the excessive catch [by accepting reductions in their] future catch limits."); *see also* Press Release, MAFF, ICCAT Annual Meeting (14th Special Meeting (Dec. 17, 2004), *available at* http://www.maff.go.jp/mud/571.htm.

Commission scheduled a review in November 2006 of Taiwan's record. To advance compliance, the Taiwanese government announced that it would require forty-one tuna-catching ships to be scrapped or have licenses suspended. Taiwan appropriated up to NT$18 million as a subsidy for each ship to be removed from the fleet. In addition, the government allocated NT$50 million annually to place observers on every distant water fishing ship flagged by Taiwan.[127] In response to these actions by Taiwan, ICCAT restored Taiwan's tuna quota to the 14,900 metric tons level for 2007.[128]

Despite the fact that some environmental organizations have derided the ICCAT Commission's management efforts as inadequate,[129] measures such as those undertaken by ICCAT demonstrate the intensity of international concerns about IUU fishing and overcapacity. In the ICCAT management area, Japan was initially a target of international efforts to reduce overcapacity and halt IUU fishing practices. As Japan was addressing its own overcapacity and non-compliance issues, it became an outspoken proponent of worldwide fleet reduction and elimination of flags of convenience. The early ICCAT actions set the stage for what would occur in the Western and Central Pacific Ocean, namely Japan and Taiwan's tuna fishing interests facing off against one another in the continuing global debate of capacity reduction and the IUU fishing threat. Ironically, the charges against Taiwan that led to the punitive action by ICCAT presaged the same kind of scenario in the Southwest Pacific, where Japan was discovered to be taking southern bluefin far in excess of quota and was subjected to a sharp punitive reduction of its quota.[130]

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[127] Deborah Kuo, *World Tuna Group Resolves to Cut Taiwan's Annual Catch Limit*, CENT. NEWS AGENCY—TAIWAN, Nov. 20, 2005; *Taiwan: Government to Idle 41 Atlantic Tuna Ships Next Year*, PACIFIC MAGAZINE, Nov. 22, 2005.

[128] Annie Huang, *ICCAT Restores Taiwan's Tuna Quota for 2007*, TAIWAN J., Dec. 8, 2006, http://taiwanjournal.nat.gov.tw/ct.asp?xItem=23563&CtNode=122 (last visited Dec. 24, 2007). At the same time, Japanese industry and government complained that it was impossible to bring under control the cargo transfers of catches at sea if IUU vessels continued "laundering" cargoes (estimated at 18,000 tons of bigeye tuna alone) at Japanese ports using vessels flagged by states that operated under the regulations. *See* Stuart Biggs, *Japan Holds Conservation Meeting Amid Threat to Tuna*, Bloomberg.com, http://www.bloomberg.com/apps/news?pid=newsarchive&sid=aoc8kqDjr_oM (last updated Mar. 27, 2007). "Fish laundering" is a term used to describe the sale of shipments or cargoes that are documented incorrectly as to place or date of catch.

[129] *See, e.g.*, Press Release, World Wildlife Fund, Illegal Tuna Fishing Leads to Demise of Species (Nov. 11, 2004), *available at* http://worldwildlife.org/news/displayPR.cfm?prID=162 (critiquing the ICCAT quota system as "little more than a political tool, hiding practices of tuna fishing, shipping, processing, and trading that violate existing rules").

[130] *See infra* notes 292-94 and accompanying text.

2. *The roles of Japan, Taiwan, and the Forum Fisheries Agency in the establishment of the Western & Central Pacific Fisheries Commission*

Japan and Taiwan are the two dominant DWF nations in the Western and Central Pacific Ocean ("WCPO"). In recent years, with over seventy percent of the world's fisheries fully exploited, overexploited or depleted,[131] WCPO waters have attracting increasing numbers of foreign industrial fishing vessels. Approximately fifty to sixty percent of the total tuna catch in these waters is taken within the exclusive EEZ of the Forum Fisheries Agency ("FFA" or "Forum Agency") member countries.[132] Member states and the FFA have taken actions to deal with the problem of IUU fishing; thus, a number of monitoring, control and surveillance ("MCS") measures have been adopted since the early 1980s, variously based on the terms of the following: (1) the Harmonized Minimum Terms and Conditions for Foreign Fishing Vessel Access ("MTCs");[133] (2) the Regional Register of Foreign Fishing Vessels;[134] (3) the Niue Treaty;[135] (4) the Nauru Agreement;[136] (5) the Palau Arrangement;[137] (6) the Federated States of Micronesia Fisheries Arrangement;[138] (7)

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[131] In 2002, the FAO estimated that among the major marine fish stocks or groups of stocks for which information is available, about forty-four percent are fully exploited, eighteen percent are overexploited, and an additional ten percent have been depleted or are recovering from depletion. *See* FAO, STATE OF WORLD FISHERIES, *supra* note 48, at 23; Scheiber, *Ocean Governance, supra* note 2, at 119.

[132] The seventeen members of Forum Fisheries Agency ("FFA") are Australia, Cook Islands, Federated States of Micronesia, Fiji, Kiribati, Marshall Islands, Nauru, New Zealand, Niue, Palau, Papua New Guinea, Samoa, Solomon Islands, Tokelau, Tonga, Tuvalu and Vanuatu. *See* Forum Fisheries Agency, http://www.ffa.int/node/14 (last visited Oct. 20, 2007). The FFA was established by the South Pacific Forum in 1979 to assist its members in negotiating tuna fishery access arrangements with DWF nations and to help develop Pacific Island states' national fishery legislation. Forum Fisheries Agency, http://www.ffa.int/node/12 (last visited Oct. 20, 2007).

[133] For a discussion of this and other FFA measures, *see* Gerald Moore, "Enforcement without Force: New Concepts in Compliance Control for Foreign Fishing Operations," *in Essays in Memory of Jean Carroz* (1987), *available at* http://www.fao.org/docrep/s5280T/s5280t0m.htm#TopOfPage.

[134] The FFA Regional Register of Foreign Fishing Vessels was established in September, 1983. *See* William M. Sutherland, *Coastal State Cooperation in Fisheries: Emergent Custom in the South Pacific*, 1 INT'L J. ESTUARINE & COASTAL L. 14 (1986).

[135] Niue Treaty on Cooperation in Fisheries Surveillance and Law Enforcement in the South Pacific Region, http://www.oceanlaw.net/texts/niue.htm (last visited Oct. 20, 2007) (signed July 9, 1992 and entered into force May 1993).

[136] Nauru Agreement Concerning Cooperation in the Management of Fisheries of Common Interest, http://www.oceanlaw.net/texts/nauru.htm (last visited Oct. 20, 2007) (adopted Feb. 11, 1982).

[137] The Palau Arrangement for the Management of the Western Pacific Purse Seine Fishery was established in October 1992. *See* Michael Lodge, *The Development of the Palau*

the FFA-US Multilateral Treaty on Fisheries;[139] and (8) the FFA-US Minute of Agreement on Surveillance and Enforcement.[140] The MCS measures implemented under these various instruments have had a positive effect in reducing IUU fishing activities in the EEZs of the member countries of the Forum Agency.[141]

In recent years, with increasing pressure on the tuna fisheries in the WCPO, the Forum Agency has shifted its focus from the negotiation of fisheries access arrangements to the negotiation of an effective conservation and management regime. Since 1994, the FFA member states and the DWF nations operating in the WCPO have discussed how to jointly manage the forty to fifty percent of tuna being caught on the high seas and in the waters of non-FFA member countries. These discussions—referred to as multilateral high level consultations ("MHLCs")—resulted in adoption of the Convention on the Conservation and Management of Highly Migratory Fish Stocks in the

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Arrangement for the Management of the Western Pacific Purse Seine Fishery, 22 MARINE POL'Y 1 (1998).

[138] The Federated States of Micronesia Arrangement for Regional Fisheries Access, http://www.oceanlaw.net/texts/micronesia.htm (last visited Oct. 20, 2007) (entered into force Sep. 23, 1995 and adopted in Nov. 1994 by the Tenth Special Meeting of the Parties to the 1982 Nauru Agreement Concerning Cooperation in the Management of Fisheries of Common Interest).

[139] The Treaty on Fisheries between the Governments of Certain Pacific Island States and the Government of the United States of America, http://www.oceanlaw.net/texts/summaries/pacisles.htm (last visited Oct. 20, 2007) (signed on Apr. 2, 1987 and entered into force on June 15, 1988). The operational provisions were originally designed for a five-year period but have subsequently been extended through June 14, 2013. The two sides agreed on forty-five fishing licenses, US$3 million in annual licensing fees, and US$18 million in annual economic assistance provided by the U.S. government under the Economic Assistance Agreement associated with the Treaty. *See* International Fisheries: Before the Subcomm. on Fisheries, Conservation, Wildlife, and Oceans, H. Comm. On Resources (108th Congress, Leg. Sess. 2) (2004) *available at* http://www.state.gov/g/oes/rls/rm/2004/32245.htm (testimony of David A. Balton, Deputy Assistant Secretary of State for Oceans and Fisheries, International Fisheries).

[140] Forum Fisheries Agency, Sixth Annual Consultation of Parties to the Treaty, Nadi, Fiji, March 4-8, 1994, *Minute of Agreement on Surveillance and Enforcement* (signed March 8, 1994) (governing the FFA Secretariat's relationship with the U.S. National Marine Fisheries Service ("NMFS") and the U.S. Coast Guard).

[141] Andrew H. Richards, *Reported Fisheries Violations in the EEZs of FFA Member Countries, 1978-2001: An Analysis of the Violations and Prosecutions Database* at 8, FFA Report No. 01/18 (2001). Because of the widespread and comprehensive applications of the Harmonized Minimum Terms and Conditions for Foreign Fishing Vessel Access ("MTCs") by FFA member states in areas under their respective national jurisdiction, the Western and Central Pacific Fisheries Commission ("WCPFC") has been asked by the FFA members to take the MTCs into account during consideration of compliance and enforcement arrangement for the Convention Area. The area of competence ("the Convention Area") of the WCPF Commission is defined in Article 3 of the WCPF Convention. *Id.*

Western and Central Pacific Oceans.[142] In discussions of the IUU problem during the preparatory conference ("PrepCon") process for this Convention, the focus was upon the issue of non-participant activities, rather than participant activities, in the Forum Agency member states' EEZs.[143]

Japan pursued the dual causes of capacity reduction and IUU fishing elimination at the negotiating conferences in preparation for the writing of the Convention on the Conservation and Management of Highly Migratory Fish Stocks in the Western and Central Pacific treaty. In 2002, Japan submitted to PrepCon a report accusing Taiwan's vessels of "fish laundering" and re-flagging LSTLVs to developing countries such as Seychelles, Vanuatu and Bolivia as a way to evade commitments made in the 1999 Japan-Taiwan Joint Action Program. Japan claimed that "[t]he import records as well as the alleged relationship between Chinese Taipei's (Taiwan's) LSTLVs and IUU LSTLVs clearly indicated that tuna caught by IUU LSTLVs are being imported to Japan in the names of duly licensed Chinese Taipei's vessels (fish laundering)."[144] The Japanese report concluded that the effectiveness of the existing WCPO measures based on negative listing has been undermined significantly because of the problems of flag hopping, forgeries of certificates of registry, and fish laundering.[145] The parties subsequently adopted a resolution at this PrepCon to urge restraint in capacity expansion and fishing efforts; to apply the precautionary approach; to comply with the IPOA-IUU; and to promote cooperation among parties and regional fishery management organizations.[146]

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[142] Western and Central Pacific Fisheries Comm'n [WCPFC], Convention on the Conservation and Management of Highly Migratory Fish Stocks in the Western and Central Pacific Oceans Western and Central Pacific Fisheries Commission, http://www.wcpfc.int (follow "Convention Texts" hyperlink) (last visited Oct. 20, 2007) (adopted Sept. 5, 2000 and entered into force June 19, 2004). The Convention will place increased monitoring, control and surveillance ("MCS") responsibilities on FFA members. *Id.* For background on the Convention and the MHLCs, see AUSTL. DEP'T OF AGRIC., FISHERIES, AND FORESTRY, WESTERN AND CENTRAL PACIFIC OCEANS—HIGHLY MIGRATORY FISH STOCKS, *available at* http://www.daff.gov.au/fisheries/international/wcfpc-fishstocks.

[143] Interviews conducted by co-author Song indicate that the FFA considers the failure of DWF nations to comply with its member states' reporting requirements to be the greatest single component of IUU fishing in the Western and Central Pacific. Interviews conducted at the Sixth Preparatory Conference for the Establishment of the West and Central Pacific Fisheries Commission, Bali, Indonesia, Apr. 19-23, 2004.

[144] WCPFC, Preparatory Conference for the Commission for the Conservation and Management of Highly Migratory Fish Stocks in the Western and Central Pacific, Nadi, Fiji, Nov. 18-22, 2002 (delegation From Japan).

[145] *Id.* ¶ 4.

[146] WCPFC, Preparatory Conference for the Commission for the Conservation and Management of Highly Migratory Fish Stocks in the Western and Central Pacific, Nadi, Fiji, Nov. 18-22, 2002, *Resolution of the Preparatory Conference Relating to Illegal, Unreported*

In May 2003, Japan intensified its efforts to reduce Taiwan's fishing capacity. In a statement on the progress in the measures to eliminate IUU LSTLVs, Japan declared that, "[g]iven the fact that, in reality, most of IUU LSTLVs are owned and/or operated by fishers of Chinese Taipei, consultations have been made between Japan and Chinese Taipei to promote scrapping and re-registration of the fishing vessels to Chinese Taipei's registration."[147] In accordance with the 1999 Japan-Taiwan Action Plan, as of May 2003, a total of forty-two IUU LSTLVs had been scrapped and thirty-eight re-registered in Taiwan's registry. The remaining 100 IUU LSTLVs were to have been eliminated in accordance with the 2003 Japan-Taiwan Joint Action Plan.[148]

There was general concern about the increasing number of purse seine fishing vessels being deployed in the WCPO, noted in a recommendation made by the Scientific Coordinating Group established during the PrepCon negotiation process, on the need to take practical management actions to decrease fishing mortality of both yellowfin and bigeye tuna. In response, the 2003 PrepCon approved a resolution to "strongly urge" participants to implement previous resolutions regarding fishing efforts and capacity, also calling upon any participants to prevent nationals from building new purse seine vessels unless legitimate licenses were available. PrepCon also urged those states with excess capacity to take measures to reduce it.[149]

Japan continued to press its campaign again Taiwan, contending at the fifth PrepCon (2003) that Taiwan was responsible for the building of new "super" tuna purse seine vessels that would significantly increase fishing capacity. Among the newly constructed Taiwanese-owned vessels, five were over 2000 GRT and an additional five of lesser tonnage.[150] The report pointed out that

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and Unregulated Fishing and Limits of Fishing Capacity, ¶¶ 1-3, Doc. SWCPFC/PrepCon/22 (Nov. 22, 2002).

[147] WCPFC, Preparatory Conference for the Commission for the Conservation and Management of Highly Migratory Fish Stocks in the Western and Central Pacific, Nadi, Fiji, May 5-9, 2003, *Report of the Progress in the Measures to Eliminate IUU Large Scale Tuna Long-line Fishing Vessels*, ¶4, Doc. WCPFC/PrepCon/DP.11 (prepared by the delegation of Japan).

[148] Japan-Taiwan Joint Action Program to Eliminate IUU Large-Scale Tuna Longline Vessels (2003) (on file with authors).

[149] WCPFC, Resolution of the Preparatory Conference in Response to the Recommendations of the Second Meeting of the Scientific Coordinating Group on Sustainable Fisheries Management, Doc. WCPFC/PrepCon/34 (Oct. 3, 2003) [hereinafter WCPFC Resolution], *available at* http://www.intfish.net/docs/2003/wcpfc/prepcon34.pdf.

[150] *See* Preparatory Conference for the Commission for the Conservation and Management of Highly Migratory Fish Stocks in the Western and Central Pacific, Rarotonga, Cook Islands, Sept. 29-Oct. 3, 2003, *Estimate on Impact as Result of Increase in Fishing Efforts by Super Purse-Seiners in the Western and Central Pacific* (prepared by the Japanese delegation) [hereinafter *Super Purse-Seiners Report*]. "Super" purse seiners are vessels of very large scale,

the purse seine vessels of greater than 2000 GRT deployed in the Western and Central Pacific had increased from zero in 1996 to twelve in 2003.[151]

In response, Taiwan asked Japan to stop exporting engines to Taiwan used in purse seiner construction. Taiwan promised to maintain only forty-one purse seine vessels and expressed its willingness to cooperate with the parties concerned.[152] At the next WCPF PrepCon, Taiwan repeated this promise and averred that it was concerned about the sustainability of tuna stocks in the WCPO, and the possibility of over-capacity of the tuna purse seine fishery.

At the 2004 PrepCon (in Japan), in accordance with the previously adopted resolution,[153] a statement entitled "Information Paper on Expansion of Fishing Capacity in the WCPFC Area"[154] was circulated. This document contended that the data on hand was sufficient to positively identify some twenty-eight large purse seine vessels as Taiwanese-controlled FOC ships, with ownership in seven companies altogether. Fourteen of the large purse seiner types were known to be operating in the convention area of the WCPF Commission. Seven that were positively identified as Taiwanese-controlled FOC vessels were 2200 GRT or larger, and each of them was catching more than 10,000 metric tons of tuna annually.[155] Japan complained that "it is surprisingly evident that the Taiwanese fishing industry increased its purse seine fishing capacity dramatically by use of FOC, whereas all other major fishing fleets were restrained to the stable level of fishing capacity or even reduced."[156] The Japanese paper concluded flatly that "it seems obvious that all of the seven Taiwanese companies intentionally circumvented the government licensing

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some of them running to 2000 tons or more. *See, e.g.*, Ching Fu Shipbuilding Co., 2000 CBM Super Tuna Purse Seiners, http://www.cfsb.com.tw/h025e.html (last visited Oct. 20, 2007) (describing two super purse seiners built by the firm).

[151] *Super Purse-Seiners Report*, *supra* note 150.

[152] WCPFC, Preparatory Conference for the Commission for the Conservation and Management of Highly Migratory Fish Stocks in the Western and Central Pacific, Rarotonga, Cook Islands, Sept. 29-Oct. 3, 2003, *Chinese Taipei Response to Japanese Paper on the Estimate on Impact As A Result of Increase Fishing Effort by Super Purse-Seiners in the Western and Central Pacific*, 1-2, WCPFC Doc. WCPFC/PrepCon/DP.24 [hereinafter *Chinese Taipei Response*].

[153] *See* WCPFC Resolution, *supra* note 149, ¶ 7 (urging that "any information on activities contrary to the provisions of this resolution should be reported to the next session of the Preparatory Conference and circulated to all participants").

[154] WCPFC, Preparatory Conference for the Commission for the Conservation and Management of Highly Migratory Fish Stocks in the Western and Central Pacific, Bali, Indonesia, Apr. 19-23, 2004, *Information Paper on Expansion of Fishing Capacity in the WCPFC Area*, WCPFC Doc. WCPFC/PrepCon/DP.29 (Apr. 17, 2004) (submitted by the delegation of Japan) [hereinafter *PrepCon Fishing Capacity Information Paper*].

[155] *Id.* at 3-4.

[156] *Id.* at 1.

control by use of FOC so as to have their excessive fishing capacity for tunas in the Convention Area."[157]

According to the Japanese estimates as far as LSTLVs are concerned, the Taiwanese fishing industry had increased both FOC and Taiwanese licensed vessels operating in the Convention Area, whereas the number of Japanese and Korean long-line vessels remained at a stable level.[158,159] China also increased its tuna long-line vessels in the WCPO. However, most of them are relatively small, with low productivity.[160]

On the initiative taken by the Japanese delegation at the 2004 PrepCon, a special workshop was organized by Japan and held in Sapporo later that year, to discuss possible measures to address the issue of excessive fishing capacity and IUU/FOC fishing. At the Sapporo workshop, Tomofumi Kume, Councilor of the Fisheries Agency of Japan, stated that "the bigeye and yellowfin tuna stocks, the major species under the competence of the WCPFC, are in a full or over-exploited status and probably still declining."[161] Ziro Suruki from the National Research Institute of Far Seas Fisheries, Japan, presented a report on review of stock status of bigeye tuna in the Pacific. He concluded his presentation by pointing out that stock status of Pacific bigeye was in a very critical condition, rapidly moving from overfishing state to overfished state. As fishing effort and capacity continue to increase both in

[157] *Id.* at 4.

[158] Table 1: Number of Purse Seine Vessels of Major Fishing Members registered on FFA Regional Register.

	2000 September	2001 September	2002 August	2003 June
Taiwan	34	42	41	38
Taiwanese FOC	11	11	14	28
Japan	35	34	34	34
Korea	26	27	27	27
U.S.A.	32	31	29	26
Philippines	9	20	24	23

[159] Table 2: Number of Long-line Vessels of Major Fishing Members registered on FFA Regional Register.

	2000 September	2001 September	2002 August	2003 June
Taiwan	87	112	181	210
Taiwanese FOC	10	6	55	40
Japan	211	202	216	195
Korea	134	163	171	168
China	43	95	151	156

[160] *PrepCon Fishing Capacity Information Paper, supra* note 154, at 7.

[161] Tomofumi Kume, Councilor, Fisheries Agency of Japan, Opening Statement at the Workshop on Compliance with the MHLC and WCPFC Resolutions, July 14-16, 2004, *in Report of the Workshop on Compliance with the MHLC and WCPFC PrepCon Resolutions*, Doc. WCPFC/PrepCon/DP.33 [hereinafter *Compliance Workshop Report*], *available at* http://www.wcpfc.int/pdf/WCPFC_PrepCon_DP33(Japan_Sapporo).pdf.

the WCPO and EPO, he contended, further deterioration of bigeye stock status would be inevitable.[162]

Shifting ground away from his concern with these alarming predictions, Kume staked out a position actually opposed to immediate measures by the WCPF Commission that would address the problem through enforcement of scientific management plans on the fishing grounds. From Japan's standpoint, he declared, prior to the Commission's instituting any new conservation and management measures, the parties to WCPF should "create the situation where all the members can stand at the common and fair starting line by reducing the fishing capacity [being] increased against the resolutions [adopted at the MHLC and WCPF PrepCon]."[163] This did not mean, he added, that Japan wished "to obstruct the development of fisheries in developing countries."[164] Rather, he asserted,

> [w]e recognize that localization of fishing vessels is one of the effective methods to that end. However, if a fishing nation localizes its fishing vessels, it should reduce its fishing license accordingly with the perspective to prevent increase in overall fishing capacity. Beyond any argument, this is not an approach a responsible fishing nation should take.[165]

Making it abundantly clear that Taiwan was the principal target of discussion and Japanese-sponsored resolutions at the Sapporo meeting, an Explanatory Note on the Japanese proposal that was circulated at the meeting stated explicitly that "[o]nly Chinese Taipei's [Taiwan] FOC purse seine vessels showed a drastic and conspicuous increase since 1999 (from 3 to 28)."[166] The Note read further: "It seems irrefutable that the seven Chinese Taipei's [DWF fishing] companies disregarded the past resolutions and

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[162] Ziro Suzuki, *Review of Stock Status of Bigeye Tuna in the Pacific*, Presentation at the Workshop on Compliance with the MHLC and WCPFC PrepCon Resolutions, *in Compliance Workshop Report*, *supra* note 161, at 22-37. Suruki's conclusion is consistent with his warning made in August 2003, when he suggested that bigeye stock in the WCPO would be overfished in near future if the present exploitation level is continued. Ziro Suzuki, *Current Fisheries and Stock Status of World Tuna Resources,* Presentation at the Organization for the Promotion of Responsible Tuna Fisheries, Aug. 27, 2003, *available at* http://www2.convention.co.jp/OPRT/oprt_local_e/e_news_030827.html.

[163] *Compliance Workshop Report*, *supra* note 161, at 15 (statement of Tomofumi Kume).

[164] *Id.* at 16

[165] *Id.* Some of the small FFA islands states indicated concern that any agreement on total capacity reduction would work to their disadvantage. Among the vessels that had moved to the WCPO to fish, several were actually licensed by FFA member countries under access agreements, or else re-flagged to FFA members such as Marshall Islands and Vanuatu. Interviews with Andrew Rich, Manager Monitoring, Control & Surveillance, South Pacific Forum Fisheries Agency, Sixth Preparatory Conference for the Establishment of the West and Central Pacific Fisheries Commission, Bali, Indonesia (Apr. 19-23, 2004).

[166] *Compliance Workshop Report*, *supra* note 161, at 40.

continued construction of new large tuna purse seine vessels" in the WCPO. Accordingly, Japan demanded that Taiwan institute a three-year period fleet reduction program, or alternatively, immediately stop purse seine fishing activities.[167] One of the main proposed actions was to call upon Taiwan's government to ensure that Taiwanese residents or companies scrap, or cease fishing with, twenty-six tuna purse seine vessels of 1000 GRT, and also to abolish fishing authorizations for those vessels by July 31, 2007.[168]

Responding to the Explanatory Note on the Japanese Proposal, Taiwan's delegates argued that Japan jumped too soon to a conclusion that there is a real problem of over-capacity in the WCPO and asked the participating countries in the process to adhere to the ceiling as well as the figure of 205 purse seine vessels established under the Palau arrangement.[169] Taiwan also argued that the resolutions cited by Japan should be applied to all countries concerned in the WCPO, instead of focusing on Taiwan discriminatively, given that fact that the resolutions in question urge "all States and other entities to exercise reasonable restraint in respect of any expansion of fishing effort and capacity in the Convention Area and to apply the precautionary approach forthwith [emphasis added],"[170] noting the first and second report of the Scientific Coordinating Group in terms of the status of stocks.[171] In addition, Taiwan argued that it is responsible only for the increase of tuna purse seine vessels since the adoption of the WCPF PrepCon resolution in October 2003, not before.[172] Even though Taiwan is responsible for a significant part of the increase of fishing capacity, the flag states more generally bear responsibility for the overall increase of fishing capacity in the WCPO during the MHLC and WCPF PrepCon negotiation process.[173]

Taiwan has stated that it cannot accept Japan's reasoning that "with respect to other States with less than five . . . vessels, fluctuation in small number can be regarded as no change or moderate development."[174] Taiwan takes the position that any expansion of the fishing capacity no matter its extent on the number of the fishing vessels is a kind of violation.[175] The exemption of the small number of increasing vessels cannot be made arbitrarily by Japan, but

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[167] *Id.* at 41.

[168] *See id.* at 47-48 (describing the Proposed Actions prepared by Japan).

[169] *Chinese Taipei Response*, supra note 152, at 1-2.

[170] WCPFC, Resolution Relating to IUU Fishing and Limits on Fishing Capacity, ¶ 1 Prep. Conf. Res. 34 (Oct. 3, 2004).

[171] *Id.*

[172] *Id.*

[173] *Id.*

[174] *Compliance Workshop Report, supra* note 161, at 39.

[175] *Id.*

must be subject to agreement by all the participants in the WCPF PrepCon process.[176]

Taiwan disagreed with the data provided by Japan in its explanatory note at the meeting. Japan counted twenty-five of the Taiwanese FOC tuna purse seine vessels that were built after the adoption of the resolution at the third PrepCon. But Taiwan argued that all of those vessels launched in the year of 1999 cannot be counted, mainly because these vessels either had already been completely built, were under construction, or their engines had been ordered prior to February 1999.[177] Taiwan suggested that both the Japanese and Taiwanese tuna trading companies must bear the equal responsibilities in buying tuna caught by the FOC purse seiners, given the fact that there are actually four traders, including the Japanese Ito Chu Corporation and Makurazuki Fisheries Cooperative Association that are trading with sixteen FOC purse tuna vessels, the American Tri-Marine with one, and the Taiwanese FCF Fisheries Corporation with twelve.[178]

As far as the nationality of the seven Taiwanese companies is concerned, Japan argued that these companies are registered in Taiwan. However, Taiwan pointed out while these seven companies are holding Taiwan's nationality, the beneficial owners and operators are holding different legal personality under the law of Vanuatu.[179] The Japanese proposal to count the vessel of 2000 GRT class as having equivalent capacity to 1.5 vessels of 1000 GRT class was also rejected by Taiwan, mainly because the Japanese formulation has never been discussed in the PrepCon negotiation process, let alone being agreed upon by the participants concerned.[180] Finally, Taiwan made it clear that it is not entitled to exercise the jurisdiction over those FOC tuna purse seiners that are flying the flag of Vanuatu or Marshall Islands. Taiwan's action to scrap the FOC tuna purse seine vessels in question or request these vessels to cease immediately fishing in the WCPO would construct an act of unjustified interference or intrusion of the flag state's

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[176] *Id.* Given the fact that a Spanish fishing company celebrated the launch of a 2900-ton super tuna purse seine in June 2004, which claimed to be the best tuna purse seiner in the world and is likely to be deployed to the WCPO to fish under the agreement signed between the EU and Kiribati and Solomon Islands, would the EU be considered in violation of the MHLC and WCPF PrepCon resolution if four more 2900-ton class tuna purse seine are built by member states of the EU and sent to the WCPO to fish? Taiwan's argument is not without reasonable grounding. *See* James Tsai, *A Limit to Super-Seiner Construction?*, ATUNA, June 25, 2004, http://www.atuna.com/opinions/my%20opinion/Archive/Superseiner.htm (last visited Oct. 27, 2007).

[177] *Compliance Workshop Report*, *supra* note 161, at 54.

[178] *Id.*

[179] *Id.* at 55.

[180] *Id.*

exclusive jurisdiction over the vessels.[181] In accordance with the information provided by Taiwan, during the fourth MHLC (1999) and the PrepCon negotiation process in 2004, there had been seen a decrease in the number of tuna purse seine vessels only in Taiwan's and the U.S. fleets. Taiwan reduced by eight and the U.S. by sixteen. However, during the same period of time, Philippines increased by nine vessels, Spain two, China six, New Zealand four, Federated States of Micronesia five, Marshall Islands six, and Vanuatu by sixteen.[182] In conclusion, Taiwan considered the Japanese proposal to reduce the number of Taiwanese FOC tuna purse seine vessels that are operating in the WCPO at the special workshop on compliance with the resolutions adopted in the MHLC and WCPF PrepCon process biased. But it is found that the Japanese proposal were copied in the Interim Actions with very minor revision that were agreed to by the participants at the meeting and will be sent to the seventh and the last WCPF PrepCon for further discussion in December 2004.[183]

In December 2004, the Japanese delegation proposed a Fleet Reduction Program, in which it asked Taiwan to further reduce its fleet by nine purse seine vessels by July 31, 2007. Japan proposed the following method of reduction: (1) to scrap Taiwan's licensed domestic purse seine vessels or (2) to export Taiwan's licensed purse seine vessels to the other parties as replacement of these other parties' older purse seine vessels of 1000 GRT, with the latter vessels to be scrapped. In either case, Japan demanded that the reductions in number of licenses should be permanent.[184] In addition, at the same meeting, Japan submitted a document entitled "Informal Paper on Fish Laundering Activities by Large-Scale Tuna Long-line Vessels," accusing owners of Taiwan large vessels of conducting fish laundering activities, which disguised and misrepresented IUU catches as catches by licensed vessel, or as having been caught in a regulated area. Japan further charged that illegal fish laundering activities were not limited to the cases that had been documented, but were believed to be widely and constantly conducted by owners of Taiwan's LSTLVs, with what Japan contended had caused a severe negative impact on accuracy of stock assessments and on efforts to comply with management measures.[185]

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[181] *Id.* at 56.

[182] *See id.* at 58, att. II.

[183] *See* Interim Action, *Compliance Workshop Report*, *supra* note 161, at 18-19.

[184] WCPFC, Preparatory Conference for the Commission for the Conservation and Management of Highly Migratory Fish Stocks in the Western and Central Pacific, Pohnpei, Federated States of Micronesia, Dec. 6-7, 2004, *Fleet Reduction Programme*, Doc. WCPFC/PrepCon/DP.35 (Nov. 19, 2004), *available at* www.wcpfc.int/pdf/WCPFC_PrepCon_DP35(Japan_fleet_reduction).pdf.

[185] WCPFC, Preparatory Conference for the Commission for the Conservation and

Interestingly, Vanuatu and Papua New Guinea, two developing island states that are members of FFA, expressed disapproval of Japan's fleet-reduction proposal insofar as it demanded the scrapping of tuna purse seine vessels owned or operated by Taiwan nationals to the annual meeting of the WCPFC. The objections of these two small countries were based on their fear that a move in the WCPFC to reduce fleet size would impact the development of their own purse seine fishing, and more generally (by reducing tuna fishing effort, whether legal or IUU) would impact their tuna canning industries and would cut into the economic benefits they garnered from foreign investment and license fees for fishing in their EEZs.[186] In September 2005, an informal consultation (prior to WCPFC's second regular session) was held in Tokyo, and the Japanese delegation once again complained of increasing capacity of purse seine and long-line fishing vessels owned by Taiwan in contravention of the past resolutions, and accordingly asked Taiwan to reduce overcapacity immediately.[187] In December 2005, at the second regular session itself, Japan proposed again to cut Taiwan's annual tuna quota in the Central and Western Pacific; but this proposal was rejected.[188] The problem of overfishing and the pressure on stocks was not neglected, however, as the meeting decided that members' bigeye tuna catch quota for 2006-2008 should not go beyond their average catch between 2001 and 2004.[189]

B. Japan's Initiatives at Other RFMO Meetings

Japan has also presented its view of the IUU fishing and FOC problem at meetings of other RFMOs, including those managing regimes for the Eastern

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Management of Highly Migratory Fish Stocks in the Western and Central Pacific, Pohnpei, Federated States of Micronesia, Dec. 6-7, 2004, *Information Paper on Fish Laundering Activities by "Large-Scale" Tuna Longline Vessels*, Doc. WPCFC/PrepCon/DP.34 (Nov. 29, 2004), *available at* http://www.wcpfc.int/pdf/WCPFC_PrepCon_DP34(Japan_fish_laundering).pdf.

[186] WCPFC, Preparatory Conference for the Commission for the Conservation and Management of Highly Migratory Fish Stocks in the Western and Central Pacific, Pohnpei, Federated States of Micronesia, Dec. 6-7, 2004, *Papua New Guinea Position on the Sapporo Workshop Outcome*, Doc. WPCFC/PrepCon/DP.37 (Dec. 6, 2004) *available at* http://www.wcpfc.int/pdf/WCPFC_PrepCon_DP37_PNG_.pdf.

[187] Organization for the Promotion of Responsible Tuna Fisheries [OPRT], What's New, *Urgent need to address the increasing purse seine and longline fishing capacity*, Sept. 28, 2005, http://www2.convention.co.jp/maguro/e_maguro/e_news_050928.html (last visited Oct. 27, 2007).

[188] *WCPFC Vetoes Japanese Proposal to Cut Taiwan's Tuna Quota*, ASIAPULSE NEWS, Dec. 16, 2005.

[189] *See* Taiwanese Fisheries Administration, COA, in Major Measures for December 2005 (in Chinese), *available at* http://www.fa.gov.tw/chn/organization/policy/policy.php3?year_assign=94.

Tropical Pacific IATTC,[190] the Indian Ocean IOTC, and the bluefin tuna waters of the South Pacific CCSBT. As it had done at ICCAT and WCPFC meetings, Japan has proclaimed the need to combat illicit practices generally and has directed criticism specifically at IUU fishing—and in particular, criticized FOC vessels allegedly or in fact owned by Taiwanese residents or fishing companies.[191] All the while, as was later proven, Japanese-flag vessels were engaged in overfishing drastically above their quotas, with long-range damage to the bluefin stocks that experts predict will take many years to overcome.[192]

As for the CCSBT forum, at its annual session in December 1999, the Commission adopted new measures to discourage IUU fishing.[193] At the CCSBT meetings, Japan repeatedly encouraged the creation of a list of IUU fishing vessels catching southern bluefin tuna and a positive list of operators.[194] The persistence of the Japanese in focusing attention on the IUU problem as the source of danger to survival of the bluefin stocks is ironic—while voicing continual complaints about IUU operations, the Japanese fleet itself was fishing bluefin at levels as high as three times their legal quotas and was concealing information of the actual size of its landings.[195]

Japanese delegates also focused on IUU issues in the IOTC, joining with Korea and Taiwan at the 2001 meeting of that organization in a joint statement pledging to continue the reduction of tuna fishing efforts by long-line vessels.[196] In December 2003, Japan presented a report to IOTC on a set of interrelated fleet-reduction measures taken by its own government in cooperation with Taiwan aiming to eliminate the activities of IUU large-scale tuna long-line fishing vessels.[197]

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[190] *See* MAFF, *69th Meeting of IATTC Held in Manzanillo, Mexico*, Update No. 464 (Aug. 2, 2002), *available at* http://www.maff.go.jp/mud/464.html (discussing IATTC actions).

[191] *See, e.g.*, Indian Ocean Tuna Comm'n [IOTC], Resolution Establishing A List of Vessels Presumed to Have Carried on Illegal, Unregulated and Unreported Fishing in the IOTC Area (2002), Res. 02/04 (Dec. 2, 2002), *available at* http://www.iotc.org/English/resolutions/reso_detail.php?reso=22&action=print.

[192] See *infra* text accompanying notes 287-94.

[193] MAFF, *Fourth Session of IOTC Held*, Update No. 344 (Jan. 28, 2000), *available at* http://www.maff.go.jp/mud/344.html.

[194] MAFF, *Summary of Eighth Annual Meeting of the Commission for the Conservation of Southern Bluefin Tuna Held in Miyako City, Iwate Prefecture*, Update No. 430 (Nov. 2, 2001), *available at* http://www.maff.go.jp/mud/430.html; MAFF (last visited Nov. 30, 2007); MAFF *Summary of the Tenth Annual Meeting of the Commission for the Conservation of Southern Bluefin Tuna*, Update No. 523 (Oct. 31, 2003), *available at* http://www.maff.go.jp/mud/523.html.

[195] *See infra* text accompanying notes 287-94.

[196] MAFF, *Sixth Annual Meeting of IOTC Held*, Update No. 439 (Jan. 25, 2002), *available at* http://www.maff.go.jp/mud/439.html.

[197] *See* IOTC Eighth Session, Victoria, Seychelles, Dec. 7-12, 2003, *Report on the Progress*

1. IUU issues in the OECD and FAO

Whereas the focal points of conflicts and new initiatives discussed to this point in our paper were the national governments and the RFMO meetings in the tuna regions, a second front was being opened up by a major voice of the advanced industrial states, the Organisation for Economic Co-operation and Development ("OECD"). The OECD staff, and some of the ministerial offices of its member states, had begun to frame the IUU issue in much broader terms than previously. The main thrust of OECD concern was to augment regulations at seas with proposals to attack the IUU problem employing financial, commercial and regulatory instruments that could be deployed by OECD member states within their own markets.[198] A Special IUU Workshop that was organized by OECD in Paris, France in April 2004 became the occasion for a provocative head-to-head exchange between Taiwanese and Japanese delegates. Officers of the Japanese Ministry for Agriculture, Forest and Fishing presented a paper entitled "Effort of Elimination of IUU Large-Scale Tuna Longline Vessels," stating that the "[g]lobal problem of IUU tuna longline fishing was caused solely by the Taiwanese residents."[199] The authors did concede that, thanks to the implementation of the 1999 and 2003 Japan-Taiwan joint action plans and the efforts undertaken by the RFMOs, such as the establishment of positive vessel listing scheme,[200] the number of IUU LSTLVs had been reduced substantially.[201] However, they argued that "Taiwanese fishermen [had] changed the type of fishery from large-scale longline (over 24 meters) to small-scale longline (less than 23.9 meters) as well as large-scale purse seine [sic] fishery and continue catching tunas in the area where no management measures were introduced i.e. [W]estern and [C]entral Pacific."[202]

Japan, the report averred, had engaged in various bilateral consultations with several FOC states, including the Philippines, China, Indonesia,

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in the Measures to Eliminate Illegal, Unreported and Unregulated Large Scale Tuna Longline Fishing Vessels, Doc. IOTC-S-08-13-E.

[198] Organisation for Economic Co-operation and Development [OECD], Workshop on Illegal, Unreported and Unregulated Fishing Activities, *available at* www.oecd.org/document/5/0,3343,cr2649_33901_21007109_1_1_1_1,00.html; OECD, Key Observations and Findings by the Workshop Chairs, 2004, *available at* http://www.oecd.org/document/5/0,3343,en_2649_33901_21007109_1_1_1_1,00.html.

[199] Hanafusa & Yagi, *supra* note 22, at 2.

[200] This is a list of large-scale tuna long-line fishing vessels officially recognized by international tuna fishery conservation and management organizations such as ICCAT. Fish caught by vessels not listed on the positive list are banned from all international commercial through the use of the positive list.

[201] Hanafusa & Yagi, *supra* note 22, at 2.

[202] *Id.*

Seychelles and Vanuatu.[203] The discussions with the Philippines had resulted in the reduction of long-line FOC vessels owned by Philippine interests from over forty or more in 1998 to fourteen in 2004.[204] The discussions with China seem to have been less successful, with the authors stating only that "as a result of Japan-China consultations, China declared that they would terminate relations between their [FOC/IUU long-line vessels] and IUU fishermen."[205] Indonesia de-listed over forty vessels as a result of consultations.[206]

The most significant contribution of the OECD initiative was the stress that the meeting's discussions and reports placed upon the need for positive action by governments, private business interests, non-governmental organizations, and the global fishing industry itself to produce and exchange reliable information on the legality of fishing catches, landings data, and trade flows to exercise trade measures and limit the flow of investment funds into FOC ships and their operations and to exercise new controls over the "economic drivers" behind the IUU operations that were wreaking havoc with the fish stocks and producing enormous illicit profits for investors, operators, and traders in the fisheries sectors worldwide.[207] The event also reiterated the by-then standard regulatory and enforcement proposals that had been debated in other forums, including the need for: stronger RFMO regime enforcement procedures; for more attention to the social and environmental consequences of IUU fishing; and for action to eliminate abuses associated with flag of convenience operations.

At the "Technical Consultation to Review Progress and Promote the Full Implementation of the IPOA-IUU and the IPOA-Capacity" conference, Japan proposed six actions to help eliminate IUU fishing that were similar to the proposed actions made at the OECD IUU Workshop.[208] The Japanese delegation presented a document by the Fisheries Agency of Japan, *Management of Fishing Capacity and IUU Tuna Vessels*, which discussed the overall reduction in the long-line fleet capacity by both Japan and Taiwan.

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[203] *Id.* at 6.

[204] *Id.*

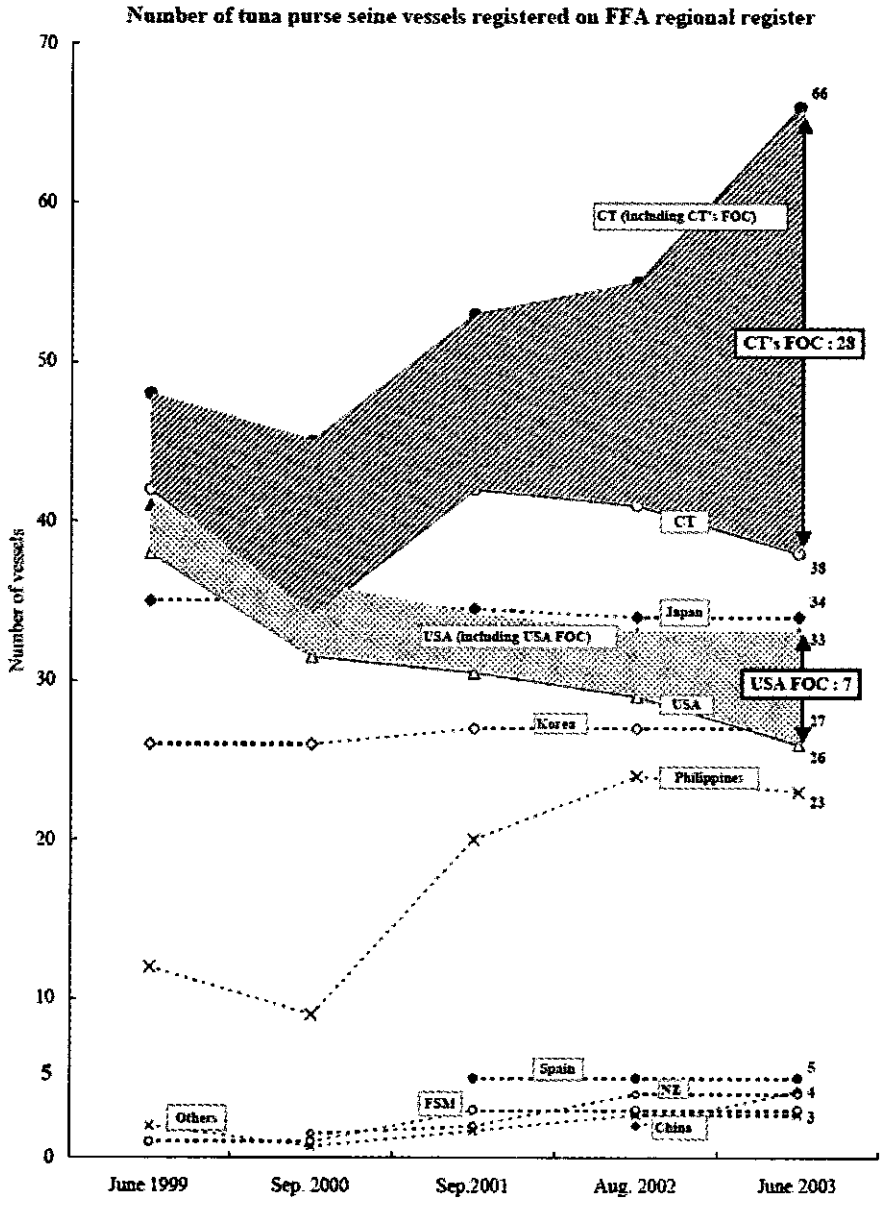
[205] *Id.*

[206] *Id.* at 6-7.

[207] Carl Christian Schmidt, Head of Fisheries Division, OECD, Paris, *Economic Drivers of Illegal, Unreported and Unregulated (IUU) Fishing, Prepared for Conference on the Governance of High Seas Fisheries and the UN Fish Agreement, St. John's, Newfoundland and Labrador* (May 1-5, 2005) (on file with authors) (discussing the meeting's tone and specific focus on new measures). *See generally* OECD, *supra* note 1 (offering a full analysis and report of the Paris conference discussion and recommendations).

[208] Fisheries Agency of Japan, Presentation at the FAO Technical Consultation to Review Progress and Promote the Full Implementation of the IPOA-IUU and the IPOA-Capacity, *Management of Fishing Capacity and IUU Tuna Vessels*, Jun. 24-29, 2004, *available at* http://www.fao.org/docrep/007/y5681e/y5681e06.htm.

Figure 1:[209]



[209] In Figure 1, "CT" stands for Chinese Taipei, which is also called Taiwan. This graph was included in an explanatory note submitted by Japan at the Workshop on Compliance with the MHLC and WCPFC PrepCon Resolutions, held July 14-16, 2004, in Sapporo, Japan. *See generally Compliance Workshop Report*, *supra* note 161.

Japan proposed six actions: (1) all states should implement IPOA-IUU and IPOA—Capacity;[210] (2) all states should implement or take action consistent with article VI of the high seas compliance agreement; (3) developed states/entities should cease large-scale fishing vessel construction; (4) all states/entities should take steps to prevent businesses from undermining effectiveness of actions; (5) all states should cooperate so as not to increase overall capacity; and (6) any state/entity whose residents had caused significant expansion should reduce capacity immediately. Japan also recommended that action be taken against beneficial owners, who were profiting from their vessels' IUU operations.

2. Cooperation with Taiwan: The OPRT and other initiatives

Japanese and Taiwanese long-line tuna fishing organizations have launched their own campaign against IUU fishing. In December 2000, the tuna industries of Japan and Taiwan contributed funds to establish the Organization for the Promotion of Responsible Tuna Fisheries ("OPRT").[211] This organization was established under the guidance of the Japanese government, whose goals were to scrap second-handed FOC vessels originated from Japan, develop a list of global list of FOC tuna long-line vessels, enhance the information collection of IUU fishing activities, and combat IUU fishing activities internationally. OPRT now includes long-line fishing organizations from Japan, Taiwan, South Korea, the Philippines, Indonesia, China, and Ecuador.[212] Its

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[210] Japan has not yet released its own National Plan of Action for either capacity or IUU fishing.

[211] *See* OPRT, http://www.oprt.or.jp (last visited Oct. 27, 2007).

[212] OPRT Participants, http://www2.convention.co.jp/maguro/e_maguro/index.html (follow "OPRT Participants" hyperlink) (last visited Oct. 21, 2007).

OPRT has stated that before the organization began, there were 250 reported FOC tuna longline vessels that were shipping their catch to Japanese markets. *See* HIROYA SANO, ARE PRIVATE INITIATIVES A POSSIBLE WAY FORWARD? ACTIONS TAKEN BY PRIVATE STAKE HOLDERS TO ELIMINATE IUU TUNA FISHING ACTIVITIES, ¶ 4 (2004) (document prepared for the OECD IUU Workshop, April 19-20, 2004).

As of March 2005, OPRT membership included eleven fishing organizations and 1425 registered vessels, accounting for over ninety percent of the world's LSTLV fleet. OPRT NEWSLETTER INT'L, July, 2005, at 4, *available at* http://www.oprt.or.jp/eng/pdf/oprt7.pdf; *see also* OPRT What's New, *Ecuador's Organization for Promotion of Responsible Tuna Fisheries (FUNDATUNA) Joins OPRT*, Feb. 10, 2004, http://www2.convention.co.jp/maguro/emaguro/e_news_040210_1.html.

main stated purpose is to combat IUU fishing.[213]

OPRT maintains its own publicly viewable positive list of vessels.[214] It not only lists vessel name and ownership but also lists the regions in which the vessels operate. Such a composite list is important because it demonstrates that many vessels do not confine their fishing practices to one region or even one ocean.[215] It also exemplifies the need to have interactive cooperation between and among RFMOs in order to effectively manage marine fisheries.[216] While it is extremely doubtful that positive lists have in fact eliminated IUU

Table 3: OPRT-Registered Fishing Vessels

OPRT Members	Vessels
Japan Federation of Japan Tuna Fisheries Cooperative Associations Japan Tuna Fisheries Association National Ocean Tuna Fishery Association National Offshore Tuna Fisheries Association	434
Taiwan Deep Sea Boatowners and Exporters Association	600
Korea Deep Sea Fisheries Association (Tuna Long-line Fisheries Committee)	172
OPRT Philippines Inc.	18
Indonesia Tuna Association (ASTUIN)	14
China Fisheries Association (Distant Water Fisheries Branch)	113
FUNDATUNA (Ecuador)	5
Legitimized vessels (Vanuatu and Seychelles registered)	69
Total	1425

See OPRT NEWSLETTER INT'L (OPRT, Tokyo, Japan), July, 2005, *available at* http://www.oprt.or.jp/eng/pdf/oprt7.pdf.

[213] SANO, *supra* note 212, ¶ 1.

[214] *See* OPRT Database, http://www2.convention.co.jp/cgi-bin/maguro/TF1_sender_creator.cgi (last visited Oct. 21, 2007).

[215] Many vessels on the list operate in both the Atlantic Ocean and the Pacific Ocean.

[216] OPRT has advocated the positive list scheme and claims that because of such lists, "tuna harvested by IUU/FOC vessels is unable to be traded in international markets." *OPRT*, OPRT PROMOTES RESPONSIBLE TUNA FISHERIES TO ENSURE THE SUSTAINABLE USE OF TUNA RESOURCES, http://www2.convention.co.jp/maguro/e_maguro/pdf/oprt_new.pdf (last visited Oct. 21, 2007).

fishing practices in the tuna fisheries, they do seem to be a step in the right direction.

On April 23, 2003, Japan and Taiwan established a new joint action plan on cooperation in management of large scale tuna long-line fisheries.[217] In accordance with the new plan, Taiwan agreed to take necessary measures to intensify the control of its residents that invest in or otherwise support or engage in IUU fishing. The measures to be taken by Taiwan include: (1) requiring its residents to acquire prior authorization to operate tuna fisheries on the high seas; (2) restricting export of LSTLVs to those countries which have been identified as involved in IUU fishing activities; (3) denying access of IUU fishing vessels to Taiwanese ports; and (4) imposing sanctions, if necessary and appropriate, to violators of fish laundering, in accordance with applicable law.[218]

Japan, in return, promised to promote scrapping the remaining IUU LSTLVs built in Japan but owned and/or operated by Taiwanese residents. Taiwan pledged to promote re-registration of those IUU LSTLVs built in Taiwan to its registry, while maintaining the policy of vessels replacement. Both Taiwan and Japan cooperated in the legalization of the IUU LSTLVs of Seychelles and Vanuatu flags.[219]

Meanwhile, Japanese and Taiwanese interests were moving to commit themselves to specified fishing-effort reductions. Thus, the

> Federation of Japan Tuna Fisheries Co-operative Associations and Taiwan Deep Sea Tuna Boat Owners and Exporters Association concluded an agreement in Tokyo on June 22, 2004, specifying that "the two organizations will cooperatively work for the reduction in the number of large-scale tuna longline fishing vessels and that Taiwan will make maximum efforts to keep the amount of frozen sashimi tuna caught by Taiwanese fishing vessels exported to Japan below 99,000 tons."[220]

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[217] Japan-Taiwan Joint Action Program to Eliminate IUU Large-Scale Tuna Longline Vessels (2003) (on file with authors).

[218] *Id.*

[219] Japan agreed to take necessary measures to intensify the control of its residents and request its residents not to render assistance to the activities of IUU fishing. *Id.*

[220] OPRT, What's New, *Cooperation in Efforts Toward the Reduction of the Longline Fishing Vessels*, June 28, 2004, http://www2.convention.co.jp/maguro/e_maguro/local/e_news_040628_2.html (last visited Oct. 27, 2007). As noted earlier, however, the flow of exports from Taiwan to Japan went forward at levels far above this agreed tonnage. *See* Yi, *supra* note 81 and accompanying text.

C. Taiwan's Actions and Policies Regarding Its Tuna Fleet

In 1985, Taiwan had seventy-five LSTLVs, in comparison with South Korea's 200 and Japan's 773.[221] In addition, South Korea owned 150 long-line vessels flying the flag of convenience.[222] It has been suggested that the issue of FOC fishing began with the Korean practice in 1980s. By 1999, Taiwan's tuna long-line vessels increased to 553, together with about 210 FOC tuna long-line vessels. However, the size of the Japanese tuna long-line fleet had shrunk to 528, as a result of a voluntarily cut in 1998 and 1999 of 130 long-line vessels, in accordance with the policy enunciated in the IPOA-Capacity document.[223] It is against this background that in the 1990s, Japan exported about 130 second-hand large-scale LSTLVs, and Taiwan built and exported about 110 LSTLVs. Most of these vessels were registered in countries with open registry systems such as Belize, Cambodia, Honduras and Equatorial Guinea, and thereafter, these vessels became the main source of IUU/FOC fishing activities conducted in different areas of the world's oceans.

In addition to the cooperative efforts undertaken in accordance with the 1999 and 2003 Japan-Taiwan joint action plans, a wide range of domestic measures have also been taken by the Taiwanese government to eliminate IUU fishing. In 2001 and 2003, Taiwan amended its fisheries law and regulation that had prohibited importation of any type of fishing vessels into Taiwan, for the purpose of allowing the Taiwan-built IUU/FOC vessels to obtain Taiwanese registration.[224] Later on, the procedure for the importation of non-Taiwanese registered fishing vessels, built in Taiwan and operated by the Taiwanese residents overseas was promulgated, allowing these Taiwan-built IUU/FOC LSTLVs to apply for re-registration.[225] Those vessels that are in the

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[221] *See, e.g.*, COUNCIL OF AGRIC., TAIWAN REPUBLIC OF CHINA, FORTY YEARS OF TAIWAN'S FISHERIES: SPECIAL VOLUME 47 (1993).

[222] *Id.*

[223] *Id.* at 338. Major reasons for the rapid growth of Taiwan's LSTLVs include the export of the Japanese second-handed tuna long-line vessels to Taiwan, the increasing demand for good prices in the Japanese market for tunas, and a relaxation Taiwan's restrictions on new vessel construction in 1988, which had allowed the construction of new long-line and purse seine vessels in the over 700 GRT class. COUNCIL OF AGRIC., *supra* note 221, at 24.

[224] Huang Xian-wen & Chen Yu-chen, *Responses to the Call to Combat IUU Fishing Activities*, Fishery Extension No. 188, 12-23 (in Chinese); *see also* FISHERY ADMINISTRATION, COUNCIL OF AGRIC., TAIWAN, NEW IMAGE FOR TAIWAN'S FAR SEAS TUNA LONGLINE FISHERY, *available at* http://www.fa.gov.tw/eng/media/text/nitfstuna.txt; Tsay Tsu-Yaw, *A Study of the Optimal Scale for Deep Sea Fishery and Managment—Tuna Fishery*, TAIWAN INST. OF ECON. RES., Jul. 22, 2005, at 9-14; Tsay Tsu-Yaw, A Study of the Developing Trend of IUU Fishing and Possible Construction of a Managment System to Govern the Taiwnese-Operated FOC Long-line Tuna Fishing, chs. 3-4 (May 2005) (unpublished Ph.D. Thesis, Graduate Institute of Applied Economics, National Taiwan Ocean University).

[225] Xian-wen & Yu-chen, *supra* note 224.

process of applying for re-registration are required to submit catch reports and to install advanced electronic monitoring systems ("VMS") onboard.[226]

These measures and policies were especially welcome from the standpoint of Japan, which all the while was continuing to press assertively, as we have seen, to get Taiwan to reduce the number and capacity of its tuna purse-seine vessels operating in the WCPO. It was clearly the case that, without such reductions by Taiwan, Japan could lose its comparative advantage in the central and western Pacific Ocean area's tuna fishery, especially because the number of Taiwan's tuna fishing vessels (in particular, purse seiners) has become larger than the number of Japan's tuna vessels competing in that ocean area.[227]

1. Progress—and questions: The Western and Central Pacific Fisheries Convention

In September 2000, both Japan and South Korea voted against the adoption of the WCPF Convention. Japan considered the Convention biased because of alleged discrimination against the interests of some DWF nations, and Japan charged that the agreement focused too much on protecting the fisheries interests of the coastal states, namely, the Pacific island countries. The inclusion of the precautionary principle in the WCPF Convention[228] was also seen by Japan as problematic, for it was seen as a doctrinal tool that could be wielded by the Commission to establish tighter control and smaller quotas of tuna in the convention's ocean region. The Japanese position also focused on the controversial question of how the treaty would affect traditional immunities of vessels at sea, as they had been protected by the "freedom of the seas" rules regarding navigation on the high seas. Japan suggested that before it would accept the terms of the WCPF Convention, revisions must be made to provisions relating to boarding and inspection[229] and the regional observer program.[230] Japan also objected to the convention's prescribed procedures for the settlement of disputes[231] and to provisions regarding non-parties to the Convention.[232] Japan also raised questions as to the overlapping management

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[226] *Id.*

[227] Moreover, there was the foreseeable possibility that by establishing its membership (acceding to the Convention) first, Taiwan might be in a position to assure continued dominance in size of fleet over Japan in the new regulated regime.

[228] Western and Central Pacific Fisheries Comm'n, Convention on the Management of Highly Migratory Fish Stocks in the Western and Central Pacific Ocean, art. 6, Sept. 5, 2000, 40 I.L.M. 278 [hereinafter WCPF Convention].

[229] *Id.* art. 26.

[230] *Id.* art. 28.

[231] *Id.* art. 31.

[232] *Id.* art. 32.

competence of CCSBT (which regulated bluefin tuna) and of the new WCPF Commission.[233] Two years later, however, a dramatic reversal came from Japan when its delegates introduced a resolution at the third WCPF PrepCon, reversing its position on the treaty and apparently announcing its acceptance of the WCPF Convention.[234]

2. Taiwan's responses to Japanese demands

Taiwanese officials have responded to Japan's demands in a number of ways. First, the Taiwanese government has indicated a willingness to take cooperative actions with the RFMOs and individual countries concerned. Second, as has been mentioned, Taiwan has adopted domestic measures and cooperative actions with the countries concerned, in particular Japan, through bilateral agreements to eliminate IUU fishing. Third, it has declined to accept without resistance Japan's pressures for fleet reduction of tuna vessels, responding that such actions should be based on fairness and real concern over conservation and management of tuna resources, as opposed to being instruments (to Japan's advantage) of market and commercial competitiveness. Implicit in this position, of course, is the idea that to resist giving Japan a competitive advantage works in favor of Taiwan's own competitive position in the fishing areas. Fourth, Taiwan has acknowledged that the fisheries' interests of the developing states of the region—and, in particular, the small Pacific island countries—must be taken into account in framing any conservation and management measures by the WCPC Commission, which became active in December 2004. Fifth, Taiwan has accepted that the monitoring, control and surveillance ("MCS") measures adopted by the FFA members—and also the fisheries management agreements or arrangements concluded between the FFA member countries and other foreign countries—must be respected. Sixth, Taiwan has taken as intransigent a position on flagging rules under traditional freedom-of-the-seas concepts as Japan has done with respect to vessel boarding and inspection on the high seas. Taiwan denies that it is appropriate to ask any nation (as it has been pressed to do) to exercise flag state jurisdiction over any vessel if it is not clearly entitled to such jurisdiction

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[233] *See* Guo Chin-Lao, *Japan's View on WCPFC Convention*, translation of the article written by Komazu Masayuki, *International Fisheries News*, (Taiwan), 2002, at 42-51 (in Chinese) (on file with authors).

[234] The Japanese now also explicitly acknowledge a need to apply the precautionary approach to fisheries management and reiterated its views as to the importance of limiting the expansion of fishing efforts in the WCPO prior to the entry into force of the WCPF Convention. *See* WCPFC, Resolution of the Preparatory Conference Relating to Illegal, Unreported and Unregulated Fishing and Limits on Fishing Capacity, Prep. Conf. Res. 22 (Nov. 22, 2002), *available at* http://www.wcpfc.int/pdf/WCPFC_PrepCon_22(IUU_Resolution).doc.

under the rules of customary international law. And finally, Taiwan insisted that a difference must be recognized between the legal personality of fishing companies, on the one hand, and share-holders of fishing entities, on the other.

Contrary to the accepted wisdom of ocean law academics and other experts, Chu-lung Chen, President of Ming Dar Fishery Corporation in Taiwan, views that the "the IUU fishing problem does not necessarily link with FOC fishing vessels."[235] Perhaps not surprisingly, Chen's company has taken no actions to prevent IUU fishing. Chen also takes the view that a non-governmental organization of some sort is the best type of agency capable of addressing the IUU fishing problem. In support of this view, he contends that domestic political influences are of overwhelming influence when governmental or inter-governmental organizations address the IUU fishing problem. As far as multilateral international action is concerned, he believes that RFMOs are potentially, at least, capable of preventing IUU fishing because they can adopt some recommendations or resolutions, such as recommending trade sanctions, if they can manage to mobilize the necessary support from their members. The main drawback to reliance upon RFMOs in combating IUUI, he contended, is the classic problem: the interference of politics and economic rivalry with respect to garnering the benefits from a management regime.[236]

A different approach is expressed in the response from Mr. James Tsai, the President of Fong Kuo Fishery Co. Ltd., in Taiwan. He strongly opposes unlimited construction of super purse seiners, a trend that he argues has the potential to ruin the sustainability of the fisheries. He places the focus on the Forum nations and their licensing practices. Tsai asserts that because FFA member countries are issuing fishing licenses to the newly constructed super purse seine vessels, these vessels have legal status when they fish in waters regulated by WCPO. He calls upon the Pacific Island states to seriously consider feasible means to stop the construction and to reduce utilization of super purse seine fishing vessels. He also declares that the FFA should hold the line on expansion by maintaining the 205 tuna boat ceiling as agreed to by the parties concerned under the Palau Arrangement. For Taiwan itself, he suggests that the government should consider imposing a ban on export of any super purse seine vessel overseas. As for Japan, he suggests that actions should be taken to ban the export of main engines and components that are sold to be used in super purse seiners and contends that "all the engines and main parts of the Taiwanese super purse seiners are produced and imported from Japan."[237]

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[235] Questionnaire response from Chu-lung Chen, President, Ming Dar Fishery Co., Ltd. (May 2004) (on file with authors).

[236] *Id.*

[237] Tsai, *A Limit to Super-Seiner Construction?*, *supra* note 176.

This sampling of leadership opinion is indicative in a small but telling way of how the continuing bilateral tensions between Japan and Taiwan reflects—and also certainly serve to complicate—the larger complex of competitive industrial and national interests that are at play in the ocean fisheries areas so badly threatened today by the impact of IUU operations and by overfishing practices that the RFMOs are designed to bring under effective control.

IV. Overcapacity and the IUU Issue in the Matrix of Japan's Ocean Resource Policies

A. Trade Restrictions and Other Measures Taken by Japan to Prevent IUU Fishing

One major issue that has yet to be effectively addressed by the global community is effective control of the imports of IUU fishing catch in the markets of receiving nations. Japan is the world's largest importer of marine fish and fish product. Moreover, it represents the leading import market for the highest-value fish, including tuna (especially bluefin) of sashimi quality.[238] In 1999, it was estimated that IUU fishing vessels caught approximately 40,000 tons of tuna sold in Japanese markets.[239] The World Wildlife Fund reported research in 2004 indicating that illegal fishing for bluefin tuna in Europe is intimately linked to the incentive represented by the profitable Japanese market demand.[240]

Japan has adhered to RFMO decisions to ban fish imports from countries identified as undermining regional management schemes. In line with ICCAT policy on sanctions, in June 1996 Japan enacted the Special Law on Measures to Reinforce Conservation and Management of Tuna Resources.[241] This law resulted in the ban on importation of Atlantic bluefin tuna from Belize and Honduras (two FOC states) and was enacted in direct response to ICCAT recommendations.[242] Also, under this law, all frozen tuna (excluding albacore) transporters or importers were required to report the fishing vessel name, where the fish was caught, the flag, and information about the vessel or

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[238] For example, in 2001 a greater than 4000 pound bluefin tuna sold for over $170,000 in the Japanese fish market. *See* Scotman, *Bluefin Tuna Under Threat as Fishermen Exploit Quota Loophole*, Nov. 7, 2003, *available at* http://www.thescotman.scotman.com/index.cfm?id=1214612003; Fackler, *supra* note 50.

[239] *See* Komatsu, *supra* note 53, ¶ 11(f).

[240] *See WWF Ties Illegal Tuna Fishing in Europe to Japan Demand*, Japan Times, July 3, 2004, *available at* http://search.japantimes.co.jp/cgi-bin/nn20040703a9.html.

[241] *See* Komatsu, *supra* note 53.

[242] *Id.* ¶ 16(a).

catch owner.[243] For example, in July 2003, Japan stated that it would ban port calls by fishing vessels flagged to Bolivia and Sierra Leone based on ICCAT decisions.[244] After creation of an ICCAT positive list of bluefin tuna farming facilities ("farming facilities authorized to operate for farming of bluefin tuna caught in the Convention area"), Japan implemented trade restrictive measures to prevent importation of non-authorized farmed bluefin tuna.[245] Japan also requires all fish products to be labeled with place of origin information.[246] Japan is considering the adoption of the observer program, in which observers will be sent to the Japanese super frozen tuna transshipping vessels to check the transshipment and landing of the tuna catch and to help deal with the problem of "fish laundering" and other IUU fishing activities. In addition, Japan is considering to setting a DNA inspection mechanism, which, again, is aimed to deal with the problem of "fish laundering."[247]

Nonetheless, despite such trade barriers, fish caught illegally by Japanese flag vessels (either landed directly or transshipped at sea to other vessels, usually FOC ships) is still quite prevalent in Japanese markets. The Russian island, Sakhalin, north of Japan, is known for illegal fishing problems.[248] In response to fishing quotas and taxes, Russian fishing boats falsify records and take catches directly to Japan and South Korea. Thus the official Russian figures for volume of seafood delivered to Japan are a billion dollars less than the amount Japanese traders report.[249] In addition to monitoring trade, Japan makes some effort to monitor its nationals. Japanese nationals must get permission from the government before working on a vessels flagged to a state other than Japan.[250] Persistent subsidies give fleets breaks on costs such as fuel cost, vessel construction, and insurance. FAO states that world subsidies equal $15 billion per year (whereas annual trade in fish products is $55

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[243] *Id.* ¶ 16(d).

[244] *See Ban on Port Calls by IUU Tuna Fishing Vessels*, OPRT NEWSLETTER INT'L (OPRT, Tokyo, Japan), Jul. 2003, *available at* http://www.oprt.or.jp/eng/pdf/news_e_no1.pdf. The ban on Equatorial Guinea, Cambodia and Sierra Leone was lifted at the 2004 Annual ICCAT meeting. *See Big-Eye Overfishing Addressed*, OPRT NEWSLETTER INT'L (OPRT Tokyo, Japan), Dec. 2004, *available at* http://www.oprt.or.jp/eng/pdf/oprt6.pdf.

[245] OPRT, *ICCAT Announced Positive List for Tuna Farming*, OPRT NEWSLETTER INT'L (OPRT, Tokyo, Japan), Dec. 2004, *available at* http://www.oprt.or.jp/eng/pdf/oprt6.pdf; *see also* OPRT, *Trade Management Measures for Farmed Tuna*, http://www2.convention.co.jp/maguro/e_maguro/local/e_news_041203_1.html.

[246] *See* Komatsu, *supra* note 53, ¶ 16(h).

[247] Wu Kuo Chin, *Excerpt and Translation of International News Reports*, Feb. 15, 2005 & Mar. 15, 2005, *available at* http://www.tuna.org.tw (in Chinese).

[248] *See* Sabrina Tavernise, *A Violent Death Exposes Fish Piracy in Russia*, N.Y. TIMES, June 27, 2002, at A3.

[249] *See* Yuzhno-Sakhalinsk, *Fish Smugglers Seem to Reap Grim Revenge on Russian General*, N.Y. TIMES, May 29, 2002, at A11.

[250] *See* Komatsu, *supra* note 53, ¶ 16(e).

billion). Japan provides $3 billion, or a fifth of the world total. According to one study, the most heavily subsidized fishing industries are in the European Union, Japan, and China.[251]

B. Japan's Efforts to Combat IUU Fishing Within Its Own EEZ Waters

Not only is Japan pushing for measures to reduce IUU fishing on the international front, it is combating IUU fishing within its own waters.[252] Beginning in 2004, the Japanese government has published reports of IUU fishing incidents occurring in domestic waters. Examples of the actions that have been covered include one particular dangerous incident in April 2004, when a South Korean bottom gill-net fishing boat was located within Japan's EEZ and thought to be engaged in illegal fishing.[253] When confronted, the vessel rammed the Japanese enforcement vessel and escaped.[254] Japan has seized several foreign vessels within its claimed EEZ, including: a Chinese fishing trawler within Japan's EEZ, charged with falsifying its log book;[255] a Taiwanese gillnet vessel, charged with operating without permission;[256] a South Korean trawler, charged with falsifying its log book;[257] and a Taiwanese trawler, charged with operating without permission.[258] From January 2000 through July 2004, Japan reported seizing a total of 135 foreign fishing

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[251] Oceana, UNEP Workshop, Apr. 26-27, 2004, *EU Fisheries Policy is Heading in the Right Direction—Is Subsidy Policy on the Same Track?*, at 2, *available at* http://www.oceana.org/fileadmin/oceana/uploads/europe/reports/unep_workshop_fisheries_subsidies.pdf (citing Ragnar Arnason, Workshop on overcapacity, overcapitalization and subsidies in European Fisheries, Portsmouth United Kingdom, Oct. 28-30, 1998, *Fisheries Subsidies, Overcapitalization and Economic Losses*, *available at* www.hi.is/~ragnara/documents/ Papers/paper-fin.doc.

By contrast, the U.S. provides $150 million (according to World Resources Institute). *Id.*; *see also* William J. Broad & Andrew C. Revkin, *Has the Sea Given Up Its Bounty?*, N.Y TIMES, July 29, 2003.

[252] *See* Joon-Suk Kang, *The United Nations Convention on the Law of the Sea and Fishery Relations between Korea, Japan and China*, 27 MARINE POL'Y 111 (2003) (describing several boundary disputes in demarcating the exclusive economic zones for Japan, South Korea, and China).

[253] MAFF, *Report on the Collision Between a South Korean Bottom Gill-Net Fishing Boat and a Fisheries Agency Fishing Control Ship*, Update No. 545 (May 21, 2004), *available at* http://www.maff.go.jp/mud/545.html.

[254] *Id.*

[255] MAFF, *Succession of Incidents Involving Illegally Operating Foreign Fishing Vessels*, Update No. 550 (June 25, 2004), *available at* http://www.maff.go.jp/mud/550.html.

[256] *Id.*

[257] MAFF, *Seizures of Illegally Operating Foreign Fishing Vessels in July, 2004*, Update No. 559 (Sept. 10, 2004), *available at* http://www.maff.go.jp.

[258] *Id.*

vessels.[259] Japan also reported that two of its own fishing vessels were seized within the South Korean EEZ and fined for falsifying log book information.[260]

Regarding its own fleet, Japan has some monitoring programs in place.[261] Starting in 2002,[262] some vessels were monitored via a satellite vessel monitoring system ("VMS"), as a result of access agreements for their fishing operations in the EEZs of other states.

C. Japan's Resistance to Certain Conservation Measures

Japan has been playing an active role in bringing up the issue of IUU fishing, in particular the problem of IUU/FOC fishing, to the discussions in the WCPF PrepCon negotiation process. However, two years before the adoption of the IOPA-IUU, Japan opposed the suggestion to adopt the precautionary approach at the Multilateral High-Level Conferences on South Pacific Tuna Fisheries ("MHLC"). At the fifth MHLC, Japan "described the precautionary approach as a 'dangerous concept' because it would preclude fishing except in ideal conditions."[263]

In contrast to its policy of implementing fleet reduction, Japan has proven reluctant to burden its own fleet with regulations that would advance conservation of the marine environment. For example, a 1993 draft IATTC plan for managing fishing capacity in the Eastern Pacific area contained language that Japan wanted modified.[264] First, the recommended modifications would have watered down the language by deleting all references to actions that "shall" be taken, substituting the word "should."[265] Second, the Japanese proposed modifications to remove language that referred to

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[259] *See id.*

[260] MAFF, *The Matter of the Seizure of Japanese Fishing Vessels in South Korean Waters*, Update No. 551 (July 2, 2004), *available at* http://www.maff.go.jp/mud/551.html.

[261] IATTC, Permanent Working Group on Compliance, *A Satellite-Based Vessel Monitoring System (VMS) for IATTC Parties*, ¶ 3.2, Doc. IATTC-70-09 (June 24-27, 2003), *available at* http://www.iattc.org/PDFFiles/IATTC-70-09%20VMS%20for%20IATTC.pdf.

[262] This 2002 policy did not, however, provide for such monitoring equipment of Japanese vessels fishing in Japan's own EEZ waters. *Id.*

[263] Katherine Anderson, *The New Fisheries Convention: A Turning Point for Oceania*, (*citing* Sandra Tarte, *Negotiating a Tuna Management Regime for the Central and Western Pacific: Policy Options and Strategies for Pacific Island States*, seminar at the Australian National University (Aug. 1998)). Later, however, Japan assumed a different posture, formally acknowledging that the precautionary approach principle is important. *See supra* note 234 and accompanying text.

[264] IATTC, *Draft Plan for Regional Management of Fishing Capacity*, Doc. CAP-7-05 EPO Capacity Plan (June 2003), *available at* http://www.iattc.org/PDFFiles2/CAP-7-05%20EPO%20Capacity%20Plan.pdf.

[265] *Id.*

conservation of anything other than the fish stocks.[266] In discussing conservation, the original language stated that "[t]he management of fishing capacity should facilitate conservation and sustainable use of tuna stocks in the [Eastern Pacific Ocean] and the protection of the marine environment."[267] Japan proposed to remove the phrase "and the protection of the marine environment."[268] Also, in a section discussing review and adjustments to the plan, the original language stated that "[t]he overall capacity target should be reviewed regularly to ensure that it takes into account ecosystem considerations and that it remains in balance with the available fishery resources and management objectives."[269] Japan's proposed modification called for deleting the phrase "that it takes into account ecosystem considerations and."[270]

In the WCPF preparatory conferences, too, Japan's treatment of IUU issues was often focused upon modifying assertive language, and the Japanese delegation apparently sought to divert attention from issues (other than overcapacity) that many other parties regarded as central to effectively addressing the IUU threat. Thus the FFA criticized Japan's proposals as being "one-sided," because Japan referred

> only to the issue of [flag of convenience] vessels and not to IUU fishing by vessels of Preparatory Conference participants States in national waters within the Convention Area—an issue on which Japan appears to have been less cooperative than most other fishing States, as indicated by Japan being the only major fishing States that has failed to cooperate in the provisions of log-sheet data for high seas fishing and by the relatively low level of observer coverage on Japanese vessels.[271]

Japan stated in July 2002 that, consistent with its stand on maintaining traditional immunities for vessels on the high seas,[272] it did not agree with a proposed Convention provision regarding the boarding and inspection on the high seas by a third party, because "rights and obligations of flag states on the high seas should be ensured as a matter of principle."[273] Again, a reversal, or at least modification, of Japan's basic position followed, and in July 2005 Japan finally acceded to the convention and became a member of the WCPFC, leaving its fishing vessels potentially liable to limited boarding and inspection at sea.

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[266] *Id.* ¶¶ 10(d), 30.

[267] *Id.* ¶ 10(d).

[268] *Id.*

[269] *Id.* ¶ 30.

[270] *Id.*

[271] *Id.* at 12-13.

[272] *See supra* text accompanying notes 37-38.

[273] MAFF, *The 21st General Assembly of the Association of Pacific Island Legislatures Held*, *supra* note 49.

As mentioned above,[274] under guidance of the Japanese government the long-line tuna operators of both Japan and Taiwan joined forces to sponsor the OPRT trade organization, which now has expanded its reach and is supported by the long-liner tuna fishing industry groups in Korea, the Philippines, China, Indonesia, and Ecuador.[275] Conservation is OPRT's stated goal, but the main thrust of arguments in its publications is negative and aimed at the purse seiner industry, which is in competition with long-lining, and which OPRT condemns for relying on what it claims is a destructive fishing technology.[276] By contrast, the OPRT public statements and publications praise long-lining as "a resource-friendly fishing technique," [277] a claim with which few fishery scientists or conservationists would agree. In its advertising pamphlets OPRT promotes the notion that the tuna long-lining industry is an environmentally friendly industry.[278] At a recent Japanese long-lining conference in 2003, Japanese fishing industry members, consumers, academics, and administrators issued the Kesennuma Declaration.[279] This declaration denied claims that long-lining is threatening sea turtles and sharks, despite decisions by the Convention on International Trade in Endangered Species of Wild Flora and Fauna ("CITES") to list two shark species as endangered; the CITES action, this declaration asserted, was an "inappropriate application of the Convention" under which the action was taken, further declaring that "excessive restrictions . . . disregard the fact that many of the shark resources are abundant and can

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[274] *See supra* text accompanying notes 211-13.

[275] *See* Table 3, *supra* note 212.

[276] *Governments, Fishing Industry Renew Their Strong Will to Promote Responsible Management of Tuna Fisheries at WTLFC*, OPRT NEWSLETTER INT'L (OPRT, Tokyo, Japan), Sept. 2003, at 1-2, *available at* http://www.oprt.or.jp/eng/pdf/news_e_no2.pdf (stating that the World Tuna Long-line Fishery Conference "expressed concern about a sharp increase in recent years in the number of large-scale purse-seine fishing vessels that are inflicting mounting pressures on marine resources, especially on juvenile fish"); *Scientist Stresses the Need to Control Fishing Efforts Including Purse-Seine and Farming*, OPRT NEWSLETTER INT'L (OPRT, Tokyo, Japan), Sept. 2003, at 2-3, *available at* http://www.oprt.or.jp/eng/pdf/news_e_no2.pdf. The article summarizes Dr. Ziro Suzuki's lecture, pointing out that the purse-seining accounts for sixty percent of the world tuna catch and that long-lining "has not increased substantially except for [ten] years in early developing period of this fishery." *Id.* OPRT also attacks tuna farming in a recent newsletter through an interview with Dr. Makoto Miyake, a former ICCAT assistant executive secretary. *See Warning Against Rapidly Expanding Tuna Farming*, OPRT NEWSLETTER INT'L (OPRT, Tokyo, Japan), Jun. 2004, *available at* http://www.oprt.or.jp/eng/pdf/oprt4c.pdf. This is not to deny that the interview may accurately reflect the environmental issues and concerns associated with tuna farming.

[277] *Longlining is a Resource-Friendly Fishing Technique: Joint Declaration at Kesennuma Symposium*, OPRT NEWSLETTER INT'L, (OPRT, Tokyo, Japan) Sept. 2003, *available at* http://www.oprt.or.jp/eng/pdf/ news_e_no22.pdf.

[278] *See* OPRT, *Tuna Longlining Meets the Challenge*, *available at* http://www2.convention.co.jp/maguro/e_maguro//pdf/oprt4.pdf.

[279] *See Longlining is a Resource-Friendly Fishing Technique*, *supra* note 277, at 4.

support sustainable use."[280] Also, the declaration states that appeals for moratoria on tuna long-lining due to sea turtle bycatch "negat[e] the principles of sustainable use," and reflected "a tendency to promote unnecessary restrictions in the absence of scientific evidence . . . ."[281] Such assertions by OPRT and other Japanese fishing interests are not necessarily inaccurate in every instance; what is noteworthy for purposes here, in an assessment of how the problem of achieving sustainable tuna fishing is being debated, is that OPRT consistently points out the environmental problems associated with fishing activities other than long-lining, while insistently denying that long-lining does any damage to the marine environment and resources.[282]

D. Regulation and a Resource Crisis in the Bluefin Tuna Regime

Japan has engaged in long-line fishing for southern bluefin tuna for more than fifty years.[283] Its catch peaked in the early 1960s at 75,000 metric tons —more than an order of magnitude more than Japan's current allocation of just over 3000 metric tons.[284] Catch declined considerably through the 1980s and Australia, Japan, and New Zealand engaged in trilateral management discussions in the mid-1980s to adopt voluntary catch limits.[285] This relationship was formalized in 1994 with the creation of the CCSBT.[286]

Japan is a member of the Commission for the CCSBT, which administers the bluefin tuna management regime; and in this forum too, there has been a long history of tension with regard to the Japanese position on sustainable-management issues. In the mid-1990s, a conflict arose between Japan and Australia and New Zealand over scientific stock estimates—a dispute that found its way, famously, to the International Tribunal for the Law of the Sea ("ITLOS"). Japan had argued repeatedly at CCSBT meetings (as it did during litigation in ITLOS) that the stock was larger than the scientific board had calculated and therefore the total allowable catch should be increased. From 1998 to 2000, Japan engaged in an "experimental fishing program," and in

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[280] *Id.*

[281] *Id.*

[282] The position that OPRT and Japanese delegates take regarding the problems with purse-seining methods are not surprising considering the fact that long-line vessels catch larger fish, which go for a higher price on the sashimi market. *See* Hanafusa & Yagi, *supra* note 22, at 1.

[283] FAO, REVIEW OF ASPECTS OF SOUTHERN BLUEFIN TUNA BIOLOGY, POPULATION, AND FISHERIES (A.E. Canton ed., 1991), *available at* http://www.fao.org/DOCREP/005/T1817E/T1817E15.htm.

[284] *Id.*

[285] *Id.*

[286] CCSBT, About the Commission—Origins of the Convention, http://www.ccsbt.org/docs/about.html (last visited Nov. 10, 2007).

retaliation Australia and New Zealand closed their ports to Japanese vessels and sought a solution via ITLOS.[287]

In the eyes of Australia and New Zealand, Japan was engaged in illegal and unregulated fishing by engaging in commercial fishing operations under the guise of science.[288] The "experimental" catch was not trivial. In its first year of operation, the "experimental" program resulted in the additional catch of 1464 tons of southern bluefin tuna above its designated allocation. By restricting its experimental harvest to the areas where fish stocks were known to be present, neglecting large areas where stocks were apparently depleted—or at least not in evidence in commercially viable volume—Japan was able to claim that stocks were in healthy enough condition to warrant larger annual quotas, contending that to obtain broader coverage of the migratory area, and thus lend its results scientific validity, was too expensive to be practical.[289] Japan ended this program in 2000, but the issue of total allowable catch continued to plague the CCSBT. From 1998 to 2003, the members disagreed on the total allowable catch and allocation of that catch, leading to voluntary management of the resource.[290] More recently, Japan was asked by an international committee on tuna fisheries to reduce its bluefin tuna catch.[291]

The ITLOS decision sent the issue to arbitration, but its significance in the management of southern bluefin was overshadowed by a dramatic announcement in August 2006 that Japan had been fishing at vastly higher

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[287] MAFF, *Special CCSBT Meeting Held*, Update No. 391 (Jan. 19, 2001), *available at* http://www.maff.go.jp/mud/391.html. There is an abundance of scholarly literature on the southern bluefin case in the International Tribunal for the Law of the Sea ("ITLOS"). *E.g.*, Leah Sturtz, *Southern Bluefin Tuna Cases: Australia and New Zealand v. Japan*, 28 ECOLOGY L.Q. 455-86 (2001); Cesar Romano, *The Southern Bluefin Tina Dispute: Hints of a World To Come*, 32 OCEAN DEV. & INT'L LAW 313-48 (2001); Simon Marr, *The Southern Bluefin Tuna Cases: The Precautionary Approach and Conservation and Management of Fish Resources*, 11 EUR. J. INT'L LAW 815 (2000).

[288] *See* Press Release, International Tribunal for the Law of the Sea, Dispute Concerning Southern Bluefin Tuna: Australia and New Zealand Versus Japan—Provisional Measures Requested (July 30, 1999), *available at* http://www.itlos.org/news/press_release/1999/press_release_24_en.pdf.

[289] Yoichiro Sato, *Japan's Efforts to Responsibly Manage Southern Bluefin Tuna Resources Bear Fruit*, JAPAN TIMES, Jun. 7, 2001, at 17; *see also* Moritaka Hayashi, *The Southern Bluefin Tuna Cases: Prescription of Provisional Measures by the International Tribunal for the Law of the Sea*, 13 TUL. ENVTL. L.J. 361, 368 (2000) (discussing the litigation); Press Release, International Tribunal for the Law of the Sea, Japan Files Response and Counter Request for Provisional Measures in Case Concerning Conservation of Tuna (Aug. 9, 1999), *available at* http://www.itlos.org/news/press_release/1999/press_release_25_en.doc.

To put this number in perspective, the current total allowed catch by Japan is 3000 tons. *See* CCSBT, *supra* note 58.

[290] MAFF, *Summary of the Tenth Annual Meeting of the Commission for the Conservation of Southern Bluefin Tuna*, *supra* note 194.

[291] *Tuna Fishing Nations Urged to Reduce Bluefin Catch*, INFOFISH, July 15, 2005.

levels than their quotas had provided. The top-level Australian official who made this finding public, Richard McLoughlin, managing director of the Australian Fisheries Management Authority, stated: "Essentially the Japanese have stolen $2 billion worth of fish from the international community [by dint of their own underreported fishing and their import of bluefin from IUU vessels,] and have been sitting in meetings for fifteen years saying they are as pure as the driven snow."[292]

By October, the CCSBT commissioners made clear just how outrageous the excess catch had been, announcing that Japan had now acknowledged that it had taken cumulatively over 100,000 tons above its quota, drastically reducing the surviving stock, according to one report, fully eighty percent.[293] Having acknowledged its record of deception and its abuse of the management regime, Japan accepted radically reduced quotas. Not long afterward the Commission announced that the entire scientific program had to be reevaluated because the damage to stocks had been so devastating. At the same time it had to reduce quotas for all parties to the Convention. The bluefin quota reductions for Japan were viewed as stopgap measures, with stocks not expected to recover for seven years or more, if ever.[294]

The southern bluefin tuna scandal served as a dismal bookend to Taiwan's recent illegal overfishing of Atlantic bluefin, with Taiwan made to bear punitive quota reductions parallel to the quota cuts that Japan was forced to accept when its wholesale assault on the tuna stocks in the Southern bluefin area was found out. There was no comfort in the ironic parallel pattern of behavior by these two fishing powers, which have exchanged heated charges of misbehavior on the fishing grounds over many years.

E. The Whaling Controversies and the IWC

Debates of policy in the International Whaling Commission ("IWC") have similarly produced severe tensions over Japanese policies regarding conservation and sustainability. In 1982, the IWC agreed to institute a ban on commercial whaling, with a moratorium that went into effect in 1986, a measure justified by the fact that numerous species were near extinction after

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[292] Andrew Darby, *Japan Illegally Poached Bluefin Tuna Worth $2 Billion*, CYBER DIVER NEWS NETWORK, Aug. 10, 2007, http://www.cdnn.info/news/eco/e060810.html (last visited Nov. 10, 2007). McLoughlin's comments were made during a University speech with the understanding that his comments would remain anonymous; however, the speech was recorded and posted online. *Id.*

[293] Gillian Bradford, *Bluefin Tuna Plundering Catches Up With Japan*, ABC NEWS, Oct. 16, 2006, http://www.abc.net.au/stories/2006/10/16/1765413.htm (last visited Oct. 21, 2007).

[294] CCSBT, RECENT NEWS, http://www.ccsbt.org/docs/news.html (last visited Oct. 21, 2007).

centuries of whaling, but more especially as the result of modern large-scale "industrialized" whaling operations since the 1940s. However, Japan began the program to hunt whales in what it called "scientific research whaling" in the Antarctic in late 1987 and in the northern Pacific in 1994. Japanese whaling vessels currently catch about 400 minke whales a year in Antarctica. It is notorious that much of the whale meat ends up on store shelves and on the table of gourmet restaurants. The Japanese government defends this practice as a measure to avoid waste of food products beyond what is required for the scientific project. Environmental groups and many other IWC nations contend that Japanese "scientific research whaling" is actually commercial whaling in disguise and a thin disguise at that.[295] But Joji Morishita, Director for International Negotiations at Japan's Fisheries Agency, maintains that "[w]haling itself has been sort of a symbol for Japanese identity"[296] and that eating whale, regarded as a gourmet delicacy, is an important part of its cultural heritage.[297] During the eighteen years of whaling under the Japan Whale Research Program under Special Permit in the Antarctic ("JARPA") program, more than 6800 Antarctic minke whales (*Balaenoptera bonaerensis)* have been killed in Antarctic waters, compared with a total of 840 whales killed globally by Japan for scientific research in the thirty-one year period prior to the IWC commercial whaling moratorium.

At the June 2005 annual meeting of IWC, Japan attempted to persuade member countries of IWC to endorse its plan for increased whaling, which, if approved, would have doubled its "scientific" whaling in the Southern Ocean Sanctuary around Antarctica and also added endangered humpback and fin whales to its target list. However, IWC members rejected the Japanese proposal. In a resolution adopted at the meeting, the IWC Scientific Committee was asked to review the outcomes of the scientific whaling program (JARPA I) that ended in March 2005,[298] and the government of Japan was "strongly urge[d] . . . to withdraw the newly proposed JARPA II program or revise it so that any information needed to meet the stated objectives of the proposal

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[295] *See* Harry N. Scheiber, *Historical Memory, Cultural Claims, and Environmental Ethics: The Jurisprudence of Whaling Regulation, in* LAW OF THE SEA: THE COMMON HERITAGE AND EMERGING CHALLENGES 127-66 (Harry N. Scheiber ed., 2000).

[296] Kelly Olsen, *Japan's Point Man on Whaling Draws Good Reviews at Meeting*, DESERET MORNING NEWS, Jun. 27, 2005, at 7, *available at* http://www.deseretnews.com/dn/view/0,1249,600144404,00.html.

[297] *See, e.g., Anger over Whale Pet Food Claims*, BBC NEWS, Feb. 16, 2006, *available at* http://news.bbc.co.uk/1/hi/sci/tech/4700418.stm.

[298] *See* MAFF, *A Weekly Update of News from the Japanese Ministry of Agriculture, Forestry and Fisheries*, Update No. 583, ¶ 1 (Apr. 22, 2005), *available at* http://www.maff.go.jp/mud/583.html.

would be obtained using non-lethal means."[299] Despite severe condemnation of its whaling policies, Japan hews to the position that whaling is no longer an issue of species conservation as was the situation in the 1960s and 1970s, when several whale species had been over-harvested and effective measures to protect the endangered species were urgently needed. The government of Japan maintains that most of the eighty-plus species of whales are not endangered and that many species are abundant and increasing.[300]

Many academic commentators and governmental officials involved in international fisheries and whaling policies have sharply criticized Japan's whaling practices, while the activist organizations Greenpeace and Sea Shepherd have deployed ships to chase whaling vessels at sea in direct efforts to halt the Japanese harvest of Antarctic whales. Greenpeace states that its objective in the Antarctic is to focus international attention on Japan's whaling activities, whereas Sea Shepherd attempts to forcefully disrupt what they deem an illegal operation.[301] Protests in early 2006 garnered much publicity because they involved physical confrontation: Greenpeace was involved in a collision with a Japanese vessel that each side blames on the other; and a Sea Shepherd boat intentionally side-swiped a Japanese whaling ship.[302] Hideki Moronuki, head of the whaling section of the Japanese Fishing Ministry, said that the increased level of confrontation may reduce Japanese whaling catch but will not stop their research.[303] Led by Brazil, seventeen nations in January 2006 submitted a formal request to Japan asking that they end their whaling activities.[304] Japan consistently adheres to its official position that its opting out of the IWC regulations and its disregard of the moratorium are justified because Japanese whaling is exclusively for "scientific research" purposes and consists of regulated catches of whale species that Japan deems not endangered.[305]

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[299] International Whaling Comm'n, *Resolution on JARPA II*, Res. 2005-1, ¶ 13 (2005), *available at* http://www.iwcoffice.org/meetings/resolutions/resolution2005.htm#1.

[300] MINISTRY OF FOREIGN AFFAIRS OF JAPAN, THE POSITION OF THE JAPANESE GOVERNMENT ON RESEARCH WHALING, http://www.mofa.go.jp/policy/q_a/faq6.html (last visited Nov. 21, 2007).

[301] *The 7.30 Report: Whaling Causes Trouble on the High Seas*, (Australian Broadcasting Corp. television broadcast Jan. 16, 2006), *available at* http://www.abc.net.au/7.30/content/2006/s1548651.htm.

[302] *Japan Says Clashes at Sea Could Reduce Whale Catch*, KHALEEJ TIMES, Jan. 12, 2006, *available at* http://www.khaleejtimes.com/DisplayArticleNew.asp?section=theworld&xfile=data/theworld/2006/january/theworld_january262.xml.

[303] *Id.*

[304] *Nations Urge Japan to Stop Whaling*, AUSTRALIAN ASSOCIATED PRESS, Jan. 18, 2006, *available at* http://www.news.com.au/story/0,10117,17861532-29277,00.html.

[305] *See infra* text accompanying notes 309-10. At the last IWC meeting, the Japanese delegation announced that it was considering withdrawal from the treaty and the commission altogether. *The World Today: Japan Threatens to Leave International Whaling Commission,*

F. The Dilemma of "Sustainable Management": Is it Always Conservation "For Use"?

Aggressive as Japan has been in regard to the controversial whaling issues, on the larger question of conservation of high seas fisheries Japan appears to be increasingly willing to align itself with scientific management interests in regard to high seas fisheries resources generally—albeit consistently in the mode of promoting *sustainable exploitation for use*, including use by Japanese fishing operators, rather than with the primary objective of protecting ecosystem integrity, promoting the defense of marine biodiversity, or giving top priority to conservationist objectives. Thus, at international and regional meetings in the last several years, while the Japanese delegations have persistently voiced concern about the problem of flags of convenience, they have shown no similar enthusiasm for the adoption of strong measures to protect marine ecology, let alone measures that would force cutbacks in the scope and size of Japanese tuna fishing operations on the high seas.[306]

To be sure, Japan has adhered to RFMO decisions to put in place new trade barriers to IUU fishing vessels. Japan has recently engaged in a large-scale vessel-scrapping program in response to RFMO pressure and the FAO International Plan of Action for the Management of Fishing Capacity.[307] And, as discussed above, it has pursued bilateral negotiations with Taiwan to reduce fleet capacity. While results favorable to sustainability may be traced to these Japanese initiatives, this agenda may be more about protecting its own allocation and access to resources than about protecting ocean ecology. Japanese government and industry interests have sought to claim scientific backing for the tuna industry agenda and have published studies that dispute the evidence unfavorable to them published by scientists in the international management programs, the FAO, and the academic world. The most notorious example was that Japan, faced with a reduced allocation of southern bluefin tuna, contested the scientific data and engaged in its own "experimental" catch studies, a major step that led to the ITLOS arbitration and soon afterward the discovery of scandalous violations of the Convention by Japanese vessels and importers.[308] Similarly, in defending its position on the whaling moratorium, Japan has repeatedly stated that its research shows not only that whales consume large quantities of fish[309] but also that whales

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(Australian Broadcasting Corp. television broadcast Jun. 1, 2007) *available at* http://www.abc.net.au/worldtoday/content/2007/s1939858.htm.

[306] *See supra* text accompanying notes 305.

[307] IPOA-Capacity, *supra* note 17.

[308] See *supra* notes 283-94 and accompanying text.

[309] *See, e.g.*, MAFF, *The Twenty-Fifth Session of the Committee on Fisheries of FAO*, Update No. 499 (Apr. 25, 2003), *available at* http://www.maff.go.jp/mud/499.html.

"undermine fisheries conservation efforts and world food security."[310] In regard to the CITES listing for protection of the great white sharks, moreover, Japan lodged a reservation, and thereby rejected the CITES designation for protection of these sharks.[311] Again in the face of widely accepted global scientific opinion, Japan asserts "no scientific data shows the state of being threatened with extinction and hardly any international trade is likely to impact the status of the species."[312]

This is not to say that the steps Japan has taken are not commendable or that other states that have a high stake in fisheries are not supporting conservation agendas for the same reason. This issue is presented merely to point out that "conservation" may be a loaded word that has less to do with notions of preservation and protection of biodiversity and more to do with protecting economic interests of those nations wishing to gain access to diminishing resources.

Japan continues to push for decreased capacity in the tuna long-line fisheries. Recently, Japan convened the International Tuna Fisheries Conference on Responsible Fisheries and Third International Fishers Forum on July 25-29, 2005 in Yokohama, Japan, to promote responsible tuna fisheries and reduce by-catch in the long-line fishery. Japan also convened a joint meeting in early July 2007 of tuna management RFMOs to promote their coordination and cooperation.[313]

V. HISTORICAL CONTINUITIES AND VARIATIONS

The present-day situation in international politics and law bearing on IUU fishing issues is not without precedent or indeed deep historical roots as to how the global community confronts the challenges involved in coping with overcapacity and the need for sustainability of limited marine food resources. Taking a long view of the issues we have discussed, the contemporary problems in management of high-seas marine fisheries analyzed in these pages illustrate a convergence of core themes in the modern history of ocean

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[310] *Id.* Similarly, both Iceland and Norway's whaling industries and governments have claimed that commercial whale hunts are important for protection of fin fish stocks in ocean areas where the whales have been foraging with the result that fish stocks are being diminished and their fishing industries consequently harmed. *See, e.g., Iceland Catches First Whale After Resuming Commercial Whaling,* MONSTERSANDCRITICS.COM—SCIENCE AND NATURE, http://science.monstersandcritics.com/news/article_1213353.php (last visited Oct. 21, 2007).

[311] Press Release, OPRT, Fisheries Agency, Japan, Rejects Acceptance of the Introduction of Trade Regulations on Great White Sharks and Irrawaddy Dolphins without Reasonable Rationale (Jan. 5, 2005), *available at* http://www2.convention.co.jp/maguro/e_maguro/index.html.

[312] *Id.*

[313] *Id.* ¶ 6.

fisheries management. Although variations over time and the specifics of the fisheries or the area of the oceans in question can be responsible for variations, nonetheless, the continuities are striking. First, the current-day IUU issues are illustrative of continuing efforts, across a broad front, to establish functionally defined global regimes that will address ocean-resources that were not satisfactorily anticipated or adequately addressed by the terms of the 1982 UNCLOS. These new regime issues involve responses to such diverse problems as, among others, the submerged wrecked ships threatening environmental damage,[314] the presence of spent nuclear fuel rods dumped in the northern oceans,[315] and the exploitation and ownership issues relating to genetic materials in the deep sea and in EEZ waters.[316] Perhaps most prominent of all, in recent years, has been the question of high-seas fisheries and their effective management. This last question, which has animated our inquiry in this article, has resolved itself in the last decade to a matter of how the terms of the 1995 FSA (Straddling Stocks Convention) can be worked out through the operation of RFMOs and through bi- and multi-lateral agreements concerning fleet and capacity reduction, and by other actions. A key to the resolution of this issue is the elimination of IUU fishing and the creation and maintenance of multilateral regimes that will provide effective scientific management, sustainability, and conservation of marine fisheries in the world's high-seas ocean areas.

A second respect in which the present study reflects historic, ongoing problems in ordering the law of the oceans is the question of achieving effective implementation in management programs that must rely upon the accuracy of the data produced by scientific research in fisheries biology, fish-population biodynamics, and synoptic oceanographic studies. The movement in science, away from species-by-species analysis to ecosystem and habitat research, has made the problem more difficult than ever. To be sure, the technology for empirical investigation of species and stocks has advanced

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[314] John G. White, *Historic Time Capsules or Environmental Time Bombs? Legal & Policy Issues Regarding the Risk of Major Oil Spills from Historic Shipwrecks*, *in* BRINGING NEW LAW TO OCEAN WATERS 225-56 (David C. Caron & Harry N. Scheiber eds., 2004).

[315] Daniel J. Fornari, *New Opportunities and Deep Ocean Technologies for Assessing the Feasibility of Subseabed High-Level Radioactive Waste Disposal: 21st Century Oceanography Applied to Solving Outstanding Questions*, presented to the Law of the Sea Institute, Conference: Oceans in the Nuclear Age (Feb. 10-11, 2006) (on file with authors); Alexander S. Skaridov, *Russian Approach to the Protection of the Arctic Seas from the Radioactive Wastes*, presented to the Law of the Sea Institute, Conference: Oceans in the Nuclear Age (Feb. 10-11, 2006) (on file with authors).

[316] Scheiber, *The Biodiversity Convention and Access to Genetic Materials in Ocean Law*, *supra* note 11; Richard J. McLaughlin, *Managing Foreign Access to Marine Genetic Materials: Moving from Capture to Cooperation*, *in* BRINGING NEW LAW TO OCEAN WATERS 257-82 (David C. Caron & Harry N. Scheiber eds., 2004).

enormously, especially as the result of DNA research. Nonetheless, the difficulties inherent in obtaining accurate data on the conditions and dynamics of habitats or ecosystems, as is required by the newer instruments of international law, remain intractable, as they have been from the start.[317]

Apart from these considerations, the most basic statistical task of collecting data on the status of stocks and trends in biomass, age structure, and health is undermined when the operations of IUU vessels (whose catches remain largely outside the database, as they are outside any regulatory or scientific regime) corrupt the estimates.[318]

Finally, Japan's relationship to the older RFMOs and the new Central and West Pacific organization illustrates a timeless problem in the history of multilateral agreements for management. *This is the problem of distinguishing self-interested, protectionist motives from genuinely conservationist-management objectives when a fishing nation negotiates a bi- or multi-lateral agreement, or when it participates in the implementation of a "sustainable fishing" or conservationist treaty.* In the political and negotiating processes involved when such agreements are formed or administered, this distinction is often the focus of disputes, not only among the state parties, but sometimes (perhaps commonly) even within the bureaucracies of the individual states.

Deeply rooted historical continuities are involved in the ongoing confrontation of this last problem in the history of fisheries policies and international law. A dramatic example can be cited from the history sixty-three years ago of the Truman Fisheries Proclamation,[319] a United States policy initiative that set off the torrent of offshore extended-jurisdiction claims by other states that inaugurated the modern "ocean enclosure" movement and

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[317] *See* Harry N. Scheiber, *From Science to Law to Management: The Ecosystem Management Concept in Historical Perspective*, 24 ECOLOGY L.Q. 631 (1997). By its very nature, ecosystem study requires that the lines of investigation be complex, and in the case of large marine ecosystems, such as the habitat for the distant water tuna fisheries, the problems of applying ecosystem study to practical management are further complicated by the migration of various species through numerous EEZs and by disputed claims of "historic interest" or "real interest." *Id.*; *see also*, Lee A. Kimball, *Deep Sea Fisheries of the High Seas: The Management Impasse*, 19 INT'L J. MARINE & COASTAL L., 259, 277-78 (2004); Scott Parson, *Ecosystem Considerations in Fisheries Management: Theory and Practice*, 20 INT'L J. MARINE & COASTAL L. 381 (2005); Roger B. Griffis & Katherine W. Kimball, *Ecosystem Approaches to Coastal and Ocean Stewardship*, 6 ECOLOGICAL APPLICATIONS 706 (1996).

[318] Determining the condition of a specific fishery stock, or the dynamics that are affecting a stock, and more generally its habitat, requires scientific investigation with accurate data. Uncertainties may have tragic consequences, as happened with Japan's denial of the endangerment of the pygmy blue whale. *See generally* GEORGE L. SMALL, THE BLUE WHALE (1977).

[319] Proclamation. No. 2668, 10 Fed. Reg. 12304 (Sept. 28, 1945).

led to the formulation of the EEZ concept that was incorporated in the 1982 UNCLOS.[320]

In the following decade, during the negotiating process for the International North Pacific Fisheries Convention of 1952, the first post-World War II multilateral agreement for ocean fisheries, the same tension was manifested. This convention was an agreement among Canada, the United States, and Japan (then just emerging from the occupation), and was the first international fisheries treaty in the postwar era to incorporate the maximum sustained yield concept as a basis for limiting fishing participation or levels of catch.[321] Again, the political officers in Ottawa objected to the manifestly self-interested objective of the Convention, which was drafted by American officials with the central aim of requiring Japan to waive its rights under prevailing international law to fish within three miles of the United States and Canadian coastlines. The concept of extended offshore jurisdiction, the Canadian External Affairs Department complained, appeared to be "aimed more as protection against competition than at conservation," whatever the pretensions to sustainability embodied in the provisions for research and determination of maximum sustainable yield levels.[322] Ironically, the way in which Japan's DWF interests were seriously disadvantaged, at least in this sector of the world's oceans, this first of the postwar multilateral ocean fisheries agreements may partly explain why Japan would subsequently adhere consistently to hard-line diplomacy, often bringing upon itself a strong reaction from other marine and coastal states in global negotiations, in the decades that have passed since the North Pacific convention was concluded.[323]

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[320] *See* SCHEIBER, INTER-ALLIED CONFLICT, *supra* note 27, at 9-37 (discussing the history of the Truman Proclamation and its impact); *see also* Harry N. Scheiber, *Origins of the Abstention Doctrine in Ocean Law: Japanese-U.S. Relations and the Pacific Fisheries, 1937-1958*, 16 ECOLOGY L.Q. 23, 29-59 (1989) [hereinafter Scheiber, *Origins of the Abstention Doctrine*].

[321] Scheiber, *Origins of the Abstention Doctrine*, *supra* note 320, at 24.

[322] Harry N. Scheiber, *Japan, the North Atlantic Triangle: A Perspective on the Origins of Modern Ocean Law*, 1930-53, 6 SAN DIEGO INT'L L.J. 27, 94 (2004) (citing U.S. State Dept. Memorandum of Conversation, Subj: Japanese Fishery Treaty, between Mr. Collins of Canadian Embassy and Mr. Johnson of Northeast Asian Office, March 23, 1950 (March 24, 1950)).

[323] Of course, Japan's economic interests have been consistently at stake, because its DWF fleet was the world's most productive through nearly all the postwar era of the late 20th Century and remains today in the top level of production. Increasingly, cultural politics, expressed in Japanese interests' claims for the sanctity of "freedom of the seas," have also been a major factor in Japan's often intransigent approach to international agreements restricting its fishing operations. *See* Shigeru Oda, *Recollections of the 1952 International North Pacific Fisheries Convention: The Decline of the "Principle of Abstention,"* 6 SAN DIEGO INT'L L.J. 11 (2004) (discussing the abstention doctrine in the 1952 North Pacific agreement and the subsequent history of Japan's relations to the Law of the Sea).

VI. CONCLUSION

As this article presents, a familiar and complex mixture of motives is strikingly evident today in the policies of the major player nations as to global ocean tuna resources as multilateral agreements are concluded. There is continuing debate, moreover, on how UNCLOS principles and the FSA mandates should best be implemented in the continuing regime-formation process.[324] With respect specifically to tuna management in the world's oceans today, one may assume that as developing fishing countries push for a greater percentage of the world catch, countries with established fishing interests and large allocations will push back harder. Can there ever be a fair system that balances historical use and investment with the urgent needs of developing countries, including the small island states of the Pacific, and that addresses issues of equity and the needs and rights of states to share in a common resource? As the tuna resource is threatened or depleted, the problems will become more acute. Will there be effective global fleet reduction reduce capacity? Or will other vessels be built that restore or even enlarge total capacity in the fishing grounds?

Resources are still being depleted at an alarming rate, and it is necessary for Japan and other major importing countries to move towards restricting imports more effectively in order to ban the products of IUU fishing. Scrapping of vessels is an important component of policy for any fishing state deemed to be contributing to excess capacity. It is obvious, from the history of fisheries diplomacy and RFMO deliberations, that political pressure can work. As noted earlier, in the last two years, policy experts have also stressed the importance of getting the cooperation of financial institutions in the developed countries to cut off the lifeblood of capital for IUU ship purchases and operations. The list of countries making capacity reductions needs to be expanded, of course; but to be truly effective such efforts must be accompanied by decreases in the allocated quotas of fishing in regulated regimes, by more effective enforcement of the regulations that are adopted, by expanded observer coverage, and by other measures directly concerned with monitoring, surveillance and enforcement on the water.

Perhaps of paramount importance, as we have argued here, is the need for inclusiveness of all relevant DWF states in the regional organizations, with appropriate negotiated adjustments of catch allocations to recognize diverse interests of fishing nations, with adjustments that take account of historic rights and, equally, to recognize the needs and rights of smaller developing

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[324] The incorporation of stock assessment analysis into management regimes is a deeply contested issue. *See supra* Part IV.D; *see also* Olav Schram Stokke, *Conclusions*, *in* GOVERNING HIGH SEAS FISHERIES, *supra* note 14 at 332-45.

nations. Already there has been a formal move to achieve some harmonization of policies and better operational coordination among the RFMOs that are concerned globally with sustainability of tuna stocks.[325] No less important than rules of fishing operations on the water, upgraded enforcement, and the ever-present allocation issues is the imperative need for the regional organizations to adhere to key provisions of the U.N. Fish Stocks Agreement. The provisions mandating the adoption of the precautionary principle, the protection of fish habitat, and the deployment of an ecosystem approach in evaluating of the fisheries and their environments all desperately require clarification and serious enforcement. The regulatory authority in the RFMOs must be strengthened and the authoritative application of sustainable regulation must be imposed to realize a turnaround in the critical global fisheries situation.

[325] *See, e.g.*, MICHAEL LODGE ET AL., RECOMMENDED BEST PRACTICE FOR REGIONAL FISHERIES MANAGEMENT ORGANISATIONS (2007), *available at* http://www.illegal-fishing.org/item_single.php?item=document&item_id=217&approach_id=16; World Wildlife Fund, *EU Steps Forward to Fight Illegal Fishing*, Oct. 17, 2007, http://www.panda.org/about_wwf/what_we_do/marine/news/index.cfm?uNewsID=115400.

Medical Malpractice in Hawai'i: Tort Crisis or Crisis of Medical Errors?

I. INTRODUCTION

Midway through an operation on Arturo Iturralde's spine at the Hilo Medical Center, surgeon Robert Ricketson realized that the titanium rods he intended to implant were missing from his surgical kit.[1] Rather than wait ninety minutes for the missing parts to be flown over from Honolulu, Dr. Ricketson sawed apart a stainless-steel screwdriver and implanted a piece of the shaft into Mr. Iturralde's spine.[2]

A week after the January 29, 2001 surgery, the screwdriver shaft broke.[3] Corrective surgery was required, which was also performed by Dr. Ricketson.[4] In the days after the first surgery, no one informed Mr. Iturralde or his family about the improvised nature of the procedure.[5] In fact, the only reason the incident was ever disclosed was that a nurse retrieved the pieces of the screwdriver from the trash and took them to local attorney Robert Marx.[6] The nurse later told the *Honolulu Star Bulletin*, "I just knew they were going to take the screwdriver out and put the right rod in and never tell anyone."[7] Mr. Iturralde later had to undergo two additional corrective surgeries.[8] These follow-up surgeries caused nerve damage that left Mr. Iturralde, an ordained Baptist minister, incontinent and paraplegic and contributed to his death in 2003 at the age of seventy-six.[9]

Mr. Iturralde's family sued Dr. Ricketson and the Hilo Medical Center, which had given Dr. Ricketson surgical privileges despite a number of red flags.[10] Dr. Ricketson had previously been sued for malpractice seven times, paying one plaintiff $1.3 million after Dr. Ricketson severed a number of

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[1] Rod Thompson, *Jury Sides with Patient Who had Screwdriver Put in Back*, HONOLULU STAR BULL., Mar. 14, 2006, at A1 [hereinafter Thompson, *Jury*].

[2] Sally Apgar, *Medical Mayhem; Malpractice Complaints Dog a Former Big Island Surgeon*, HONOLULU STAR BULL., July 15, 2003, at A1 [hereinafter Apgar, *Medical Mayhem*].

[3] Thompson, *Jury*, *supra* note 1.

[4] Apgar, *Medical Mayhem*, *supra* note 2, at A9.

[5] *Id.*

[6] Rod Thompson, *Surgeon Improvised with Screwdriver, Jury Told*, HONOLULU STAR BULL., Feb. 10, 2006, at B3 [hereinafter Thompson, *Surgeon*].

[7] Apgar, *Medical Mayhem*, *supra* note 2, at A9.

[8] *Id.*

[9] *See id.*; Thompson, *Surgeon*, *supra* note 6, at A1.

[10] *See* Apgar, *Medical Mayhem*, *supra* note 2, at A9; Thompson, *Jury*, *supra* note 1.

nerves in her back.[11] He also had his medical license revoked in Texas and temporarily suspended in Oklahoma.[12] Medical board documents from the two states indicate that Dr. Ricketson had become addicted to narcotics, written fake prescriptions, and stolen drugs from patients.[13]

In 2006, a jury awarded Mr. Iturralde's family economic damages of $307,000 to cover hospital bills incurred following the initial surgery.[14] In addition, the family was awarded noneconomic damages of $1.87 million to compensate them for the pain and suffering endured by Mr. Iturralde, as well as for loss of consortium and other nonpecuniary losses.[15] The jury found that Dr. Ricketson was sixty-five percent responsible for the Iturralde's economic and noneconomic damages, while the hospital was thirty-five percent responsible.[16] Dr. Ricketson was also held 100% responsible for punitive damages of $3.4 million, which are not covered by malpractice insurance in Hawai'i, but it appears unlikely that he will have the financial resources to pay the award.[17]

Critics of Hawai'i's medical malpractice tort system claim that judgments like this one are causing a medical malpractice insurance crisis, driving doctors out of high-risk practices and even out of Hawai'i.[18] To alleviate the crisis, critics propose capping medical malpractice damage awards.[19] Part II of this comment takes a close look at Hawai'i's medical malpractice system and finds that empirical evidence often does not support critics' contentions. Claims of a crisis appear exaggerated. Moreover, although medical malpractice insurance premiums did rise each year from 2003 to 2005, research suggests that caps on damage awards are unlikely to be an effective or equitable solution to rising premiums. Rather than shifting the costs of medical negligence from the medical system onto victims (which is what damage caps do), this comment proposes in Part III to cut medical malpractice costs by addressing the real crisis in medical errors. To that end, Part IV discusses a number of specific proposals to improve patient safety.

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[11] Sally Apgar, *Researching Doctors Can Be Hard Task*, HONOLULU STAR BULL., July 27, 2003, at A1 [hereinafter Apgar, *Researching Doctors*].

[12] *Id.*

[13] Apgar, *Medical Mayhem*, *supra* note 2, at A9.

[14] *See* Thompson, *Jury*, *supra* note 1.

[15] *See id.*

[16] *Id.*

[17] *See id.*

[18] *See, e.g.*, HAW. MED. ASS'N, DON'T PUT YOUR ACCESS TO HEALTH CARE AT RISK (undated), *available at* http://www.hmaonline.net/Portals/12/Website%20PDFs/Brochure-Tort%20Draft4.pdf.

[19] *E.g.*, *id.*

II. HAWAI'I'S MEDICAL MALPRACTICE TORT SYSTEM

A. Overview

Medical malpractice suits are typically governed by state laws, which tend to be fairly consistent across states.[20] To prove a medical malpractice claim, a plaintiff must generally establish four elements.[21] First, the plaintiff must show a duty of care, typically by establishing a physician-patient relationship.[22] Second, the plaintiff must show that the physician was negligent in breaching the relevant medical standard of care.[23] Third, the plaintiff must establish causation—specifically, that the physician's negligent conduct was a "substantial factor in bringing about the harm."[24] Fourth, the plaintiff must prove damages.[25]

In Hawai'i, three types of damages may be awarded. First, economic damages may be awarded for hospital bills, lost wages, nursing care costs, rehabilitation costs, and any other economic loss suffered as a result of the injury.[26] Second, noneconomic damages may be awarded for injuries like pain and suffering, disfigurement, and loss of companionship.[27] Third, punitive damages may be awarded in cases where the "defendant has acted wantonly or oppressively or with such malice as implies a spirit of mischief or criminal indifference to civil obligations."[28]

Proponents of the current tort system argue that it fairly apportions the costs of substandard care, serves a deterrent function, and sets moral standards for

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[20] Lindsay J. Stamm, Comment, *The Current Medical Malpractice Crisis: The Need for Reform to Ensure a Tomorrow for Oregon's Obstetricians*, 84 OR. L. REV. 283, 290 (2005).

[21] *Id.*

[22] *See, e.g.*, O'Neal v. Hammer, 87 Hawai'i 183, 190, 953 P.2d 561, 568 (1998) (holding that "there is a sufficiently close relationship between a physician and a patient, who is seeking a second opinion, to impose on the second opinion physician the duty to inform the patient of the risks and alternatives to the proposed treatment or surgery").

[23] *E.g.*, Craft v. Peebles, 78 Hawai'i 287, 298, 893 P.2d 138, 149 (1995) (stating that "the question of negligence must be decided by reference to relevant medical standards of care for which the plaintiff carries the burden of proving through expert medical testimony." (quoting Nishi v. Hartwell, 52 Haw. 188, 195, 473 P.2d 116, 121 (1970) (citations omitted))).

[24] Mitchell v. Branch, 45 Haw. 128, 132, 363 P.2d 969, 973 (1961), *cited with approval in* Aga v. Hundahl, 78 Haw. 230, 236, 891 P.2d 1022, 1029 (1995).

[25] *E.g.*, Bryan A. Liang, *The Adverse Event of Unaddressed Medical Error: Identifying and Filling the Holes in the Health-Care and Legal Systems*, 29 J.L. MED. & ETHICS 346, 349 (2001).

[26] HAW. REV. STAT. §§ 663-1, -8 (2005).

[27] *Id.* § 663-8.5.

[28] AMFAC, Inc. v. Waikiki Beachcomber Inv. Co., 74 Haw. 85, 138, 839 P.2d 10, 82 (1992) (quoting Masaki v. General Motors Corp., 71 Haw. 1, 16-17, 780 P.2d 566, 575 (1989)).

provider behavior.[29] Opponents of Hawai'i's system, on the other hand, argue that problems have reached crisis proportions.[30] They claim that the medical malpractice tort system is driving doctors out of the state, forcing practitioners to quit working in emergency rooms, and pushing doctors from high-risk specialties.[31] Medical associations nationwide are lobbying legislators and funding media campaigns that advocate tort reform. In Hawai'i, the state affiliate of the American Medical Association ran paid advertisements in a number of local print publications in 2006 urging the public to support medical tort reform.[32]

This advocacy work has paid off. In a 2003 Gallup Poll conducted for the Kaiser Family Foundation, eighteen percent of Americans said that the medical malpractice system was in a state of "crisis," fifty-six percent said that it was a "major problem," and twenty-two percent said that it was a "minor problem."[33] Only two percent of Americans surveyed said that the issue of medical malpractice litigation was not a problem.[34] In a 2005 survey co-sponsored by the Kaiser Family Foundation, nineteen percent of Americans said that malpractice lawsuits were the "most important reason health care costs are rising."[35] Only "high profits made by drug and insurance companies" were considered a more important reason for rising health costs, with thirty-five percent of respondents citing this reason as "most important."[36]

B. Proposals to Reform Hawai'i's Medical Tort System

Hawai'i currently has several laws in place to reduce medical malpractice litigation and to cut damage awards. In 1976, the Hawai'i State Legislature responded to concerns about rising medical malpractice costs by requiring prospective plaintiffs to obtain an advisory decision from the Medical Claims Conciliation Panel before filing a claim.[37] In 2003, the Legislature added a

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[29] *E.g.*, Barry R. Furrow, *Regulating Patient Safety: Toward a Federal Model of Medical Error Reduction*, 12 WIDENER L. REV. 1, 9-12 (2005). *See generally* Michelle J. White, *The Value of Liability in Medical Malpractice*, 13 HEALTH AFF. 75 (1994).

[30] *See, e.g.*, HAW. MED. ASS'N, *supra* note 18.

[31] *E.g.*, *id.*

[32] Hawai'i Medical Association, Legislative Activities, http://web.archive.org/web/20060810100632/http://www.hmaonline.net/legislative.htm (last visited Oct. 6, 2007).

[33] KAISER FAMILY FOUNDATION, PUBLIC OPINION ON THE MEDICAL MALPRACTICE DEBATE 3 (2005), *available at* http://www.kff.org/spotlight/malpractice/upload/Spotlight_Dec05_malpractice-2.pdf.

[34] *Id.*

[35] *Id.* at 1.

[36] *Id.*

[37] HAW. REV. STAT. § 671-12 (2005).

second screening requirement, mandating consultation with a doctor practicing in the same specialty as the doctor involved in the claim before bringing a claim to the panel.[38] In 1995, Hawai'i also placed a $375,0000 cap on damages for "pain and suffering."[39]

While opponents of tort reform argue that Hawai'i's current laws effectively regulate medical malpractice litigation, there has been pressure to place additional restrictions on lawsuits.[40] Some of this pressure has trickled down from the national level. William Sage, a Columbia University law professor, writes, "Malpractice reform is now a rallying cry in a larger political context between the general business community and general trial lawyer and consumer interests over the effect of personal injury litigation on the U.S. economy and social fabric."[41] With few exceptions, Republicans are the business community's political proxies in this fight, while Democrats represent the trial lawyers and consumer interests.[42] The reasons for this split are largely philosophical, but may also be related to campaign finance—the Association of Trial Lawyers of America was the second largest political action committee contributor in the 2000 election cycle (with eighty-six percent of its contributions going to Democrats),[43] while business groups contributed approximately $334 million during the 2002 election cycle (with sixty-four percent of contributions going to Republicans).[44]

In 2005, President George W. Bush initiated a push for medical malpractice reform with a national policy address in Collinsville, Illinois.[45] In the speech, President Bush proposed a federal cap of $250,000 on noneconomic damages in medical malpractice lawsuits.[46] Republican legislators from more than a dozen states subsequently made medical malpractice reform a top state legislative priority.[47] Republican governors from a number of states also placed the issue on their agendas, [48] including Hawai'i's Governor Linda Lingle.

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[38] *Id.* § 671-12.5.

[39] *Id.* § 663-8.7.

[40] *See, e.g.*, HAW. MED. ASS'N, *supra* note 18.

[41] William M. Sage, *The Forgotten Third: Liability Insurance and the Medical Malpractice Crisis*, 23 HEALTH AFF. 10, 13 (2004).

[42] TOM BAKER, THE MEDICAL MALPRACTICE MYTH 11 (2005).

[43] WILLIAM HALTOM & MICHAEL MCCANN, DISTORTING THE LAW: POLITICS, MEDIA, AND THE LITIGATION CRISIS 117 (2004).

[44] Thomas B. Edsall, *Big Business's Funding Shift Boosts GOP*, WASH. POST, Nov. 27, 2002, at A1.

[45] Robert Pear, *Bush Begins Drive to Limit Malpractice Suit Awards*, N.Y. TIMES, Jan. 6, 2005, at A18.

[46] *Id.*

[47] James Dao, *A Push in States to Curb Malpractice Costs*, N.Y. TIMES, Jan. 14, 2005, at A21.

[48] *Id.*

In her 2007 State of the State address, Governor Lingle called for "sensible[] medical malpractice reform," which would put "reasonable limits on so-called non-economic damages."[49] Governor Lingle's proposal was introduced as House Bill 1325.[50] Hawai'i law currently caps damages for pain and suffering at $375,000.[51] Under the legislation proposed by Governor Lingle, all noneconomic damages—including pain and suffering, disfigurement, and loss of consortium—would be capped at $250,000 in medical tort lawsuits.[52]

C. A Closer Look at Hawai'i's Medical Malpractice "Crisis"

Physicians in Hawai'i are not required to carry liability insurance, but most hospitals and clinics require proof of coverage before they will permit doctors to use their facilities.[53] Over the past five years, the cost of this coverage has increased.[54] For example, physicians insured by the Medical Insurance Exchange of California ("MIEC"), the largest malpractice insurer in Hawai'i (covering more than 1100 of the state's 3616 doctors), saw their premiums rise by five percent in 2003, twenty-five percent in 2004, and fifteen percent in 2005 before rates stabilized in 2006 and 2007.[55] Rates in certain specialties have increased even faster than the average. Specialists in obstetrics and gynecology ("OB/GYNs"), for example, have seen their premiums increase from an average of $40,662 in 2001 and 2002 to $62,515 in 2004 and 2005, an increase of fifty-four percent.[56] Proponents of tort reform contend that these increases constitute a crisis, which is being fed by a legal system that is

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[49] Governor Linda Lingle, 2007 State of the State Address 12 (Jan. 22, 2007), http://www.hawaii.gov/gov/leg/2007-session/STATE_OF_THE_STATE_ADDRESS_2007.pdf.

[50] H.B. 1325, 24th Leg., Reg. Sess. (Haw. 2007).

[51] HAW. REV. STAT. § 663-8.7 (2005).

[52] H.B. 1325, 24th Leg., Reg. Sess. (Haw. 2007). The bill failed to pass the House Committee on Health during the 2007 legislative session. *See* Hawai'i State Legislature, Bill Status HB 1325, http://www.capitol.hawaii.gov/session2008/lists/getstatus2.asp?billno=HB1325 (last visited Oct. 6, 2007).

[53] *See* American Medical Association Liability Insurance Requirements, http://www.ama-assn.org/ama/pub/category/4544.html (last visited Oct. 6, 2007) (noting that nine states—Colorado, Connecticut, Florida, Georgia, Kansas, Massachusetts, Pennsylvania, Rhode Island, and Wisconsin—mandated medical malpractice liability insurance in 2007).

[54] Derrick DePledge, *Malpractice-Award Cap Getting New Look*, HONOLULU ADVERTISER, Feb. 20, 2007, at A1.

[55] *Id.*

[56] STATE OF HAW. INSURANCE DIVISION, REPORT OF THE PHYSICIAN ON-CALL CRISIS TASK FORCE 8 (2006), *available at* http://www.hawaii.gov/dcca/areas/ins/main/reports/2006%20Report%20of%20the%20Physician%20On-Call%20Crisis%20Task%20Force.pdf.

out of control.[57] In reality, however, critics appear to be overstating the problem.

1. Medical liability insurance costs represent less than one percent of total health costs

Medical liability insurance costs have a very small impact on overall health care spending. In 2002, American health care providers spent $9.6 billion on medical liability insurance, while $1.553 trillion was spent on all health care.[58] Thus, the cost of medical liability insurance constituted approximately 0.62% of national health expenditures.[59] In Hawai'i, providers spent $37.4 million on premiums in 2002,[60] while $5.397 billion was spent on all health care[61]—meaning that payments for malpractice coverage constituted 0.69% of all health care expenditures in the state.

2. Doctors overestimate importance of premiums on their bottom line

While medical malpractice premiums are a very small line item on the balance sheet of the overall health care system, doctors claim that rising premiums are cutting deeper and deeper into their bottom lines.[62] Interestingly, however, medical malpractice premiums were actually lower nationally in 2000 than they were in 1986, adjusted for inflation.[63] In constant 2000 dollars, premiums fell from $20,106 in 1986 to $18,400 in 2000.[64]

Given the fact that medical malpractice premiums decreased in real terms between 1986 and 2000, why has the issue of medical malpractice reform maintained such a high profile? One possible explanation is that a relatively slight increase in premiums from 1996 to 2000 correlated with a relatively

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[57] *See, e.g.*, HAW. MED. ASS'N, *supra* note 18.

[58] JACKSON WILLIAMS ET AL., PUBLIC CITIZEN, MEDICAL MALPRACTICE BRIEFING BOOK: CHALLENGING THE MISLEADING CLAIMS OF THE DOCTORS' LOBBY 9 (2004), *available at* http://www.citizen.org/documents/MedMalBriefingBook08-09-04.pdf.

[59] *Id.*

[60] *Id.* at 39.

[61] OFFICE OF THE ACTUARY, 2004 STATE ESTIMATES—ALL PAYERS—PERSONAL HEALTH CARE (2007), *available at* http://www.cms.hhs.gov/NationalHealthExpendData/downloads/nhestatesummary 2004.pdf.

[62] *E.g.*, Christie Wilson, *Hawai'i Losing its Doctors*, HONOLULU ADVERTISER, Jan. 28, 2007, at A1.

[63] Marc A. Rodwin et al., *Malpractice Premiums and Physicians' Income: Perceptions of a Crisis Conflict with Empirical Evidence*, 25 HEALTH AFF. 750, 751 (2006).

[64] *Id.* at 752.

large reduction in net practice incomes.[65] Malpractice premiums fell from eleven percent of total practice expenses in 1986 to six percent of total expenses in 1996.[66] From 1986 to 1996, physicians' average net incomes also rose from $205,930 to $254,229, an increase of twenty-three percent.[67] From 1996 to 2000, however, malpractice premiums increased from six percent to seven percent of total expenses.[68] Over the same four-year period, physicians' average net incomes fell ten percent, to $229,500.[69]

It is possible that physicians attributed the decline in their net incomes to rising malpractice expenses.[70] In reality, however, a majority of the decline was attributable to declining revenue, as opposed to rising expenses.[71] From 1996 to 2000, physicians' net revenues fell by an average of $6182 per year, while malpractice premiums increased by $731 per year.[72] Although the source of this revenue decline is not clear, possible explanations include:

> reduction in physician payment rates as a result of the policies of third party payers; decreased physician revenue as a result of physicians' financial risk sharing; reduction in the volume of services provided as a result of utilization review; and decreases in the number of services provided by each physician, as a result of an increase in the number of physicians practicing.[73]

Doctors in Hawai'i may be facing similar financial pressures. Increases in medical malpractice insurance costs in Hawai'i coincided with reductions in Medicare reimbursement rates (which many private insurers also use as a benchmark).[74] These reductions in reimbursement rates have had a significant negative impact on physicians' net incomes.[75] Moreover, Hawai'i's strong economy has meant higher rents for office space across the board, including medical office space.[76] Unemployment has also stood near record lows, pushing up the cost of medical office employees.[77] As discussed below, the

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[65] *Id.*

[66] *Id.* at 751, 753.

[67] *Id.* at 752.

[68] *Id.* at 753.

[69] *Id.* at 752. It should be noted that even with this decline, physicians' average incomes remained between the ninety-fifth and ninety-ninth percentiles for all Americans. *Id.* at 757.

[70] *Id.* at 755.

[71] *Id.*

[72] *Id.* at 753.

[73] *Id.* at 755.

[74] Wilson, *supra* note 62.

[75] DePledge, *supra* note 54.

[76] *See* Nina Woo, *Honolulu Office Rents to Keep Rising While Vacancy Declines,* HONOLULU STAR BULL., Jan. 12, 2007, at B1.

[77] *See* Dave Segal, *Isle Jobless Rate Lowest in 30 Years*, HONOLULU STAR BULL., Jan. 25, 2007, at C1.

number of physicians practicing in Hawai'i is also increasing.[78] Together, these economic forces are putting significant pressure on physicians' incomes.[79] Medical malpractice insurance premiums may be just a small piece of a larger problem, but the issue is drawing a disproportionate amount of attention because large damage awards serve as a media-friendly hook and trial attorneys are always a convenient foil.[80]

3. The number of doctors in Hawai'i is increasing

A pamphlet authored by the Hawai'i Medical Association asserts that the state's "legal climate for physicians is driving them away."[81] While the Hawai'i Medical Association presents anecdotal information to support its claim that doctors are leaving the state and exiting certain high-risk specialties,[82] state statistics show that doctors are entering the profession here in large numbers.[83] In fact, the number of doctors licensed to work in Hawai'i grew by nearly nineteen percent from 2000 to 2005,[84] almost four times the state's population growth rate.[85]

Although the number of doctors in Hawai'i is increasing overall, there appears to be a genuine problem with the geographic distribution of providers, particularly specialists.[86] The Hilo Medical Center, for example, only had two orthopedic surgeons on staff in 2007, down from five in 2002.[87] With only two orthopedic surgeons serving the Hilo area, there are times when no one is available to handle an emergency and a patient must be flown to Honolulu for care.[88]

Although the Hawai'i Medical Association suggests that medical malpractice costs have a large impact on neighbor island physician recruitment and retention, medical provider attrition from rural areas is a national trend

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[78] DePledge, *supra* note 54.

[79] *See id.*

[80] *See* HALTOM & MCCANN, *supra* note 43.

[81] HAW. MED. ASS'N, *supra* note 18.

[82] *Id.*

[83] DePledge, *supra* note 54.

[84] *Id.*

[85] STATE OF HAW. DEP'T OF BUS., ECON. DEV. & TOURISM, HAWAI'I POPULATION ESTIMATE: 2006, at 1 (2006), *available at* http://www.hawaii.gov/dbedt/info/census/popestimate/06state_pop_hawaii/Hawaii_Population_Estimate_06_DBEDT.doc.

[86] Wilson, *supra* note 62.

[87] Helen Altonn, *Neighbor Islands Short-Handed with Surgeons*, HONOLULU STAR BULL., Jan. 16, 2006, at A1.

[88] *Id.*

that does not appear to be linked to tort reform.[89] Rather, commentators attribute the national shortage of health professionals in rural areas to lifestyle issues, the high rates of uninsured (who tend to be less able to pay for health care), high numbers of public health recipients (whose care tends to be less profitable than privately insured patients), and a general need for physicians to work longer hours in these areas for less reimbursement.[90]

4. Malpractice claims in Hawai'i are falling

Generally, one expects a tort system that is out of control and facilitating "runaway lawsuits," as the Hawai'i Medical Association has suggested,[91] to generate increasing numbers of claims each year, many of them frivolous. Medical malpractice claims in Hawai'i, however, have been steadily declining since 2002.[92] Between 2002 and 2005, claims have been declining at an average annual rate of over nine percent per year—falling from 166 claims in 2002 to 105 claims in 2005.[93] Moreover, from 2004 to 2006 only one claim that came before the Medical Claims Conciliation Panel—which consists of a doctor, an attorney, and a chairperson (who may be an attorney or doctor)—was judged to be frivolous.[94]

D. The Effect of Tort Judgments on Malpractice Premium Increases

Although Hawai'i's medical malpractice insurance problem appears to be overstated, premiums did appreciate significantly from 2003 to 2005.[95] The Hawai'i Medical Association clearly links premium increases to tort judgments: "When a jury awards a million dollars, it is not the defendant(s) that pay, but the insurers. The insurer then recovers its losses, including legal fees, with increased premiums."[96] Viewed in these terms, the issue looks simple. In reality, however, the situation is more complex. In 2003, the U.S.

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[89] Press Release, Univ. of North Carolina at Chapel Hill, State Gains Nurse Practitioners, Loses Rural Primary-Care Doctors (Oct. 27, 1998), http://www.unc.edu/news/archives/oct98/busse10.htm.

[90] Lee Romney, *Rural Areas Have a Doctor Deficiency*, L.A. TIMES, Jan. 7, 2007, at A1.

[91] HAW. MED. ASS'N, *supra* note 18.

[92] STATE OF HAW. DEP'T OF COMMERCE & CONSUMER AFFAIRS, THE MEDICAL CLAIMS CONCILIATION PANEL: REPORT TO THE TWENTY-FOURTH LEGISLATURE 6 (2006), *available at* http://www.hawaii.gov/dcca/areas/oah/main/reports/MCCP%20Annual%20Report%20to%20the%202007%20Legislature.pdf.

[93] *Id.*

[94] DePledge, *supra* note 54.

[95] *Id.*

[96] HAW. MED. ASS'N LEGISLATIVE ACTIVITIES, http://hmaonline.net/pdfs/TortReformBrochure2006.pdf (last visited Oct. 6, 2007).

General Accounting Office ("GAO") prepared a report examining the problem of increasing medical malpractice premium rates and found that rising rates were attributable to a number of sources, including insurers' losses, a less competitive climate, and investment losses.[97]

1. Insurers' losses

From a long-term perspective, the Hawai'i Medical Association is right about tort judgments—higher judgments will lead to higher insurance rates. Among the fifteen largest medical malpractice insurers in the nation in 2001, incurred losses (insurers' expectations of losses that would be paid on claims in that year) averaged seventy-eight percent of the insurers' total expenses.[98] Thus, as incurred losses rise, insurers must generally set premiums high enough to cover those losses. However, while it is true that higher losses will lead to higher premiums in the long run, short-run spikes in premiums may be caused by reasons other than high jury verdicts.[99]

2. A less competitive climate for insurers

One possible reason for a short-run spike in premiums is a change in the competitive climate of insurers. The competitive climate for insurers did change in the 1990s when price wars led insurers to sell policies at below-market rates.[100] Motivated by a desire to increase market share and to accumulate capital to use in the surging investment market, insurers pushed aggressively into new markets.[101] However, as competition intensified and the bull investment market slowed in 2000, insurance companies began to lose large amounts of money.[102]

Medical Inter-Insurance Exchange ("MIIX"), for example, a New Jersey-based company that expanded into twenty-four states in search of greater market share, lost $164 million in the last three months of 2001.[103] In 2002, MIIX announced that it was not going to renew policies for 7000 physicians

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[97] U.S. GEN. ACCOUNTING OFFICE, MEDICAL MALPRACTICE INSURANCE: MULTIPLE FACTORS HAVE CONTRIBUTED TO INCREASED PREMIUM RATES 15 (2003), *available at* http://www.gao.gov/new.items/d03702.pdf [hereinafter "GAO"].

[98] *Id.* at 16.

[99] *Id.* at 24-33.

[100] *See* Rachel Zimmerman & Christopher Oster, *Assigning Liability: Insurers' Missteps Helped Provoke Malpractice "Crisis"*, WALL ST. J., June 24, 2002, at A1; Charles Kolodkin, Commentary, *Medical Malpractice Industry Trends? Chaos!*, INT'L RISK MGMT. INST., Sept. 2001, http://www.irmi.com/Expert/Articles/2001/Kolodkin09.aspx.

[101] Zimmerman & Oster, *supra* note 100.

[102] *Id.*

[103] *Id.*

outside of New Jersey.[104] Similarly situated companies in other states also began to pull out of their respective markets.[105] With the competitive threat receding, surviving companies were able to retrench and raise premiums.[106] In fact, many insurers raised premiums above a normally competitive level in order to recoup losses.[107] Thus, pricing decisions by insurers led to several years of artificially low premiums, followed by a price spike that brought revenues back into alignment.[108]

3. Investment losses

Insurers may also raise premiums when investment returns fall.[109] Malpractice insurers invest money that is not needed to pay claims or overhead expenses.[110] State law mandates that earnings on these investments be taken into account when setting premium rates.[111] Thus, when investment income is high, as it was during the 1990s, premium rates typically fall as investment income covers a portion of claim losses.[112] When investment income subsequently falls, however, as it did from 2000 to 2002, premium rates must be increased to make up for the shortfall.[113] In its report, the GAO estimates that the fifteen largest medical malpractice insurers increased premium rates an average of 7.2% from 2000 to 2002 to compensate for lower investment income.[114]

E. Are Caps on Damages the Answer?

The recent spike in Hawai'i's malpractice insurance rates may have been caused by short-term problems like investment losses or insurer pricing decisions. Looking ahead, however, if policymakers decide that it is in the public interest to restrain medical malpractice insurance costs over the long term, losses on claims will have to be controlled.

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[104] *Id.*
[105] *Id.*
[106] *Id.*
[107] *See* Kolodkin, *supra* note 100.
[108] Zimmerman & Oster, *supra* note 100.
[109] GAO, *supra* note 97, at 25.
[110] *Id.* at 24.
[111] *Id.* at 25.
[112] *Id.*
[113] *Id.*
[114] *Id.* at 27.

One way to control losses is to cap damages.[115] A 2004 Emory University study found that loss ratios (awards, settlement, and defense costs as a percentage of premiums) in states that capped damage awards were 11.7% lower than in states that did not cap awards.[116] However, stringent caps do not guarantee low premiums. In Los Angeles, for example, where a $250,000 noneconomic damage cap has been in place for over three decades, OB/GYNs pay $86,348 for coverage, compared to $61,684 in Honolulu.[117] Moreover, damage caps have not been found to reduce the number of claims filed,[118] but do appear to have a small positive impact on the supply of physicians.[119]

While caps on damage awards may be effective in reducing medical malpractice insurers' costs, those costs do not disappear. In fact, malpractice damage caps work by shifting the burden of medical negligence from the medical system onto the victims of negligence. To illustrate, imagine that Hawai'i enacted a $100,000 cap on economic damages. If a patient injured by medical negligence then required $150,000 in nursing care, and was awarded damages in this amount by a jury, his physician would only be responsible for paying $100,000. In this scenario, the doctor saved $50,000, but the costs of the negligence were simply passed on to the patient who now had to find a way to pay for his nursing care himself.

Noneconomic damage caps apply to payments for mental and emotional injuries and physical disfigurement, but the same principles apply. Take the case of a hypothetical patient whose face is severely scarred due to the negligence of her physician. If a jury determines that she suffered $150,000 in damages for her physical disfigurement and pain and suffering, but noneconomic damages are capped at $100,000 by state law, her recovery will be limited to $100,000. In this scenario, the negligent physician saves $50,000. These costs would be borne by the patient, who would not be fully compensated for the diminishment of the quality of her life.

Rather than shifting costs from negligent physicians onto victims, a more systemic approach would work to reduce malpractice insurance costs by reducing the incidence of errors. Fewer errors will translate into fewer lawsuits and fewer damage awards.

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[115] Kenneth E. Thorpe, *The Medical Malpractice "Crisis": Recent Trends and the Impact of State Tort Reforms*, 4 HEALTH AFF. 20, 26 (2004).

[116] *Id.*

[117] DePledge, *supra* note 54.

[118] Brian A. Liang & LiLan Ren, *Medical Liability and Damage Caps: Getting Beyond Band Aids to Substantive Systems Treatment to Improve Quality and Safety in Healthcare*, 30 AM. J.L. & MED. 501, 506 (2004).

[119] Daniel P. Kessler et al., *Impact of Malpractice Reforms on the Supply of Physician Services*, 293 JAMA 2618, 2621 (2005).

III. THE CRISIS IN MEDICAL ERRORS

According to the influential 1999 Institute of Medicine ("IOM") report, *To Err is Human*, between 44,000 to 98,000 people may be killed in the United States each year by medical errors.[120] Even at the lower estimate, preventable medical errors would be responsible for more deaths than breast cancer, AIDS, or car accidents.[121] Other commentators have put the numbers in perspective by pointing out that the IOM's death estimates are equivalent "to having three jumbo jets filled with patients crash every two days"[122] and noting that "the United States loses more lives to patient safety incidents every six months than it did in the entire Vietnam War."[123] The IOM estimated the cost of these errors at $17 to $29 billion per year, approximately two to three times the cost of all medical liability insurance premiums paid in 2002.[124] Costs are attributable to ameliorative treatment expenses, lost income, loss of household production, and disability costs.[125]

Assuming that Hawai'i's rate of medical errors tracks the national average estimated by the IOM, between 189 to 422 Hawai'i patients are expected to die each year as a result of preventable medical errors.[126] The annual projected cost of these errors is $73 to $125 million.[127] In reality, however, research suggests that Hawai'i's rate of medical errors likely exceeds the national average. For example, two 2006 studies ranked Hawai'i hospitals among the worst in the nation in terms of patient safety.[128]

The first study, conducted by private healthcare researcher Solucient, measured the clinical and financial performance of Hawai'i's fourteen major hospitals and found that, as a group, they performed in the bottom twenty percent of all states.[129] A second study conducted by the research company Health Grades, Inc. ranked Hawai'i hospitals forty-third out of fifty states based on their performance on selected patient safety indicators.[130] The

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[120] INSTITUTE OF MEDICINE, TO ERR IS HUMAN: BUILDING A SAFER HEALTH SYSTEM 26 (Linda T. Kohn et al. eds., 1999).

[121] *Id.*

[122] Editorial, *Preventing Fatal Medical Errors*, N.Y. TIMES, Dec. 1, 1999, at A22 (quoting Dr. Lucian Leape).

[123] David A. Hyman & Charles Silver, *The Poor State of Health Care Quality in the U.S.: Is Malpractice Liability Part of the Problem or Part of the Solution?*, 90 CORNELL L. REV. 893, 901 (2005).

[124] INSTITUTE OF MEDICINE, *supra* note 120, at 27.

[125] *Id.*

[126] WILLIAMS ET AL., *supra* note 58, at 39.

[127] *Id.*

[128] Greg Wiles, *Isle Hospitals Rated Low*, HONOLULU ADVERTISER, Mar. 30, 2007, at A1.

[129] *Id.*

[130] *Id.*

Honolulu Advertiser subsequently conducted a follow-up analysis using data obtained from the U.S. Department of Health and Human Services' hospital comparisons website and found that Hawai'i hospitals were "three times more likely to score below the [national] average than above average when it comes to twenty-one medical safety processes."[131]

In sum, research indicates that patient safety is an important health issue and that medical errors likely have a significant impact on medical malpractice costs in Hawai'i. At present, commentators disagree about the approach that should be taken to address medical errors.[132] Some argue that interventions should focus on punishing mistakes,[133] while others advocate fixing systemic problems.[134] Given the complexity of the issue, a range of approaches will likely be required. Some of the most promising are discussed below.

IV. PROPOSALS TO IMPROVE PATIENT SAFETY

A. Improve Disclosure of Errors

After Dr. Ricketson implanted the screwdriver shaft into Mr. Iturralde's spine, no one informed Mr. Iturralde or his family about the nature of the procedure, discussed possible dangers facing the patient, or identified corrective actions that might be taken.[135] In fact, when the screwdriver broke a week after the original operation, the hospital allowed Dr. Ricketson to perform the corrective surgery on Mr. Iturralde.[136] It was only after this second surgery that Mr. Iturralde and his family learned about the error.[137] Although one might assume that a doctor has a legal obligation to inform his or her patient when the doctor erroneously inflicts a serious injury on the patient, in most states no such obligation exists.[138] Lack of disclosure is problematic from a patient safety perspective because it hinders the learning that may occur with an honest airing of mistakes and breaks the bond of trust that is an integral part of a healthy doctor-patient relationship. Moreover, lack

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[131] *Id.*

[132] *E.g.*, Hyman & Silver, *supra* note 123, at 895-900.

[133] *See, e.g.*, Press Release, Public Citizen, Five Percent of Doctors Responsible for Half of All Medical Malpractice, Study Finds (Sept. 25, 2002), http://www.citizen.org/pressroom/release.cfm?ID=1222 [hereinafter Public Citizen Press Release].

[134] *E.g.*, Liang, *supra* note 25, at 346.

[135] *See* Apgar, *Medical Mayhem*, *supra* note 2.

[136] *Id.*

[137] *Id.*

[138] *See* William M. Sage et al., *Bridging the Relational-Regulatory Gap: A Pragmatic Information Policy for Patient Safety and Medical Malpractice*, 59 VAND. L. REV. 1263, 1283 (2006).

of disclosure of medical errors may prevent appropriate remedial actions from being taken, as was seen in the Iturralde case.

1. Current disclosure requirements

At present, doctors in Hawai'i are not legally obligated to disclose medical errors.[139] There are no federal laws mandating disclosure of medical errors.[140] Four states—Florida,[141] Nevada,[142] New Jersey,[143] and Pennsylvania[144]—currently require disclosure of medical errors, but the State of Hawai'i does not.

A number of private organizations do encourage error disclosure, but these entreaties do not carry the force of law.[145] The American Medical Association, for example, indicates that the "physician is ethically required to inform the patient of all the facts necessary to ensure understanding of what has occurred"[146] and the American College of Physicians' ethics manual states that physicians should disclose to patients "information about procedural or judgment errors made in the course of care if such information is material to the patient's well-being."[147] Similarly, the Joint Commission on the Accreditation of Healthcare Organizations ("JCAHO"), a private organization that state and local governments have authorized to accredit hospitals, requires reporting of serious medical errors to both patients and to JCAHO.[148] Penalties available to JCAHO include loss of hospital accreditation or placement on a hospital watch list. However, because penalties are rarely levied and affect the hospital rather than the individual physician,[149] the JCAHO mandate has not had a significant effect on physician behavior.

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[139] *See id.*

[140] *Id.*

[141] FLA. STAT. ANN. § 395.1051 (West Supp. 2007).

[142] NEV. REV. STAT. § 439.855 (2007).

[143] N.J. STAT. ANN. § 26:2H-12.25 (West Supp. 2007).

[144] 40 PA. CONS. STAT. ANN. § 1303.308 (West Supp. 2007).

[145] Sage et al., *supra* note 138, at 1284.

[146] AMERICAN MEDICAL ASSOCIATION COUNCIL ON ETHICS AND JUDICIAL AFFAIRS, AMA CODE OF ETHICS: CURRENT OPINIONS WITH ANNOTATIONS § E-8.12 (2006).

[147] AMERICAN COLLEGE OF PHYSICIANS, ETHICS MANUAL (1998), *available at* http://www.acponline.org/ethics/ethicman5th.htm#disclose.

[148] BARRY R. FURROW ET AL., HEALTH LAW 58 (5th ed. 2004).

[149] Barry R. Furrow, *Medical Mistakes: Tiptoeing Toward Safety*, 3 Hous. J. Health L. & Pol'y 181, 207-08 (2003).

2. Current disclosure practices

In a 2002 survey of 245 United States hospitals, only one-third indicated that they had board-approved policies in place mandating that patients be told "about unexpected harm that occurs as a result of treatment or care, not directly because of a patient's illness or underlying condition."[150] Although a majority of respondent hospitals indicated that they did not have disclosure policies in place, sixty-five percent nonetheless indicated that they "always" told patients of "death/serious injury" that occurred as a "result of treatment or care."[151] Thirty-four percent of hospitals, however, only reported such harm "frequently/sometimes."[152] Moreover, the survey found that disclosure rates varied depending on the cause of harm.[153] More than half of hospitals were less likely to disclose preventable injuries than unpreventable injuries.[154] The survey also found that disclosure frequency was much less than would be expected given error rates estimated in the IOM report.[155] In sum, the researchers concluded, "there is still a long way to go before serious harm is consistently and thoroughly disclosed to patients."[156]

At the individual physician level, a number of studies have found that doctors often fail to disclose medical errors.[157] For example, in one study, 114 internal medicine residents were asked to identify the most serious medical mistake they made in the previous year.[158] The residents were then asked if they had discussed the mistake with the patient or patient's family.[159] Only twenty-seven (twenty-four percent) indicated that they had done so.[160] Similarly, a 2002 survey of physicians found that, of those who had experienced an error in their own health care, only thirty-one percent said that the involved health worker had disclosed the mistake.[161]

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[150] Rae M. Lamb et al., *Hospital Disclosure Practices: Results of a National Survey*, 22 Health Aff. 73, 74 (2003).

[151] *Id.* at 74-75.

[152] *Id.* at 77.

[153] *Id.*

[154] *Id.*

[155] *Id.* at 79.

[156] *Id.*

[157] Thomas H. Gallagher & Mary H. Lucas, *Should We Disclose Harmful Medical Errors to Patients? If So, How?*, 12 J. CLINICAL OUTCOMES MGMT. 253, 255 (2005).

[158] *Id.* at 254-55.

[159] *Id.*

[160] *Id.* at 255.

[161] *Id.*

3. Benefits of disclosure

Health care providers may avoid disclosing errors to patients for a number of reasons, including a fear of incurring higher litigation costs and worry that the patient will lose confidence in the healthcare team.[162] A growing body of evidence, however, suggests that these fears are misplaced. Research suggests that full disclosure may actually reduce malpractice costs and help to maintain patient trust. Disclosure may also help hospitals and doctors to learn from their mistakes, promoting patient safety.

For example, a study of the Veterans Affairs Medical Center ("VAMC") in Lexington, Kentucky, which implemented a policy of full disclosure in 1987, found that the policy reduced the institution's malpractice liability costs.[163] The hospital had previously responded to medical errors with "an adversarial combination of little disclosure and much opposition."[164] Under the new policy, patients and their families were informed of mistakes immediately and were provided with an apology and an admission of fault (verbally and, if desired, in writing).[165] The Lexington facility also offered patients help with filing compensation claims and attempted to make fair settlement offers to negligently injured patients.[166]

Since implementing this policy, the Center has "paid more claims, but at a lower cost per claim [than peers]."[167] In 1999, the median private sector malpractice settlement was $497,412, whereas the Lexington facility paid an average of $98,150 per claim.[168] As a result, the Center's overall liability costs ranked in the lowest quartile of Veterans Affairs centers.[169] Researchers suggest that the Center's cost per claim may be lower because patients who are informed of errors are more willing to negotiate a settlement.[170] The Center's chief of staff, Steven Kraman, argues that if all hospitals implemented similar policies, "every patient who was injured would get fair

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[162] Deborah L. Volker & Angela P. Clark, *Taking the High Road: What Should You Do When an Adverse Event Occurs? Part II*, 18 CLINICAL NURSE SPECIALIST 180, 180 (2004).

[163] *Id.*

[164] Jonathan R. Cohen, *Apology and Organizations: Exploring an Example from Medical Practice*, 27 FORDHAM URB. L.J. 1447, 1451 (2000).

[165] *Id.* at 1453.

[166] *Id.*

[167] Daniel O'Connell et al., *Disclosing Unanticipated Outcomes and Medical Errors*, 10 J. CLINICAL OUTCOMES MGMT. 26 (2003).

[168] 3RD ANNENBERG CONFERENCE ON PATIENT SAFETY, SUMMARY OF THE CONFERENCE PROCEEDINGS (May 17, 2001), http://web.archive.org/web/20051104200408/http://www.npsf.org/congress_archive/2001/summary_thursday.html.

[169] O'Connell et al., *supra* note 167, at 26.

[170] *Id.*

compensation, the lawyers would get nothing, and you wouldn't see $12 million verdicts."[171]

Gradually, other institutions are beginning to follow the Lexington VAMC's lead. The University of Michigan Health System, for example, implemented a policy in 2002 that encourages physicians to disclose errors and apologize for mistakes.[172] Since launching the practice, the system's annual attorney fees fell from $3 million to $1 million per year, and notices of intent to sue fell from 262 to 130 per year.[173]

Similarly, COPIC, a large Colorado malpractice insurer, implemented the "3Rs" (recognize, respond, resolve) program in 2000.[174] Under the program, COPIC encourages disclosure of medical errors, provides physicians with error disclosure training and support, and offers patients reimbursement for economic damages when appropriate.[175] From 2000 to 2003, 435 qualifying incidents were identified and 153 patient reimbursements were made.[176] None of the cases proceeded to a formal lawsuit and preliminary data suggests that the program has significant cost-saving potential.[177]

Disclosure may also help physicians to maintain a relationship of trust with patients. Ethicist Lee Taft notes, "[u]ndisclosed error interrupts the essential ingredient of trust between doctor and patient and disrupts the doctor's sense of integrity. Although the error itself relates to physical harm, the lack of apology disrupts the moral dimension of the doctor's relationship with the patient, the broader medical community, and himself."[178] One could easily imagine this sort of distrust arising in the wake of the Iturralde case, where a patient at Hilo Hospital may now be less likely to take his physician at his word if he is told that a medical injury he suffered was not caused by negligence.

Research appears to confirm this relationship between disclosure and trust. In a survey of 990 members of a New England-based health plan, for example, 98.8% of respondents indicated that they would want to be told of medical

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[171] Andrea Gerlin, *Accepting Responsibility, by Policy*, PHILADELPHIA INQUIRER, Sept. 14, 1999, at A18.

[172] Lindsey Tanner, *MDs Finding 'I'm Sorry' Cuts Malpractice Suits*, STAR-LEDGER (New Jersey), Nov. 12, 2004, at 16.

[173] *Id.*

[174] *A Success Story*, COPIC'S 3RS PROGRAM (COPIC Cos., Denver, Col.), Mar. 2004, at 1, *available at* http://www.callcopic.com/publications/3rs/march_2004.pdf.

[175] Gallagher & Lucas, *supra* note 157, at 256.

[176] *A Success Story*, *supra* note 174.

[177] *Id.*

[178] Lee Taft, *Apology and Medical Mistake: Opportunity or Foil?*, 14 ANNALS HEALTH L. 55, 66 (2005).

errors that resulted in any type of injury.[179] Such disclosure, the researchers reported, "reduced the reported likelihood of changing physicians and increased patient satisfaction, trust, and emotional response."[180]

Disclosure of errors may also "promote physician reflection and institutional learning," resulting in improved patient safety.[181] While such reflection and learning may take place without external disclosure, "external responsibility may breed internal responsibility."[182] Dealing with patients openly and honestly may nurture an organizational culture of openness and honesty toward errors. Moreover, injured patients and their families may be able to contribute to physicians' and hospitals' learning processes, but will only do so if informed of errors.[183]

4. Proposals for improving disclosure

Given the reluctance of many hospitals and physicians to disclose errors to patients, a number of commentators argue that disclosure should be made mandatory. In *The Medical Malpractice Myth*, University of Connecticut law professor Tom Baker observes that:

> We make bakeries tell us the fat content of our cookies. We make credit card companies tell us when they make a mistake in our monthly statements. We make car companies tell us when they find out about even a very minor problem with their cars. In terms of what really matters in our lives, these are small things compared to what happens to us in the hospital. Why not require doctors and hospitals to tell us what we need to know?[184]

This is a good question. It is not clear why disclosure is legally mandated when a credit card company makes a mistake in its customer's statement, but not when a doctor implants a screwdriver in his patient's spine.

A mandatory disclosure statute could be structured in a number of ways, but Baker outlines one promising possibility.[185] After an adverse event occurs, Baker suggests requiring providers to tell the patient, orally and in writing, "(a) what happened, (b) what the preferred outcome would have been, (c) how what happened differed from the preferred outcome, and (d) what they or

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[179] Kathleen M. Mazor et al., *Health Plan Members' Views About Disclosure of Medical Errors*, 140 ANNALS INTERNAL MED. 409, 409 (2004).

[180] *Id.*

[181] Editorial, *Words that Heal*, 140 ANNALS INTERNAL MED. 482, 483 (2004).

[182] Cohen, *supra* note 164, at 1466.

[183] Editorial, *supra* note 181, at 483.

[184] BAKER, *supra* note 42, at 92.

[185] *Id.* at 159.

others could have done differently to increase the chance of getting the preferred outcome."[186]

Under the proposal, all professionals who took part in the care, as well as the hospital, would be obligated to disclose the event to the patient.[187] This obligation could be fulfilled by personally disclosing the event, or by receiving a signed document stating that someone else had already made the disclosure.[188] If disclosure is not made and the patient brings suit, "the adverse health-care event will be regarded as resulting from the negligence of any health-care provider who had an obligation to disclose but did not do so."[189]

Applying this proposal to the Iturralde case, Dr. Ricketson, any nurses involved in the surgery, and the Hilo Medical Center would have been required to inform Mr. Iturralde about the problems with his surgical procedure. Thus, if Dr. Ricketson failed to inform Mr. Iturralde about the error, as he did in this case, the nurses and hospital would have been obligated to do so or would have faced liability for negligence.

B. Increase Scrutiny of Doctors by the State Medical Licensing Board

In 2001, the year Mr. Iturralde went into spine surgery, Hawai'i's disciplinary board ranked fiftieth out of fifty states and the District of Columbia in disciplinary actions per 1000 doctors, according to a report by Public Citizen, a national non-profit public interest organization.[190] Hawai'i's board disciplined approximately 0.80 physicians per 1000, compared with the national average of 3.36 physicians per 1000.[191] In 2005, Hawai'i's disciplinary rate increased to 2.19 physicians per 1000, moving the state to number forty on the list.[192] However, Hawai'i is one of only four states to have been ranked in the bottom fifteen for each of the last ten three-year periods.[193]

Public Citizen states that a low disciplinary rate may be indicative of inadequate funding, inadequate staffing, reactive (as opposed to proactive) investigations, poor leadership, lack of independence, or a poor legal

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[186] *Id.* Baker defines an "adverse event" as "an unintended injury caused by medical management rather than by the disease process." *Id.* at 161.

[187] *Id.* at 167.

[188] *Id.*

[189] *Id.* at 160.

[190] PUBLIC CITIZEN, RANKING OF STATE MEDICAL BOARDS' SERIOUS DISCIPLINARY ACTIONS IN 2001 (HRG PUBLICATION NO. 1616) (2002), http://www.citizen.org/publications/release.cfm?ID=7166&secID=1158&catID=126.

[191] *Id.*

[192] Sally Apgar, *Survey Shows Isles at 40th in Nation for Rate of Disciplining Doctors*, HONOLULU STAR BULL., Apr. 28, 2006, at B1.

[193] *Id.*

framework for disciplining doctors.[194] Hawai'i's board appears to have problems in many of these areas. For instance, Public Citizen recommends that boards raise fees to $500 a year in order to hire adequate staff.[195] Currently, Hawai'i's fees are set at $145 per year.[196] Public Citizen also recommends that boards sever ties with state medical societies.[197] Hawai'i's board, however, relies heavily on the Hawai'i Medical Association's Committee on Physician's Health to monitor members for everything from drug addiction to competence.[198]

Improving the performance of the Hawai'i Medical Board by increasing its funding and independence could yield large dividends given the fact that a small proportion of doctors have been found to be responsible for a significant proportion of all malpractice awards.[199] In a 2004 analysis of the federal government's National Practitioner Data Bank, which retains records of malpractice judgments and settlements since September 1990, Public Citizen found that 4.8% of the nation's doctors were responsible for 51.1% of all malpractice payments from 1990 to 2002, totaling approximately $21 billion.[200] Drilling deeper into the data, 1.7% of doctors were found to be responsible for 27.5% of all malpractice payments, totaling $11 billion.[201] Assuming that malpractice incident trends in Hawai'i track national trends, weeding out a small number of incompetent doctors could reduce total malpractice awards significantly.

C. Give Premiums a Chance to Work

Policymakers face substantial pressure to take action to reduce physicians' medical malpractice premiums.[202] An implied assumption held by those applying this pressure seems to be that physicians do not have the ability to influence premium rates themselves. This assumption, however, is almost certainly inaccurate. Research suggests that physicians are capable of bringing their premium rates down and will work to do so when rates rise to a level that provides them with an adequate financial incentive to undertake necessary steps.

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[194] PUBLIC CITIZEN, *supra* note 190.

[195] WILLIAMS ET AL., *supra* note 58, at 49.

[196] STATE OF HAW. DEP'T OF COMMERCE & CONSUMER AFFAIRS, REQUIREMENTS AND INSTRUCTIONS: PHYSICIAN, *available at* http://www.hawaii.gov/dcca/areas/pvl/boards/medical/application_publication/pvl_Physician.pdf

[197] WILLIAMS ET AL., *supra* note 58, at 49.

[198] Apgar, *Researching Doctors*, *supra* note 11.

[199] *See* Public Citizen Press Release, *supra* note 133.

[200] *Id.*

[201] *Id.*

[202] *See, e.g.*, DePledge, *supra* note 54.

Anesthesiologists, for example, were able to significantly reduce their medical malpractice exposure by undertaking a comprehensive patient safety overhaul.[203] In the 1980s, anesthesiologists were facing high medical malpractice premiums that were increasing faster than the premiums of other specialists.[204] At the time, there was one anesthesia-related death in every 10,000 to 20,000 administrations.[205] In an effort to find a way to improve medical outcomes and bring their malpractice premiums under control, the American Society of Anesthesiologists ("ASA") initiated a closed-claim project that attempted to examine every anesthesia-related medical malpractice claim on file.[206] Using information gleaned from this work, the ASA adopted practice guidelines to improve patient safety and lobbied for better anesthesia equipment.[207] As a result of the ASA's coordinated efforts, anesthesia-related mortality rates fell ten to twenty-five fold in a decade and anesthesia became the "only health sector to achieve 'six sigma' quality, or fewer than four deaths per one-million exposures, the same maximum rates of defects routinely achieved by such corporations as General Electric and Motorola."[208]

As mortality rates fell, insurers' anesthesia-related claims costs also fell, dropping from eleven percent to 3.6% of insurers' total medical malpractice costs.[209] Insurers passed these savings onto anesthesiologists, significantly reducing medical malpractice rates for physicians practicing in this specialty.[210] In one year, for example, the Controlled Risk Insurance Company cut anesthesiologists' premiums at Harvard hospitals from $17,690 to $11,750.[211] For anesthesiologists as a group, average premiums were $18,000 in 2002, which is about the same rate they were charged in 1985—a significant reduction after inflation is considered and much lower than the rate charged most other specialists.[212]

If policymakers had responded to anesthesiologists' rising premiums by capping damage awards, the impetus for a major study and large investments in new equipment likely would have been lost. In fact, the chairman of the committee that supervised the closed-claim project indicated that the ASA was

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[203] Stephen C. Schoenbaum & Randall R. Bovbjerg, *Malpractice Reform Must Include Steps to Prevent Medical Injury*, 140 ANNALS INTERNAL MED. 51, 51 (2004).

[204] *Id.*

[205] Hyman & Silver, *supra* note 123, at 918.

[206] BAKER, *supra* note 42, at 109.

[207] *Id.*

[208] Schoenbaum & Bovbjerg, *supra* note 203, at 51-52.

[209] Hyman & Silver, *supra* note 123, at 919.

[210] Schoenbaum & Bovbjerg, *supra* note 203, at 51.

[211] Hyman & Silver, *supra* note 123, at 919.

[212] Schoenbaum & Bovbjerg, *supra* note 203, at 51.

motivated by an effort to reduce premium rates.[213] "If patients were not injured," he explained, "they would not sue, and if the payout for anesthesia-related patient injury could be reduced, then insurance rates should follow."[214]

As malpractice premiums increase, other specialties could become motivated to make safety advances comparable to those made by anesthesiologists. Surgeons, for example, currently leave surgical instruments in 1000 to 1500 patients each year, which is an error rate fifteen times higher than would be necessary to achieve six sigma quality.[215] With the right equipment and processes in place, one could imagine surgeons substantially reducing the incidence of this type of error.

V. CONCLUSION

Under the damage cap proposed by Governor Lingle, the Iturraldes' recovery for economic and noneconomic damages would have been limited to $557,000.[216] This would have saved the insurance system approximately $1.62 million. The cost of this savings, however, would have been borne largely by Mr. Iturralde and his family. The Iturraldes would have only been compensated $250,000 for the pain, suffering, loss of consortium, and emotional distress associated with Mr. Iturralde's having endured three additional corrective surgeries and living out the final years of his life paraplegic and incontinent, rather than the $1.87 million in damages the jury determined they suffered.

This comment argues for an alternative method of achieving cost savings. Rather than implementing a policy that transfers the costs of negligent behavior to victims of negligence, savings would be achieved by finding ways to reduce medical negligence itself. For example, this comment argues for a more active medical licensing board. Such a board likely would have rejected Dr. Ricketson's medical license application given his checkered history. If Dr. Ricketson had made it past the board and had implanted the screwdriver shaft, the error likely would have been quickly disclosed under the disclosure law discussed in this comment. Once the error was disclosed, remedial action likely could have been taken before the screwdriver broke, possibly preventing further injury to Mr. Iturralde.

At present, pursuing a remedy through the tort system is the only way for most injured patients to obtain compensation for injuries caused by the acts of negligent medical providers. The tort system also plays a key role in

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[213] BAKER, *supra* note 42, at 109.

[214] *Id.*

[215] Schoenbaum & Bovbjerg, *supra* note 203, at 52.

[216] $307,000 in economic damages + $250,000 (capped) in non-economic damages = $557,000. See H.B. 1325, 24th Leg., Reg. Sess. (Haw. 2007), for details on the proposed cap.

deterring negligent behavior and encouraging investment in safer medical processes and equipment. Damage caps throw a wrench into this system, preventing courts from efficiently allocating the costs of negligence to negligent actors. Rather than upsetting this delicate balance, consideration should be given to policies that address the root cause of the medical malpractice problem—namely, policies that promote patient safety.

Steven K. Idemoto[217]

[217] J.D. Candidate 2008, William S. Richardson School of Law, University of Hawai'i at Manoa.

Prostitution: Protected in Paradise?

I. INTRODUCTION

Prostitution, often referred to as "the world's oldest profession," has been a part of societies for thousands of years.[1] From Mary Magdalene to Pretty Woman, western cultural narratives have celebrated the image of the reformed prostitute: the "hooker with a heart of gold" who, with the help of a heroic male, abandons her life on the streets to become a "respectable" lady. In *real* life, however, the word "prostitute"[2] conjures up images of seedy massage parlors, pimps, and drugs, while prostitutes themselves are spurned by society and castigated by its penal system. And, despite the enduring permanence of the prostitution profession, many Americans today continue to be harshly judgmental of these women[3] and are staunchly opposed to integrating them into society.

In light of prostitution's dark associations, it is easy to forget that "we the people"[4] includes the women waiting on the corners of Hotel Street and trolling down the streets of Waikiki. It is equally easy to forget that these women also have lives, families, needs, and constitutional rights. Although it may be difficult for many to think about prostitutes objectively rather than with scorn or derision, one way to re-conceptualize them is to think of prostitutes as wage-earners fulfilling terms of a contract: these women are merely performing a service in exchange for payment.[5] Most Americans "take money for the use of [their] bod[ies]. Professors, factory workers, lawyers, opera singers, prostitutes, doctors, legislators—[they] all do things with parts

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[1] *See* HILARY EVANS, HARLOTS, WHORES, & HOOKERS 11-12 (1979); Jessica Drexler, *Governments' Role in Turning Tricks: The World's Oldest Profession in the Netherlands and the United States*, 15 DICK. J. INT'L L. 201, 201 (1996). Some researchers believe that prostitution behaviors are exhibited in higher primates, as scientists have observed female and younger male chimps "offering their sexual services" in exchange for food or to avoid attack. VERN BULLOUGH & BONNIE BULLOUGH, WOMEN AND PROSTITUTION: A SOCIAL HISTORY 1 (1987). Most social scientists agree that prostitution has its origins in early human history. *Id.* at 7.

[2] A prostitute is the person soliciting payment for sex acts; a "john" is her customer. *See* AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 970, 1455 (Anne H. Soukhanov ed., Houghton Mifflin Co. 1992) (1969).

[3] Although both males and females work as prostitutes, this paper focuses on the impact of state laws on female prostitutes. Thus, prostitutes are sometimes referred to simply as "women" in the paper.

[4] U.S. CONST. pmbl.

[5] Alexandra Bongard Stremler, *Sex for Money and the Morning After: Listening to Women and the Feminist Voice in Prostitution Discourse*, 7 U. FLA. J.L. & PUB. POL'Y 189, 193 (1995).

of [their] bodies for which [they] receive a wage in return."[6] The difference is that, with the exception of the prostitute, each of the aforementioned workers holds a job that society legitimates, whereas the prostitute's labor is regarded with hostility. The prostitute's occupation is not only marginalized, but criminalized as well.[7]

As professor Sylvia Law notes, prostitution is the only type of consensual sexual activity that continues to be criminally sanctioned in America today.[8] Indeed, Hawai'i does not currently punish any other forms of adult consensual sex: sodomy, fornication, and adultery are all legal activities.[9] Prostitution alone is singled out for prohibition.

Although there are undoubtedly many people in society who find prostitution morally repugnant and vehemently oppose the notion of legalizing the practice, courts cannot decide the *constitutionality* of a particular law based on its popularity with the social majority.[10] As Justice Holmes once noted, the Constitution was "made for people of fundamentally differing views, and the accident of our finding certain opinions natural and familiar, or novel, and even shocking, ought not to conclude our judgment upon the question [of] whether statutes embodying them conflict with the Constitution of the United States."[11]

Accordingly, negative attitudes toward an unpopular group should not dictate a court's decision on whether a statute criminalizing the group's activities comports with the Constitution. Hawai'i's prostitution proscription, based on sexism and prejudice, cannot be held constitutional simply because prostitutes are not well-liked members of society. This paper argues that *private* prostitution between consenting adults should be legalized for three

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[6] Sylvia A. Law, *Commercial Sex: Beyond Decriminalization*, 73 S. CAL. L. REV. 523, 538 (2000) (quoting Martha C. Nussbaum, *"Whether from Reason or Prejudice": Taking Money for Bodily Services*, 27 J. LEGAL STUD. 693-94 (1998)).

[7] *See* HAW. REV. STAT. § 712-1200 (1993).

[8] Law, *supra* note 6, at 526. Prostitution, like sodomy, fornication, and adultery, involves two individuals engaged in a sexual act. However, prostitution is the only one of these activities that necessarily involves the exchange of money.

[9] *See generally* HAW. REV. STAT. §§ 701-713 (1993 & Supp. 2006).

[10] If courts made decisions based on majority sentiment, cases that we now consider constitutionally repugnant, such as *Plessy v. Ferguson*, might still be considered good law. *See* 163 U.S. 537, 540 (1896) (holding that a statute providing for "equal but separate accommodations for the white, and colored races" comported with the Thirteenth and Fourteenth Amendments), *overruled by* Brown v. Bd. of Educ., 347 U.S. 483 (1954).

[11] Lochner v. New York, 198 U.S. 45, 76 (1905) (Holmes, J., dissenting); *see also* Bowers v. Hardwick, 478 U.S. 186, 216 (1986) (Stevens, J, dissenting) ("[T]he fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice; neither history nor tradition could save a law prohibiting miscegenation from constitutional attack."), *overruled by* Lawrence v. Texas, 539 U.S. 558 (2003).

reasons. First, history has demonstrated that with the right community attitudes, prostitutes can be successfully integrated into society. Second, the current laws criminalizing the practice violate the due process and equal protection clauses of the Fourteenth Amendment to the United States Constitution. Finally, the current laws violate the due process, equal protection, and privacy guarantees found in the Hawai'i state constitution.

Part II of this article briefly explores Hawai'i's history of prostitution, and Part III examines the current legal status of prostitution in Hawai'i. Part IV considers Hawai'i's prostitution statute in relation to the Fourteenth Amendment to the United States Constitution, and Part V provides an extensive look at the right to privacy explicitly granted by the Hawai'i Constitution. Part VI discusses possible and current proposed and prostitution regulations. Finally, Part VII reaches the conclusion that the Hawai'i legislature and judiciary ought to recognize private prostitution as a protected activity.

II. PROSTITUTION IN HAWAI'I'S PAST

During World War II, despite both federal[12] and state prohibitions on prostitution, Honolulu's Chinatown neighborhood was home to fifteen brothels and their live-in prostitutes.[13] Both local police and military powers chose to ignore the laws banning prostitution, because as George Sumner, chairman of the Police Commission, explained, too many men in Honolulu were "just like animals" to even consider shutting down the brothels.[14] Instead, the police and military officers worked with the prostitutes and madams, regulating their activities.[15] Between 1941 and 1943, the Honolulu Police Department ("HPD") registered approximately 250 prostitutes as "entertainers," each of whom paid a dollar a year for a license.[16]

Each Honolulu prostitute worked at least twenty days out of the month and "serviced" about 100 men per working day.[17] Most of the workers were white women from San Francisco who moved to Hawai'i during the war, lured by

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[12] *See* BETH BAILEY & DAVID FARBER, THE FIRST STRANGE PLACE: RACE AND SEX IN WORLD WAR II HAWAII 98 (1992) (noting that in July of 1941, President Franklin D. Roosevelt signed the May Act into law, which was designed to "stamp out any and all prostitution aimed at servicemen"). The May Act applied to the states as well as to any American territories. *Id.* at 99.

[13] *See id.*

[14] *Id.* at 99-100.

[15] *See id.* at 100 ("During most of the war, the brothels were a regulated enterprise supervised by the municipal, territorial, and federal authorities.").

[16] *See id.* at 98. These entertainers were required to report and pay taxes on earned income. *Id.*

[17] *See id.* at 100. Every man who came into a brothel paid three dollars; one dollar went to the madam running the establishment, and the other two went to the prostitute. *Id.*

the possibility of making a fortune.[18] Each prostitute was responsible for subsidizing the costs of her required weekly gynecological visits, tests for venereal disease, and hospitalization bills if she acquired sexually transmitted diseases.[19]

For the most part, both Hawai'i residents and military personnel approved of the regulated brothels because "in the face of what they saw as unstoppable urges and acts," the prostitution houses kept venereal rates "relatively low" while confining the soldiers' sexual activities to a limited geographical area.[20] An editorial from the period in *Hawaii* magazine characterized it this way: "[f]rom the community standpoint . . . we can be thankful that most of the extra-marital or extra-legal sexual relationships *are* with prostitutes—women who have chosen that profession—and not with our daughters and sisters and wives."[21]

The brothel era in Honolulu ended on September 21, 1944, when Governor Steinback ordered the regulated brothels shut down.[22] Of course, prostitution in Hawai'i did not end with the closing of the brothels;[23] the practice continues today.

III. THE CURRENT LEGAL STATUS OF PROSTITUTION IN HAWAI'I

As HPD's "entertainer" registration system has long been abandoned, it is unknown how many Hawai'i women currently make their living as prostitutes. However, one can draw rough estimates from prostitution arrest statistics: according to records from the state judiciary, the number of arrests for prostitution has averaged 423 per year for the past thirteen years.[24]

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[18] *See id.* at 107. Many of the working Chinatown prostitutes made $30,000 to $40,000 a year, while the average non-prostitute working woman was earning less than $2,000 annually. *Id.* at 100.

[19] *See id.* at 101.

[20] *See id.* at 99.

[21] *Why Talk About Prostitution,* HAWAII, Jul. 31, 1944.

[22] *See generally* BAILEY & FARBER, *supra* note 12, at 130-31. Neither the military nor most madams fought the decision; most of the madams felt "they had little to complain about," as "no one had expected the wartime situation to last." *Id.* at 131.

[23] *See id.* at 131. Women who stayed in the business "set up shop elsewhere" and charged from $25-100 for the same "three-minute routine." *Id.* at 131-32.

[24] Peter Boylan, *O'ahu Prostitution Back on the Rise,* HONOLULU ADVERTISER, Aug. 26, 2006, at 1A. However, because prostitution arrests figures include johns and do not parse out repeat offenders, it is difficult to ascertain from these arrest statistics how many prostitutes actually operate in Honolulu today.

A. Hawai'i Revised Statutes

Currently, any form of sex in exchange for money is illegal in Hawai'i, and both solicitation by and patronage of prostitutes are considered petty misdemeanors.[25] According to Hawai'i Revised Statutes ("HRS"), "[a] person commits the offense of prostitution if the person engages in, or agrees or offers to engage in, sexual conduct with another person for a fee."[26]

The current prostitution statute was added to the Hawai'i Penal Code in 1972, when the Hawai'i Legislature adopted its version of the American Law Institute's Model Penal Code.[27] The Judiciary Committee explained that the updated prostitution statute created important new prostitution laws by "reducing the offense . . . to a petty misdemeanor," and by "imposing more severe sentences for those who advance or profit [from the acts of others] than for those who *only* personally engage in it."[28]

In the commentary to HRS Section 712-1200, legislators observed that although "[h]istory has proven that prostitution is not going to be abolished either by penal legislation nor [sic] [by] the imposition of criminal sanctions," the trend of thought in America "is that 'public policy' demands that the criminal law go on record against prostitution."[29] Lawmakers also noted that the customary arguments set forth rationalizing the suppression of prostitution were simply "not convincing," as there were narrower and more effective ways in which to handle these issues.[30] The legislators even remarked that the idea of legalizing prostitution while confining it to certain areas "exhibit[ed] foresight and practicality," but determined that because "a large segment of society is not presently willing to accept such a liberal approach," prostitution

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[25] *See* HAW. REV. STAT. § 712-1200 (1993).

[26] *Id.* § 712-1200(1). A conviction for prostitution carries with it a mandatory fine of $500 and either probation, community service, or thirty days of jail time, depending on the arrestee's number of prior convictions. *Id.* § 712-1200(3) to (4). As used in the section, "sexual conduct" is defined as "'sexual penetration,' 'deviate sexual intercourse,' or 'sexual contact.'" *Id.* § 712-1200(2).

[27] H.R. STAND. COMM. REP. NO. 227, 6th Leg., Reg. Sess. (Haw. 1971), *reprinted in* 1971 HAW. HOUSE J. 1971, 784.

[28] HAW. LEGISLATIVE REFERENCE BUREAU, 1972 DIGEST AND INDEX OF LAWS ENACTED 31 (1972) (emphasis added). The new law also differed from the old in that acts of "indiscriminate sexual intercourse" *without* payment, e.g., fornication and adultery, were no longer criminalized. *Id.*

[29] HAW. REV. STAT. § 712-1200, cmt (1993).

[30] *Id.* The traditional arguments mentioned by legislators were "the prevention of disease, the protection of innocent girls from exploitation, and the danger that more sinister activities may be financed by the gains from prostitution." *Id.*

must be criminalized as a means of controlling its scope and "protecting those segments of society which are offended by its *open* existence."[31]

B. Community and Court Attitudes Toward Prostitution

In 1998, the Hawai'i Legislature designated Waikiki a "prostitution free zone."[32] In such zones, police officers can arrest "known prostitutes"[33] if spotted in one of the zones between 6:00 P.M. and 6:00 A.M., and the prostitutes will have to serve automatic thirty-day sentence.[34] Supporters of these zones have lobbied for expansion of the covered geographical areas. Although the supporters acknowledge that the zones merely "force prostitutes to seek out new parts of town," they insist that the zones are nonetheless necessary to "control the problem."[35]

Hawai'i courts consider prostitution a petty offense. In *State v. Lindsey*, the Hawai'i Supreme Court decided that prostitution did not meet the minimum threshold for constitutional seriousness to warrant a trial by jury.[36] To make its decision, the court looked to the legislative history of HRS Section 712-1200 and determined that the legislature: (1) had been "somewhat reluctant to continue to criminalize prostitution;" (2) indicated that it was more concerned with prostitution's secondary effects than the act itself; and (3) felt that prostitution was a less serious offense than its related problems, such as violence and promoting prostitution.[37] Thus, although both the court's language and the statute's legislative history indicate that neither governmental branch views prostitution as a very serious crime, both branches continue to insist on its criminalization.

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

[32] HAW. REV. STAT. § 712-1207 (Supp. 2006). In 2000, the law was amended to allow counties to designate up to three other such "prostitution free zones" on the island. *Id.*

[33] *See* Boylan, *supra* note 24 (explaining that "known prostitutes" are women who have been previously arrested and convicted).

[34] *Id.*

[35] *Id.*

[36] 77 Hawai'i 162, 166, 883 P.2d 83, 87 (1994). Defendant Lindsey, who had been found guilty of three charges of prostitution in district court bench trials, argued that her convictions should be invalidated because the gravity of Hawaii Revised Statutes Section 712-1200's mandatory punishments indicated that prostitution was an offense serious enough to warrant a jury trial. *Id.* at 163, 883 P.2d at 84.

[37] *Id.* at 166-67, 883 P.2d at 87-88.

IV. THE FOURTEENTH AMENDMENT AND THE PROHIBITION ON PROSTITUTION

Within the Fourteenth Amendment[38] are two clauses that a court may use to invalidate local government ordinances: the first says that no state "shall deprive any person of life, liberty, or property, without due process of law" and the second that no state shall "deny to any person within its jurisdiction the equal protection of the laws."[39] Therefore, the Hawai'i prostitution statute can be found unconstitutional under the Fourteenth Amendment if it violates either the due process or equal protection clauses. This paper will discuss both of these clauses in relation to the Hawai'i prostitution statute.

A. The Equal Protection Clause

1. Equal protection and discriminatory enforcement of prostitution laws

In general, most facially-neutral statutes will be upheld against equal protection challenges so long as courts find that the legislatures had rational bases for enacting them, even in cases where a statute contains a classification that affects certain groups within a class more than others.[40] In recent years, the Supreme Court has accorded great deference to the decisions of state lawmakers, and in many cases, has refused to find violations of equal protection. [41] Justice Thomas has explained this extremely lenient standard by stating that "in areas of social . . . policy, a statutory classification that neither proceeds along suspect lines nor infringes fundamental constitutional rights must be upheld against equal protection challenge if there is *any*

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[38] U.S. CONST. amend. XIV, §1.

> [A]ll persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Id.

[39] Ry. Express Agency, Inc. v. New York, 336 U.S. 106, 111 (1949) (Jackson, J., concurring) (quoting U.S. CONST. amend. XIV, §1).

[40] *See* Personnel Adm'r of Mass. v. Feeney, 442 U.S. 256, 271-72 (1979) ("When the basic classification is rationally based, uneven effects upon particular groups within a class are ordinarily of no constitutional concern.").

[41] *See, eg.*, FCC v. Beach Commc'ns, 508 U.S. 307, 313 (1993) ("Whether embodied in the Fourteenth Amendment or inferred from the Fifth, equal protection is not a license for courts to "judge the wisdom, fairness, or logic of legislative choices.").

reasonably conceivable state of facts that could provide a rational basis for the classification."[42]

Nevertheless, courts *may* invalidate as unconstitutional even facially neutral statutes if courts find them to be discriminatory as applied.[43] But, disparate impact alone is not enough to trigger a heightened level of judicial scrutiny; instead, to prevail on a claim of discriminatory application, a plaintiff must also prove that the disproportionate impact he or she experienced can be traced back to a prejudicial intent.[44]

To prove a claim of discriminatory enforcement in Hawai'i, a defendant must first "present sufficient evidence to establish the existence of intentional or purposeful discrimination"[45] and then prove that the discrimination is "'deliberately based upon an unjustifiable standard, such as race, religion, or other arbitrary classification.'"[46] As explained in *Personnel Administrator of Massachusetts v. Feeney*, the two-fold inquiry for statutes challenged on gender-based discrimination grounds involves: (1) determining whether the statutory classification is overtly or covertly based upon gender; and (2) asking whether the adverse effects experienced by the challengers reflect an "invidious gender-based discrimination."[47]

Because tests for discriminatory enforcement require not only proof of disparate impact, but also of ill intent, it is very difficult for plaintiffs to prevail on these claims. For the most part, prostitutes making equal protection

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[42] *FCC*, 508 U.S. at 313 (emphasis added). Certain classifications, such as race, "in themselves supply a reason to infer antipathy" and will be upheld against constitutional challenge only "upon an extraordinary justification." *Feeney*, 442 U.S. at 272. In addition to race, categorizations by alienage and national origin also require strict judicial scrutiny. *See* City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 440 (1985) ("These factors are so seldom relevant to the achievement of any legitimate state interest that laws grounded in such considerations are deemed to reflect prejudice and antipathy . . . ."). Fundamental rights are a "significant component of liberty" which trigger strict scrutiny and include "voting, interstate travel, and various aspects of privacy." BLACK'S LAW DICTIONARY (8th ed. 2004).

[43] *See* Yick Wo v. Hopkins, 118 U.S. 356, 373-74 (1886) (finding that even though a law appears to be fair and impartial, a court can still find it unconstitutional if the law is applied with an "unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights").

[44] *See* Washington v. Davis, 426 U.S. 229, 242 (1976) (noting that the Court has "not held that a law, neutral on its face and serving ends otherwise within the power of government to pursue, is invalid under the Equal Protection Clause simply because it may affect a greater proportion of one race than of another"). Disproportionate impact is "not irrelevant, but it is not the sole touchtone of an invidious racial discrimination forbidden by the Constitution." *Id.* The term discriminatory purpose "implies that the decisionmaker . . . selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group." *Feeney*, 442 U.S. at 279.

[45] State v. Kailua Auto Wreckers, 62 Haw. 222, 227, 615 P.2d 730, 734 (1980).

[46] *Id.* (quoting Oyler v. Boles, 368 U.S. 448, 456 (1962)).

[47] 442 U.S. at 274.

claims have generally been unsuccessful, as courts tend to treat legislators' and law enforcement officials' decisions with great deference.[48]

2. Equal protection and gender discrimination

Because prostitution is one of the only "unskilled jobs where women on average can earn more than men,"[49] it is unsurprising that the field is female-dominated. At first glance, the greater numbers of women in the business might explain why only one-third of prostitution-related arrests in a recent FBI nationwide survey were men.[50] But, although prostitution is a crime "necessarily involving at least two people[,] . . . only one is readily prosecuted in the justice system."[51] As professor Sylvia Law explains, "[e]nforcement of laws prohibiting commercial sex typically targets the person who offers sex for money, rather than those who promote such work or profit from it, or those who offer money for sex."[52]

In Hawai'i, as in other states, although both solicitation *and* procurement of sex for hire is illegal, women nevertheless "continue to bear the burden of enforcement, prosecution, and sentencing."[53] In 2003, for example, 68.1% of all the prostitution arrestees in Hawai'i were female,[54] and in 2005, females accounted for 58.5% of arrestees.[55] This disparity could be a result of negative sexist attitudes on the part of law enforcement officials: prostitutes are considered insignificant and expendable, whereas imprisoning or otherwise stigmatizing the average male patron will most likely involve

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[48] *See* State v. Tookes, 67 Haw. 608, 699 P.2d 983 (1985); *see also* State v. Sandoval, 649 P.2d 485, 487 (N.M. Ct. App. 1982) (dismissing petitioner's constitutional arguments as being "without merit").

[49] Coty R. Miller & Nuria Haltiwanger, *Crime and Punishment Law Chapter: Prostitution and the Legalization/Decriminalization Debate*, 5 GEO. J. GENDER & L. 207, 208 (2004). According to the U.S. Department of Labor, women who were full-time wage and salary workers earned only eighty-one percent as much as their male counterparts in 2005. U.S. DEP'T OF LABOR, HIGHLIGHTS OF WOMEN'S EARNINGS IN 2005, NO. 995, at 1 (2006), *available at* http://www.bls.gov/cps/cpswom2005.pdf.

[50] In 2005, 14,615 of prostitution-related arrestees were male and 27,026 were female. U.S. DEP'T OF JUSTICE, CRIME IN THE U.S. 2005, TEN-YEAR ARREST TRENDS (2005), *available at* http://www.fbi.gov/ucr/05cius/data/ table_33.html.

[51] Julie Lefler, *Shining the Spotlight on Johns: Moving Toward Equal Treatment of Male Customers and Female Prostitutes*, 10 HASTINGS WOMEN'S L.J. 11, 11 (1999).

[52] Law, *supra* note 6, at 527.

[53] Stremler, *supra* note 5, at 194.

[54] DEP'T OF JUSTICE, CRIME IN HAW., A REVIEW OF UNIF. CRIME REPORTS 111 (2003), *available at* http://hawaii.gov/ag/cpja/main/rs/Folder.2005-12- 05.2910/2003/CIH03.pdf.

[55] DEP'T OF JUSTICE, CRIME IN HAW. 2005, A REVIEW OF UNIF. CRIME REPORTS III (2007), *available at* http://hawaii.gov/ag/cpja/main/rs/Folder.2005-12-05.2910/Crime%20in%20 Hawaii%202005%20%28Annual%29/.

"disrupting a man's 'respectable' employment, standing in the community, and even his marriage."[56] Thus, "while the female prostitute is vilified, her clients are seen as men who simply make mistakes, if they are seen at all."[57]

Because gender-based statutory classifications "have traditionally been the touchstone for pervasive and often subtle discrimination," the Court has generally found that sex-based categorizations must bear a "close and substantial relationship to important governmental objectives."[58] It has also recognized that "when a neutral law has a disparate impact upon a group that has historically been the victim of discrimination, an unconstitutional purpose may still be at work."[59]

In *Village of Willowbrook v. Olech*, the Supreme Court recognized that a successful equal protection claim can be brought by a "class of one" who claims that he or she has "been intentionally treated differently from others similarly situated and that there is no rational basis for the difference in treatment."[60] In the case of prostitution, female solicitation and male procurement are equally unlawful, yet women prostitutes are targeted by the practice of using male decoys.

In *State v. Tookes*, defendants Francine Tookes and Christel Tarkington alleged that the conduct of the police agent who targeted them in separate undercover operations denied them due process of law and that the methods used by the police denied women equal protection.[61] Chief Justice Lum, writing for the court, declined to hold that the volunteer's actions constituted constitutionally outrageous conduct[62] and determined that "[t]he decision to target punishment on the seller of a prohibited service, whose profit motivation could lead him or her to violate the law more frequently than potential customers, easily satisfies" the heightened scrutiny level for gender-

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[56] Stremler, *supra* note 5, at 194-95 (quoting Kenneth Shuster, *On the "Oldest Profession": A Proposal in Favor of Legalized but Regulated Prostitution*, 5 U. FLA. J.L. & PUB. POL'Y 1 (1992)).

[57] Lefler, *supra* note 51, at 11.

[58] Personnel Adm'r of Mass. v. Feeney, 442 U.S. 256, 273 (1979); *see also* Craig v. Boren, 429 U.S. 190, 197 (1976).

[59] *Feeney*, 442 U.S. at 273 (citing Washington v. Davis, 426 U.S. 229 (1976) and Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252 (1977)).

[60] 528 U.S. 562, 564 (2000) (citing Sioux City Bridge Co. v. Dakota County, 260 U.S. 441 (1923)). The purpose of the Equal Protection Clause is to guarantee every person protection from arbitrary and intentional discrimination, whether that discrimination comes from the language of the statute itself or through improper execution by state officials. *Id.*

[61] 67 Haw. 608, 610, 699 P.2d 983, 985 (1985). In *State v. Tookes*, a civilian volunteer with the Honolulu Police Department had sex with each of the defendants in order to secure evidence for prostitution convictions. *Id.*

[62] *Id.* at 613.

based classifications.[63] This attitude downplays the criminality of the role that patrons play in the work of prostitutes and overlooks the fact that "although prostitutes receive money . . . their positions there would not exist if it were not for the presence and demand of the johns that come to be serviced."[64]

Defendant Tarkington also argued that HRS Section 712-1200 violated the guarantees of equal protection found in the state and federal constitutions.[65] The court rejected this claim, holding that she was unable to prove an overwhelming pattern of discriminatory enforcement because there had been "no testimony that police avoided arresting known male prostitutes" and because of testimony that there was "no department policy to discriminate against female prostitutes in favor of male prostitutes."[66] The court's reasoning is sexist and unfair, because it requires that Tarkington procure testimony from law enforcement officials *admitting* a gender bias against women.

Here, although the prostitution statute is facially neutral and there is no *official* departmental policy favoring male prostitutes, gender discrimination can be inferred by the methods used in application of the law.[67] In Honolulu, law enforcement officials target the seller of the service, who is usually a female. According to a member of the Honolulu Police Department ("HPD") stationed in Waikiki, law enforcement officials nearly always use male decoys to target prostitutes; female decoys are rarely used.[68] As a result, male would-be customers are arrested and punished less often. By applying the facially-neutral statute in a way that targets women, officers fail to treat similarly situated female and males alike, and the statute falls short of providing women prostitutes with equal protection of the law.

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[63] *Id.*

[64] Miller & Haltiwanger, *supra* note 49, at 227. The Hawai'i court's approach also runs afoul of Justice Jackson's warning that "nothing opens the door to arbitrary action so effectively as to allow those officials to *pick and choose* only a few to whom they will apply legislation." Ry Express Agency, Inc. v. New York, 336 U.S. 106, 112 (1949) (Jackson, J., concurring) (emphasis added). By endorsing the methods used by the police (i.e. targeting punishment on the seller), the court allows law enforcement officials to "pick and choose" to pursue a biased pattern of targeting women.

[65] *See Tookes*, 67 Haw. at 614, 699 P.2d at 987.

[66] *Id.* at 615, 699 P.2d at 988.

[67] *Cf. Washington v. Davis*, 426 U.S. 229, 242 (1976) (explaining that "an invidious discriminatory purpose may often be inferred from the totality of the relevant facts").

[68] Telephone Interview with Roland Turner, Sergeant, Honolulu Police Dep't, in Honolulu, Haw. (Apr. 21, 2007).

B. Prostitution and Substantive Due Process

The Due Process Clause of the Fourteenth Amendment contains both procedural and substantive components,[69] entitling persons to "process" before a state can deprive them of "life, liberty, or property" and substantively guaranteeing them protection against arbitrary and unreasonable regulations that would *effectively* deprive them of the same.[70]

The substantive element of the Due Process Clause ensures that individuals' fundamental rights are protected against offenses by the States.[71] This protection is not limited to the "precise terms of the specific guarantees elsewhere provided in the Constitution"[72]: the Supreme Court has found the Due Process Clause to protect not only the liberties explicitly found in the Bill of Rights, but also other personal freedoms considered "central to the liberty protected by the Fourteenth Amendment."[73]

Although the Constitution does not explicitly mention any "right to privacy," the Supreme Court has recognized that various constitutional guarantees "create zones of privacy" which are protected from arbitrary legislation by the Due Process Clause.[74] However, only personal rights "that can be deemed 'fundamental' or 'implicit in the concept of ordered liberty' are included in this guarantee of personal privacy."[75] Therefore, in order for private prostitution to gain constitutional protection, the act must be re-conceptualized by the courts as an individual's sexual choice that is within her fundamental right to privacy.

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[69] *See* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 846 (1992) ("[A] literal reading . . . might suggest that [the Clause] governs only the procedures by which a State may deprive persons of liberty, . . . the Clause has been understood to contain a substantive component as well, one 'barring certain government actions regardless of the fairness of the procedures used to implement them.'" (quoting Daniels v. Williams, 474 U.S. 327, 331 (1986))).

[70] *Id.* at 846-47 (explaining that the Due Process Clause contains both procedural and substantive elements and acts as a safeguard against "executive usurpation and tyranny" and against "arbitrary legislation" (quoting Poe v. Ullman, 367 U.S. 497, 541 (1961))).

[71] *See* Whitney v. California, 274 U.S. 357, 373 (1927).

[72] Poe v. Ullman, 367 U.S. 497, 543 (1961) ("This 'liberty'. . . is a rational continuum which, broadly speaking, includes a freedom from all substantial arbitrary impositions and purposeless restraints . . . .").

[73] *Casey*, 505 U.S. at 847. Such personal freedoms include intimate decisions relating to marriage, abortion, contraception, and family life. *Id.* at 851.

[74] Griswold v. Connecticut, 381 U.S. 479, 484 (1965). The right of privacy has been found in the penumbras of the First, Third, Fourth, Fifth, and Ninth Amendments, as well in the penumbras of the Bill of Rights. *See id.* at 484-85.

[75] Roe v. Wade, 410 U.S. 113, 152 (1973) (quoting Palko v. Connecticut, 302 U.S. 319, 325 (1937)).

In *Griswold v. Connecticut,* Justice Goldberg described how courts customarily determine which rights are to be deemed "fundamental," and thus, protected.[76] Judges, he explained, "are not left at large to decide cases in light of their personal and private notions. Rather, they must look to the 'traditions and (collective) conscience of our people' to determine whether a principle is so rooted (there) as to be ranked as fundamental.'"[77] The question with which judges must grapple is "whether a right involved 'is of such a character that it cannot be denied without violating those 'fundamental principles of liberty and justice which lie at the base of all our civil and political institutions.'"[78] Thus, the *traditional* method of finding "fundamental rights" poses particular problems for women, ethnic minorities, homosexuals, and politically unpopular groups, such as prostitutes, as their rights are decidedly *not* at the "base of our civil and political institutions."[79]

In *Griswold v. Connecticut,* the Court acknowledged that sexual activity between married couples was encompassed within the fundamental right to privacy protected by the Constitution.[80] In *Griswold*, the Court reversed the defendants' convictions for giving information, advice, and instruction on contraception, as the Court found their activities to be protected by the right to privacy.[81] Justice Douglas found that "specific guarantees in the Bill of Rights have penumbras, formed by emanations of those guarantees that help give them life and substance" and that "[v]arious guarantees create zones of privacy."[82]

The right of privacy found in *Griswold* for married couples was extended in *Eisenstadt v. Baird* to unmarried individuals as well.[83] The Court reasoned that although the decision in *Griswold* was founded in the context of the marital relationship, the analysis could be extended to single persons as well, since a married couple is a basically an association of two separate

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[76] *Griswold*, 381 U.S. at 493 (Goldberg, J., concurring).

[77] *Id.* (quoting Snyder v. Mass., 291 U.S. 97, 105 (1934)).

[78] *Id.* (quoting Powell v. State of Alabama, 287 U.S. 45, 67 (1932)).

[79] *Id.*

[80] 381 U.S. 479 (1965).

[81] *Id.* at 485-86.

[82] *Id.* at 484. For instance, freedom of association is found in the penumbra of the First Amendment, while the Fourth and Fifth Amendments have been found to protect private persons from "all governmental invasions 'of the sanctity of a man's home and the privacies of life.'" *Id.* at 483-84 (quoting Boyd v. United States, 116 U.S. 616, 630 (1886)). Both the freedom of association and the protection from intrusion into the privacy of the home comport with the idea of finding *private* prostitution as within the protected zone of privacy when the prostitute conducts her work *solely* within the home.

[83] *See* 405 U.S. 438, 453 (1972).

individuals.[84] In *Roe v. Wade*, the Court found that an individual's right to privacy was "broad enough to encompass a woman's decision whether or not to terminate her pregnancy."[85]

Recently, the Supreme Court expanded the individual's privacy right within the home in *Lawrence v. Texas*, a case which questioned the constitutionality of a statute making it criminal to engage in "deviate sexual intercourse."[86] The majority found that the statute impermissibly outlawed private conduct in which the petitioners were "free as adults to engage," under the Due Process Clause of the Fourteenth Amendment.[87]

Thus, the freedom protected by the Due Process Clause of the Constitution allows homosexuals the right to make *personal choices* regarding whether or not to engage in private acts of sexual intimacy.[88] This right of privacy found for homosexuals' intimate relationships can and should be expanded to include the rights of prostitutes to engage in *private* sexual behavior, free from governmental intrusion, as well. The fact that prostitutes receive money for their sexual acts should not alter the analysis of these private sexual relationships. By criminalizing prostitution in the privacy of one's own home, the state reaches into the private arena to deny these women the personal freedom to choose whether or not to engage in private sexual activities for payment.[89] Because the State has no legitimate reason for reaching into the home, its actions are arbitrary and capricious and violate prostitutes' substantive due process rights.

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[84] *Id.* Thus, Justice Brennan wrote, "[i]f the right of privacy means anything, it is the right of the *individual*, married or single, to be free from unwarranted government intrusion into matters so fundamentally affecting a person as the decision whether to bear or to beget a child." *Id.* (emphasis added).

[85] 410 U.S. 113, 152 (1973). The right to terminate a pregnancy is not unfettered. The Supreme Court has ruled in cases subsequent to *Roe* that at some point the rights of the woman must be balanced against the rights of the unborn child. *See, e.g.*, Gonzales v. Carhart, __ U.S. __, 127 S.Ct. 1610 (2007).

[86] 539 U.S. 558, 562 (2003).

[87] *Id.* at 564.

[88] *Id.* at 567 ("[A]dults may choose to enter upon this relationship in the confines of their homes .... The liberty protected by the Constitution allows homosexual persons the right to make this choice.").

[89] *Cf. id.* at 562 (noting that traditionally, "the State is not omnipresent in the home" and that "[l]iberty protects the person from unwanted government intrusions into a dwelling or other private places").

V. HAWAI'I'S RIGHT TO PRIVACY

Unlike the United States Constitution,[90] the Hawai'i constitution grants an *explicit* right of privacy to its citizens: it provides that "the right of the people to privacy is recognized and shall not be infringed without the showing of a compelling state interest" and directs the legislature to "take affirmative steps to implement this right."[91] According to the reports of the 1978 Constitutional Convention, the privacy right was intended to give "each and every individual the right to control certain highly personal and intimate affairs of his own life"[92] and to "insure that privacy is treated as a fundamental right for purposes of constitutional analysis."[93] Furthermore, the Hawai'i Constitution is *intended* to "afford[] much greater privacy rights than the federal right to privacy"[94] and "encompass[] the notion that in certain highly personal and intimate matters, the individual should be afforded freedom of choice absent a compelling state interest."[95]

Although the Hawai'i citizen's right to privacy is explicit, it is not absolute and can be regulated through governmental restrictions. However, if the government desires to "intrude into those 'certain highly personal and intimate affairs of [a person's] life,'" it must first be able to demonstrate a substantial and legitimate state interest.[96] If the State is able to do so, "the right of the group will prevail over the privacy rights or the right of the individual."[97] In light of the "important nature" of the privacy right, however, the State must use the "least restrictive means" should it desire to interfere with the right."[98]

Because the Hawai'i Constitution "contains a *specific* provision *expressly* establishing the right of privacy as a constitutional right," the "text of our constitution appear[s] to invite" the Hawai'i Supreme Court "to look beyond the federal standards in interpreting the right to privacy."[99] Nonetheless, as the following cases demonstrate, although the Hawai'i Supreme Court has

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[90] *See generally* Griswold v. Connecticut, 381 U.S. 479 (1965).

[91] HAW. CONST. art. I, § 6.

[92] STAND. COMM. REP. NO. 69, Constitutional Convention (1978), *reprinted in* HAWAII CONSTITUTIONAL CONVENTION, PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF HAWAII OF 1978, VOL. I 674 (1980).

[93] COMM. WHOLE REP. NO. 15, Constitutional Convention (1978), *reprinted in* HAWAII CONSTITUTIONAL CONVENTION, PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF HAWAII OF 1978, VOL. I 1024 (1980).

[94] State v. Kam, 69 Haw. 483, 491, 748 P.2d 372, 377 (1988).

[95] COMM. WHOLE REP. NO. 15, at 1024.

[96] *See Kam*, 69 Haw. at 493, 748 P.2d at 378 (citing STAND. COMM. REP. NO. 69, at 674-75).

[97] *Id.*

[98] *Id.*

[99] State v. Mallan, 86 Hawai'i 440, 448, 950 P.2d 178, 186 (1998).

articulated that the Hawai'i constitutional right to privacy is broader than that granted by the Federal Constitution, the court has been reluctant to give those words much practical significance.

A. State v. Mueller: *Prostitutes & Privacy Rights*

In *State v. Mueller*, Defendant Mueller appealed a conviction for the offense of committing prostitution.[100] Mueller argued that because the activity took place in a completely private setting (her home) and there was no public solicitation involved, her activities were protected by the constitutional right to privacy.[101] The Hawai'i Supreme Court rejected her claim.[102]

The *Mueller* court first examined the right to privacy as recognized in *Roe*, *Griswold*, *Eisenstadt*,[103] and *Stanley v. Georgia*[104] but found that the cases provided "no clear and binding statement on the matter of [its] present concern."[105] The court stated that although Mueller's decision was "arguably an intimate one," its constitutional protection was questionable because it had "yet to be drawn into a federally protected zone of privacy."[106]

Next, the court turned to the legislative history of the Hawai'i Constitution's privacy right for direction on how broadly they should construe the right.[107] Because the legislative history again referred to the federal cases discussed above, the court concluded that it was "led back to *Griswold*, *Eisenstadt*, and *Roe* and appear[ed] to have come full circle in [its] search for guidance on the intended scope of privacy protected by the Hawai'i Constitution.[108]

While the court agreed that the holdings of *Eisenstadt* and *Stanley* suggested "room for argument that the [privacy] right encompasses any decision to engage in sex at home with another willing adult" and acknowledged that the drafters of the Hawai'i Penal Code found the "usual reasons for suppressing prostitution 'not convincing,'" it nonetheless decided that Mueller's claim failed because she had not convincingly demonstrated that "a decision to engage in prostitution has been recognized as a fundamental right."[109] Instead, the court found that the statute passed the rational basis test

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[100] State v. Mueller, 66 Haw. 616, 619, 671 P.2d 1351, 1354 (1983).

[101] *See id.*

[102] *See id.* at 618, 671 P.2d at 1354.

[103] *See* discussion *supra* Part IV.B.

[104] 394 U.S. 557, 568 (1969) (holding that the First and Fourteenth Amendments prohibit the States from criminalizing private possession of obscene material in one's own home).

[105] *Mueller*, 66 Haw. at 622, 671 P.2d at 1355.

[106] *Id.* at 629, 671 P.2d at 1360.

[107] *See id.* at 623-24, 671 P.2d at 1356-57.

[108] *Id.* at 626, 671 P.2d at 1358.

[109] *Id.* at 626-27, 671 P.2d at 1358.

because the assumed "social interest in order and morality" comported with the legislature's asserted "need for public order."[110]

Thus, the court in *Mueller* declined to view the defendant's activities as encompassed within the privacy right almost purely based on prior decisions of the United States Supreme Court, none of which dealt directly with the issue at hand. The court concluded that the prostitution statute was only subject to rational basis review rather than a stricter level of scrutiny because "the defendant ha[d] directed [them] to nothing suggesting a decision to engage in sex for hire at home should be considered basic to ordered liberty."[111]

B. State v. Kam: *Broader Privacy Rights Acknowledged*

Five years after the Hawai'i Supreme Court declined to offer privacy protection for prostitutes in *Mueller*, the court in *State v. Kam* decided that the Hawai'i Constitution *did* grant broader constitutional rights to petitioners than afforded by the Federal Constitution.[112] In *Kam*, sellers of erotic material were convicted of promoting pornographic magazines in violation of HRS Section 714-1214(1)(a).[113] Defendants argued that the statue impermissibly violated the Hawai'i Constitution's right to privacy, and the court agreed.[114] The court found that the "personal decision . . . to read or view pornographic material in the privacy of one's own home must be afforded the protection of the Hawai'i Constitution," because "[r]eading or viewing pornographic material in the privacy of one's own home in no way affects the general public's rights."[115] Thus, because the court found pornography in the home protected and the enforcement of HRS Section 714-1214(1)(a) to have a

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[110] *Id.* at 628, 671 P.2d at 1359.

[111] *Id.* However, the *Mueller* court *did* acknowledge that the Supreme Court previously noted that it "ha[d] not definitively answered the difficult question whether and to what extent the Constitution prohibits state statutes regulating [private consensual sexual] behavior among adults." *Id.* at 623, n.5, 671 P.2d at 1356 (quoting Carey v. Population Services Int'l, 431 U.S. 678, 694 n.17 (1977)).

[112] State v. Kam, 69 Haw. 483, 491-94, 748 P.2d 372, 377-79 (1988) (finding that the decision to read or view pornography in the home must be afforded the protection of the Hawai'i Constitution's privacy provision); *cf.* United States v. 12 200-Ft. Reels of Super 8 mm Film, 413 U.S. 123, 128 (1973) (ruling that "the protected right to possess obscene material in the privacy of one's own home does not give rise to a correlative right to have someone sell or give it to others)".

[113] *Kam*, 69 Haw. at 484, 748 P.2d at 373; *see also* HAW. REV. STAT. § 712-1214(1)(a) (1993) ("A person commits the offense of promoting pornography if, knowing its content and character, the person: (a) disseminates for monetary consideration any pornographic material.").

[114] *Kam*, 69 Haw. at 485, 748 P.2d at 374.

[115] *Id.* at 494, 748 P.2d at 379.

"detrimental impact on privacy rights," the court required the State to demonstrate a compelling government interest that could justify the infringement of petitioners' privacy rights.[116] Because the State was unable to do so, the court invalidated the statute as an unauthorized infringement upon petitioners' privacy rights.[117]

C. State v. Romano: Mueller, *Revisited*

In the 2007 case *State v. Romano*, the Hawai'i Supreme Court again declined to view the scope of the privacy right as including private prostitution activities.[118] Among other arguments on appeal, Defendant Romano contended that the Hawai'i Supreme Court's holding in *Mueller* was erroneous in light of the ruling in *Lawrence v. Texas* and that Hawai'i's fundamental right to privacy *should* be deemed to protect private prostitution.[119] The majority, while noting that conduct once deemed criminal is sometimes later determined to be protected under the privacy right, found prostitution "almost singularly unique in historical and social condemnation."[120] For that reason, the court declined to draw private prostitution into the "protective shelter of Hawai'i's privacy provision."[121]

Justice Levinson, the sole dissenter in *Romano*, argued that *Lawrence*'s precedent "severely undermine[d] [the] court's federal constitutional analysis in *Mueller*."[122] The majority disagreed, concluding that although the language of *Lawrence* "may seemingly point to a broader application," the court was not required to extend the proposition to include prostitution.[123]

Justice Levinson also argued that the majority construed the liberty interest at stake too narrowly, "indulg[ing] in a 'fallacy of trivialization'" by appearing to examine the issue the same way the court did in *Mueller* and asking whether "a decision to engage in sex for hire is a fundamental liberty right in our scheme of ordered liberty."[124] Instead, the proper question was "whether

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[116] *Id.* at 495, 748 P.2d at 379-80.

[117] *See id.*

[118] 114 Hawai'i 1, 155 P.3d 1102 (2007).

[119] *See id.* at 4, 155 P.3d at 1105 (citing Lawrence v. Texas, 539 U.S. 558 (2003)).

[120] *Id.* at 12, 155 P.3d at 1113.

[121] *Id.* at 13, 155 P.3d at 1114.

[122] *Id.* at 17, 155 P.3d at 1119.

[123] *Id.* at 9, 155 P.3d at 1110. Thus, the court construed *Lawrence* narrowly and held that it did not apply because the court understood Justice Kennedy's opinion as specifically listing prostitution on a list of activities not protected by the holding in *Lawrence*. *Id.* at 7, 155 P.3d at 1110. In *Lawrence v. Texas*, Justice Kennedy noted that "the case at hand did not involve . . . public conduct or prostitution." 539 U.S. 558, 578 (2003).

[124] *Romano*, 114 Hawai'i at 22, 155 P.3d at 1123 (Levinson, J., dissenting). Similarly, in *Lawrence*, the U.S. Supreme Court recognized that it had "misapprehended the claim of liberty"

Romano enjoy[ed] a fundamental right to freedom from the state's interference in, and criminalization of, her *private* conduct without a compelling and narrowly tailored justification."[125] Justice Levinson distinguished Romano's "purely private behavior," which would require the legislature to demonstrate a compelling state interest before imposing criminal penalties, from the "public realm, where the state retains broad power to impose time/place/manner regulations."[126]

D. Mueller *and* Romano *Were Wrongly Decided*

The *Mueller* court decided (and the *Romano* court affirmed) that even *private* prostitution is not covered by an individual's fundamental right to privacy. However, a careful examination of the decisions made by the Hawai'i Supreme Court in *State v. Kam* and by the United States Supreme Court in *Lawrence v. Texas* leads one to the determination that the *Mueller* court and the *Romano* majority came to the wrong conclusion. Private consensual sex between adults, regardless of pay, *should be* covered by the Hawai'i Constitution's privacy guarantee. The *Mueller* decision, which the *Romano* court held as binding precedent from which it refused to depart,[127] was incorrect for several reasons.

1. The Hawai'i Supreme Court is free to broaden the scope of privacy covered by the Hawai'i Constitution

The *Mueller* court came to its decision first by looking to United States Supreme Court cases for guidance on whether prostitution could be encompassed by the privacy right and announced that it had "no clear and binding judicial statement on the matter."[128] This declaration was somewhat deceptive, as it leads one to believe that the Hawai'i Supreme Court is *required* to interpret the state constitution in exactly the same manner as the Supreme Court would interpret the federal Constitution and is completely bound by Supreme Court precedent. It is not: five years after it decided *Mueller,* the Hawai'i court explicitly stated its ultimate authority to grant greater privacy rights to Hawai'i citizens than would be allowed by the federal

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at issue in *Bowers* by asking whether the Constitution provided a "fundamental right to engage in consensual sodomy" rather than asking whether homosexuals enjoyed a right to privacy for their consensual sexual activities. 539 U.S. at 567.

[125] *Romano*, 114 Hawai'i at 23, 155 P.3d at 1124 (Levinson, J., dissenting) (emphasis added).

[126] *Id.*

[127] *Id.* at 11, 155 P.3d at 1112 (stating that "*Mueller* is precedent").

[128] State v. Mueller, 66 Haw. 616, 622, 671 P.2d 1351, 1355 (1983).

Constitution.[129] Furthermore, the United States Supreme Court has acknowledged that a state *is* allowed to "adopt in its own Constitution individual liberties more expansive than those conferred by the United States Constitution."[130] Thus, the Hawai'i court is free to expand privacy rights to encompass activities it finds to be within the State's constitutional right to privacy, regardless of whether those particular issues have already been decided by the Supreme Court.[131]

The Hawai'i Constitution must be interpreted with due consideration to both the intent of the framers and the intent of the Hawai'i citizens who adopted it, since the "fundamental principle in interpreting a constitutional provision is to give effect to that intent."[132] While both the *Mueller* and *Romano* courts determined that the "intent" of the framers was not to give rights to prostitutes, the drafters of the privacy provision *did* intend to ensure that each Hawai'i citizen had a protected right to "personal autonomy, to dictate his [or her] lifestyle, to be oneself" and to "control certain highly personal and intimate affairs of his [or her] own life."[133] This right should not be limited for certain women just because they receive payment for some of their "personal and intimate affairs."

2. *The* Mueller *court's reliance on* Doe v. Commonwealth's Attorney *was erroneous*

After examining United States Supreme Court precedent, the *Mueller* court looked to the Supreme Court's summary affirmation of the Virginia District Court opinion in *Doe v. Commonwealth's Attorney*,[134] a case relied upon by

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[129] *See* State v. Kam, 69 Haw. 483, 491, 748 P.2d 374, 377 (1988) (stating that the Hawai'i Supreme Court is the "ultimate judicial tribunal with final, unreviewable authority to interpret and enforce the Hawai'i Constitution" and is "free to give broader privacy protection than that given by the federal constitution").

[130] Pruneyard Shopping Center v. Robins, 447 U.S. 74, 81 (1980).

[131] *See* Michigan v. Long, 463 U.S. 1032, 1041 (1983) (stating that it will not review a state court decision that "indicates clearly and expressly that it is alternatively based on bona fide separate, adequate, and independent grounds"). Thus, the Supreme Court would not disturb a decision based on the Hawai'i Constitution's privacy provision, even if it disagreed with the holding.

[132] *Kam*, 69 Haw. at 492, 748 P.2d at 377; *see also* State v. Lester, 64 Haw. 659, 667, 649 P.2d 346, 352-53 (1982) (citing *State v. Miyasaki*, 62 Haw. 269, 614 P.2d 915 (1980)) ("State constitutions must be construed with due regard to the intent of the framers . . . ."), *aff'd*, Lester v. Falk, 934 F.2d 324 (9th Cir. 1991).

[133] STAND. COMM. REP. NO. 69, Constitutional Convention (1978), *reprinted in* HAWAII CONSTITUTIONAL CONVENTION, PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF HAWAII OF 1978, VOL. I 674 (1980).

[134] 403 F. Supp. 1199 (E.D. Va. 1975), *aff'd* 425 U.S. 901 (1976). In *Commonwealth's Attorney*, the issue was whether a Virginia statute prohibiting adult males from engaging in

Texas when defending its anti-sodomy law in *Bowers v. Hardwick*.[135] The Virginia courts found that, because the sodomy statute did not "offend . . . the Bill of Rights or any other of the Amendments," it was within the State's power to prohibit homosexual sodomy.[136] The Supreme Court affirmed without writing an opinion. Although the *Mueller* court conceded that a summary affirmation was not of equal precedential value as an opinion on the merits, it stated that because it could not find any opinions which did treat the issue on the merits, its "quest for specific guidance on whether a federally established right protected the defendant here end[ed] with *Doe v. Commonwealth's Attorney*."[137] In light of *Lawrence*, the *Mueller* court's reliance upon *Commonwealth's Attorney* seems undoubtedly in error: in *Lawrence,* the Supreme Court found that a statute prohibiting homosexual sodomy did indeed abridge an individual's fundamental right to privacy. Thus, the Court's summary affirmance of *Commonwealth's Attorney* should not be relied upon as a confirmation of its legal principles.

3. The Hawai'i Supreme Court's use of outdated dicta is unpersuasive

Finally, the *Mueller* court's quotations of dicta found in concurrences in *Griswold v. Connecticut* and the dissent in *Poe v. Ullman*[138] are not convincing. First, the court noted that Justice Goldberg would have held Connecticut's adultery and fornication statutes to be undoubtedly constitutional if such issues had been raised and pointed out his qualification that the holding in *Griswold* in "no way interferes with a State's proper regulation of sexual promiscuity or misconduct."[139] Next, the court quoted Justice White's concurrence in *Griswold*, which stated that "the State's policy against all forms of promiscuous or illicit sexual relationships . . . [was] concededly a permissible and legitimate legislative goal."[140] The *Mueller* court then cited a dissent in *Poe*, in which Justice Harlan opined that morality *is* a proper concern of the state, as "laws forbidding adultery, fornication, and

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private, consensual homosexual relations deprived them of their rights to due process, freedom of expression, and privacy. State v. Mueller, 66 Haw. 616, 622-23, 671 P.2d 1351, 1356 (1983).

[135] 478 U.S. 186, 188 (1986), *overruled by* Lawrence v. Texas, 539 U.S. 558 (2003).

[136] *Commonwealth's Attorney*, 403 F. Supp. at 1200.

[137] *Mueller*, 66 Haw. at 623, 671 P.2d at 1356; Griswold v. Connecticut, 381 U.S. 479, 485-86 (1965) (holding a law forbidding the use of contraceptives as an unconstitutional intrusion into the privacy of the marital relationship); Poe v. Ullman, 367 U.S. 497, 507-09 (1961) (dismissing petitioners' constitutional complaint for lack of state enforcement).

[138] 367 U.S. 497 (1961).

[139] *Mueller*, 66 Haw. at 622, 671 P.2d at 1356 n.3 (quoting Griswold v. Connecticut, 381 U.S. 479, 498-499 (1965) (Goldberg, J., concurring)).

[140] *Id.* (quoting *Griswold*, 381 U.S. at 505) (White, J., concurring)).

homosexual practices . . . form a pattern . . . deeply pressed into the substance of our social life."[141]

The Hawai'i Supreme Court's reliance on this dicta seems especially misguided in light of the fact that the Hawai'i Legislature chose *not* to outlaw any of the aforementioned sexual relationships.[142] The legislative history of HRS Section 712-1200 reveals that lawmakers specifically omitted "the usual provisions pertaining to sexual offenses such as fornication and adultery" from the Hawai'i Penal Code.[143] The purposeful "absence of these provisions," the lawmakers wrote, "reflects a judgment that to invoke the criminal process [in these matters] serves no social function."[144] Therefore, it is only in the case of prostitution where the Hawai'i State Legislature has taken a position affirmatively stating a stance against a particular consensual sexual activity between adults.

4. Romano *should not have followed* Mueller

The aforementioned reasons that the *Mueller* decision is now viewed as incorrect make the *Romano* court's decision to hold *Mueller* as binding precedent, nearly twenty-five years later, puzzling. In *Romano,* the court held that "prudential and pragmatic considerations" did not "compel a departure from the doctrine of stare decisis, so as to justify overruling *Mueller*, much less based on the [United States Supreme] Court's present express holding in *Lawrence.*"[145]

However, "it is common wisdom that the rule of *stare decisis* is not an 'inexorable command,' and certainly is not such in every constitutional case."[146] A court's task, when re-examining a prior holding, includes asking "whether related principles of law have so far developed as to have left the old rule no more than a remnant of abandoned doctrine" or "whether facts have so changed, or come to be seen so differently, as to have robbed the old rule of significant application or justification."[147] Such is the case here. Times and attitudes have changed in the nearly twenty-five years since *Mueller* was decided. Although prostitution has become no more accepted by Hawai'i

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[141] *Id.* (quoting Poe v. Ullman, 367 U.S. 497, 545-46 (1961) (Harlan, J., dissenting from dismissal on jurisdictional grounds)).

[142] *See generally* HAW. REV. STAT. §§ 701-713 (1993 & Supp. 2006).

[143] H.R. STAND. COMM. REP. NO. 227, 6th Leg., Reg. Sess. (Haw. 1971), *reprinted in* 1971 HAW. HOUSE J. 1971, 786. The Honolulu prosecutor indicated that these offenses were "rarely enforced and as such constitute[d] useless vestiges." *Id.*

[144] *Id.*

[145] State v. Romano, 114 Hawai'i 1, 14, 155 P.3d 1102, 1115 (2007) (citations omitted).

[146] Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 854 (1992).

[147] *Id.* at 854-55.

society, in that same time period both the United States and Hawai'i Supreme Courts have come to recognize greater, enhanced privacy rights for the individual,[148] which *do* warrant a departure from the *Mueller* precedent.

VI. PERMISSIBLE AND PROPOSED REGULATIONS

In Hawai'i, *all* private, consensual sex between adults should be regarded as a freedom protected by the privacy guarantees in the state and federal Constitutions. However, even fundamental rights can be subject to state regulation.[149] Therefore, even if private prostitution is someday implicated in the fundamental right to privacy, the State could still have a permissible interest in its regulation.

When fundamental rights are involved, the Supreme Court has held that any "regulation limiting those rights may be justified only by a 'compelling state interest'" and must be narrowly-tailored to serve genuine state interests.[150] Because the community's interests and the health and safety of prostitutes and their patrons can be satisfied in less intrusive ways than complete prohibition by penalization, the legislature should instead decriminalize and regulate private prostitution.

It would be beneficial for both prostitutes and their patrons if the State took an active role in regulating the health of the prostitutes rather than fining them and/or sending them to jail. In Nevada, certain counties permit legalized prostitution in brothels, and regulations are in place to help prevent the spread of disease.[151] From 1987 (when the regulations were enacted) through the most current available statistics in 2004, no legal prostitutes in Nevada had been infected with HIV or other STDs.[152]

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[148] *See generally* State v. Kam, 69 Haw. 483, 491, 748 P.2d 372, 377 (1988); Lawrence v. Texas, 539 U.S. 558 (2003).

[149] *E.g., Casey*, 505 U.S. at 874 (finding that a state could regulate abortion to the extent that it did not impose an "undue burden" on a woman's ability to make that decision).

[150] Roe v. Wade, 410 U.S. 113, 155 (1973) (internal citations omitted).

[151] *See generally* Miller & Haltiwanger, *supra* note 49, at 237-38. In Nevada, anyone who desires employment as a prostitute in a licensed brothel must first submit to medical exams, including tests for the sexually transmitted diseases HIV, syphilis, gonorrhea, and Chlamydia. *Id.* at 238. Once employed, the women are examined weekly for gonorrhea and Chlamydia in addition to their monthly screenings for HIV and syphilis and must insist that their patrons use condoms. *Id.*

[152] *Id.* at 239; *see also* Drexler, *supra* note 1, at 227.

In January of 2007, Hawai'i legislators introduced House Bill 982[153] and Senate Bill 706[154] which, if passed, would amend HRS Section 712-1200 to decriminalize private prostitution activities.[155] Among other changes, the proposed bill would modify the current statute to make prostitution a crime only "in a public place that is likely to be observed by others who would be affronted or alarmed."[156] Prostitution outside the private realm would be a "violation, subject to a fine of up to $500" rather than a "petty misdemeanor."[157]

While these House and Senate bills have the sponsorship of fourteen lawmakers,[158] others will undoubtedly oppose passage of the bill. City councilmember Rod Tam[159] was cited as saying that he hopes the Legislature will one day increase the penalty for prostitution because "until the Legislature comes out with stronger penalties, the problem will remain."[160] Another piece of proposed legislation, House Bill 330, reflects this viewpoint,[161] and would make a third or subsequent conviction for prostitution a class C felony.[162] This proposed legislation is shortsighted and unduly harsh on prostitutes. Although the current statute only classifies prostitution as a petty misdemeanor,[163] it is nonetheless a criminal condemnation: a scarlet letter of shame that will remain a dark spot on a convicted prostitute's record should she ever try to seek out alternate employment. When enacting the present prostitution law, Hawai'i legislators noted that for certain individuals and their customers, "a conviction under the present law for engaging in prostitution is a devastating and humiliating stigma that will last forever."[164]

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[153] H.B. 982, 24th Leg., Reg. Sess. (Haw. 2007), *available at* http://www.capitol.hawaii.gov/session2008/bills/HB982_.htm.

[154] S.B. 706, 24th Leg., Reg. Sess. (Haw. 2007), *available at* http://www.capitol.hawaii.gov/session2008/bills/SB706_.htm.

[155] On August 27, 2007, both the Senate and House Bills were carried over to the 2008 Regular Session. Hawaii State Legislature Bill Status and Documents, http://www.capitol.hawaii.gov/site1/docs/ docs.asp (search for status of HB982 and SB706) (last visited Oct. 13, 2007).

[156] H.B. 982; S.B. 706.

[157] H.B. 982; S.B. 706.

[158] H.B. 982; S.B. 706.

[159] As a City Councilmember (rather than a House Representative or Senator), Tam will not vote on the bill; his statements are included as an example of community sentiment.

[160] Boylan, *supra* note 24, at 1A.

[161] H.B. 330, 24th Leg., Reg. Sess. (Haw. 2007), *available at* http://www.capitol.hawaii.gov/session2008/bills/HB330_HD1_.htm.

[162] *Id.* The bill would also make loitering for the purposes of engaging or advancing prostitution a class C felony for any third or subsequent convictions. *Id.*

[163] HAW. REV. STAT. § 712-1200 (Supp. 2006).

[164] State v. Lindsey, 77 Hawai'i 162, 166, 883 P.2d 83, 87 (1994).

Despite one's personal feelings on the subject of prostitution, the moral majority may not "use the power of the State to enforce these views on the whole society through operation of the criminal law."[165] Women who choose to engage in private, consensual sexual activities with other adults should not be punished as criminals simply because the majority of society may have strong beliefs that sex for a fee is either immoral or unethical. The Court's "obligation is to define the liberty of all, not to mandate [its] own moral code."[166]

VII. CONCLUSION

The current Hawai'i statute outlawing prostitution was not enacted to eliminate prostitution (an impossible goal, considering the longevity of the practice), but to appease the Hawai'i public, whom legislators felt were not ready for a more "liberal approach" to prostitution regulation.[167] The Hawai'i Supreme Court, rather than admitting that private prostitution comports with the State Constitution's right to privacy, has twice deferred to the legislature's judgment that prostitution's criminalization is necessary for public order. However, because the legislature's public interest justification for criminalizing prostitution does not meet the compelling interest standard required for privacy invasions, the statute should be invalidated as unconstitutional. As cases like *Brown v. Board of Education*[168] have shown us, the legislature and the judiciary should not wait to act until the entire public is "ready" to accept that prostitutes have the same constitutional rights as the rest of us: if they do, they will likely be waiting forever.[169]

Marissa H.I. Luning[170]

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[165] Lawrence v. Texas, 539 U.S. 558, 571 (2003).

[166] Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 850 (1992).

[167] HAW. REV. STAT. § 712-1200, cmt (1993).

[168] 347 U.S. 483, 495 (1954) (holding that the "separate but equal" doctrine in public schools denies students equal protection of the laws).

[169] *See e.g. Editorial Excerpts from the Nation's Press on Segregation Ruling*, N.Y. TIMES, May 18, 1954 (noting that at the time of the decision, some felt that the ruling was "contrary to [their] way of life . . .").

[170] J.D. Candidate 2008, William S. Richardson School of Law, University of Hawai'i at Manoa. Thanks to Mom and Aunty Corinne.

An Analysis of Hawai'i's Tradition of "Local" Ethnic Humor

I. INTRODUCTION

> [Question] In what neighborhood on Oahu are three languages spoken fluently at different times of the day or year?
> [Answer] Kahala, where English is spoken at night, Tagalog during the day when the residents leave for work and are replaced by Filipino gardeners and maids, and Japanese during Golden Week.
>
> —Frank DeLima, *The Da Lima Code*[1]

In Hawai'i, the public performance of ethnic[2] jokes has long been a staple of island life, holding a secure and prevalent place in local culture. Although the jokes often target and victimize the various racial groups inhabiting the state, many Hawai'i residents not only tolerate the jokes, but actually embrace them as part of local tradition. On a more critical level, however, racial humor has long been an area of contention amongst Hawai'i-based scholars: while some view such jokes as harmless, others believe that the practice reinforces existing ethnic stereotypes and contributes to racial inequality.[3]

Although there is no question that this type of humor *is* widely considered amusing, there are important social and legal questions that arise from its practice.[4] Just as it is important to preserve a tradition that many local residents consider to be a cornerstone of "what it means to live in Hawai'i," it is equally important to critically examine possible negative effects of "local" style racial humor. Even considering the observation that the population of Hawai'i is among the country's most ethnically diverse, as well as perhaps one of the most racially tolerant, racism continues to persist in the state.[5] Further, despite the fact that the state has no numerical ethnic majority, there is a very real social hierarchy that is largely correlated with ethnicity. Though it would be overly broad to scapegoat all of Hawai'i's race problems upon the practice

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[1] FRANK DELIMA, THE DA LIMA CODE 118 (Jerry Hopkins ed., 2006). Kahala is well-known for being one of the most affluent neighborhoods on the Hawaiian island of Oahu.

[2] In this paper the author uses the terms "ethnicity" and "race" synonymously.

[3] *Compare* Glen Grant & Dennis M. Ogawa, *Living Proof: Is Hawai'i the Answer?*, 530 ANNALS AM. ACAD. POL. & SOC. SCI. 137, 151 (1993), *with* Roderick N. Labrador, *"We Can Laugh at Ourselves": Hawai'i Ethnic Humor, Local Identity and the Myth of Multiculturalism*, 14 PRAGMATICS 291 (2004); *see also* interview with Jonathan Y. Okamura, Professor, Univ. of Haw. Ethnic Studies Dep't, in Honolulu, Haw. (Feb. 5, 2007).

[4] This paper was not written to condemn the work of Hawai'i-based comedians who utilize racial humor in their routines. The author genuinely respects their opinions and accomplishments, but would like to invite the reader to consider the impact that such humor may have on an individual and societal level.

[5] *See generally* Grant & Ogawa, *supra* note 3 (describing racism in Hawai'i).

of telling racial jokes, there is at least a tenable argument that the liberal allowance of such performances contribute in part to racism in Hawai'i.[6]

This paper seeks to provide an overview and analysis of the potential effects of racial humor upon Hawai'i's population, focusing primarily on those jokes conveyed to *public* audiences rather than those told within private venues.[7] Part II presents a brief background of the evolution of the composition of Hawai'i's racial make-up and describes the tradition of racial humor in the state. Part III provides a general overview of the nature and psychological effects of stereotyping and racism, and seeks to give the reader a conceptual framework within which to analyze ethnic humor in Hawai'i. Racial humor's general appeal, harm, and relationship to racial hierarchies is described in Part IV. Part V applies these theories of racial humor to the context of Hawai'i, examining the humor's impact and describing its individual and societal harms, as well as local reluctance to find harm in such humor. Finally, Part VI delves into a legal analysis of racial humor in Hawai'i, exploring how ethnic jokes can be analyzed under both the United States Constitution and state laws, and explores the importance of context in determining local ethnic humor's legal validity.

II. THE EVOLUTION OF THE RACIAL MAKE-UP OF HAWAI'I

A. The Formation of Hawai'i's Racial Environment

The Hawaiian Islands have long been populated by Native Hawaiians, an indigenous race of people.[8] Western foreigners arrived in the islands in 1778,[9] and eventually Caucasian immigrants acquired large tracts of Hawaiian land to use for sugar plantations beginning in the 1840s.[10]

As sugar production increased, so did Caucasian plantation owners' need for labor.[11] Due to a greatly reduced Native Hawaiian population,[12] plantation

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[6] *See generally* Labrador, *supra* note 3 (describing the potential dangers of ethnic humor in Hawai'i).

[7] Although ethnic humor persists in both private and commercial venues, this paper concentrates primarily on the public performance of racial humor in Hawai'i.

[8] Haunani-Kay Trask, *Settlers of Color and "Immigrant" Hegemony: "Locals" in Hawai'i*, 26 AMERASIA J. 1, 1 (2000). Native Hawaiians' first documented contact with foreigners occurred in 1778 with the arrival of Captain James Cook, whose entrance marked the beginning of commercialism in Hawai'i. SUCHENG CHAN, ASIAN AMERICANS: AN INTERPRETIVE HISTORY 26 (1991).

[9] Grant & Ogawa, *supra* note 3, at 140.

[10] CHAN, *supra* note 8, at 26.

[11] *Id.* at 26-27.

[12] As a result of an influx of disease brought by the settlers to which the Native Hawaiians had no immunity, the indigenous population in 1860 was, at most, a fifth of the size that it had been when Captain Cook first arrived. *Id.* at 26.

owners began recruiting foreign workers, sending for laborers from countries such as China, Japan, Korea, Portugal, Puerto Rico, and the Philippines.[13] This great influx of immigrants drastically altered the ethnic population of the Hawaiian Islands. Whereas in 1835 less than one percent of the total population was non-Native Hawaiian, by 1920 approximately eighty-four percent of Hawai'i's inhabitants consisted of immigrants and their offspring.[14]

During this time period, the vast majority of immigrants both worked and lived in plantation "camps," small communities surrounding the crop fields wherein basic living essentials were provided to the workers and their families.[15] Here, laborers of various ethnicities lived in the same general area, but were separated into different sub-camps demarcated by race. Given the varying degrees of habitability of these sub-camps, race became largely linked to social position and quality of housing in the plantation community.[16] Plantation owners did nothing to alleviate the problem, and actually encouraged inter-ethnic tensions as part of a labor strategy to prevent collective strike efforts.[17] As a result, plantations became breeding grounds for racial antagonism and feelings of ethnic jealousy and superiority.[18]

B. Hawai'i's Current Racial Environment

Today, vestiges of plantation-era racial stratifications are readily apparent in Hawai'i's everyday society.[19] Despite the fact that the 2000 United States Census reports that the state has no numerical racial majority,[20] certain ethnic groups continue to wield more economic or political power than others.[21] In

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[13] Ronald Takaki, *Native and Asian Labor in the Colonization of Hawai'i, in* MAJOR PROBLEMS IN ASIAN AMERICAN HISTORY 55 (Lon Kurashige & Alice Yang Murray eds., 2003). With the help of these immigrants, sugar production soon grew into the leading industry in Hawai'i by the early 1900s. HELEN ZIA, ASIAN AMERICAN DREAMS: THE EMERGENCE OF AN AMERICAN PEOPLE 36 (2000).

[14] Takaki, *supra* note 13, at 55.

[15] *Id.* at 57. *See generally* EDWARD NORBECK, PINEAPPLE TOWN 16-57 (1959).

[16] *See generally* NORBECK, *supra* note 15, at 16-57 (describing daily life in plantation camps).

[17] ZIA, *supra* note 13, at 37 (quoting RONALD TAKAKI, STRANGERS FROM A DIFFERENT SHORE: A HISTORY OF ASIAN AMERICANS (1989)).

[18] Grant & Ogawa, *supra* note 3, at 145-46.

[19] *See* Noel J. Kent, *Myth of the Golden Men: Ethnic Elites and Dependent Development in the 50th State, in* ETHNICITY AND NATION-BUILDING IN THE PACIFIC 98, 101 (Michael C. Howard ed., 1989) (describing how "[i]n ethnic relations, the 'dead hand' of the plantation will be felt long after the last one in Hawai'i closes down").

[20] Labrador, *supra* note 3, at 292.

[21] *Id*; *see also* Jonathan Y. Okamura, *The Illusion of Paradise: Privileging Multiculturalism in Hawai'i, in* MAKING MAJORITIES: COMPOSING THE NATION IN JAPAN, CHINA, KOREA, FIJI, MALAYSIA, TURKEY, AND THE UNITED STATES 264, 274-75 (D.C. Gladney ed., 1998) [hereinafter Okamura, *The Illusion of Paradise*].

particular, Caucasians (hereinafter referred to as "*haole*," the local term for Caucasian[22]), Japanese, Chinese, and Koreans are generally positioned firmly at the top of the social hierarchy, while Native Hawaiians, Filipinos, and Samoans are underrepresented in Hawai'i's professional community, overrepresented in lower-level occupational positions such as laborers and service workers, and tend to have relatively lower rates of attaining higher education.[23] Unfortunately, this "racialized" social hierarchy has remained largely static since the 1970s when tourism emerged to lead Hawai'i's economy, saturating the local job market with low-wage jobs offering little room for promotion. Today, tourism continues to be the state's leading industry, meaning that opportunities for social-status mobilization remain severely limited and are restricted primarily to those who have the highest level of education. In other words, collectively speaking, Native Hawaiians,[24] Filipinos, and Samoans are typically left with fewer opportunities to climb the proverbial social ladder.[25]

C. Emergence and Persistence of Racial Humor in Hawai'i

Despite the social stratification of the various ethnic groups that populate Hawai'i, it remains true that the state's population is extremely racially varied, and, due at least partially to geographic constraints of island living, is intermingling.[26] Historically, with so many racial groups living in such close proximity to each other, locals ultimately cultivated the practice of "having fun with their differences,"[27] perhaps as a way to diffuse what could have otherwise been manifested as violent encounters.[28]

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[22] The term "*haole*" is more commonly used in Hawai'i than the terms "Caucasian" or "white," although it is not fully equivalent to a racial category because it does not typically include people of Portuguese and Hispanic origin. *See* John Kirkpatrick, *Ethnic Antagonism and Innovation in Hawai'i*, *in* ETHNIC CONFLICT: INTERNATIONAL PERSPECTIVES 298, 315 n.2 (Jerry Boucher et al. eds., 1979).

[23] Jonathan Y. Okamura, *Why There Are No Asian Americans in Hawai'i: The Continuing Significance of Local Identity*, 35 SOC. PROCESS IN HAW. 161, 175 (1994); *see also* Okamura, *The Illusion of Paradise*, *supra* note 21, at 270-71.

[24] For Native Hawaiians, these difficulties are further complicated by their struggle for indigenous rights. *See generally* Trask, *supra* note 8.

[25] Interview with Jonathan Y. Okamura, *supra* note 3; *see also* Okamura, *The Illusion of Paradise*, *supra* note 21, at 269-71.

[26] *See* Grant & Ogawa, *supra* note 3.

[27] *See* DELIMA, *supra* note 1, at viii.

[28] *See* Kirkpatrick, *supra* note 22, at 309-10 (describing how racial antagonism exists between ethnic groups in Hawai'i, but that the state's unique racial demographics allows the avoidance of violent encounters).

In the 1950s and '60s, "having fun with differences" evolved into Hawai'i's unique style of ethnic-oriented comedic performance ("local humor" or "local comedy").[29] Public performances of local humor first emerged with comedians such as Sterling Mossman, Lucky Luck, and Kent Bowman who performed song and joke routines that made use of "pidgin English," an island dialect that evolved during the plantation era and was—and in many ways, still is—associated with Hawai'i's working class.[30]

Performance of local comedy continued to grow in popularity, with wildly popular comedic groups such as the renowned "Booga Booga"[31] relying heavily on racial stereotypes commonly held by residents of the state.[32] Today, the tradition remains prevalent, with a number of local comedians such as Lanai and Augie T., Paul Ogata, Greg Hammer, and Da Braddahs enjoying steady popularity.[33]

With this brief background of race relations and of local humor in Hawai'i, one can now turn to the question of whether there is any evidence of a negative relationship between racism and local humor. In order to gain a conceptual framework within which to analyze this issue, one can begin by considering the nature and effects of stereotyping and racism, in general.

III. THE NATURE AND EFFECTS OF STEREOTYPING AND RACISM

Although humankind has practiced racial discrimination for many years,[34] recent changes in social consciousness have led many to be more conscientious about publicly verbalizing blatantly racist thoughts. Interestingly however, despite deliberate efforts to repress derogatory thinking, cognitive psychological theory indicates that it may be impossible for individuals to completely avoid stereotyping.[35] Indeed, humans are hard-wired to form

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[29] Labrador, *supra* note 3, at 293.

[30] *Id.* at 298; *see also* Kirkpatrick, *supra* note 22, at 307 (indicating that pidgin English was associated with the working class). *See generally* Grant & Ogawa, *supra* note 3, at 149 (describing pidgin English).

[31] Booga Booga originally consisted of James Kawika Piimauna "Rap" Reiplinger, James Grant Benton, and Ed Kaahea. Hawai'i TravelNewsletter.com, Booga Booga, http://www.hawaiitravelnewsletter.com/attractions/booga-booga.htm (last visited Oct. 12, 2007). Reiplinger left the group in 1977 and was replaced by Andy Bumatai. *Id.*

[32] *See* Labrador, *supra* note 3, at 298-99 (citing Lee A. Tonouchi, *No Laugh Brah, Serious: Pidgin's Association Wit Local Comedy*, 1 HYBOLICS 22 (1999)) (stating that "[e]thnic identity [was] the key to [Booga Booga's] ability to generate material which [was] universally appealing to local audiences," with "Booga Booga's substantial popularity stem[ming] in part from being about to capitalize on dis [sic] movement creating separate ethnic identities").

[33] *Id.* at 299.

[34] *See* KRISTEN MYERS, RACETALK: RACISM HIDING IN PLAIN SIGHT 20 (2005).

[35] *See* Jerry Kang, *Trojan Horses of Race*, 118 HARV. L. REV. 1489, 1499 (2005).

schemas, "cognitive structure[s] that represent[] knowledge about a concept or type of stimulus, including its attributes and the relations among those attributes."[36] Schemas are thus helpful in "providing rules that map objects into a class, as well as general information about members of the class," and are a survival technique that humans developed to deal with the constant bombardment of our senses by environmental stimuli.[37] Indeed, without schemas, humans would cognitively drown in a mass of discrete bits of information.[38] Importantly, the implicit and explicit meanings embedded within schemas are socially-learned and may be applied to any number of entities, including other human beings, who may be categorized into various social categories such as gender, age, or race.[39]

Focusing attention upon racial schemas, research suggests that the meanings embodied within such schemas can come both from direct experiences with individuals of those ethnic groups, as well as from what Professor Jerry Kang terms "vicarious experiences" with those individuals. Professor Kang defines "vicarious experiences" as "stories of or simulated engagements with racial others provided through various forms of the media or narrated by parents and our peers."[40] Significantly, Professor Kang opines that, given the sheer quantity and frequency of "vicarious experiences," it is these experiences that may be the dominating factor in the formation of our racial schemas.[41] Indeed, according to folklorist Alan Dundes, individuals receive the bulk of their impressions of others not from personal contact with other groups, "but rather from the proverbs, songs, *jokes*, and other forms of folklore we have heard about *all our lives*," inducing us to make judgments of people on the basis of those expressions.[42]

Schemas can thus be used to understand the mechanisms through which racist attitudes and behavior are generated, conveyed and reinforced on both an

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[36] *Id.* at 1498 (quoting SUSAN T. FISKE & SHELLEY E. TAYLOR, SOCIAL COGNITION 98 (2nd ed. 1991)).

[37] *Id.* at 1498-99.

[38] *Id.* at 1499 (citing SUSAN T. FISKE & SHELLEY E. TAYLOR, SOCIAL COGNITION 367 (2d ed. 1991)).

[39] When an individual's racial schema is triggered by a target person, the schema largely dictates that individual's thoughts about what type of person the target is. *See id.* at 1506 (citing SUSAN T. FISKE ET AL., *The Continuum Model: Ten Years Later*, *in* DUAL-PROCESS THEORIES IN SOCIAL PSYCHOLOGY 231, 239-42 (Shelly Chaiken & Yaacov Trope eds., 1999)); *see also* SUSAN T. FISKE & SHELLEY E. TAYLOR, SOCIAL COGNITION 98 (2d ed. 1991).

[40] Kang, *supra* note 35, at 1539 (citing RUPERT BROWN, PREJUDICE: ITS SOCIAL PSYCHOLOGY 83 (1995)).

[41] *Id.* at 1540.

[42] JOSEPH BOSKIN, HUMOR AND SOCIAL CHANGE IN TWENTIETH-CENTURY AMERICA 30 (1979) (quoting Alan Dundes, *A Study of Ethnic Slurs: The Jew and the Polack in the United States*, 84 J. OF AM. FOLKLORE 186, 187 (1971)) [hereinafter BOSKIN, HUMOR AND SOCIAL CHANGE] (emphasis added).

individual as well as societal level. Because stereotypes are often embedded and conveyed in racial jokes, it is therefore arguable that such humor at least partially contributes to the formation of prejudiced racial schemas. In particular, if certain races are more harshly targeted in humor than others, those who listen to the jokes may develop or reinforce schemas about those groups that are derogatory in nature. By influencing thoughts, racist schemas ultimately manifest in discriminatory conduct.[43]

Unfortunately, according to experts, racial insults are one of the most common channels through which xenophobic attitudes are conveyed throughout society. Via these attacks, such views are spread both laterally within existing populations as well as passed on to succeeding generations, thereby perpetuating social stigmas associated with various racial groups.[44] On an individual level, the repeated exposure to racism inflicts various psychological injuries upon minorities, with victims oftentimes developing timid, withdrawn, bitter, or hyper-tense personality traits.[45] Additionally, victims often experience a reduced sense of self-worth, driving them to escape though alcohol, drugs, or other kinds of anti-social behavior.[46]

Considering the harm caused by racism and the complex mechanisms by which racism is conveyed, it is worth considering whether ethnic humor propagates racism.

IV. SOCIETAL MANIFESTATION OF RACIAL HUMOR

A. The Appeal of Racial Humor and Its Place in Stand-Up Comedy

It is theorized that ethnic jokes are especially well constructed because they allow jokers and listeners to target and subordinate "outside" groups or individuals.[47] Listeners are said to enjoy a feeling of gratification when witnessing a person in a superior position (whether it be socially, politically, or otherwise) being "taken down a notch" because of that person's inadequate performance.[48] Studies have indicated that "people tend to enjoy aggressive,

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[43] *See generally* Kang, *supra* note 35.

[44] Richard Delgado, *Words That Wound: A Tort Action for Racial Insults, Epithets, and Name-Calling*, 17 HARV. C.R.-C.L L. REV. 133, 135-37 (1982).

[45] *Id.* at 139.

[46] *Id.* at 137-39 (citing K. CLARK, DARK GHETTO 82-84, 90 (1965)).

[47] LEON RAPPOPORT, PUNCHLINES 15-16 (2005). Humor's structural value may generally be summarized by the "superiority theory," which suggests that people derive a feeling of pleasure from laughing at those who are uglier, less intelligent, or more unfortunate than themselves. *Id.*

[48] *Id.* at 78.

sexual jokes ridiculing persons or groups they dislike," and that such forms are often in the form of "traditional *racial, ethnic*, and gender humor."[49]

With the recent movement towards a more politically correct society, however, it is increasingly difficult for people to freely indulge these urges in polite conversation. Stand-up comedy, in contrast, generally follows the rule that "anything goes," allowing ethnic stereotypes to be considered acceptable when placed in a humorous context and under the protection of the categorical status of "stand-up comedy."[50] Comedic performances thus provide audiences with one of the only remaining acceptable means of engaging in an otherwise unacceptable topic, thereby contributing to its immense success and popularity.[51]

B. The Harms of Racial Humor and Its Contribution to Racial Hierarchies

Academics have long noted the harmful effects that racial jokes have on society as a whole. Such jokes are found to act as a double-edged sword to buttress inter-ethnic division by simultaneously inducing a bond between individuals of the same ethnicity while at the same time "'draw[ing] a line,' producing . . . 'joint aggressiveness against outsiders.'"[52] In this way, repeated incidences of hostility disguised in the form of humor serve to reinforce social stereotypes and racial schemas by communicating which social or ethnic groups are "insiders" (the aggressors) and which are "outsiders" (the targets).[53]

On a large scale, racial humor ultimately also appears to contribute to the societal construction of racial hierarchies by communicating ideas regarding the relationship between ethnicity and social status.[54] By reinforcing stereotypes and indicating which groups are acceptable and which are considered outsiders, "the joke is a crucial means by which social places are established,"[55] for jokes are a form of communication and "social hierarchy

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[49] *Id.* at 27 (emphasis added).

[50] *Id.* at 123.

[51] *See id.* at 50.

[52] JOSEPH BOSKIN, REBELLIOUS LAUGHTER: PEOPLE'S HUMOR IN AMERICAN CULTURE 201 (1997) [hereinafter BOSKIN, REBELLIOUS LAUGHTER] (quoting KONRAD LORENZ, ON AGGRESSION 284 (1963)).

[53] *See* BOSKIN, HUMOR AND SOCIAL CHANGE, *supra* note 42, at 28.

[54] *See* Melissa K. Hughes, *Through the Looking Glass: Racial Jokes, Social Context, and the Reasonable Person in Hostile Work Environment Analysis*, 76 S. CAL. L. REV. 1437, 1453 (2003).

[55] BOSKIN, HUMOR AND SOCIAL CHANGE, *supra* note 42, at 10 (citing Edward Earl Graham, *Joking Relationships and Humor as Systems of Social Control*, 3 NEW SCHOLAR 165-66, 170 (1973)).

cannot and does not exist without being embodied in meanings and expressed in communications."[56]

Perhaps even more disturbing is the way in which racial humor can be used as a tool to maintain societal status quo by preventing minorities from disrupting and ascending the hierarchy. According to Joseph Boskin, director of the Urban Studies and Public Policy Program at Boston University:

> When a minority group begins to attain greater social and economic flexibility, increased affluence, and heightened political awareness, there simultaneously develops an increased insecurity on the part of others in society. Fear thus exacerbates previously held images and produces a corresponding profusion of the "numskull" or "idiot" type of jokes [directed at that minority group].[57]

Consequently, with ethnic jokes firing up anti-minority sentiment the moment the group begins to mobilize, socialized racial hierarchies remain stubbornly static.[58] The analysis now turns to the question of whether there is a relationship between ethnic humor and racial intolerance in Hawai'i.

V. RACIAL HUMOR IN HAWAI'I

A. Local Humor and Local Social Hierarchies

In Hawai'i, like elsewhere, racial stigmas contribute to and reinforce a "racialized" social hierarchy. In particular, those groups occupying the lower rungs of the local hierarchy appear to bear the brunt of the effects of antagonistic attitudes, with ethnic stereotypes often targeting those groups more harshly than others.[59] According to Dr. Kathryn Takara, a former Professor of Ethnic Studies at the University of Hawai'i, "[in Hawai'i] the

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[56] Hughes, *supra* note 54, at 1454 (quoting CATHARINE MACKINNON, ONLY WORDS 13 (1993)).

[57] *See* BOSKIN, HUMOR AND SOCIAL CHANGE, *supra* note 42, at 31.

[58] *See id.* Interestingly, minorities have often been noted to use their own form of ethnic humor to retaliate against the majority and empower themselves as a group. BOSKIN, REBELLIOUS LAUGHTER, *supra* note 52, at 145. However, although minorities may make jokes about majority groups, in reality there is a very real difference between jokes told at the expense of racial groups "higher up" on the social hierarchy and those targeted at racial groups at the bottom of the hierarchy. *See* CHRISTIE DAVIES, ETHNIC HUMOR AROUND THE WORLD: A COMPARATIVE ANALYSIS 43 (1990) (describing how, depending on their place in society, some racial groups are stereotyped as "stupid," while others are typecast as "canny"). Those jokes that victimize "superiors" tend to target neutral or positive stereotypes linked to the group, while jokes that victimize "inferiors" tend to ridicule based on harsh stigmas associated with the group. *Id.* at 43-45.

[59] *See, e.g.*, Labrador, *supra* note 3, at 299 ("Filipinos are by no means the only targets of ethnic jokes, but some argue that they bear a disproportionate burden.").

most hostile, threatening [stereotypes] have to do with darker-skinned people. And the least harmful, with lighter-skinned individuals . . . ."[60]

These stereotypes often make appearances in public performances of local humor, with comedians playing off the stereotypes to target darker-skinned people more negatively than those who are lighter-skinned. For example, a local comedic duo known as "Lanai and Augie" play off the stereotype that Samoans are slow-witted and foolishly showy in the following joke:

> [Question] How many Samoan guys does it take to pop popcorn?
> [Answer] Three. One to hold the pan and two to show off and shake the stove.[61]

Filipinos, though not of Polynesian descent, are similarly dark-skinned, and as such, are likewise typecast in a negative light. For example, Frank DeLima, a local comedian commonly referred to as the "king of ethnic humor in Hawai'i,"[62] frequently makes Filipino jokes that take advantage of the stereotype that Filipinos are relegated to blue-collar work:

> [Question] Do you know why Filipinos are so short?
> [Answer] So they don't have to bend over when they make the beds.[63]

In stark contrast to the jokes targeting Filipinos and Polynesians, jokes targeting *haole*, Japanese, and Chinese—those at the top of the local hierarchy—are noticeably less negative. Rather, these groups tend to get teased primarily because of certain non-negative traits associated with the ethnicity. For example, DeLima has developed a fictional character named "Glenn Miyashiro," a stereotypical middle-aged local Japanese man, who is "a shy accountant . . . wear[ing] tucked-in reverse-print aloha shirts . . . [who] come[s] from Kaimuki and drives a Toyota."[64] Although DeLima plays off the common stereotypes of local Japanese when making jokes about this character, the fact of the matter is that Glenn Miyashiro is a working professional living in the relatively affluent neighborhood of Kaimuki, and is an overall "nice guy." Jokes such as this one do not necessarily convey overly

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[60] Linda A. Revilla, *Filipino Americans: Issues for Identity in Hawai'i, in* PADIRIWANG 1996: LEGACY AND VISION OF HAWAI'I'S FILIPINO AMERICANS 9, 9 (Jonathan Okamura & Roderick Labrador eds., 1996). To illustrate, Dr. Takara notes that "Filipinos, Hawaiians, Samoans, African-Americans and, to a lesser degree, Tongans are said to be 'criminals,' 'violent,' 'sexually aggressive,' and 'stupid.'" *Id.*

[61] LANAI TABURA & AUGIE TULBA, LANAI & AUGIE'S JOKE OF THE DAY 35 (2001).

[62] Labrador, *supra* note 3, at 294 (citing Mark Coleman, *DeLima*, HONOLULU STAR-BULL., Mar. 2, 2003, at C1, C4).

[63] DELIMA, *supra* note 1, at 85.

[64] Rita Ariyoshi, *Mean Old Mr. Sun Cho Lee and the Role of Ethnic Humor in Hawai'i*, SPIRIT OF ALOHA, Nov.-Dec. 2004, at 34. In Hawai'i, working professionals such as accountants typically wear *aloha* (Hawaiian-print) shirts at the workplace. This local custom is both accepted and encouraged.

harsh ideas—rather, they emphasize and reinforce the idea that Japanese are at the top of the local hierarchy, and further, because Japanese lack any exceedingly negative qualities, they deserve to be there.

Slightly more antagonistic are the jokes regarding local Chinese (who are locally referred to as "*pake*"[65]). Many of the Chinese jokes focus on the local stereotype that Chinese people are frugal to the point of being cheap. Frank DeLima frequently uses this stereotype in his jokes, asking, for example:

> [Question] Did you hear about the new brand of tires, Pakestone?
> [Answer] They not only stop on a dime, they pick it up.[66]

Stereotypes about Chinese also tend focus to on their prevalence in local business—in particular, owning and running stores. For example:

> [Question] Why did the Pake cross the road?
> [Answer] To open another store.[67]

Though stereotypes about being cheap are certainly negative, "being cheap" does not rise to the same level of hostility and degradation as those stereotypes that target Filipinos and Polynesians. Rather, combined with the jokes regarding the prominence of Chinese in local business, the ultimate message that Chinese jokes tend convey is that Chinese are savvy and cleverly cheap, thereby enabling them to do well in business. Like the Japanese jokes, ethnic humor targeting local Chinese suggests that the Chinese are deserving of their place at the top of the racial hierarchy.

Interestingly, local humor also highlights the various types of racial hierarchies in Hawai'i. Though up to now we have only discussed racial hierarchies in general terms, the more complex actuality is that racial groups occupy relatively different hierarchical ranks, depending on the type of hierarchy (socioeconomic, political, popularity, etc.) being considered. Perhaps nowhere else is this difference so pronounced as in the case of the *haole* in Hawai'i. *Haole* jokes appear to come in two strains. On one hand, the *haole* is portrayed as wealthy and powerful, as exemplified in the following joke:

> [Question] Why did God invent *haoles*?
> [Answer] Somebody has to buy retail.[68]

Likewise, another joke sets up a scenario where:

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[65] The term "*pake*" is the local term referring to those of Chinese descent, and typically carries with it a negative connotation of "cheapness."

[66] DELIMA, *supra* note 1, at 91.

[67] *Id.*

[68] *Id.* at 107.

"Two *haoles* were drinking at the Wai'alae Country Club . . . ."[69]

The jokes suggest that Caucasians are politically and economically powerful in Hawai'i, thereby reinforcing their place atop the political and economic hierarchies in the state.[70] In contrast, however, *haole* jokes may also suggest that Caucasians are perpetual and unwanted "outsiders" to the state, and numerous jokes make fun of their "strange" customs:

[Song Lyrics] . . . Caucasians are not like you and me . . . It's like they come from another planet . . . don't want no Caucasians around here . . . .[71]

Jokes such as this one hint at the reality that Caucasians, although socially dominant in other ways, are at the *bottom* of the social popularity hierarchy in Hawai'i.[72]

B. Individual and Societal Harm on a Local Level

On an individual level, evidence of harm inflicted by the racist messages conveyed in local humor is quite prevalent. Scholars have noted that amongst the local Filipino population, for example, feelings of self-doubt and shame of cultural background are especially prevalent.[73] According to Linda Revilla, author of *Filipino Americans: Issues for Identity in Hawai'i*, one of "the effect[s] of all of these negative stereotypes and jokes[] . . . [is that] we have young Filipinos who are ashamed of being Filipino," because, as she puts it, "[w]ho wants to identify with a group that others make fun of?"[74]

Hawai'i's society, at large, may also be negatively affected by the prejudicial impact of local humor. Recalling the schema analysis, societal attitudes and "vicarious experiences" largely affect the meanings and biases held within people's racial schemas.[75] Racially biased schemas in turn lead to a self-sustaining cycle of discrimination and rigid racial hierarchies.[76]

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[69] *Id.* at 108. Waialae Country Club is an exclusive social club in Honolulu.

[70] Okamura, *The Illusion of Paradise*, *supra* note 21, at 275-76.

[71] DELIMA, *supra* note 1, at 103-04.

[72] *See, e.g.*, Kirkpatrick, *supra* note 22, at 310 (noting the antagonistic attitude of many residents towards Caucasians, as evidenced by events such as the frequent reoccurrences of "Kill a *Haole* Day," in some public high schools).

[73] *See, e.g.*, Revilla, *supra* note 60, at 9 (noting that the seventy-fifth anniversary commemoration of Filipino immigration to Hawai'i was marked by an official publication containing a cartoon that posed the question, "are you Filipino?" and a woman ardently responding, "[c]ourse not! I'm Spanish-Chinese-British-Irish-French-Indian-Finnish-Thai-Mexican-Hawaiian," but following up with, "[b]ut my parents are er, Filipino").

[74] *Id.* at 9-10.

[75] *See* discussion *supra* Part III.

[76] *See* discussion *supra* Parts V.A, VI.B.

Thus, although listeners may find local humor to be amusing, the ethnically disparate messages conveyed about the different racial groups[77] of Hawai'i may be subconsciously integrated into audience members' racial schemas, thereby contributing to discrimination on a large scale in the state.

C. "It's Just a Joke"—The Dangers of Insisting that Local Humor is Harmless

Like their mainland counterparts, when faced with negative feedback concerning racial humor, local comedians (and their supporters) are quick to respond that the representations are "just jokes," that critics should "lighten up" and that there is no great harm in having fun with the inevitable phenomenon of stereotyping.[78]

Alarmingly, however, expressions of hostility are disguised in laughter when transferred via humor, and the derogatory messages often pass unnoticed and are never questioned in any meaningful way by society.[79] In Hawai'i, the potential danger of ethnic humor is largely overlooked, protected by the common perception that that the state is "the 'melting pot of the Pacific,' a 'crossroads of East and West' in a social setting imbued with the Polynesian spirit of *aloha*"[80] and, as such, a place where racism is not of much concern.[81] The "melting pot" theory thus protects and sanctions local humor as a cultural establishment beyond critical scrutiny, even from those victims who are being targeted.[82]

However, several scholars have observed that the idea that Hawai'i is the "melting pot of the Pacific" is nothing but a fallacy when considering the substantial social and political inequalities between racial groups in the state.[83]

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[77] *See* discussion *supra* Part V.A.

[78] Frank DeLima, for example, has taken the position that "[ethnic] differences are funny. It is not cruel to have fun with these differences. Those who take offense cause problems." DELIMA, *supra* note 1, at viii.

[79] *See* MYERS, *supra* note 34, at 190 ("The excuse of 'just joking,' then, [is] really a cop out. Jokes [are] a useful vehicle for shoring up intergroup boundaries. They perpetuate[] racist ideas in a disarming way. If challenged, they [are] easily dismissed as well-meaning, good fun.").

[80] Grant & Ogawa, *supra* note 3, at 138.

[81] *E.g.*, Martin Kasindorf, *Racial Tensions Are Simmering in Hawaii's Melting Pot*, USA TODAY, Mar. 7, 2007, *available at* http://www.usatoday.com/news/nation/2007-03-06-hawaii-cover_N.htm (quoting Hawai'i Governor Linda Lingle stating that Hawai'i is "a model for the world" for inter-ethnic harmony).

[82] *See, e.g.*, RAPPOPORT, *supra* note 47, at 126 (stating that "it is even cooler to relish or wink at the stereotypes applied to your own group").

[83] *See* discussion *supra* Part II.B; *see also* Revilla, *supra* note 60, at 9 (asserting that the notion that Hawai'i is a "melting pot" is nothing but a myth).

Ironically, therefore, the very belief that Hawai'i is a "melting pot" may serve to mask any dangers potentially posed by ethnic humor.[84]

According to Joseph Boskin, such passiveness is critically risky, as the inability of listeners to recognize the attack "mak[es] aggressive humor even more undermining and dangerous."[85] Consequently, if Hawai'i is ever to truly move closer to the ideal of the "racial paradise," it is important to bring to light and look critically at practices—such as racial humor—that may be preventing genuine inter-racial harmony.

Considering the substantial social impact that local humor has in Hawai'i, *can* ethnic humor be lawfully curtailed, and if so, *should* it be, and to what extent?

VI. LEGAL ANALYSIS OF LOCAL HUMOR

Of the many constitutional guarantees, the First Amendment protection of freedom of expression is perhaps one of the best-known, and it is a cornerstone of American legal philosophy. Under this provision, "Congress shall make no law . . . abridging the freedom of speech, or of the press."[86] First Amendment jurisprudence is thoroughly entrenched in American law, and courts have sanctioned freedom of expression even when the content of the message is socially offensive or unpopular.[87] There are, however, several well-substantiated exceptions to the protections of the First Amendment. For example, speech that infringes on public order, such as bomb threats, incitements to riot, obscene phone calls, and "fighting words"—words that by their very utterance inflict injury[88]—may be properly regulated by the government without infringing upon constitutional guarantees.[89]

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[84] Interview with Jonathan Y. Okamura, *supra* note 3.

[85] BOSKIN, HUMOR AND SOCIAL CHANGE, *supra* note 42, at 28.

[86] U.S. CONST. amend. I.

[87] *E.g.*, Texas v. Johnson, 491 U.S. 397, 414 (1989); *see also* Richard D. Bernstein, *First Amendment Limits on Tort Liability for Words Intended to Inflict Severe Emotional Distress*, 85 COLUM. L. REV. 1749, 1763 (1985).

[88] Susan Gellman, *Sticks and Stones Can Put You in Jail, but Can Words Increase Your Sentence? Constitutional and Policy Dilemmas of Ethnic Intimidation Law*, 39 UCLA L. REV. 333, 369 (1991) (defining "fighting words" as "those which by their very utterance inflict injury or tend to incite an immediate breach of the peace").

[89] Mari J. Matsuda, *Legal Storytelling: Public Response to Racist Speech: Considering the Victim's Story*, 87 MICH. L. REV. 2320, 2355 (1989).

A. First Amendment Analysis

1. Fighting Words

Of the First Amendment exceptions, the "fighting words" doctrine is perhaps most relevant to an analysis of racially-charged language, especially when considering the aforementioned arguments that racist comments inflict psychological injury.[90] According to the United States Supreme Court, "fighting words" are "those which by their very utterance inflict injury or tend to incite an immediate breach of the peace."[91] However, it is important to note that, in reality, American courts have generally been very reluctant to uphold convictions under the "fighting words" doctrine,[92] and the Supreme Court has only done so once.[93] Nonetheless, even the most ardent civil libertarians would be hard-pressed to argue that the First Amendment provisions are absolute.[94] Consequently, it is at least remotely conceivable that a reasonable person could find that some publicly communicated racial language—including racial humor targeting some person or persons—is beyond the scope of protection offered by the Constitution and therefore subject to government regulation.[95]

2. Hate Speech

It is in this vein that several notable scholars have argued that racist "hate speech" both can and should be government regulated and curtailed in the United States.[96] Generally, even hate speech is tolerated under law, so long

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[90] *See* discussion *supra* Part IV.B; *see also* Gellman, *supra* note 88, at 340 (explaining that psychologists have noted that "the psychological harm of race-based stigma is often much more severe than that of other stereotypes").

[91] Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942) (upholding a "fighting words" conviction), (*superseded by statute*, ALA. CODE § 13A-11-8 (2005).

[92] Gellman, *supra* note 88, at 369-70.

[93] *Chaplinsky*, 315 U.S. at 574.

[94] Matsuda, *supra* note 89, at 2356.

[95] Racial humor in Hawai'i is often disseminated via mediums such as comedy shows aired on local television and radio stations. *See* discussion *infra* Part VI.A.2. Although television and radio stations are often privately owned, the content of their communications may nonetheless be properly analyzed under a constitutional framework. ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLE AND POLICIES 486 (2nd ed. 2002); Richard B. Gallagher, Annotation, *First Amendment Guaranty of Free Speech and Press as Applied to Licensing and Regulation of Broadcast Media*, 69 L. ED. 2d 1110 (2006) (stating that "newspapers and radio, are included in the press whose freedom is guaranteed in the First Amendment").

[96] *See* Matsuda, *supra* note 89.

as it does not rise to a "true threat."[97] But, scholars advocate that racist hate speech is "any expression of the idea that color marks a person as suspect in morals or ability"[98] and should not be tolerated. Given ethnic jokes' tendency to propagate negative stereotypes of certain groups of people on the basis of race,[99] such a broad definition arguably encompasses racist humor[100] and allows such jokes to ride on the coattails of the movement calling for a First Amendment exception for racist hate speech.[101]

However, others have argued a more narrow reading of the definition of "hate speech." These scholars have suggested that, while both racial humor and racist hate speech have the ability to communicate largely identical and hurtful messages,[102] the two forms of communication differ in substantively different ways from one another. In fact, Professor Mari Matsuda, a leading scholar on the legality of hate speech, acknowledges that racial humor is perhaps less egregious than racist hate speech, for ethnic jokes "are said with a smile, and in a context that is socially understood as a somewhat more appropriate venue for insult."[103]

3. *Unwilling Recipients of Language*

The United States Supreme Court has examined the issue from a different angle and held that the First Amendment freedom of expression rights must be balanced against the weight of the rights of people to be free from exposure to unwanted communications.[104] As such, the Court has stated that "no one has a right to press even 'good' ideas on an unwilling recipient,"[105] and has thus protected the interests of unwilling listeners in situations where "the degree of captivity makes it impractical for the unwilling viewer or auditor to avoid exposure."[106] In the case of racial jokes in Hawai'i, many jokes—or

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[97] Virginia v. Black, 538 U.S. 343, 359 (2002).

[98] John T. Nockleby, *Hate Speech in Context: The Case of Verbal Threats*, 42 BUFF. L. REV. 653, 657 (1994) (quoting Frank Michelman, *Universities, Racist Speech and Democracy in America: An Essay for the ACLU*, 27 HARV. C.R.-C.L. L. REV. 339, 339 (1992)).

[99] *See* discussion *supra* Part IV.B.

[100] *See* Nockleby, *supra* note 98, at 657 (stating that this definition of "hate speech" may properly encompass "off-the-cuff remarks or 'jokes' that reinforce racial stereotypes").

[101] *See generally* Matsuda, *supra* note 89.

[102] *See id.* at 2368.

[103] *Id.* at 2368-69.

[104] Erznoznik v. City of Jacksonville, 422 U.S. 205, 208 (1975) (stating that "pitting the First Amendment rights of speakers against the privacy rights of those who may be unwilling viewers or auditors . . . demand[s] delicate balancing").

[105] Rowan v. U.S. Post Office Dep't, 397 U.S. 728, 738 (1970).

[106] *Erznoznik*, 422 U.S. at 209 (citing Lehman v. City of Shaker Heights, 418 U.S. 298 (1974)).

even entire routines—are frequently aired on local television and radio stations.[107] With the substantial popularity of television and radio, it is not a far stretch of the imagination to postulate that some people who watch or listen to these shows may unexpectedly become an "unwilling recipient" of local humor and take offense. Even more to the point, Frank DeLima annually delivers hundreds of performances of local comedy to elementary and intermediate school children.[108] These students are obligated to attend the shows as part of school-mandated curriculum, and it is conceivable that at least a few of the students may find the humor offensive and can be considered unwilling participants.

With the level of prevalence of racial humor in Hawai'i being as high as it is, it is thus virtually impossible to live in the state and remain unexposed to such humor without extraordinary effort. To completely avoid exposure to local humor, one would conceivably have to stop listening to the radio, refrain from watching television, and not attend public or private schools. Such inconvenience arguably meets the standard of "impracticality" set forth by the Supreme Court.[109]

Accordingly, it is plausible that racial jokes both can and should be curtailed and regulated in Hawai'i, at least to the extent that they are widely and publicly exhibited. In line with this proposal is the Supreme Court's suggestion that a limitation of the mere *scope* of controversial language may sometimes be enough to cure constitutional infringement, stating that, "it may not be the content of the speech, as much as the deliberate 'verbal or visual assault,' that justifies proscription."[110] Here, with the ambiguity of whether the content of Hawai'i-style racial jokes may be considered outside the protections of the First Amendment, there is greater likelihood that the humor

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[107] *See* Local Television at its Best, http://www.oceanic.com/OceanicWebApps/Television/OC16/OC16_main.html (last visited Dec. 2, 2007). Each week, OC-16, a local television station, airs a variety of television shows featuring racially-themed jokes. KDNN-FM, a local radio station, features a morning radio show featuring personalities Lanai and Augie, local comedians that use ethnic humor. *See* Erika Engle, *KSSK Retains Its Usual Spot Atop Radio Ratings*, HONOLULU STAR-BULL., July 30, 2002, at C2.

[108] *See* Frank DeLima Public Appearances, http://www.frankdelima.com/calendar.html (last visited Dec. 2, 2007) (noting that DeLima performs hundreds of shows every year using ethnic humor to elementary and intermediate school students at various schools in Hawai'i). As of 2006, DeLima visits every public school in Hawai'i every year, and every private school every two years. DELIMA, *supra* note 1, at vii.

[109] *See, e.g.*, FCC v. Pacifica Found., 438 U.S. 726, 748-49 (1978) (finding that it is impractical for an unwilling listener to avoid potentially offensive mass media broadcasts, given that "the broadcast audience is constantly tuning in and out, [such that] prior warnings cannot completely protect the listener or viewer from unexpected program content").

[110] City of Hill v. Colorado, 530 U.S. 703, 716 (2000) (quoting Erznoznik v. Jacksonville, 422 U.S. 205, 210-11 n.6 (1975)).

would be considered illegal for its inappropriately broad range than for being prima facie unconstitutional.[111]

B. Analysis of Personal Freedom and Racial Jokes

A second argument supporting the illegality of public performances of ethnic humor is the idea that the *targets* of racial jokes are unlawfully restricted in their personal freedom.[112] Under Hawai'i Revised Statutes ("HRS") Section 489-3, "unfair discriminatory practices that deny, or attempt to deny, a person the *full and equal enjoyment* of the goods, services, facilities, privileges, advantages, and accommodations of a place of *public accommodation* on the basis of *race*, sex, including gender identity or expression, sexual orientation, color, religion, ancestry, or disability are *prohibited*."[113] Because many of the stand-up comedy shows in Hawai'i are open to members of the public and are held in places of "public accomodation," these laws may accurately apply.[114] As discussed earlier, local television programs, radio shows, and public and private schools are all frequent venues for racial humor, making it virtually impossible to live in Hawai'i and avoid ethnic jokes.[115]

The question thus becomes whether state laws may legitimately seek to prohibit ethnic jokes from being told to public audiences in Hawai'i. Very little Hawai'i case law is closely on point. Under a substantially similar statute, dissenting New York judges in *Gladwin v. McHarris* were quick to note that stores selling Polish gag gifts may be perceived by customers as demeaning and derogatory and potentially interfered with some customers' right to enjoyment of a place of public accommodation.[116] Although *Gladwin* was ultimately dismissed for lack of jurisdiction, it is arguable that the selling of discriminatory gag gifts is substantially similar to the telling of racial jokes directed at a public audience. Like discriminatory paraphernalia in a public

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[111] *See* Nockleby, *supra* note 98, at 657 ("First Amendment concerns with hate speech regulations will most likely be minimized if one specifies which forms of hate speech trigger concern and describes the category of speech narrowly . . . .").

[112] *See* Matsuda, *supra* note 89, at 2337.

[113] HAW. REV. STAT. § 489-3 (1993) (emphasis added).

[114] *See id.* § 489-2. Although many local comedy shows charge admission fees, the law is still applicable, given that a "place of public accommodation" is defined as "a business, accommodation, refreshment, *entertainment*, recreation, or transportation facility of any kind whose goods, services, facilities, privileges, advantages, or accommodations are extended, offered, *sold*, or otherwise made available to the general public as *customers*, clients, or visitors." *Id.* (emphasis added).

[115] *See* discussion *supra* Part VI.A.2.

[116] State Div. of Human Rights v. McHarris Gift Ctr., 52 N.Y.2d 813, 814, 816 (1980) (Cooke, C.J., and Jansen, J., separately dissenting).

venue, racial jokes targeted at a public audience have the potential to offend and psychologically harm[117] members of the public, limiting their free and equal enjoyment of a public place on the basis of race, in violation of HRS Section 489-3.

Though many public exhibitions of local humor are voluntarily attended or listened to, many—in particular, the shows at Hawai'i schools—are not. Hence, even in the face of the argument that the vast majority of people do not consciously take offense to local racist humor, it is easily conceivable that at least a few may be offended by such jokes and may thus be denied full and equal enjoyment of the public accommodation in which the jokes are told. Consequently, it can be argued that local humor should be somewhat curtailed to balance the rights of all residents to full and equal enjoyment of public accommodations against the rights of individuals to have the freedom to tell such jokes.

C. The Importance of Context

On a more general note, as with any consideration of speech, the *context* in which language is spoken is of utmost importance in determining the full meaning of the language. Consequently, it is crucial to examine contextual factors before determining the extent to which certain types of racially-charged speech may be legally regulated and/or restricted. Law Professor John Nockleby has examined this issue at length, arguing that "it is only through an exploration of such non-content-based factors as the setting in which the communication occurs that we can begin to answer [the] troubling question[]" of exactly what the limits are to legally controlling racially-motivated oral intimidation.[118] According to Professor Nockleby,

> A contextual inquiry entails examining background facts against which words are uttered in an effort to infer the "meaning" of the communication. Such factors might include the *identities* of the speakers and the listeners, the current and historical *relationship* between the parties, the *place* in which the communication is made, and the *method* or *mode* of communication. These factors are all matters which affect, and sometimes control, the meaning of a particular speech act.[119]

Given the importance of context in influencing the precise meaning of spoken language, it is thus unsurprising that government's ability to regulate certain types of speech has been largely based on the environment in which the

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[117] *See* discussion *supra* Parts III, V.B.

[118] Nockleby, *supra* note 98, at 659.

[119] *Id.* at 659-60 (emphasis added).

communication takes place.[120] Indeed, the Supreme Court has found that "words that are commonplace in one setting are shocking in another,"[121] suggesting that context plays a determinative role in any inquiry as to whether certain language may be properly regulated by the state. However, given the extreme complexities and nuances involved in each unique context, it is virtually impossible to create a blanket rule as to what contexts may legitimately contain certain language.[122] Consequently, Nockleby proposes that any determinations of whether certain speech may be legally regulated should be evaluated on a case-by-case basis, focusing on specific circumstances before deciding whether the speech should be considered harmful and subject to government regulation.[123]

Whether the contextual factors involved in the public displays of local humor suggest that the humor is harmful to such an extent that the jokes should be restricted is a question that remains unsettled, because the many competing factors do not clearly indicate an answer in either direction. Thus, in order to further narrow our analysis, we now turn to specific contexts in which ethnic humor *has* been found to be harmful and thereby subject to government regulation.

Certainly, language in certain venues, such as work[124] and schools,[125] is legitimately regulated despite First Amendment provisions because of the government's interest in protecting people in those contexts. For our

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[120] *E.g.*, United States v. Am. Library Ass'n, Inc., 539 U.S. 194 (2003) (considering the role that libraries have in providing age-appropriate material to their users and holding that the Children's Internet Protection Act, 20 U.S.C. § 9134, which provides federal funding only to those public libraries that restrict children's access to pornography websites, does not violate the First Amendment); *see also* discussion *infra*.

[121] Hughes, *supra* note 54, at 1477 (quoting FCC v. Pacifica Found., 438 U.S. 726, 747 (1978)).

[122] Nockleby, *supra* note 98, at 712; *see also* Hughes, *supra* note 54, at 1471 (stating that "any attempt to restrict social context analysis to the immediate setting, relationships, or individuals involved fails to adequately consider the larger social and historical setting . . . . Racial harassment carries subtle nuances that garner meaning far beyond the immediate circumstances and environment in which it occurs").

[123] Nockleby, *supra* note 98, at 712.

[124] *See, e.g.*, Title VII of the Civil Rights Act, 42 U.S.C. § 2000e-2(a)(1) (1982). While Title VII does not explicitly ban racist speech in a work environment, the Equal Employment Opportunity Commission, in interpreting the Act, has consistently found that "harassment on the basis of national origin is a violation of Title VII," and that "[*e*]*thnic slurs* and other *verbal* or physical conduct relating to an individual's national origin constitute[s] harassment when this conduct . . . [h]as the purpose or effect of creating an intimidating, hostile or offensive working environment." 29 C.F.R. § 1606.8 (1990) (emphasis added).

[125] *See, e.g.*, Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260 (1988); Bethel Sch. Dist. v. Fraser, 478 U.S. 675 (1986); Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503 (1969).

purposes, examining language restriction in the workplace is helpful in honing in on the outer boundaries of these restrictions in regard to racial jokes. Constitutionally speaking, the state has been allowed to restrict speech in the context of the work environment because the government has a valid interest in protecting the interests of employees.[126] Unlike other locations, the workplace is a venue in which the vast majority of Americans must necessarily spend a significant amount of time in order to survive.[127] Further, during working hours, employees are, figuratively speaking, "captives" of their employers, with whom they have a subordinate economic relationship.[128] Given the vulnerability of employees, the state has thus been allowed to interfere in the workplace in ways that it has not in other venues.[129]

Could such considerations thus serve to restrict local humor in Hawai'i, in general? Certainly, local humor is prevalent on such a level as to be unavoidable in Hawai'i. However, it would be difficult to argue that Hawai'i's environment, in general, has become so saturated with ethnic humor as to suggest that it may be properly restricted under Title VII.

Next, turning to an analysis of restricting language in universities, we are confronted with a somewhat different set of contextual factors that come into play when considering whether to ban hate speech, including racist jokes, on campuses. Proponents of such bans argue that universities are "instilled with a unique mission to pursue knowledge and truth through unfettered discourse. At the same time, the university must promote the ideals of equality and tolerance as well as ensure that all students have the same access to pursue their educational goals."[130] Interestingly, this description of the goals of universities is quite similar to those of a democratic society (as is Hawai'i). Thus, on an ideological level, it can be argued that Hawai'i should strive to

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[126] Nockleby, *supra* note 98, at 675.

[127] *Id.*

[128] *Id.*

[129] *E.g.*, Swinton v. Potomac Corp., 270 F.3d 794 (9th Cir. 2001) (finding in favor of an African American employee who felt compelled to quit his job because of the constant stream of racially discriminatory jokes told by his supervisor during work). The Ninth Circuit re-examined the extent that language can be restricted in the workplace, and re-affirmed that racist jokes can, standing alone, constitute a violation of Title VII of the Civil Rights Act, despite the fact that the discrimination is cloaked in the form of "humor." *See* Hughes, *supra* note 54, at 1464, 1467. However, it is also important to note that a majority of the courts have held that a few scattered racist remarks in such a venue would not be a violation of Title VII; rather, in order to succeed on such a claim, a plaintiff would need to show that ethnically derogatory remarks substantially permeated the work environment. *See* Ellen E. Lange, Note, *Racist Speech on Campus: A Title VII Solution to a First Amendment Problem*, 64 S. CAL. L. REV. 105, 123 (1990).

[130] Catherine B. Johnson, Note, *Stopping Hate Without Stifling Speech: Re-Examining the Merits of Hate Speech Codes on University Campuses*, 27 FORDHAM URB. L.J. 1821, 1847-48 (2000).

ban racist speech and humor in the interest of protecting the mission of promoting ideals of equality and tolerance. However, on a realistic level, the public universities' bans on racist speech were quickly struck down as unconstitutional under the First Amendment.[131] Thus, if such language restriction is considered unconstitutional in the limited context of public universities, it is highly unlikely that local humor could ever legitimately be limited in as broad a context as the entire state of Hawai'i.

Thus, although contextual factors may be an important consideration in future analyses of restricting public performances of local humor in certain, more restricted situations, a contextual analysis appears to indicate that although local humor is potentially harmful, it probably cannot be legitimately regulated by the government on a state-wide basis.

VII. CONCLUSION

"Why are you such a killjoy? Can't you take a joke, or is law school making you into such a square that you need to attack the other 99.9% of the population who actually appreciates a good laugh?" Such were the typical responses this work from those who heard the topic. However, I would like to be clear that I, like everyone else, love to laugh and have a good time, and have found just as much amusement from local humor as others who willingly partake in such performances. On a more sober note, though, I cannot simply ignore the possibility that these jokes potentially have a significant and harmful impact on race-relations in Hawai'i.

Racism in Hawai'i has a long history, dating back to the plantation era, and continues today, as evidenced by a local "racialized" social and political hierarchy, and with inequalities between racial groups painfully apparent. While local humor reflects these differences, it also appears to contribute and reinforce certain stigmas associated with various ethnic groups, causing real harm on both an individual and societal level. Legally, it is unlikely that publicly broadcasted local humor could ever be completely outlawed, as courts have been staunchly adamant about protecting even that speech which communicates socially unpopular messages. However, there appears to be a plausible argument that local-style racial jokes are harmful and overly pervasive, and can therefore be lawfully restricted in scope as to how and where they are performed.

Hawai'i, like anywhere else in the world, has obviously not yet found a panacea to the problems of inter-ethnic tensions. Further, given the way in which people are biologically wired to distrust "outsiders," and to unconsciously form and act on mental schemas, it is unlikely that we will ever

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[131] *Id.* at 1822.

completely succeed in eradicating racism. However, this is not to say that we must resign ourselves to a racism-riddled society. Rather, a responsible society should do everything possible in pursuit of this ideal with the hope that we can, at the very least, improve our current status and strive to truly become a "melting pot" of the Pacific.

Karyn R. Okada[132]

[132] J.D. Candidate 2008, William S. Richardson School of Law, University of Hawai'i at Manoa. The author would like to dedicate this article to Raymond and Trudy Okada, to Shigeo and Masaye Okada and in memory of Masao and Natsuko Ohara, for their love, support, and encouragement.

"Officially" What? The Legal Rights and Implications of ʻŌlelo Hawaiʻi

I. INTRODUCTION

I ka ʻōlelo nō ke ola, i ka ʻōlelo nō ka make: Through language there is life, through language there is death.[1] The native people of Hawai'i know the power of the spoken word. The survival of a people's language is the key to the survival of their identity. ʻŌlelo Hawaiʻi,[2] the native language of Hawai'i, was nearly extinguished by a "ban" on the language in 1896 and subsequent government policies.[3] Fortunately, ʻōlelo Hawaiʻi was added as an official language of the State of Hawai'i in the Constitutional Convention of 1978.[4]

Since then, Hawai'i law has failed to give real meaning to having ʻōlelo Hawaiʻi as an "official language." ʻŌlelo Hawaiʻi has been given a place in Hawai'i to survive but not to thrive. Because ʻōlelo Hawaiʻi is an official language of Hawai'i, it is important for legal practitioners to understand the rights and responsibilities associated with its use in Hawai'i. Part II of this article recounts the history of the aboriginal people of Hawai'i and their language, both before and after the overthrow of the Kingdom of Hawai'i, the role that missionaries have played in suppression and support of the language, and the current status of ʻōlelo Hawaiʻi. Part III provides a legal analysis of the Hawai'i State Constitution, federal Native language mandates, and federal and state caselaw. Part III also examines how other United States jurisdictions—New Mexico and the Commonwealth of the Northern Mariana Islands—and international jurisdictions—Aotearoa (New Zealand) and Canada—have addressed multi-lingual populations. Parts IV and V offer the legislative process as a way to promote the resurgence of ʻōlelo Hawaiʻi.

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[1] MARY KAWENA PUKUI, ʻŌLELO NOʻEAU: HAWAIIAN PROVERBS AND POETICAL SAYINGS 129 (2004) (translating the proverb as: "Life is in speech; death is in speech").

[2] For the purposes of this paper, ʻōlelo Hawaiʻi will not be italicized because it is not a foreign language in Hawai'i.

[3] Paul F. Nahoa Lucas, *E Ola Mau Kākou I Ka ʻŌlelo Makuahine: Hawaiian Language Policy and the Courts*, 34 HAW. J. HIST. 1, 9-10 (2000). *See infra* Part II.

[4] *See infra* notes 85-90 and accompanying text (discussing the 1978 Hawai'i Constitution Convention).

The author questions the United States' authority in Hawai'i. *See generally* David Keanu Sai, *American Occupation of the Hawaiian State: A Century Unchecked*, 1 HAW. J. L. & POL. 46, 56 (2004), *available at* http://www2.hawaii.edu/~hslp/journal/vol1/Sai_Article_(HJLP).pdf (discussing whether Hawai'i is under the jurisdiction of the United States or alternately "occupied"). For the purposes of this paper, however, the author assumes the authority of the United States and State of Hawai'i.

II. HISTORY OF 'ŌLELO HAWAI'I

A. *Ka Po'e 'Ōiwi: The Natives*

'Ōlelo Hawai'i is the native language and speech of Hawai'i.[5] It is a "poetic, expressive language consisting of a vocabulary of some twenty-five thousand words."[6] According to Western linguistics, 'ōlelo Hawai'i belongs to the "Malayo-Polynesian (Austronesia) language family."[7] 'Ōlelo Hawai'i is rich with figurative meanings, or kaona, "to an extent unknown in English."[8] Furthermore, for the Hawai'i 'ōiwi,[9] "'Ōlelo, 'word' or 'speech,' [is] far more than a means of communicating[,]. . . the spoken word [does] more than send into motion forces of destruction and death, forgiveness and healing. The word [is] itself a force."[10]

B. *Nā Mikioneli a me ka 'Ōlelo 'Ē: Missionary Linguists*

Shortly after Captain Cook stumbled upon Hawai'i, the mikioneli (missionaries) arrived in Hawai'i in 1820.[11] They "eventually sought to educate [the Hawai'i 'ōiwi] about Christianity in their ['ōlelo Hawai'i], motivated primarily by the directives of their employer, the American Board of Commissioners for Foreign Missions," but also because of "simple logistics," because the Hawai'i 'ōiwi "were many and the missionaries were few."[12] Their work was simplified by the previous efforts of missionaries "that developed a written or Roman alphabet" for the *Reo Tahiti*.[13] 'Ōlelo Hawai'i was constructed on an "orthographic base of 12 letters" and by 1822, the first sixteen-page primer, *Pī-ā-pā*, had been printed.[14] The Hawai'i 'ōiwi mastered

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[5] Lucas, *supra* note 3, at 1.

[6] *Id.*

[7] ALBERT J. SCHÜTZ, THE VOICES OF EDEN: A HISTORY OF HAWAIIAN LANGUAGE STUDIES 15 (1994). 'Ōlelo Hawai'i "has the simplest sound of any Malayo-Polynesian, and perhaps of any language in the world." Lucas, *supra* note 3, at 1 (citation omitted).

[8] SCHÜTZ, *supra* note 7, at 210.

[9] "Hawai'i 'ōiwi" will be used instead of the English words "Native Hawaiian" and "Hawaiian."

[10] MARY K. PUKUI, E.W. HAERTIG & CATHERINE LEE, NĀNĀ I KE KUMU: VOL. II 124 (2d ed. 2002).

[11] MAENETTE K. P. BENHAM & RONALD H. HECK, CULTURE AND EDUCATIONAL POLICY IN HAWAI'I: THE SILENCING OF NATIVE VOICES 31 (1998).

[12] Lucas, *supra* note 3, at 2.

[13] BENHAM & HECK, *supra* note 11, at 55. *Reo Tahiti* is the native language of Tahiti.

[14] *Id.*

the new written medium of 'ōlelo Hawai'i swiftly.[15] By 1853, only thirty-one years after the publication of the *Pī-ā-pā*, "nearly three fourths of the [Hawai'i 'ōiwi] population over the age of sixteen years [was literate in 'ōlelo Hawai'i]."[16]

C. Ke Aupuni o Hawai'i: The Kingdom of Hawai'i

Throughout the nineteenth century, the relationship between the United States and the Kingdom of Hawai'i solidified. The United States not only recognized the independence of the Kingdom of Hawai'i, but extended full and complete diplomatic recognition to the Kingdom and entered into treaties and conventions governing commerce and navigation in the years of 1826, 1842, 1875, and 1887.[17]

1. Lololi nā kānāwai: Judicial and legislative change

Beginning in 1846, the Kingdom's legislature declared that all laws enacted were to be published in both 'ōlelo Hawai'i and English.[18] However, "[b]y 1850, English had become the language of business, diplomacy, and to a considerable extent, of government itself."[19] The dispute between the use of both languages in Hawai'i's laws eventually led to court cases in which Hawai'i courts upheld the supremacy of 'ōlelo Hawai'i as the governing law.[20] In 1865, Associate Justice George Robertson, writing for the court in *Metcalf v. Kahai*,[21] held that, regarding a law concerning property damages caused by an owner's animals, the 'ōlelo Hawai'i version prevailed over the English.[22] Five months later, in *Hardy v. Ruggles*,[23] Chief Justice William L. Lee found that "where there is a radical and irreconcilable difference between the English and ['ōlelo Hawai'i], the latter must govern, because it is the language of the

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[15] Lucas, *supra* note 3, at 2.

[16] BENHAM & HECK, *supra* note 11, at 70.

[17] Jon M. Van Dyke & Melody K. MacKenzie, *An Introduction to the Rights of the Native Hawaiian People*, HAW. B.J., July 2006, at 63, 63.

[18] Lucas, *supra* note 3, at 3.

[19] *Id.*

[20] *Id. See also* discussion *infra* Part III.B (analyzing state and federal court treatment of 'ōlelo Hawai'i-speaking plaintiffs).

[21] 1 Haw. 402 (1856).

[22] Lucas, *supra* note 3, at 3 (citing Metcalf v. Kahai, 1 Haw. 402 (1856)).

[23] 1 Haw. 457 (1856) (concerning a statute for proper filing of documents with the Bureau of Conveyances).

legislators of the country. This doctrine was first laid down by the Superior Court in 1848, and has been steadily adhered to ever since."[24]

The Kingdom of Hawai'i and Territory of Hawai'i published all laws in both 'ōlelo Hawai'i and English until 1943,[25] when "the practice of publishing laws in ['ōlelo Hawai'i] was abolished by statute."[26]

2. Kāko'o 'ia ka namu: Armstrong's preference

Richard Armstrong, former missionary and second minister of public instruction of the Kingdom of Hawai'i from 1848 to 1860, was a strong supporter of the use of English in Hawai'i schools.[27] Armstrong explained that,

> [w]ere the means at our command, it would be an unspeakable blessing to have every native child placed in a good English school and kept there until it had [acquired] a thorough knowledge of what is now . . . the business language on the Islands, and which would open its mind to new and exhaustless treasures of moral and intellectual wealth.[28]

However, Armstrong understood that "[t]he language of a nation is part of its very being and never was and never will be changed except by a very gradual process."[29]

During Armstrong's administration, "the first government-sponsored school in English was established in 1851, and by 1854, government-run English schools were effectively competing with the ['ōlelo Hawai'i] schools."[30] Consequently, a major shift occurred, and more students enrolling in the English-speaking schools decreased the need for 'ōlelo Hawai'i teachers.[31] In 1886, the report of the minister of public instruction of the Kingdom of Hawai'i legislature stated that "[i]n the future, . . . if these heterogeneous elements are to be fused into one nationality in thought and action, it must be by means of the public free schools of the nation, the medium of instruction being the English

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[24] *Id.* at 463. Three years following the *Hardy v. Ruggles* decision, advocates for "English-mainly" lobbied the Kingdom of Hawai'i's legislature to enact the Civil Code of 1859, Section 1493, which states that "[i]f at anytime a radical and irreconcilable difference shall be found to exist between English and ['ōlelo Hawai'i] versions of any part of this Code, the English version shall be held binding." Lucas, *supra* note 3, at 3-4.

[25] Lucas, *supra* note 3, at 3-4.

[26] *Id.*

[27] *Id.*

[28] *Id.* at 4-5.

[29] *Id.* at 5.

[30] *Id.*

[31] *Id.*

language chiefly."[32] Moreover, the amount of written material for the English-medium schools was greater than for 'ōlelo Hawai'i-medium schools.[33]

The influence of Armstrong's English preference policies continued on through subsequent administrations. In 1884, the president of the Board of Education commented: "[W]hy worry over the quality of teachers in ['ōlelo Hawai'i]? We shan't need them much longer, anyway."[34] Likewise, in 1890, the president of the Board of Education noted that 'ōlelo Hawai'i schools were "[u]seful in places where it is absolutely impossible to obtain teachers who know anything of the English language . . . . In such places funds at the disposal of the Board hardly warrant the expenditure of even twenty dollars a month upon a teacher."[35] In 1887, the private Kamehameha Schools for Boys had an Armstrong-like stance on the medium of instruction.[36] William B. Oleson, the first headmaster, imposed "strict rules" to prevent any language other than English on the campus.[37] The culmination of these events ultimately led to the closing of all 'ōlelo Hawai'i common schools.[38]

3. Kū'ē: Resistance to English

In 1864, the Reverend Lorrin Andrews stated that "for the Government to set up English schools, to the neglect of educating its own people in their own language, would, in my opinion, be a suicidal act."[39] Likewise, Reverend Lorenzo "Makua Laiana" Lyons remarked:

> I've studied ['ōlelo Hawai'i] for 46 years . . . . It is an interminable language . . . it is one of the oldest living languages of the earth, as some conjecture, and may well be classed among the best . . . . [T]he thought to displace it, or to doom it to

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[32] *Id.*

[33] *Id.* at 6. Although some may view this as a choice of the Hawai'i 'ōiwi, it was not an equal choice because: (1) "the quality of education was not the same"; (2) "[m]ost of the teacher professional development was conducted only for English-speaking education"; and (3) "many of the texts and materials brought in from the United States were not translated for use in the common schools." BENHAM & HECK, *supra* note 11, at 93.

[34] Lucas, *supra* note 3, at 6.

[35] *Id.*

[36] *Id.* at 7.

[37] *Id.*

[38] *Id.* at 9. *See also* Sam L. No'eau Warner, *The Movement to Revitalize Hawaiian Language and Culture*, *in* THE GREEN BOOK OF LANGUAGE REVITALIZATION IN PRACTICE 134 (Leanne Hinton & Ken Hale eds., 2001) (noting that in 1848, ninety-nine percent of 631 common schools were taught through the medium of 'ōlelo Hawai'i).

[39] Lucas, *supra* note 3, at 7.

> oblivion by substituting the English language, ought not for a moment to be indulged. Long live the grand old, sonorous, poetical ['ōlelo Hawai'i].[40]

According to Mataio Kekūanāo'a, 1864 Board of Education President:

> The theory of substituting the English language for the ['ōlelo Hawai'i], in order to educate our people, is as dangerous to [Hawai'i] nationality, as it is useless in promoting the general education of the people .... [I]f we wish to preserve the Kingdom of Hawai[']i for [Hawai'i 'ōiwi], and to educate our people, we must insist that the ['ōlelo Hawai'i] shall be the language of all our National schools, and the English shall be taught whenever practicable, but only, as an important *branch* of [Hawai'i] education.[41]

4. 'A'ohe malu: English reigns

On January 17, 1893, the Kingdom of Hawai'i's government was overthrown by a United States-backed coup.[42] During the following years, the Hawai'i 'ōiwi were active in their opposition to the "annexation" of Hawai'i.[43] In 1896, three years after the overthrow of the Hawai'i government, the controversial[44] Republic of Hawai'i enacted a law which required that English be the medium of instruction in all schools.[45] According to the Act of June 8, 1896, Chapter 57, Section 30:

> The English language shall be the medium and basis of instruction in all public and private schools .... *Any schools that shall not conform to the provisions of this section shall not be recognized by the Department.*[46]

Reverend McArthur, six months before the 1896 law took effect, shared: "The English language will be taught in all the public schools .... The present

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[40] *Id.*

[41] RALPH S. KUYKENDALL, THE HAWAIIAN KINGDOM VOLUME II, 1854-1874: TWENTY CRITICAL YEARS 112 (1953).

[42] *See* Sai, *supra* note 4, at 56.

[43] Van Dyke & MacKenzie, *supra* note 17, at 63. Opposition was "evidenced by petitions signed by 21,269 people representing more than half of the [Hawai'i 'ōiwi] population at the time." *Id.* (citing Nālani Minton & Noenoe Silva, *Kū'ē: The Hui Aloha 'Āina Anti-Annexation Petitions 1897-1898* (1998)).

[44] *See generally* Sai, *supra* note 4.

[45] Lucas, *supra* note 3, at 8.

[46] Act of June 18, 1896, ch. 57, § 30 (codified at 1897 Haw. Comp. Laws § 123 (1897)) (emphasis added). *See* Lucas, *supra* note 3, at 8.

generation will generally know English; *the next generation will know little else.*"[47]

According to the 1896 act, the schools in Hawai'i had a choice to use English or not; however, a choice contrary to the law meant forfeiture of government funding.[48] As a result of this English-preference law, the number of 'ōlelo Hawai'i schools dropped greatly "from a high of 150 in 1880 down to zero in 1902."[49] Conversely, "the number of English-medium schools significantly rose from 60 in 1880 to 203 in 1902."[50] The Republic report of 1896 remarked that "[t]he gradual extinction of a Polynesian dialect may be regretted for sentimental reasons, but it is certainly for the interest of the [Hawai'i 'ōiwi] themselves."[51] Also, under the Organic Act of 1900, all government business would only be conducted in English.[52]

The effect of the law of 1896 and corporal punishment, "social sanctions," in school brought results as if the language had been banned.[53] 'Ōlelo Hawai'i was "strictly forbidden anywhere within schoolyards or buildings."[54] Deceased kupuna Rose Manu, a mānaleo (native speaker), shared her experience at school: "I went to school not knowing the English language. The teacher told me to write my name, I could not [respond to her in English]. And I want to go to the bathroom but I cannot speak English . . . so when I return home, my clothes are drenched."[55] While 'ōlelo Hawai'i "was still quite strong in public life in the early days of the Territory, the main loss of language came through the school system, which attacked the language at its most vulnerable and important point, the children from ['ōlelo Hawai'i]-speaking homes."[56] 'Ōlelo Hawai'i speaking teachers were sent to homes where 'ōlelo Hawai'i was spoken to chastise parents for speaking to their children in their native tongue.[57]

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[47] Lucas, *supra* note 3, at 8 (emphasis added).

[48] *Id.* at 9.

[49] *Id.*

[50] *Id.*

[51] *Id.*

[52] Summer Kupau, *Judicial Enforcement of "Official" Indigenous Languages: A Comparative Analysis of the Māori and Hawaiian Struggles for Cultural Language Rights*, 26 U. HAW. L. REV. 495, 499 (2004).

[53] E-mail from Puakea Nogelmeier, Associate Professor of 'ōlelo Hawai'i, University of Hawai'i at Mānoa, to Kau'i Sai-Dudoit, Ho'olaupa'i Hawaiian Newspaper Resource Project Manager, Bishop Museum (Sept. 30, 2005, 05:22 HST) (on file with author).

[54] Lucas, *supra* note 3, at 9.

[55] Interview by Clinton Kanahele with Rose Manu, Kupuna, Ulumau Village, in Kāne'ohe, Haw. (July 30, 1970). The interview was conducted in 'ōlelo Hawai'i and the author translated the quoted sections into English.

[56] U.S. DEP'T OF INTERIOR, NATIVE HAWAIIANS STUDY COMMISSION, REPORT ON THE CULTURE, NEEDS, AND CONCERNS OF NATIVE HAWAIIANS 196 (1983).

[57] Lucas, *supra* note 3, at 9.

A writer to *Ka Puuhonua o Na Hawaii* in 1917 sadly states that "[t]here is no child under 15 years of age who can converse correctly in the mother tongue of this land."[58]

The Territory of Hawai'i legislature attempted to reintroduce 'ōlelo Hawai'i in the school curriculum, but not as a medium of instruction. In 1919, the legislature amended the 1896 law by including that "['ōlelo Hawai'i] shall be taught in addition to the English in all normal and high schools of the Territory."[59] This statute was further amended in 1935 to include "that daily instruction for at least ten minutes in conversation or, in the discretion of the department, in reading and writing, in ['ōlelo Hawai'i] shall be given in every public school conducted in any settlement of homesteaders."[60] Albert Schütz comments that the 1919 and 1935 amendments "were—at best—farcical, and—at worst—insulting to the language and culture."[61] The amendments were consequently repealed in 1965.[62]

In the late 1880's, newspapers printed in 'ōlelo Hawai'i flourished.[63] The number of newspapers drastically declined from "twelve (nine secular, three religious) in 1910 to one (religious) in 1948."[64] As radio and television were introduced, no 'ōlelo Hawai'i programs were produced.[65] The impact of this shift in the medium of education, coupled with no speaking forum, ultimately led the language into public dormancy.

The island of Ni'ihau is the last single native-speaking community with approximately 150 individuals.[66] Furthermore, there are "fewer than two thousand native speakers, all above sixty years of age scattered throughout O'ahu, Moloka'i, Hawai'i, Lāna'i, Maui and Kaua'i, who must function [in an] English-speaking environment."[67]

As the English language appeared to triumph over the 'ōlelo Hawai'i, political changes in the 1970's shifted this balance.

5. 'Auhea ka 'ōlelo Hawai'i: Where did it go?

During the 1970's "Hawai'i 'Ōiwi Renaissance," the Hawai'i 'ōiwi sought to return to their ancestors' way of life, especially their language. Consequently,

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[58] *Id.*
[59] *Id.* at 10.
[60] *Id.*
[61] SCHÜTZ, *supra* note 7, at 359.
[62] LUCAS, *supra* note 3, at 10.
[63] Warner, *supra* note 38, at 133-34.
[64] LUCAS, *supra* note 3, at 9.
[65] *Id.*
[66] *Id.* at 10.
[67] *Id.*

the Hawai'i State Constitutional Convention of 1978 added 'ōlelo Hawai'i as an official language to the State constitution.

During the 1980's, 'ōlelo Hawai'i returned as a medium of instruction in the public schools. In 1983, the 'Aha Pūnana Leo was created by a small group of 'ōlelo Hawai'i educators to revive 'ōlelo Hawai'i medium instruction.[68] By this time, the use of 'ōlelo Hawai'i as a medium of instruction had ceased for nearly ninety years.[69] 'Aha Pūnana Leo created the Pūnana Leo preschools, modeled after Māori-language preschools *Te Kōhanga Reo* in Aotearoa, to reestablish 'ōlelo Hawai'i as the medium of instruction.[70] In 1986, an amendment to Hawai'i Revised Statute section 298-2 (the 'ōlelo Hawai'i "ban" law of 1896) was passed to allow "special projects using ['ōlelo Hawai'i] as approved by the board of education."[71] Therefore, in 1987, the State Board of Education ("BOE") "approved the Hawaiian Language Immersion Project, a two-year pilot program for children who wished to continue their education in ['ōlelo Hawai'i] after graduating from Pūnana Leo."[72] The BOE cautioned, however, that "it [would] be in concept only and [would] be contingent on the Department of [Education] being able to find the resources to implement the program."[73] The program was specifically "contingent on the availability of qualified personnel, parent/student interest, and sufficient curriculum materials."[74]

In 1987, Papahana Kaiapuni Hawai'i—the 'ōlelo Hawai'i immersion program—was created and has continued to grow.[75] In 1988, the "BOE voted to expand the program to the second grade, and a year later, to the sixth grade."[76] In 1992, the BOE approved the program to extend to grade twelve.[77] In 1995, the BOE approved a long-range development plan to:

> assist the ['ōlelo Hawai'i]-speaking families in the revitalization of the language and culture and maintain usage of the language, to assist those families who wish

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[68] Kauanoe Kamanā & William H. Wilson, *Hawaiian Language Programs*, *in* STABILIZING INDIGENOUS LANGUAGES 1 (G. Cantoni ed., 1996), *available at* http://www.ncela.gwu.edu/pubs/stabilize/additional/hawaiian.htm.

[69] *Id.*

[70] Lucas, *supra* note 3, at 10-11.

[71] *Id.* at 11 (quoting HAW. REV. STAT. § 298-2 (1995) (current version at HAW. REV. STAT. § 302A-1128 (2007))).

[72] *Id.* (quoting Minutes of Board of Education 9-10 (July 23, 1987)).

[73] *Id.*

[74] *Id.*

[75] *Id.*; *see also* Papahana Kula Kaiapuni, *History of Ka Papahana Kaiapuni Hawai'i*, http://www.k12.hi.us/~kaiapuni/HLIP/history.htm (last visited Nov. 4, 2007).

[76] Lucas, *supra* note 3, at 11.

[77] *Id.*

> to integrate into the ['ōlelo Hawai'i]-speaking community by eventually replacing their home language with ['ōlelo Hawai'i] for future generations, and to assist those families who wish to use ['ōlelo Hawai'i] as a second or third language in interacting with the ['ōlelo Hawai'i]-speaking community.[78]

Moreover, "[w]hen fifteen or more qualified children . . . wish to enroll in [Papahana Kaiapuni Hawai'i] the superintendent of education may provide facilities . . . or provide transportation to the nearest schooling site providing the program."[79] The first two Papahana Kaiapuni Hawai'i classes graduated from high school in June of 1999.[80] In 2004, Kahuku High & Intermediate School and Moloka'i Intermediate School became the eighteenth and nineteenth Papahana Kaiapuni Hawai'i schools.[81]

6. Nā pōpilikia: Kaiapuni woes

Although Papahana Kaiapuni Hawai'i has made significant strides with 'ōlelo Hawai'i, the "BOE has remained unwilling to commit sufficient funds to develop curriculum materials and teacher training that will place [Papahana Kaiapuni Hawai'i] on a level that equals or exceeds the instruction given in English in public schools."[82] Despite the addition of eight schools since 1994, "funding for the sixteen Kaiapuni school sites has remained constant since 1993 at $3.1 million."[83] Furthermore, spending per pupil has decreased "from $1,845 in fiscal year 1991-1992 to $849 per student in fiscal year 1997-1998."[84]

III. LEGAL ANALYSIS OF 'ŌLELO HAWAI'I

A. He 'Ōlelo Kūpono no Hawai'i: "Official" State of 'Ōlelo Hawai'i

In 1978, Article XV, Section 4 of the Hawai'i State Constitution was amended to read:

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[78] *Id.*
[79] HAW. REV. STAT. § 302H-4 (2006).
[80] Lucas, *supra* note 3, at 11.
[81] *See* Papahana Kula Kaiapuni, *supra* note 75.
[82] Lucas, *supra* note 3, at 11.
[83] *Id.*
[84] *Id.* at 11-12.

> English and ['ōlelo Hawai'i] shall be the official languages of Hawai'i, except that ['ōlelo Hawai'i] shall be required for public acts and transaction only as provided by law.[85]

The amendment was made "in order to give full recognition and honor to the rich cultural inheritance that [Hawai'i 'ōiwi] have given to all ethnic groups of this State, by making ['ōlelo Hawai'i] an official language of the State."[86] Furthermore, the Committee of the Whole stated that:

> [T]he study of ['ōlelo Hawai'i], culture, and history was important to the diversity of cultures in the State of Hawai'i. Moreover, *this is the only place where [Hawai'i] studies [are] likely to occur since the State of Hawai'i is the 'āina [land] for [Hawai'i 'ōiwi]: there is no other place.* Other ethnic groups in Hawai'i can return to their originating country, such as Japan, Korea, China, Portugal, England, the mainland, etc. to study."[87]

More importantly, the intent was "to overcome certain insults of the past where the speaking of ['ōlelo Hawai'i] was forbidden in the public school system, and of today where ['ōlelo Hawai'i] is listed as a foreign language in the language department at the University of Hawai'i."[88]

Although this amendment does not give specific rights to 'ōlelo Hawai'i, the "constitutional amendment should have power, even though it is non-implementing."[89] At this point however, there is nothing for the judiciary to enforce.[90] As a result, there have not been any cases adjudicated that address the legal rights associated with Article XV, Section 4 of the Hawai'i State Constitution and the official status of 'ōlelo Hawai'i.

B. He Aupuni Noho Hewa: U.S. Rule

The United States has little regard for indigenous languages, when compared to "Western European countries in general."[91] One writer states that the

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[85] HAW. CONST. art. XV, § 4.

[86] HAW. AFF. COMM., STAND. COMM. REP. NO. 57, *reprinted in* 1 Proceedings of the Constitutional Convention of 1978 at 638 (1980).

[87] COMM. OF THE WHOLE, REP. NO. 12, *reprinted in* 1 Proceedings of the Constitutional Convention of 1978 at 1016 (Haw. 1980) (emphasis added).

[88] *Id.*

[89] Interview with Jon Van Dyke, Constitutional Law Professor, William S. Richardson School of Law, in Mānoa, Haw. (Mar. 9, 2007).

[90] *Id.*

[91] James Fife, *The Legal Framework for Indigenous Language Rights in the United States,* 41 WILLAMETTE L. REV. 325, 326 (2005).

"awareness of and support for language rights in America are in a primitive state," as reflected in the treatment of Native American languages.[92] However, the U.S. Congress acknowledges "evidence that student achievement and performance, community and school pride, and educational opportunity is clearly and directly tied to respect for, and support of, the first language of the child or student."[93]

1. He kānāwai no nā 'ōlelo 'ōiwi: NALA

Passed in 1990, the Native American Languages Act ("NALA") is the "only federal law that attempts to address the concerns of ['ōlelo Hawai'i] language-rights advocates."[94] Prior to NALA's enactment, the Select Committee on Indian Affairs "favorably reported on the bill . . . finding 'language is the basis of culture.'"[95] Section 2904 of NALA states: "The right of Native Americans to express themselves through the use of Native American languages shall not be restricted in any public proceeding, including publicly supported education programs."[96] NALA applies to the Native Americans, Native Alaskans, Aleut peoples, Hawai'i 'ōiwi, and "any descendant of the aboriginal people of any island in the Pacific Ocean that is a territory or possession of the United States."[97]

2. Tagupa v. Odo

In 1993, William H. Tagupa, a Hawai'i 'ōiwi attorney and member of the Hawai'i Bar Association, "brought an employment discrimination suit . . . against the University of Hawai'i Board of Regents" in Hawai'i state court.[98] Tagupa attempted to give his deposition in 'ōlelo Hawai'i as a *pro se* plaintiff in a case against the University of Hawai'i.[99] Tagupa knew "this choice was pono."[100] On December 21, 1993, Magistrate Judge Yamashita granted a protective order for the defendants that required Tagupa to respond to the

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[92] *Id.*

[93] Native American Languages Act, 25 U.S.C. § 2901(6) (2000).

[94] Lucas, *supra* note 3, at 12.

[95] Fife, *supra* note 91, at 352-53.

[96] 25 U.S.C. § 2904 (2000).

[97] *Id.* § 2902(4).

[98] Kupau, *supra* note 52, at 508. *See* Tagupa v. Odo, 843 F. Supp. 630 (1994), *rev'd* 95 F.3d 1158 (9th Cir. 1996).

[99] *Tagupa*, 843 F. Supp. at 631.

[100] Kupau, *supra* note 52, at 495. Pono means "upright, just, fair." MARY KAWENA PUKUI & SAMUEL H. ELBERT, HAWAIIAN DICTIONARY 340 (1986).

deposition in English.[101] Tagupa appealed Magistrate Judge Yamashita's ruling on the grounds that it was "clearly erroneous and contrary to both Article XV, Section 4 of the Hawai[']i Constitution and the 1990 Native American Language Act."[102] The issue before Federal Judge Alan Kay was "whether an individual of [Hawai'i 'ōiwi] ancestry has a right to use ['ōlelo Hawai'i] in a civil judicial proceedings regardless of their proficiency in English."[103]

Regarding the official language amendment claim, Judge Kay commented that:

> [T]he Hawai[']i Constitution, and the subsequent case law interpreting it, provides little guidance regarding whether an American citizen of [Hawai'i 'ōiwi] ancestry residing in Hawai[']i can assert, as a matter of right, the privilege of giving oral deposition testimony in ['ōlelo Hawai'i] when he or she is fluent in the English language.[104]

Judge Kay declined judgment on this issue because "a definitive judicial determination of this issue is better left to the Hawai[']i state courts."[105] Judge Kay did, however, find that Tagupa's request for an interpreter at his deposition was an "unnecessary expense that would needlessly complicate and delay the deposition process."[106] Also, "[t]he mere fact that ['ōlelo Hawai'i] is also an official language of Hawai'i does not compel this Court to ignore the practical realities of this dispute."[107]

The NALA claim did not work in Tagupa's favor either. Although section 2904 of NALA states that "the use of Native American languages shall not be restricted in any public proceeding," Judge Kay did not find its application in this case.[108] He ultimately found that "Congress did not . . . intend to extend the Language Act to judicial proceedings in federal courts."[109] For these reasons and others,[110] Tagupa was later forced to give his oral deposition in

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[101] *Tagupa*, 843 F. Supp. at 631.
[102] *Id.*
[103] *Id.*
[104] *Id.*
[105] *Id.*
[106] *Id.*
[107] *Id.*
[108] *Id.* at 632.
[109] *Id.*
[110] *Id.* at 632-33. Among the reasons given were: (1) the original discrimination claims against the University of Hawai'i did not concern 'ōlelo Hawai'i; (2) Tagupa "is a member of the Hawai[']i Bar who fully understands the American judicial process and possesses a mastery of the English language"; (3) allowing Tagupa to give his deposition in 'ōlelo Hawai'i would add "needless delays and costs" because the parties would have to seek, pay and agree on an appropriate interpreter; and (4) the deposition in 'ōlelo Hawai'i would create "disputes over the

English.[111] As observed by an author, "whatever protections NALA provides for indigenous languages, they are subordinate to generalized concerns for litigation costs and apparently subject to some sort of showing of need."[112]

The ruling in this case is disturbing because it will most likely affect all involved in the resurgence of 'ōlelo Hawai'i. According to one article, this case "closes the door to any future Pūnana Leo graduate, proficient in English and ['ōlelo Hawai'i], who chooses to speak '[ō]lelo Hawai'i in the courts."[113] According to the 1990 census of Hawai'i, a little more than 8,800 people speak 'ōlelo Hawai'i, of which approximately ninety-three percent are bilingual.[114] This creates a dire situation where only a select group of native speakers, those that are not proficient in English, may use 'ōlelo Hawai'i in court proceedings.

3. Office of Hawaiian Affairs v. Department of Education

On November 27, 1995, the Office of Hawaiian Affairs ("OHA") filed suit against the State of Hawai'i Department of Education ("DOE") in *Office of Hawaiian Affairs v. Department of Education (OHA)*.[115] The "crux of Plaintiffs' complaint is that the State of Hawai['i should provide more [Papahana Kaiapuni Hawai'i] programs in public schools."[116] The program was not meeting the growing need of Hawai'i students interested in joining the program.[117] The Plaintiffs claimed that the Defendants violated: (1) Article X, Section 4 of the Hawai'i State Constitution "by failing 'to provide a comprehensive Hawaiian education program' and failing to encourage 'community expertise' to develop ['ōlelo Hawai'i] programs and teachers"; and (2) Hawai'i Revised Statutes section 1-1 "by failing to protect the 'customary rights'" of Hawai'i 'ōiwi to use their native tongue.[118] Plaintiffs sought injunctive relief to "require Defendants to provide sufficient resources (teachers, classrooms, and learning materials) for [Papahana Kaiapuni Hawai'i], to devise a plan to expand

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'correct' English translation" of Tagupa's answers. *Id.*

[111] Kupau, *supra* note 52, at 510. *See also* Tagupa v. Odo, 95 F.3d 1158 (9th Cir. 1996) (reversing the trial court's judgment and remanding with instructions to grant defendants complete summary judgment on the grounds of qualified immunity and sovereign immunity).

[112] Fife, *supra* note 91, at 360.

[113] Kupau, *supra* note 52, at 500.

[114] Fife, *supra* note 91, at 327.

[115] *OHA*, 951 F. Supp. 1484, 1487 (D. Haw. 1996). Other parties involved were the Chairman of the Office of Hawaiian Affairs ("OHA"), Trustees of OHA, the Superintendent of the DOE, the BOE, and individual BOE members. *Id.*

[116] *Id.*

[117] *Id.*

[118] *Id.*

[Papahana Kaiapuni Hawai'i] and make them accessible, and to develop a pool of teachers for [Papahana Kaiapuni Hawai'i] education."[119]

Defendants removed the case to federal court, contending that "OHA's claim under NALA should be dismissed because the statute creates no enforceable rights nor an implied private right of action."[120] The major issue before the court was "whether NALA confers a private cause of action to sue."[121] The Plaintiffs insisted that NALA created "an implied cause of action for members of the class protected under the act."[122] In particular, OHA claimed that they had the right "to sue the State of Hawai'i's educational departments and officials for 'restricting' their use of ['ōlelo Hawai'i] in public schools."[123]

The United States Supreme Court has set forth four factors "to determine whether Congress intended to imply a private cause of action in a federal statute."[124] The four factors are:

> (1) is the plaintiff in the special class which the statute intended to protect; (2) is there legislative intent to create a private cause of action; (3) is a private cause of action consistent with the purpose of the legislative scheme; and (4) is the cause of action traditionally relegated to state law, in which case it would be inappropriate to infer a federal cause of action.[125]

The court identified the most important question to be "whether Congress intended to create the private remedy sought by the plaintiffs."[126] The court ultimately concluded that "Congress did not intend NALA to create a private cause of action against states."[127] Furthermore, "[a]lthough Plaintiffs represent a subset of those who NALA intended to benefit—[Hawai'i 'ōiwi] who speak ['ōlelo Hawai'i]—there is no indication that Congress intended [Hawai'i 'ōiwi] or any other Native Americans to have a private cause of action under the Act."[128]

The court provided four reasons why NALA did not create a private right of action:

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[119] *Id.* at 1487-88.
[120] Lucas, *supra* note 3, at 14.
[121] *OHA*, 951 F. Supp. at 1493.
[122] *Id.*
[123] *Id.*
[124] *Id.* at 1494.
[125] *Id.*
[126] *Id.* (citations omitted) (internal quotation marks omitted).
[127] *Id.*
[128] *Id.*

> (1) legislative history weighted against implying a cause of action; (2) NALA itself spoke only of general policies and made no specific directives; (3) most of NALA's language was merely hortatory; and (4) there was no affirmative evidence in NALA that it was meant to apply to the states as opposed to the federal government.[129]

Judge Kay found that NALA would only apply if the state did not allow the use of ['ōlelo Hawai'i] in schools,[130] reasoning that the creation and continuation of the Papahana Kaiapuni Hawai'i illustrated no restriction on the language by the State.[131] At the time, the State of Hawai'i had created the Papahana Kaiapuni Hawai'i, in "which 923 students participate and which Congress commended as an exemplary model when it enacted NALA."[132] As one author opines, "[b]ecause linguistic discrimination was no longer practiced in Hawai'i, an injunction was not available to make whole those who were not directly victimized by unequal treatment."[133]

The *OHA* case is controversial for several reasons. First, in determining the legislative intent of NALA, Judge Kay relied upon President Bush's statement when signing NALA.[134] President Bush "construe[d] [the Act] as a statement of general policy and [did] not understand it to confer a private right of action on any individual or group."[135] It is perplexing that the executive branch can illustrate legislative intent: "While this statement clearly expressed President Bush's opinion on whether NALA created a private cause of action, it said nothing about Congress' intent with respect to the issue. The court admitted that the congressional legislative history was silent on the issue . . . ."[136] In the Senate Select Committee report, NALA was created "to provide Native Americans with a tool to develop programs that they believe will enrich their children and perpetuate their cultures."[137]

Secondly, NALA may be binding on the states.[138] In *OHA*, Judge Kay ruled that NALA was not intended to be binding on the states.[139] However, in the finding section of NALA, Congress states that it "is clearly in the interests of

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[129] Fife, *supra* note 91, at 360-61; *see also OHA*, 951 F. Supp. at 1494-95.

[130] *See OHA*, 951 F. Supp. at 1499.

[131] *Id.*

[132] *Id.* at 1495.

[133] Fife, *supra* note 91, at 361.

[134] *OHA*, 951 F. Supp. at 1494.

[135] Statement by President George Bush upon signing S. 2167 (Oct. 30, 1990), *reprinted in* 1990 U.S.C.C.A.N. 1849-1, 1990 WL 300956.

[136] Fife, *supra* note 91, at 361.

[137] *Id.* at 361-62 (citing S. REP. No. 250, 101st Cong. 3 (1990)).

[138] *Id.* at 362.

[139] *OHA*, 951 F. Supp. at 1497-98.

the *United States, individual States, and territories* to encourage the full academic and human potential achievements of all students and citizens and to take steps to realize these ends."[140] Although NALA uses "encourage" instead of "establish," or any other implementing words, NALA has been viewed by state agencies as a mandate that must be obeyed.[141] In Arizona, when the Attorney General was "considering the scope of the state's bilingual education ban in public schools serving the Navajo Nation, [he] stated that NALA denied the state authority to prohibit teaching of Native American languages whether the public schools were on or off the reservation."[142] Accordingly, NALA should be upheld as binding on states, but has not been treated as such in Hawai'i.

As illustrated by the cases above, "NALA is basically a statement of government policy; [and] it contains no substantive mandates for achieving its goals."[143] NALA has not enabled 'ōlelo Hawai'i advocates to hold the State of Hawai'i accountable for lack of support towards the language.

C. 'Elua 'Ōlelo: Dual Language Governments

1. New Mexico

New Mexico, the forty-seventh state, does not have an official language,[144] but it does accommodate two languages. In 1912, the first state constitution went into effect and it contained "several provisions in it that provided for a transition from the formally prevalent Spanish [language] to the acknowledged adoption of English."[145] A major cornerstone of Spanish language education in New Mexico is found in Article XII, Section 8 of the New Mexico Constitution. Section 8 states that:

> The legislature shall provide for the training of teachers in the normal schools or otherwise so that they may become *proficient in both the English and Spanish*

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[140] 25 U.S.C. § 2901(7) (2000) (emphasis added).

[141] Fife, *supra* note 91, at 362.

[142] *Id.*

[143] *Id.* at 355.

[144] E-mail from New Mexico State Library Reference Dep't., to author (Mar. 21, 2007) (on file with author) [hereinafter E-mail from New Mexico State Library].

[145] *Id.*; *see also* N.M. CONST. art. XX, § 12 (providing that "[f]or the first twenty years after this constitution goes into effect all laws passed by the legislature shall be published in both the English and Spanish languages and thereafter such publication shall be made as the legislature may provide").

> *languages*, to qualify them to teach Spanish-speaking pupils and students in the public schools and educational institutions of the state . . . .[146]

The constitution also states that "[c]hildren of Spanish descent in the state of New Mexico shall never be denied the right and privilege of admission and attendance in the public schools or other public educational institutions of the state, and they shall never be classed in separate schools."[147] These sections not only address the need for bilingual teacher training in the public schools, but also grant equal educational rights to all children of Spanish descent.[148]

Building upon Spanish history and incorporation of the language in education, New Mexico still caters to the English and Spanish languages. Currently, "election ballots are published in both English and Spanish, the pledge to the New Mexico flag is available in both English and Spanish, and a Spanish Drivers Manual is available at the Motor Vehicle Division web site."[149] Furthermore, some statutes require publication in both English and Spanish,[150] and official Spanish language newspapers have been recognized by New Mexico for the purpose of publishing legal notices.[151]

2. *Commonwealth of the Northern Mariana Islands*

The Commonwealth of the Northern Mariana Islands ("CNMI"), like Hawai'i, has more than one official language. In 1976, a constitutional convention convened and thirty-nine elected delegates drafted the constitution in Saipan.[152] The constitution was ratified by the Northern Mariana voters and became effective on January 9, 1978.[153] In 1985, Article XXII, Section 3 was amended to state: "The official language of the Commonwealth shall be Chamorro, Carolinian and English, as deemed appropriate and as enforced by the legislature . . . . This section shall not be subject to judicial review."[154] The Committee of Finance and Other Matters explained that "this new Article

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[146] N.M. CONST. art. XII, § 8 (emphasis added).

[147] *Id.* § 10.

[148] E-mail from New Mexico State Library, *supra* note 144.

[149] *Id.*

[150] *E.g.*, N.M. STAT. ANN. § 73-10-4 (West 2007).

[151] N.M. STAT. ANN. § 14-11-13 (West 2007) (listing official Spanish newspapers).

[152] Commonwealth of the Northern Mariana Islands Law Revision Commission, *Commonwealth Constitution*, http://cnmilaw.org/constitution.htm (last visited Oct. 5, 2007) [hereinafter CNMI Constitution].

[153] CNMI Constitution Article XII, http://cnmilaw.org/constitution_article22.htm (last visited Oct. 5, 2007).

[154] *Id.*

would be appropriate as part of its recognition of the culture and traditions of the people of the Commonwealth."[155]

In the 2003 case *Commonwealth of the Northern Marianna Islands v. Guerrero*,[156] appellant Peter M. Deleon Guerrero, a Chamorro, sought to overturn an assault and battery conviction against him on the grounds that "the trial court did not allow him and his attorney to use the Chamorro language when conducting his trial and questioning witnesses."[157] Guerrero properly filed a "Notice to Speak Chamorro," a document giving notice that Guerrero, "his attorneys and witnesses would speak Chamorro exclusively throughout the trial," before trial began.[158] The trial court denied his request and instructed Guerrero's attorney to proceed in English, but this was reversed on appeal.[159] The Supreme Court of CNMI had previously decided a similar case in *Jasper v. Quitugua*,[160] in which the court "made clear that native Chamorro-speaking people have a constitutional right to speak Chamorro in court."[161] In *Jasper*, the court held that "because there are three official languages in the Commonwealth, the *pro se* defendant in a tort case, who was allowed by the trial court to make opening and closing statements in Chamorro, should have been allowed to question the witnesses in Chamorro as well."[162] Furthermore, although the "defendant in *Jasper* spoke very good English, he was nonetheless entitled to speak Chamorro because the Commonwealth Constitution lists Chamorro as an official language."[163]

Although the CNMI "judiciary has chosen to conduct court proceedings in all three languages,"[164] there are some restrictions to the rule. Chief Justice Demapan closes his writing in *Guerrero* by stating:

> [W]e hold that in order for the constitutional right to speak Chamorro or Carolinian to apply, the person who wishes to use these languages must be a native speaker of these languages. It would be too costly and time-consuming to

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[155] Commonwealth of the N. Mariana Islands v. Guerrero, 2003 MP 15, ¶ 8 (quoting Committee Recommendation No. 43, *Report to the Convention by the Committee on Finance and Other Matters* (1985)).

[156] *Id.*

[157] *Id.* ¶ 1.

[158] *Id.*

[159] *Id.* ¶¶ 1-2, 7, 11.

[160] 5 N. Mar. I. 220 (1999) (holding that native Chamorro-speaking people have a constitutional right to speak Chamorro in court).

[161] *Guerrero*, 2003 MP 15 ¶ 4; *see also Jasper*, 5 N. Mar. I. 220.

[162] *Guerrero*, 2003 MP 15 ¶ 5.

[163] *Id.*

[164] *Id.* ¶ 9.

allow everyone, regardless of their native language, to speak Chamorro and Carolinian.[165]

The *Guerrero* ruling is an example of the judiciary recognizing and enforcing the constitutional rights of official languages. Judge Demapan established that native speakers of Chamorro, or of any official language, would not be denied judicial proceedings in their tongue because of their fluency in English.[166] Admittedly, *Tagupa* and *Guerrero* can be distinguished because *Tagupa* was ruled in federal court and *Guerrero* was ruled in the Supreme Court of CNMI. As Judge Kay stated in *Tagupa*, the Hawai'i state courts should issue a definitive position on the parameters of 'ōlelo Hawai'i in judicial proceedings.[167]

D. Nā 'Āina 'Ē: Internationally

1. Aotearoa (New Zealand)

The 1980 case *Mihaka v. Police* was the "first appellate case in [Aotearoa] to determine the existence of a right to speak [t]e Reo Māori in the high courts."[168] Mangu Mihaka's request to hear the prosecutions against him in *te Reo Māori*, the native language of Aotearoa, was denied because he "had not been disadvantaged in any way."[169] The High Court declared that "English is the language of the courts in [Aotearoa]."[170] *Mihaka* is no longer followed.[171]

Three years before *Mihaka*, the Parliament passed the Treaty of Waitangi Act of 1975.[172] The Act created the Waitangi Tribunal and vested it with authority to "investigate Māori claims under the Treaty of Waitangi."[173] In 1986, the "Waitangi Tribunal published Wai 11: Te Reo Māori Claim ("Te Reo Report"), a report determining whether the New Zealand Crown had an obligation to preserve [t]e Reo Māori under the Treaty of Waitangi."[174] Huirangi Waikerepuru and Nga Kaiwhakapumau I te Reo, Inc., claimed that "the Treaty mandated official recognition of the Māori language for all

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[165] *Id.* ¶ 10.

[166] *Id.* ¶¶ 9-10.

[167] Tagupa v. Odo, 843 F. Supp. 630, 631 (1994), *rev'd* 95 F.3d 1158 (9th Cir. 1996).

[168] Kupau, *supra* note 52, at 505 (citing Mihaka v. Police, [1980] 1 N.Z.L.R. 460 (C.A.)).

[169] *Id.* at 507 n.79.

[170] *Id.* at 507 n.80.

[171] *Id.* at 497.

[172] *Id.* at 510. Kupau also notes that the original Treaty of Waitangi is the "constitutional document by which Māori tribes arguably ceded sovereignty to the British Crown in 1840." *Id.*

[173] *Id.* at 511.

[174] *Id.* at 512.

purposes enabling its use as of right in Parliament, the Courts, Government Departments, local authorities and public bodies."[175]

The Tribunal concluded that *te Reo Māori* "must be regarded as a 'valued possession,'"[176] and recommended to Parliament that official recognition must be more than "mere tokenism. Official recognition must be seen to be real and significant which means that those who want to use our official language on any public occasion or when dealing with any public authority ought to be able to do so."[177] Furthermore, in the Te Reo Report, the Waitangi Tribunal stated that the "judicial enforcement of the language right greatly assists in rehabilitating the language back" to its dominant state before the arrival of the English language.[178]

In 1987, the New Zealand Parliament enacted the Māori Language Act of 1987.[179] This legislation "marked the shift from viewing an indigenous language right as an individual right, embedded in notions of justice and fairness for the individual, to a cultural right with preservation as its main objective."[180] Furthermore, the act established an expressed right to speak *te Reo Māori* in legal proceedings.[181]

In 2001, a citizen, Wharepapa, was stopped by police and when the police asked for his driver's license, name and address, he responded in *te Reo Māori*.[182] He continued to speak in *te Reo Māori*, although warned by the police, and was later "convicted of failing to supply his name and address on demand to a law enforcement officer."[183] The following year, in *Wharepapa v. Police*, Judge Priestly held that a "person in the appellant's situation ought not to be presumed to have committed an offence merely because he is speaking a language other than English, particularly when the language being spoken is an official language of New Zealand."[184]

2. *Canada*

In 1988, English and French were declared the official languages of Canada, "therefore establishing a fully operative and official vernacular bilingualism for its residents."[185] It is interesting that the French-Canadian population accounts

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[175] *Id.*
[176] *Id.* at 514.
[177] *Id.*
[178] *Id.* at 525.
[179] *Id.* at 515.
[180] *Id.*
[181] *Id.*
[182] *Id.* at 518 (citing Wharepapa v. Police, [2002] N.Z.A.R. 611 (H.C.)).
[183] *Id.*
[184] *Id.*
[185] Marla B. Somerstein, *Official Language A, B, Cs: Why the Canadian Experience with*

for only about one-quarter of Canada's population, yet that population was successful in "forcing the entire country to recognize and use French as an official language."[186] Five years later, "Canada's federal government announced its Action Plan for Official Languages, which aimed to provide a 'new momentum for Canada's linguistic duality, through increased inter-departmental co-ordination, and new investments in education, community development and the public service.'"[187]

According to Prime Minister Lester B. Pearson, "in a diverse federal state such as Canada it is important that all citizens should have a fair and equal opportunity to participate in the national administration and to identify themselves with, and feel at home in, their own national capital."[188] As a testament to Canada's conviction, "constituents can communicate with, and receive services from, federal institutions in either English or French,"[189] all laws enacted are in both English and French,[190] all "[c]itizens may speak English or French in Parliament,"[191] "an accused person in a criminal proceeding has the right to be tried in either English or French" languages,[192] and all federal institutions have employees that speak either language.[193] Interestingly, the choice of either speaking French or English "ensures equal opportunity for employment and advancement for both English and French speaking Canadians, regardless of ethnic origin or primary language."[194]

However, "Canada is better described as an English-speaking country, with French considered a second (or minority) language."[195] For instance, although both languages are spoken in all government-run organizations, the French

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Official Languages Does Not Support Arguments To Declare English the Official Language of the United States, 38 U. MIAMI INTER-AM. L. REV. 251, 252 (2006).

[186] *Id.* at 253. The 1988 Official Language Act, or Canadian Language Act, had three major objectives: "(1) to establish the equality of English and French in Parliament, within the Government of Canada, the federal administration and institutions subject to the Act; (2) to preserve and develop official language communities in Canada; and (3) to achieve equality of English and French in Canadian society." *Id.* at 256.

[187] *Id.* at 256 (quoting Dept. of Canadian Heritage, http://www.pch.gc.ca/progs/lo-ol/biling/hist_e.cfm (last visited Nov. 5, 2007)).

[188] Right Honourable Lester B. Pearson, Declaration of Principles on Bilingualism, House of Commons Debates, April 6, 1966, http://www.tbs-sct.gc.ca/report/OfLang/2001/arol-ralo1_e.asp#_Toc531762019 (last visited Nov. 5, 2007).

[189] Somerstein, *supra* note 185, at 257.

[190] *Id.*

[191] *Id.*

[192] *Id.*

[193] *Id.*

[194] *Id.*

[195] *Id.* at 271.

language "is not necessarily used outside certain geographical areas."[196] Furthermore, the "English-speaking citizens in Canada dominate in the areas of administration, politics, and the economy."[197] There is also preference given to employment applicants who are proficient in English, thereby showing a preferential language in business.[198] As observed by one author, "[t]he disadvantaged group, in this case French-speaking Canadians, are thereby forced from their national identity and must either adapt to the English-speaking society or resist demands to learn English."[199] A country's "national unity is best promoted when cultural and linguistic diversity is not discouraged."[200]

IV. SOLUTIONS FOR 'ŌLELO HAWAI'I

Prior to 1978, before the adoption of the official language amendment, lawmakers were aware of challenges but looked to a future when 'ōlelo Hawai'i could be used:

> Your Committee was cognizant of certain practical problems that might exist if ['ōlelo Hawai'i] was declared an official language without any proviso. The committee feared that all official acts and transactions might have to be in ['ōlelo Hawai'i], such as statutes, proceedings of the legislature and judicial decisions. *At this point in history, it might be too expensive and impractical to require both languages in these situations.* The committee decided that it would be more sensible to *delegate discretion to the legislature in determining the appropriate documents and acts to be in both languages.*[201]

Inclusion of 'ōlelo Hawai'i may have been "too expensive and impractical" at that "point in history," but the number of 'ōlelo Hawai'i speakers has grown tremendously since 1978.[202]

The legislature is the appropriate place to advance 'ōlelo Hawai'i. In fact, 'ōlelo Hawai'i is already "welcomed in pule [prayer], speeches, or testimony."[203] A newly proposed bill, Senate Bill 1052 ("S.B. 1052"), may hold the State accountable for the spelling of Hawai'i's native language and

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[196] *Id.*

[197] *Id.* at 271-72.

[198] *Id.* at 272.

[199] *Id.*

[200] *Id.* at 276 (quoting Gregory Balmer, *Does the United States Need an Official Language?*, 2 IND. INT'L & COMP. L. REV. 433, 446 (1992)).

[201] HAW. AFF. COMM., STAND. COMM. REP. NO. 57, *reprinted in* 1 Proceedings of the Constitutional Convention of 1978 at 638 (1980) (emphasis added).

[202] *Id.*

[203] Kupau, *supra* note 52, at 525.

words on State letterheads.[204] As Senator Clayton Hee pointed out in a Senate committee meeting, "what better way to respect the culture of our land than to spell its words correctly? . . . Is that too difficult a task in this land of aloha?"[205] The purpose of S. B. 1052 is "to ensure the constitutionally and ethically mandated preservation of the ['ōlelo Hawai'i] and culture by requiring that all state and county letterheads, when newly created or reprinted, contain the accurate, appropriate, and authentic [Hawai'i] names and language printed above the English translations."[206] Senator J. Kalani English introduced this bill and similar bills for the past six years; however, the previous bills died in the House after passing the Senate.[207] Senator English's main reason for introducing the bill is because 'ōlelo Hawai'i is an official language, and he wants it to return to the "common vernacular of Hawai'i."[208]

S.B. 1052 does acknowledge that the "Constitution of the State of Hawai'i provides for the preservation and promotion of [Hawai'i 'ōiwi] culture, history, and language."[209] In particular, the "State shall promote the study of [Hawai'i 'ōiwi] culture, history and language"[210] and "shall protect all rights, customarily and traditionally exercised for subsistence, cultural and religious purposes" of the Hawai'i 'ōiwi.[211] Making sure that the official writings, signs, and emblems of the state are "accurate, and spelled correctly and use the proper ['ōlelo Hawai'i] macrons and glottal stops not only shows the deserved respect for the native language of these islands, but also fully comports with the intent and words of the state constitution."[212]

S.B. 1052 does include some provisions that seem to show compromise. Section 2 of S.B. 1052 amends Hawai'i Revised Statute section 1-13.5, which currently gives 'ōlelo Hawai'i its official status. The bill states that "[a]ll letterheads for documents prepared by or on behalf of state or county agencies or officials shall include in the letterhead, if the letterhead contains [Hawai'i] names or language, the accurate, appropriate, and authentic ['ōlelo Hawai'i]

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[204] S.B. 1052, S.D. 2, 24th State Leg. (Haw. 2007). As of November 5, 2007, the bill has stayed in the House Committee on Water, Land, Ocean, Resources and Hawaiian Affairs.

[205] Mark Niesse, *Lawmakers Go Native With Hawaiian Bills*, HONOLULU STAR BULL., Feb. 5, 2007, at A4.

[206] Haw. S.B. 1052.

[207] Telephone Interview with J. Kalani English, Senator, Hawai'i State Legislature, in Kāne'ohe, Haw. (Apr. 19, 2007).

[208] *Id.*

[209] Haw. S.B. 1052 § 1.

[210] *Id.* (citing HAW. CONST. art. X, § 4).

[211] *Id.* (citing HAW. CONST. art. XII, § 7).

[212] *Id.*

punctuation, spelling, macrons, and glottal stops, printed above the English translation."[213] However, the bill does not apply to "state artwork or to the hanging state emblem in the rotunda of the [Hawai'i] state capitol."[214]

Likewise, Section 3 amends Hawai'i Revised Statute section 5-6.5 to state that "['ōlelo Hawai'i] is the native language of Hawai'i and shall be used on all emblems and symbols representatives of the State, its departments, agencies, and political subdivisions; provided that this requirement shall not apply to state or county letterheads . . . until a replacement for the letterhead is required."[215] S.B. 1052 is a small step in the right direction. If this bill is passed, it will have taken almost thirty years for the legislature to pass a bill that holds the State responsible for correct 'ōlelo Hawai'i usage.

V. CONCLUSION

'Ōlelo Hawai'i continues to resist extinction. However, the Hawai'i judiciary must affirmatively rule on the rights associated with the co-official language, 'ōlelo Hawai'i, for the language to survive. Judge Alan Kay stated that the Hawai'i State courts should make a definitive judicial determination on the issue of 'ōlelo Hawai'i official language rights.[216] As a proud pupil of Papahana Kaiapuni Hawai'i, this author would not be able to speak my native tongue in court because I am also proficient in English.

The Commomwealth of the Northern Mariana Islands and Aotearoa courts illustrate a definitive judicial determination that the Hawai'i courts should adopt. Furthermore, Canada and New Mexico provide excellent examples of how a dual language system could work in Hawai'i. Although Spanish is not an official language in New Mexico, the state has judiciously relied on its constitution to proffer language support. S.B. 1052 will bring more awareness to 'ōlelo Hawai'i and is a move in the right direction. However, the Hawai'i legislature must also continue to increase funding of Papahana Kaiapuni Hawai'i to an equal status with the English speaking public school counterparts.[217]

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[213] *Id.* § 2.
[214] *Id.*
[215] *Id.* § 3.
[216] Tagupa v. Odo, 843 F. Supp. 630, 631 (1994), *rev'd* 95 F.3d 1158 (9th Cir. 1996).
[217] *See* Lucas, *supra* note 3, at 11-12.

As a student at the Kula Kaiapuni o Waiau, I learned the 'ōlelo no'eau, I ka 'ōlelo nō ke ola, i ka 'ōlelo nō ka make.[218] Now I speak for its survival.

Ka'ano'i Walk[219]

[218] PUKUI, *supra* note 1.

[219] J.D. Candidate 2008, William S. Richardson School of Law, University of Hawai'i at Mānoa. Mahalo e ke Akua, nā 'aumākua, nā kūpuna, nā mākua, nā kumu, nā hoahānau, nā hoaaloha, ku'u wahine 'o Waianuhea, ka'u mau keiki, 'o Ka'ano'i a me Kala'ikūāiwa, Kumu Kapilialoha MacKenzie, a me Kumu Kapua Sproat.

The Legal Nexus in U.S. Fisheries Management: Application in the Hawaiian Longline Fishery Litigation

I. INTRODUCTION

In February 2003, a letter was sent to the United Nations ("U.N."), calling on the Secretary General to take immediate action to halt the decline of leatherback turtles in the Pacific Ocean.[1] The authors called for "a moratorium on pelagic longlines, gillnets and other fishing techniques that harm Pacific leatherback sea turtles," asserting the imminent extinction of leatherbacks in the Pacific.[2] A brief list of requests for action followed, appealing to the U.N. and fishing nations to curtail harmful fishing practices and apply precautionary measures for sustainable use of the world's oceans. It was signed by over 400 leading scientists from around the globe.[3]

Sustainability in fisheries management is continually debated in both academic and public forums. The problem is that the management of fisheries is exceedingly complex, and decisions often bear enormous socio-economic, environmental and legal consequences for those involved. Semi-selective fishing practices such as longlining and gillnetting are among the most contentious issues in fisheries management. Though these practices are economically effective from the fishing industry's perspective, the excess of bycatch produced in the process has serious consequences for marine ecosystems.[4] Depending on the method, bycatch can represent a substantial portion of the total harvest and can result in interactions with threatened or endangered species.[5] Incidental sea turtle captures and mortalities in bycatch

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[1] Letter from Homero Ariidjis, President, Grupo de los Cien et al., to the United Nations (Feb. 6, 2003), *available at* http://www.seaturtles.org/pdf/Scientistletter2-17.pdf (on file with author).

[2] *Id.*

[3] *Id.*

[4] *See* Larry B. Crowder, *Leatherback's Survival Will Depend on an International Effort*, 405 NATURE 881 (2000); *see also* Rebecca A. Lewison et al., *Quantifying the Effects of Fisheries on Threatened Species: The Impact of Pelagic Longlines on Loggerhead and Leatherback Sea Turtles*, 7 ECOLOGY LETTERS 221 (2004) (explaining that "bycatch" refers to those pelagic species that are not commercially targeted but are nonetheless incidentally caught, entangled, or hooked by commercial fishing gear).

[5] *See generally* Eric Gilman et al., *Reducing Sea Turtle By-catch in Pelagic Longline Fisheries*, 7 FISH AND FISHERIES 2 (2006) [hereinafter Gilman et al., *Reducing*] (discussing the problem of turtle bycatch in pelagic longline fishing and proposing abatement strategies); Eric Gilman et al., *Principles and Approaches to Abate Seabird By-catch in Longline Fisheries*, 6 FISH AND FISHERIES 35 (2005) [hereinafter Gilman et al., *Principles*] (discussing the problem of seabird bycatch in longline fishing and proposing abatement strategies).

are consistently cited as proof that widespread deployments of semi-selective longlines are not sustainable for pelagic food webs or conservation of marine turtle populations.[6]

On this issue, the scientific community has weighed in heavily, reporting significant declines of turtle populations in peer-reviewed, academic literature.[7] Of the seven extant sea turtle species currently found in the Pacific Ocean, six are now considered threatened or endangered.[8] Two species often caught on pelagic longline fishing gear are the leatherback (*Dermochelys coricea*) and the loggerhead (*Caretta caretta*).[9] As a result of fishing practices, leatherback nesting populations have decreased over thirty percent in the last two decades;[10] loggerhead and leatherback bycatch in Pacific fisheries are estimated to be thirty-three to thirty-four percent of the population in 2000 alone.[11] The Pacific leatherback is critically endangered,[12] and its persistence is questionable if current fishing practices continue unaltered.[13] The Pacific loggerhead is considered threatened.[14]

This paper addresses the legal nexus of statutory requirements in fisheries management in the United States. In Part II, the history of protected sea turtle species and threats associated with fisheries operations are reviewed. Subsequently, in Part III, the statutes governing protected species and fisheries management are discussed, with special attention to regulatory intersections. In Part IV, the application of statutory requirements is considered in the context of litigation concerning the Hawaiian longline fishery. Finally, in Part V, the importance of litigation and the judiciary is considered in the context of sustainable fisheries practices.

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[6] *See, e.g.*, Lewison et al., *supra* note 4, at 221 ("Given [the] 80-95% declines for Pacific loggerhead and leatherback populations over the last 20 years, [the current] bycatch level is not sustainable.").

[7] *See, e.g.*, Crowder, *supra* note 4.

[8] *See generally* International Union for the Conservation of Nature and Natural Resources Species Survival Commission, *2007 IUCN Red List of Threatened Species*, http://iucnredlist.org (access the database via the "Search" hyperlink, then enter "turtle" into the "text search" field and check "Marine" under the "What system is this species found in?" heading, then press the "Search" button).

[9] *See* Lewison et al., *supra* note 4, at 222.

[10] James R. Spotila et al., *Pacific Leatherback Turtles Face Extinction*, 405 NATURE 529, 529-30 (2000).

[11] *See* Lewison et al., *supra* note 4, at 227.

[12] Conservation of Endangered Species, 35 Fed. Reg. 8491, 8497 (June 2, 1970).

[13] *See* Crowder, *supra* note 4, at 881; Spotila et al., *supra* note 10, at 529-30.

[14] Listing and Protecting Loggerhead Sea Turtles, 43 Fed. Reg. 32800, 32800 (July 28, 1978).

II. BACKGROUND ON SEA TURTLES AND LONGLINE FISHING

A. Sea Turtle Biology and Ecologic Significance

Sea turtles are vertebrate reptiles in the families *Cheloniidae* and *Dermochelyidae* and have inhabited the world's oceans for hundreds of millions of years.[15] Despite the public, scientific, and legislative attention that sea turtles receive, researchers are still discovering much about the complex ecology, life histories, conservation strategies and worldwide distribution of sea turtles.[16] All sea turtles lay eggs buried high on beach faces in nesting locations found in a variety of worldwide locations.[17] Newly emerged hatchlings are extremely vulnerable to predation and must use a diverse array of cues to navigate safely into oceanic gyre systems.[18] Current scientific consensus holds that hatchlings reside in open-ocean ecosystems of floating sargassum ecosystems for multiple years,[19] though new methods are providing mechanisms to discern the early life histories of marine turtles.[20] Evidence of turtles' ability to access the earth's magnetic field for navigation has been discerned in studies of behaviors[21] and strong natal homing exhibited by females.[22] Once turtles reach juvenile and adult stages, researchers are able to track their distributions more accurately using remote sensing

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[15] *See* JAMES R. SPOTILA, SEA TURTLES: A COMPLETE GUIDE TO THEIR BIOLOGY, BEHAVIOR, AND CONSERVATION 57-59 (2004).

[16] *See, e.g.*, S.S. Heppell et al., *Life Table Analysis of Long-Lived Marine Species with Implications for Conservation and Management, in* LIFE IN THE SLOW LANE: ECOLOGY AND CONSERVATION OF LONG-LIVED MARINE ANIMALS 137 (John A. Musick ed., 1999); Sarah L. Milton & P.L. Lutz, *Sea Turtle Taxonomy and Distribution, in* OFFICE OF RESPONSE AND RESTORATION, NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION, OIL SPILLS AND SEA TURTLES: BIOLOGY, PLANNING AND RESPONSE 9 (2003); Michael C. James et al., *Identification of High-Use Habitat and Threats to Leatherback Sea Turtles in Northern Waters: New Directions for Conservation*, 8 ECOLOGY LETTERS 195, 195 (2005).

[17] *See* SPOTILA, *supra* note 15, at 15 (noting that incubation is approximately two months and that sex determination is related directly to temperature, which is determined by position in the nest).

[18] *See generally* Susan M. Tuxbury & Michael Salmon, *Competitive Interactions Between Artificial Lighting and Natural Cues During Seafinding by Hatchling Marine Turtles*, 121 BIOLOGICAL CONSERVATION 311 (2005).

[19] *See* SPOTILA, *supra* note 15, at 22-25.

[20] *See, e.g.*, Kimberly J. Reich et al., *The 'Lost Years' of Green Turtles: Using Stable Isotopes to Study Cryptic Lifestages*, 3 BIOLOGY LETTERS 712 (2007).

[21] *See* John F. Weishampel et al., *Spatiotemporal Patterns of Annual Sea Turtle Nesting Behaviors Along an East Central Florida Beach*, 110 BIOLOGICAL CONSERVATION 295, 295 (2002); J.A. Musick & C. J. Limpus, *Habitat Utilization and Migration in Juvenile Sea Turtles, in* THE BIOLOGY OF SEA TURTLES 137-63 (P.L. Lutz & J.A. Musick eds., 1997).

[22] *See generally* B.W. Bowen & S.A. Karl, *Population Genetics and Phylogeography of Sea Turtles*, 16 MOLECULAR ECOLOGY 4886 (2007).

technologies.[23] Leatherback and loggerhead juveniles typically forage in near-shore habitats, while adults travel thousands of kilometers along the edge of current systems in the open ocean.[24] Because sexually mature turtles spend the majority of their time in the open ocean, their habitat overlaps with commercially valuable, highly migratory fishes such as swordfish and tuna, which are targeted by longline fisheries.[25]

Sea turtle conservation efforts face several significant hurdles. Most turtles do not reach sexual maturity for a relatively long time (approximately five to thirty-five years) and very few hatchlings survive to reproducing age.[26] As a result, the recovery of impacted sea turtle populations takes decades.[27] Turtles also face novel threats from humans, including development on nesting beaches, direct fishing for turtle meat and eggs, black-market sale of shells, and incidental bycatch in marine fisheries, which circumvent evolved adaptations that have allowed turtles to persist in marine environments for millions of years.[28] The ecology and life histories of sea turtles require conservation efforts at geographic scales that match turtle population

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[23] *See, e.g.*, Janice M. Blumenthal et al., *Satellite Tracking Highlights the Need for International Cooperation in Marine Turtle Management*, 2 ENDANGERED SPECIES RESEARCH 51, 51-53 (2006). Remote sensing technologies typically utilize a transponder affixed to captured turtles, which are then released and tracked. *Id.* at 52-53.

[24] *See* Michael C. James et al., *Behaviour of Leatherback Sea Turtles, Dermochelys Coriacea, During the Migratory Cycle*, 272 THE PROCEEDINGS OF THE ROYAL SOCIETY B 1547, 1549-54 (2005); Jeffrey J. Polovina et al., *Forage and Migration Habitat of Loggerhead (Caretta caretta) and Olive Ridley (Lepidochelys olivacea) Sea Turtles in the Central North Pacific Ocean*, 13 FISHERIES OCEANOGRAPHY 36, 36 (2004) (describing forage and migration habitat of juvenile loggerheads); Lucy A. Hawkes et al., *Phenotypically Linked Dichotomy in Sea Turtle Foraging Requires Multiple Conservation Approaches*, 16 CURRENT BIOLOGY 990, 990 (2006).

[25] *See* Evan A. Howell et al., *Identifying Critical Habitat of Swordfish and Loggerhead Turtles from Fishery, Satellite Tag, and Environmental Data*, Presentation at the NOAA Pacific Islands Fisheries Science Center, 15th Annual PICES meeting (Oct. 13-22, 2006), *available at* http://www.pices.int/publications/presentations/PICES_15/Ann15_FIS_paper/FIS_Howell.pdf. *See also* James et al., *supra* note 16, at 197 (describing geographic overlap of leatherback habitat and longline fisheries); Eric Gilman & Donald Kobayashi, Sea Turtle Interactions in the Hawaii-Based Longline Swordfish Fishery (July 3, 2007), *available at* http://www.wpcouncil.org/hot/ (follow hyperlink with manuscript's title under "Active Documents" section) (unpublished manuscript, on file with author) (discussing efforts to reduce sea turtle interactions in swordfish fisheries).

[26] *See* Spotila et al., *supra* note 10, at 530; SPOTILA, *supra* note 15, at 25.

[27] *See* Bowen & Karl, *supra* note 22, at 4902; SPOTILA, *supra* note 15, at 211.

[28] *See* John Davenport & Julia L. Davenport, *The Impact of Tourism and Personal Leisure Transport on Coastal Environments: A Review*, 67 ESTUARINE, COASTAL AND SHELF SCIENCE 280, 280-84 (2006) (identifying primary threats to nesting environments, including increased coastal development, light pollution, trampling of nests, beach grooming, hunting of turtles, and turtle entanglement in marine debris); Tuxbury & Salmon, *supra* note 18, at 311-15 (discussing detrimental effects of artificial lighting on sea turtle hatchling orientation).

distributions, in this case the ocean basin or "oceanscape" scale.[29] As such, deleterious turtle interactions associated with Hawaiian fishers represent only a fraction of the cumulative impact on loggerhead and leatherback populations that inhabit the Pacific basin.

B. Global Longline Fisheries: History and Impact

Longlining is a centuries-old method for fishing with a long history of impacts on marine ecosystems.[30] Pelagic longlining provides over eighty-five percent of commercial swordfish and sixty percent of big-eye and albacore tuna worldwide,[31] with commercial operations registered in Japan and Taiwan accounting for the majority of the total catch in the Pacific.[32] The Pacific longline fishery consists of commercial fishing fleets, vessels registered under flags of convenience ("FOC"), unregistered fishing boats, and artisanal longline fishers. While some commercial fisheries, like those based in the United States, are required to provide reports and carry observers for data collection and analyses, data from artisanal fisheries, illegal, unreported and unregulated ("IUU") fishing, and subsistence fishing is sparse if not non-existent. Longline fishing is semi-selective, and fish species are targeted primarily via gear and bait type, set depth of gear, and deployment method.[33] Pelagic longline gear consists of thousands of individually-baited hooks on a mainline that can stretch for tens of kilometers; baits are often accompanied by specialized attractants such as lighting.[34] In the worldwide longline fishery, over five million hooks and 100,000 kilometers of line are deployed daily, and rates of turtle capture can range as high as 1.5 turtles per 1,000 hooks deployed.[35]

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[29] *See* Rebecca L. Lewison et al., *Understanding Impacts of Fisheries Bycatch on Marine Megafauna*, 19 TRENDS IN ECOLOGY AND EVOLUTION 598, 600 (2004) [hereinafter Lewison et al., *Understanding Impacts*] (discussing the need for a large-scale perspective).

[30] *See* Crowder, *supra* note 4.

[31] *See* Lewison et al., *supra* note 4, at 222.

[32] *See* Gilman et al., *Principles*, *supra* note 5, at 37 (noting that "Japan, Korea and Taiwan constitute the main high seas pelagic longline nations").

[33] *See generally* Keith Bigelow et al., *Pelagic Longline Gear Depth and Shoaling*, 77 FISHERIES RESEARCH 173 (2006) (discussing the effect of longlining depth on bycatch species); Lewison et al., *supra* note 4 (discussing the impact of longlining on loggerhead and leatherback sea turtles).

[34] *See* Bigelow et al., *supra* note 33, at 176 (reviewing the use of lightsticks in longline fishing).

[35] *See* LARRY B. CROWDER & RANSOM A. MYERS, 2001 FIRST REPORT TO THE PEW CHARITABLE TRUSTS: A COMPREHENSIVE STUDY OF THE ECOLOGICAL IMPACTS OF THE WORLDWIDE PELAGIC LONGLINE INDUSTRY xi (2001), *available at* http://moray.ml.duke.edu/faculty/crowder/research/crowder_and_myers_Mar_2002.pdf.

There is global academic consensus that the world's longline fishery represents one of the most pervasive human threats to turtle populations and has resulted in significant declines in loggerhead and leatherback populations.[36] Incidental bycatch of turtles on longlines occurs most frequently on shallow-set (30-90 meters from the ocean surface) longline gear primarily targeting commercially valuable swordfish (*Xiphias gladius*).[37] Estimates of annual turtle mortality from worldwide longline fishing are as high as 200,000 loggerheads and 50,000 leatherbacks in pelagic longlines.[38] In addition to turtle interactions, longlining can result in captures of black-footed and Laysan albatrosses, several species of sharks (including hammerheads and great whites), and other top predators such as white marlin, false killer whales, and Risso's dolphins.[39]

C. The Hawaiian Longline Fishery

The Hawaiian longline fishery evolved from the artisanal pole-and-line fishery in Hawai'i and expanded greatly in the late 1980s due to the development of local and export markets.[40] The fishery is capped at 164 vessels, and Hawaiian pelagic longliners primarily target tuna and swordfish; other commercially viable species such as opah, skipjack, wahoo, shark, and marlin constitute a smaller proportion of fish brought to market.[41]

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[36] *See generally* Gilman et al., *Reducing*, *supra* note 5; Gilman et al., *Principles*, *supra* note 5; Lewison et al., *supra* note 4; CROWDER & MYERS, *supra* note 35; Michele DeFlorio et al., *Incidental Captures of Sea Turtles by Swordfish and Albacore Longlines in the Ionian Sea*, 71 FISHERIES SCIENCE 1010 (2005). *See also* Expert Consultation on Interactions Between Sea Turtles and Fisheries Within an Ecosystem Context, Rome, Italy, Mar. 9-12, 2004, FAO Fisheries Report No. 738, Supplement, *available at* http://www.fao.org/docrep/007/y5477e/y5477e00.htm.

[37] *See* M.C. Pinedo & T. Polacheck, *Sea Turtle By-Catch in Pelagic Longline Sets off Southern Brazil*, 119 BIOLOGICAL CONSERVATION 335, 335-37 (2004); CROWDER & MYERS, *supra* note 35, at 113. *See generally* Bigelow et al., *supra* note 33.

[38] Lewison et al., *supra* note 4, at 221.

[39] *See* Lewison et al., *Understanding Impacts*, *supra* note 29; ERIC GILMAN, W. PAC. REGIONAL FISHERY MGMT. COUNCIL, REFERENCES ON SEABIRD BYCATCH IN LONGLINE FISHERIES 1-2 (2004), *available at* http://www.wpcouncil.org/protected/library.html (follow hyperlink of report's title under "Document Library" section).

[40] *See generally* Paul Dalzell, *Fishing, Turtles and the Law: Recent Events in the Hawaii-Based Longline Industry*, 93 FISHERIES INFO. NEWSL. 1 (2000) [hereinafter Dalzell (2000)], *available at* http://www.spc.int/coastfish/News/Fish_News/93/Paul_Dalzell.htm.

[41] Interview with Brooks H. Takenaka, Manager, United Fishing Agency, Ltd., Honolulu, Haw. (Nov. 15, 2006). The Honolulu fish auction is managed by the United Fishing Agency, Ltd. On an average day, the market brings 20-30,000 pounds of fish that are sold via auction. *Id.* A small section is excised from the tail of the fish for potential buyers to inspect for quality. *Id.* The Honolulu Fish Auction is open six days a week to the public, but the vast majority of buyers are commercial. Up to forty percent of the catch is transported out of Hawai'i to the mainland United States, Asia, Europe, and elsewhere. *Id.*

Approximately one third of Hawai'i-based longline vessels are owned by Vietnamese-Americans who are classically associated with swordfishing.[42] Hawaiian longline vessels are responsible for approximately 2.7% of the hooks deployed in the Pacific basin, and supplied the United States with approximately one half of the domestic swordfish catch in the 1990s.[43] Commercial landings are brought to market at the Honolulu Fish Auction, where annual landings have exceeded fifty million dollars in the past decade.[44] Hawaiian longliners have long experienced deleterious interactions with marine turtles, and kill rates have ranged as high as 17.5% in interactions with loggerhead turtles.[45] It is unclear, however, if the number of turtle mortalities attributed solely to Hawaiian longline vessels has had a significant effect on the Pacific populations of loggerhead and leatherback turtles, as population estimates have historically been difficult to ascertain.

In comparison to the international longline fishery, Hawaiian fishers are generally regulated more stringently than foreign vessels because U.S.-registered fishers are required to comply with federal and state laws and regulations. Prior to the litigation considered below, approximately five to ten percent of Hawaiian longline vessels were accompanied annually by National Marine Fisheries Service ("NMFS") observers, who recorded data and observations about the catch for fisheries management.[46] Hawaiian longline vessels are also required by NMFS to report information about their activities and carry active GPS-based location devices, primarily for fisheries management purposes, but also to ensure operations keep in compliance with fisheries regulations (such as spatial and temporal closures) and applicable

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[42] *See generally* Stewart D. Allen & Amy Gough, *Monitoring Environmental Justice Impacts: Vietnamese-American Longline Fisherman Adapt to the Hawaiian Swordfish Fishery Closure*, 65 HUMAN ORGANIZATION 319 (2006).

[43] *See* Dalzell (2000), *supra* note 40, at 2, 5.

[44] *See* W. PAC. REGIONAL FISHERY MGMT. COUNCIL, THE VALUE OF THE FISHERIES IN THE WESTERN PACIFIC FISHERY MANAGEMENT COUNCIL'S AREA 2-4 (1999) [hereinafter VALUE OF FISHERIES], *available at* http://www.wpcouncil.org/documents/value.pdf; *see also* Takenaka Interview, *supra* note 41.

[45] PIERRE KLEIBER, ESTIMATING ANNUAL TAKES AND KILLS OF SEA TURTLES BY THE HAWAIIAN LONGLINE FISHERY, 1991-1997, SW FISHERIES SCIENCE CTR., ADMIN. RPT. H-98-08, at 21 (July 1998), *available at* http://www.pifsc.noaa.gov/adminrpts/1998-1999/SWFC_Admin_Report_98-08.pdf (estimating that the Hawaiian longline fishery resulted in ninety-one loggerhead interactions, and approximately sixteen kills during 1994 to 1997) (draft of preliminary results). Note that these estimates are compiled based on NMFS observer data, during which approximately five percent of vessels were observed. *Id.*

[46] *Id.* at 1; *See also* Paul Dalzell, *Fishing, Turtles and the Law: Recent Events in the Hawaii-Based Longline Fishery*, 98 FISHERIES NEWSL. 34, 34 (2001) [hereinafter Dalzell (2001)], *available at* http://www.spc.int/coastfish/News/Fish_News/98/Fish_News_98.pdf.

legislation.[47] This contrasts starkly with fishing vessels not registered in the United States, which compete with Hawaiian and other American fishers in international markets. Non-U.S. registered vessels are subject only to the laws of the nation in which they are registered, the majority of which require less stringent regulation of their fishing fleets in comparison with U.S.-registered vessels.[48] The issue of enforcement is also paramount in the Pacific fishery, as commercial longlining activities are common in international waters ("high seas") where the logistics of enforcement are difficult. Hawaiian longliners have long voiced concerns about stringent environmental regulations that result in higher costs, impairing their ability to compete with non-U.S. vessels on the international market.[49]

III. THE LEGAL NEXUS IN U.S. FISHERIES MANAGEMENT: MSA, ESA AND NEPA

Federal agencies involved in fisheries management must comply with a myriad of statutes, which comprise a complex and dynamic legal landscape. Of these statutes, the principle legislation governing fisheries is the Magnuson-Stevens Fishery Conservation and Management Act ("the MSA").[50] The Endangered Species Act ("the ESA") requires specific actions by federal agencies when species that are listed as threatened or endangered may be affected.[51] The MSA and the ESA erect the legal framework that determines specific agency responsibilities when fisheries management requires consideration of threatened or endangered species. Additionally, all major federal agency actions that may significantly impact the environment[52] are required to comply with the environmental assessment process established by the National Environmental Policy Act ("NEPA").[53] NEPA works synergistically with the ESA and MSA, requiring consideration of environmental impacts of fisheries management actions by federal agencies, during which special attention to ESA-listed species may be required.

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[47] *See generally* NAT'L MAR. FISHERIES SERVICE, SUMMARY OF HAWAII LONGLINE FISHING REGULATIONS (2006), *available at* http://swr.nmfs.noaa.gov/pir/pdf/Hawaii%20Longline%20Regulation%20Summary%2024Nov06.pdf.

[48] Jon M. Van Dyke, *Regionalism, Fisheries, and Environmental Challenges in the Pacific*, 16 SAN DIEGO INT'L L.J. 143, 153-60 (2004) (discussing fishing regulations of maritime nations and international fisheries treaties in the Pacific).

[49] Interview with Dr. Stewart Allen, Fisheries Scientist, Nat'l Marine Fishery Serv., in Honolulu, Haw. (Oct. 6, 2006).

[50] 16 U.S.C. §§ 1801-82 (2000 & Supp. 2007).

[51] *Id.* §§ 1531-44.

[52] 42 U.S.C. § 4332(C) (2000 & Supp. 2007).

[53] *Id.* §§ 4321-70f.

A. *The Magnuson-Stevens Fishery Conservation and Management Act*

The MSA is the principle statute governing the management of fisheries in the United States. The MSA was enacted in 1976 and amended in 1996 and 2007.[54] The MSA establishes eight Regional Fishery Management Councils ("RFMCs") and dictates the process by which the Department of Commerce manages fisheries.[55] The Department of Commerce manages fisheries through the National Oceanic and Atmospheric Administration ("NOAA"), NMFS, and RFMCs.[56] An important requirement under the MSA is the review and approval of Fishery Management Plans ("the FMPs") formulated by RFMCs.[57] FMPs are detailed plans beholden to a stringent list of requirements designed to ensure sustainable extraction of fisheries resources while minimizing deleterious side effects of fishing practices, including bycatch.[58] Under the MSA, RFMCs are required to formulate and continually update FMPs for fisheries in their jurisdiction.[59] Though RFMCs are responsible for the formulation and execution of FMPs, it is the Secretary of Commerce that is required, under the MSA, to review and approve FMPs;[60] therefore NMFS is the target in most fisheries litigation. The review and implementation of the FMP, which qualifies as a major federal agency action under NEPA, requires NMFS to comply with NEPA's environmental impact assessment process, requiring public review and comment. Furthermore, the special areas defined in section 3(24) of the MSA are subject to the jurisdiction of the United States for the purposes of the ESA.[61]

Vessels operating in the Hawai'i-based longline fishery operate under the Pelagics Fishery Management Plan ("PFMP"), the FMP under which the Hawaiian longline industry has been managed since 1986.[62] The PFMP is

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[54] 16 U.S.C. §§ 1801-82 (2000 & Supp. 2007). *See* Magnuson-Stevens Fishery Management and Conservation Act, Pub. L. No. 94-265 (1996), *amended by* the Magnuson-Stevens Fishery Conservation and Management Reauthorization Act, Pub. L. No. 109-479 (2007). The 2007 re-authorization strengthened key provisions of the act that require the establishment of mechanisms for total allowable catch limits in Fishery Management Plans ("FMPs"), require agencies to update their environmental review process required under NEPA, provide for market-based mechanisms through limited access programs, and add bycatch reduction measures. *See* 16 U.S.C. §§ 1853, 1863, 1954 (Supp. 2007).

[55] *Id.* § 1852.

[56] *Id.* §§ 1801-82.

[57] *Id.* § 1854.

[58] *Id.* § 1853.

[59] *Id.* § 1853.

[60] *Id.* § 1854.

[61] *Id.* § 1802(24).

[62] *See generally* W. PAC. REG'L FISHERY MGMT. COUNCIL, FISHERY MANAGEMENT PLAN FOR THE PELAGIC FISHERIES OF THE WESTERN PACIFIC REGION (1986), *available at* http://www.wpcouncil.org/pelagic.htm (sections of the FMP, including amendments, may be

continually modified by the Western Pacific Region Fishery Management Council ("WestPac"), the RFMC that manages fisheries in the U.S. Pacific.[63] WestPac manages an enormous region, comprising forty-eight percent of the entire United States exclusive economic zone.[64] At over 1.5 million square nautical miles in size, WestPac's jurisdiction is the largest of any RFMC in the United States.[65] WestPac also wields considerable influence over the political process of fisheries management and has been embroiled in controversy in recent years.[66]

B. Fisheries Management and Protected Species Interactions

Under the ESA, all federal agencies are required to take special precaution not to "jeopardize the continued existence" of ESA-listed species.[67] U.S. fisheries operations can result in "takings" of threatened or endangered species, requiring special consideration by fisheries management agencies.[68] NMFS, the principle agency responsible for fisheries management, is beholden to several requirements under the ESA when formulating plans for managing interactions with listed species in marine fisheries, including: 1) development and implementation of a Recovery Plan for the conservation and

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accessed by accessing the "Select a Module" field under the "Pelagics Fishery Management Plan" heading).

[63] 16 U.S.C. § 1852(a)(1)(H) (1996) (declaring that WestPac's jurisdiction includes Hawai'i, American Samoa, Guam, the Northern Mariana Islands, and other U.S. Pacific territories).

[64] *See* VALUE OF FISHERIES, *supra* note 44, at 2; United Nations Convention on the Law of the Sea, Dec. 10, 1982, U.N. Doc. A/CONF.62/112, at arts. 1-15, 55-75. Although the United States is not a signator to the Convention, it asserts sovereignty over its exclusive economic zone as customary law through Presidential Proclamation 5030.

[65] *See* VALUE OF FISHERIES, *supra* note 44, at 2.

[66] *See generally* Letter from William Aila, Jr., to Johnnie E. Frazier, Inspector General, U.S. Dep't of Commerce (Dec. 18, 2006), *available at* http://belammc.com/wespac/docs/Aila_WESPAC_complaint2_FINAL.pdf (on file with author); Press Release, Oahu Game Fish Club, Hawai'i Fishing Groups Charge Federal Agency with Improper and Dishonest Conduct (Dec. 21, 2006), *available at* http://belammc.com/wespac/docs/Aila_PR2_FINAL.pdf (on file with author). Controversies include investigations into WestPac's use of federal monies in lobbying efforts and direct public attacks from WestPac's executive director against fishing restrictions in the newly formed Papahanaumokuakea Marine National Monument, the world's largest marine protected area. *Id.*

[67] 16 U.S.C. § 1536(a)(2) (2000 & Supp. 2007); *see also* 50 C.F.R. § 402.02 (1991) (declaring that an action will "jeopardize" a species if it "reasonably would be expected . . . to reduce appreciably the likelihood of both the survival and recovery of . . . [the] species . . . by reducing its reproduction, numbers or distribution").

[68] 16 U.S.C. § 1532(19) (2000 & Supp. 2007) (defining "take" as to "harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct").

survival of the threatened or endangered species;[69] 2) issuance of an Incidental Take Permit ("ITP"), when "takings" of threatened or endangered species may occur in federally managed activities;[70] 3) designation of "critical habitat" for listed species;[71] and 4) issuance of a Biological Opinion ("BiOp") when agency management requires consideration of interactions with ESA-listed species.[72] For longline fishers, vessels are required to carry a "general" ITP,

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[69] *Id.* § 1533(f). *See* Recovery Plans for Listed Sea Turtles, 63 Fed. Reg. 28359, 28359 (May 22, 1998); NAT'L MAR. FISHERIES SERVICE & U.S. FISH AND WILDLIFE SERVICE, RECOVERY PLAN FOR U.S. PACIFIC POPULATIONS OF THE LOGGERHEAD TURTLE (CARETTA CARETTA) (1998); NAT'L MAR. FISHERIES SERVICE & U.S. FISH AND WILDLIFE SERVICE, RECOVERY PLAN FOR U.S. PACIFIC POPULATIONS OF THE LEATHERBACK TURTLE (DERMOCHELYS CORIACEA) (1998), *available at* http://www.nmfs.noaa.gov/pr/recovery/plans.htm#turtles. Recovery plans for the Loggerhead and Leatherback marine turtles were last updated in 1998, despite significant advances in understanding of sea turtle distribution, impacts from human activities, and advances in applied technology to reduce interactions with listed turtles. *Id. See also* Listing and Recovery Priority Guidelines, 55 Fed. Reg. 24,296, 24,297-98 (June 15, 1990). In the Pacific, recovery plans are revised and updated by the Pacific Sea Turtle Recovery Team jointly managed between NMFS' Office of Protected Species and the U.S. Fish and Wildlife Service. *Id.*; *see also* NMFS & U.S. FWS, LEATHERBACK SEA TURTLE & LOGGERHEAD SEA TURTLE 5-YEAR REVIEW: SUMMARY AND EVALUATION, SECTION 4.0 (2007), *available at* http://www.nmfs.noaa.gov/pr/listing/reviews.htm#species.

[70] 16 U.S.C. § 1539(a) (2000 & Supp. 2007). *See* NOAA FISHERIES, OFFICE OF PROTECTED SPECIES, INCIDENTAL TAKE PERMIT PROGRAM FOR SEA TURTLES (2006), *available at* http://www.nmfs.noaa.gov/pr/pdfs/permits/instructions_esa_turtles.pdf.

Under Section 10(a)(1)(B) of the ESA, NMFS may issue ITPs to non-federal parties (e.g., marine fishers) for interactions with marine turtles if such taking is "incidental to, and not the purpose of carrying out otherwise lawful activities." 16 U.S.C. § 1539(a)(1)(B) (2000 & Supp. 2007).

[71] 16 U.S.C. § 1532(5) (2000 & Supp. 2007). "Critical habitat" is defined as: 1) specific areas within the geographical area occupied by the species at the time of listing, if they contain physical or biological features essential to conservation, and those features may require special management considerations or protection; and 2) specific areas outside the geographical area occupied by the species if the agency determines that the area itself is essential for conservation. *Id.*; *see also* 50 C.F.R. § 402.02 (2006) (declaring that critical habitat must be based upon the best available scientific information); 16 U.S.C. § 1536(a)(2) (2000 & Supp. 2007) (requiring each federal agency to ensure any action they authorize, fund, or carry out is not likely to jeopardize the continued existence of any endangered or threatened species, or result in the destruction or adverse modification of any designated critical habitat of such species).

[72] 50 C.F.R. § 402.02(d) (2006) (defining a "biological opinion" as a "document that states the opinion of the Service as to whether or not the Federal action is likely to jeopardize the continued existence of listed species or result in the destruction or adverse modification of critical habitat"); *see also* 16 U.S.C. § 1536 (c)(1) (2000 & Supp. 2007) (declaring that biological assessments can be "undertaken as part of a Federal agency's compliance with the requirements of section 102 of the National Environmental Policy Act of 1969").

which is only issued after approval of a permit applicant's Habitat Conservation Plan.[73]

When a federal agency action might negatively impact a marine species protected under the ESA, that agency is required to consult with either NMFS or the U.S. Fish and Wildlife Service, depending on the protected species that may be affected.[74] In the case of marine fisheries, RFMCs, in developing FMPs, must enter into a consultation process with NMFS' Office of Protected Resources in order to develop a BiOp. When species, such as the Pacific Leatherback, are critically endangered, the agency must develop a "reasonable and prudent alternative" ("RPA") during the consultation process to minimize interactions with listed species.[75] Acceptance of the RPA and associated BiOp requires ongoing legal compliance by the agency.[76]

C. Assessing the Environmental Impact of Marine Fisheries Management

NEPA requires consideration of environmental impacts for potentially harmful activities in the planning and decision-making processes of federal

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[73] *See* NOAA FISHERIES, OFFICE OF PROTECTED SPECIES, INCIDENTAL TAKE PERMIT PROGRAM FOR SEA TURTLES (2006), *available at* http://www.nmfs.noaa.gov/pr/pdfs/permits/instructions_esa_turtles.pdf.

[74] 16 U.S.C. § 1536(a)(2) (2000 & Supp. 2007). *See generally* U.S. Dep't of Commerce, NOAA Tech. Memo. NMFS-OPR-7, PELAGIC LONGLINE FISHERY-SEA TURTLE INTERACTIONS, PROCEEDINGS OF AN INDUSTRY, ACADEMIC AND GOVERNMENT EXPERTS, AND STAKEHOLDERS (1996). If, during the consultation, NMFS determines the action is likely to adversely affect listed species or critical habitat, it must issue a BiOp. *Id.* The BiOp may result in one of two conclusions, depending on the perceived severity of the impact. If the activity is not likely to jeopardize the species, the opinion includes an incidental take statement ("ITS") specifying the amount or extent of incidental take that may result from the proposed action. *Id.* Nondiscretionary reasonable and prudent measures ("RPMs") are also adopted to minimize the impact of the incidental take, and conservation recommendations are made. *Id.* If, however, jeopardy to the listed species is found to be likely, the opinion must identify any reasonable and prudent alternatives ("RPAs") to the action that would avoid such impacts, and must set threshold limits for interactions with ESA-listed species based on estimated population sizes and numbers of interactions. *Id.* Notably, there are no RPMs associated with critical habitat, only RPAs that must avoid destruction or adverse modification of critical habitat. *Id.*

[75] *See* 50 C.F.R. § 402.02 (2006). "Reasonable and prudent alternatives" are alternative actions, identified during formal consultation, that: 1) "can be implemented in a manner consistent with the intended purpose of the action"; 2) "can be implemented consistent with the scope of the Federal agency's legal authority and jurisdiction"; 3) are "economically and technologically feasible"; and 4) "would avoid the likelihood of jeopardizing the continued existence of listed species and avert the destruction or adverse modification of critical habitat." *Id.*

[76] *See* Dalzell (2001), *supra* note 46, at 34-36.

agencies.[77] The purpose of NEPA is to inform the decision-making process when "major Federal action(s)" may have an impact on the environment.[78] NEPA's primary role is to focus on the gaps and overlaps amid the myriad of environmental plans and requirements.[79] Section 2 of the act contains florid language describing Congressional intent to "encourage productive and enjoyable harmony between man and his environment,"[80] and to "promote efforts which will prevent or eliminate damage to the environment and biosphere."[81] The Congressional Declaration in Title I, Section 101 expands on these goals, further describing specific intentions in Congress' enactment of NEPA.[82] Item six in Section 101(b) refers specifically to the balanced use of renewable resources,[83] a clear targeting of resource harvesting activities such as those represented by the Hawaiian longline fishery.[84]

For all the idealistic intent of NEPA, it is Section 102 that contains the actionable language upon which lawsuits may be promulgated. The vast majority of NEPA litigation is predicated on the procedural requirement for federal agencies to conduct an environmental assessment process prior to engaging in potentially harmful activities, outlined in Section 102. Section 102(c) of NEPA requires federal agencies to "include . . . a detailed statement by the responsible official on—(i) the environmental impact of the proposed action."[85] The NEPA process first requires preparation of an environmental assessment ("EA"), [86] and the agency can circumvent the preparation of a full Environmental Impact Statement ("EIS") by issuing a well-reasoned Finding of No Significant Impact ("FONSI") if actions do not significantly impact the environment.[87] The EA and FONSI step is often bypassed when an agency engages in programmatic planning (e.g., FMPs) that integrate a broad

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[77] 42 U.S.C. § 4332(c) (2000 & Supp. 2007). NEPA also established the Council on Environmental Quality ("CEQ"), which reports to the President and Congress on environmental quality and promulgates rules for the environmental impact assessment process required by NEPA. *Id.*

[78] *See id.*

[79] *See generally* K.S. Weiner, *Basic Purposes and Policies of the NEPA Regulations*, *in* ENVIRONMENTAL POLICY AND NEPA 163-80 (Ray Clark and Larry Canter eds., 1997).

[80] 42 U.S.C. § 4321 (2000 & Supp. 2007).

[81] *Id.* § 4331.

[82] *Id.*

[83] *Id.* § 4331(b)(6).

[84] *See* Vernon L. Smith, *Economics of Production from Natural Sources*, 58 AMERICAN ECONOMIC REVIEW 409, 410 (1968). Fishery and forestry resources are classically defined as renewable resources, because these resources are renewable within a human lifetime. *Id.*

[85] 42 U.S.C. § 4332 (2000 & Supp. 2007).

[86] *See* 40 C.F.R. § 1508.9 (2006).

[87] *See* Friends of Endangered Species v. Jantzen, 596 F. Supp. 518, 524 (N.D. Cal. 1984) (noting that if the agency makes a Finding of No Significant Impact, no EIS needs to be prepared).

spectrum of management actions with obvious environmental implications.[88] In this familiar scenario, agencies are required to issue a Draft EIS, which is made available for public comment and review, the results of which are integrated into a Final EIS; all steps in the process are published in the Federal Register. Failure to comply with NEPA's procedural requirements is typically prosecuted via the Administrative Procedure Act ("APA"), which sets up a process for federal courts to review agency implementation and enforcement of NEPA.[89]

NEPA's intent can be circumvented even if procedural requirements are met.[90] A federal agency is not required to comply with a particular EIS alternative as long as the agency review of the quality and acceptance of the EIS is not arbitrary, capricious, or an abuse of agency discretion.[91] In situations where NEPA's procedural requirements have been fulfilled, the only actionable recourse remaining would be a direct challenge to the EIS. A direct legal challenge to an EIS is typically less successful than litigation predicated on an agency's failure to comply with NEPA's procedural requirements, which constitute the bulk of NEPA's litigious history.[92] The ability of litigators to pursue injunctive relief under NEPA has contributed to both the subversion of the review process and helped bolster environmental impact assessment in the decision-making process.[93]

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[88] *See* Beth C. Bryant, *NEPA Compliance in Fisheries Management: The Programmatic Supplemental Environmental Impact Statement on Alaskan Groundfish Fisheries and Implications for NEPA Reform*, 30 HARV. ENVTL. L. REV. 441 (2006); *see also* Greenpeace v. Nat'l Marine Fisheries Servs., 55 F. Supp. 2d 1248, 1258 (W.D. Wash. 1999) (noting that a key difference between an EA/FONSI and an EIS is that the EIS must consider a broad range of alternatives to the proposed federal action, while an EA can simply approve the action as proposed).

[89] *See* 5 U.S.C. §§ 551-59 (2000).

[90] Telephone Interview with Paul Achitoff, Managing Attorney, Earthjustice, in Honolulu, Haw. (Sept. 15, 2006).

[91] *See* 5 U.S.C. § 706(2)(A) (2005); Marsh v. Oregon Natural Res. Council, 490 U.S. 360, 377-78 (1989).

[92] *See generally* N.B. Dennis, *Can NEPA Prevent "Ecological Train Wrecks?", in* ENVIRONMENTAL POLICY AND NEPA 139-62 (Ray Clark & Larry Canter eds., 1997) (describing four illustrative cases in which the respective litigations were based on procedural noncompliance).

[93] *See generally* R.A. Carpenter, *The Case for Continuous Monitoring and Adaptive Management Under NEPA, in* ENVIRONMENTAL POLICY AND NEPA 163-80 (Ray Clark & Larry Canter eds., 1997) (describing the decision-making process and continuous assessment of EAs/EISs).

IV. THE HAWAIIAN LONGLINE FISHERY LITIGATION

In 1999, the Center for Marine Conservation and Turtle Island Restoration Network filed suit against NMFS in the U.S. District Court for the District of Hawai'i,[94] alleging the agency had failed to comply with statutory requirements pertaining to marine turtles protected by the ESA.[95] Plaintiffs sought injunctive relief based upon two claims. Their first claim challenged NMFS' issuance of a 1998 BiOp, which was used in the FMP for the management of the Hawai'i-based longline fishing fleet.[96] Plaintiffs also challenged NMFS' failure to prepare an EIS.[97] Successful in their NEPA claims, plaintiffs were awarded a temporary injunction[98] halting all longline fishing by the Hawai'i-based fleet until NMFS complied with the environmental assessment process.[99]

A. Leatherback Sea Turtle v. National Marine Fisheries Service: *Injunctive Relief & Statutory Compliance*

In *Leatherback Sea Turtle*, plaintiffs argued successfully for a temporary injunction, citing the failure of defendant to prepare an EIS.[100] NMFS and WestPac had previously issued an EIS in 1994 in conjunction with the PFMP, and had also issued an EA for each amendment to the PFMP.[101] The court

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[94] Leatherback Sea Turtle v. Nat'l Marine Fisheries Serv., C.V. No. 99-00152 DAE, 1999 U.S. Dist. LEXIS 23317 (D. Haw. Oct. 18, 1999).

[95] *Id. See generally* 16 U.S.C. §§ 1531-44 (2000 & Supp. 2007).

[96] *Leatherback Sea Turtle*, 1999 U.S. Dist. LEXIS 23317, at *8. At issue was NMFS' conclusion that authorizing the fishery to "take 489 loggerheads, 168 olive ridleys and 244 leatherbacks each year would not jeopardize the continued existence of these species." *Id.* at *25. Plaintiffs claimed that this conclusions was "arbitrary and capricious because it rest[ed] on factual assumptions which are either contrary to the record or without a basis." *Id. See* Natasha Loder, *Researchers Take US Government to Court Over Threats to Turtles*, 405 NATURE 495, 495 (2000) (noting that NMFS claimed a population of 85,000 leatherbacks in the Pacific, which was disputed by marine researchers).

[97] 42 U.S.C. § 4332 (2000 & Supp. 2007).

[98] *Leatherback Sea Turtle*, 1999 U.S. Dist. LEXIS 23317, at *15.

[99] *See generally* THE NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION ADMINISTRATIVE ORDER NO. 216-6, ENVIRONMENTAL REVIEW PROCEDURES FOR IMPLEMENTING THE NATIONAL ENVIRONMENTAL POLICY ACT (1999), *available at* http://www.corporateservices.noaa.gov/~ames/NAOs/Chap_216/naos_216_6.html. Each federal agency formulates guidelines for adherence to NEPA requirements. *Id.* NAO 216-6 describes "NOAA's policies, requirements, and procedures for complying with NEPA and the implementing regulations issued by the Council on Environmental Quality . . . and issued by the Department of Commerce." *Id.*

[100] 1999 U.S. Dist. LEXIS 23317, at *15.

[101] *See* W. PAC. REG'L FISHERY MGMT. COUNCIL, MANAGEMENT MEASURES TO IMPLEMENT NEW TECHNOLOGIES FOR THE WESTERN PACIFIC PELAGIC FISHERIES, A REGULATORY

agreed with plaintiffs that the issuance of a 1998 BiOp and Incidental Take Statement required issuance of an EA or EIS because it constituted a major federal action,[102] and that NMFS had violated NEPA by not preparing an EA.[103] It was also clear to the judge that defendant had made no significant efforts to decrease interactions with ESA-listed species in managing the Hawaiian longline fishery.[104] As such, Judge Ezra issued a "carefully tailored" temporary injunction on October 18, 1999 halting all longline fisheries in Hawai'i, recognizing that "[w]hen a court has found that a party is in violation of NEPA, the remedy should be shaped so as to fulfill the objectives of the statute as closely as possible."[105] Because most of the interactions with turtles occurred north of Hawai'i, the court imposed a closure of these areas and required all vessels to carry gear to untangle any captured turtles.[106] The temporary injunction would remain in place pending successful completion of an EIS by NMFS.[107]

1. Modification of the temporary injunction

The injunction was widely perceived as a victory for the conservation of sea turtles by supporters while simultaneously denigrated as unfair targeting of the Hawaiian fishing industry by opposing parties.[108] Despite achieving

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AMENDMENT TO THE FISHERY MANAGEMENT PLAN FOR THE PELAGIC FISHERIES OF THE WESTERN PACIFIC REGION INCLUDING A FINAL SUPPLEMENTAL ENVIRONMENTAL IMPACT STATEMENT 4 (2004) [hereinafter MANAGEMENT MEASURES], *available at* http://swr.nmfs.noaa.gov/pir/pfseis/Main%20document.pdf.

[102] *Leatherback Sea Turtle*, 1999 U.S. Dist. LEXIS 23317, at *46.

[103] *Id.* at *46-48.

[104] *See* Dalzell (2000), *supra* note 40, at 4.

[105] *Leatherback Sea Turtle*, 1999 U.S. Dist. LEXIS 23317, at *54. The court also stressed the importance of the "broader public interest," reasoning that any remedy should balance environmental concerns with the "the larger interests of society that might be adversely affected by an overly broad injunction." *Id.*

[106] *See* Ctr. for Marine Conservation v. Nat'l Marine Fisheries Serv., C.V. No. 99-00152 DAE, 2000 U.S. Dist. LEXIS 22516, at *10-11 (D. Haw. June 23, 2000).

[107] *See* Ctr. for Marine Conservation v. Nat'l Marine Fisheries Serv., No. 99-00152, 2000 WL 33964306, at *1 (D. Haw. July 21, 2000); Ctr. for Marine Conservation v. Nat'l Marine Fisheries Serv., No. 99-00152, 2000 WL 33964302, at *1 (D. Haw. Jan. 11, 2000).

[108] *See generally* Helen Altonn et al., *Longline Fishing Industry Calls Ban 'Devastating'*, HONOLULU STAR BULL., June 24, 2000, http://starbulletin.com/2000/06/24/news/story1.html; Will Hoover, *Longliners Set to Resume Fishing*, HONOLULU ADVERTISER, Mar. 13, 2004, at B1; Paul Achitoff, *Industry Plan Was Self-Serving and Illegal*, HONOLULU ADVERTISER, Apr. 22, 2001, at B1; Press Release, Sea Turtle Restoration Project, Lawsuit Filed to Stop Illegal Killing of Albatross and Sea Turtles by Swordfish Longline Fishery in Hawai'i (Aug. 30, 2004), *available at* http://www.seaturtles.org/press_release2.cfm?pressID=217 (on file with author); Press Release, EarthJustice, Hawaiian Swordfish Fishery to Close Over High Sea Turtle Catch (Mar. 16, 2006) (on file with author).

temporary relief for turtle conservation efforts, conditions of the injunction included elements of defendants' proposed terms that would portend future developments in the litigation. Among these terms were allowances for NMFS to "complete plans and commence research into the effects of several different gear modifications."[109] NMFS' experimentation with modification of fishing gear and practices resulted in substantial investigation into development of "turtle safe" fishing.[110]

The court also required that an independent, three-person panel comprised of scientists selected by plaintiffs, defendant and Defendant-Plaintiff Intervenor, the Hawaiian Longline Association ("HLA"), review spatial and temporal distributions of sea turtle interactions with Hawaiian longliners and make recommendations on time-area closures.[111] In doing so, the court essentially required judicial review of scientific data on sea turtle interactions in the fishery. Unsurprisingly, the three-party panel produced substantially different analyses and recommendations on the geographic extent of closures.[112] Upon review of these recommendations, the court significantly expanded some closure areas and curtailed fishing efforts in other areas, in

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[109] *Ctr. for Marine Conservation*, 2000 U.S. Dist. LEXIS 22516, at *11.

[110] *See generally* International Technical Expert Workshop on Marine Turtle Bycatch in Longline Fisheries, Seattle, Wash., U.S. (Feb. 11-13, 2003); Gilman et al., *Reducing*, *supra* note 5; Gilman et al., *Principles*, *supra* note 5. The judiciary's allowance of NMFS to conduct "experimental" longlining during the court-mandated closure of the fishery provided a snapshot assessment of whether alteration of fishing gear and practices could result in lower interactions with sea turtles. Alteration of fishing gear included use of circle hooks (versus standard "J-shaped" hooks), modifications of practices such as gear set depth and period, and method of deployment, which a NMFS study claimed would drastically reduce incidental take of endangered sea turtles. *Id.*

[111] *Ctr. for Marine Conservation*, 2000 U.S. Dist. LEXIS 22516, at *2-3. In *Leatherback Sea Turtle v. National Marine Fisheries Serv.*, C.V. No. 99-00152 DAE, 1999 U.S. Dist. LEXIS 23317 (D. Haw. Oct. 18, 1999), the court appointed the Hawaiian Longline Association ("HLA"), an industry group representing longline vessel owners and fishermen, as Defendant-Intervenor. HLA was an active party to the litigation, filing motions to modify the order of injunction and voicing opposition to some terms of the injunction. Among its myriad requests in the litigation, HLA proposed the resumption of *deep-set* longlining activities that primarily target tuna under a strict allowance for incidental takings of listed leatherback turtles. Interactions were not to exceed 244 "takings" or nineteen mortalities. *See Ctr. for Marine Conservation*, 2000 U.S. Dist. LEXIS 22516, at *5-6. This request was predicated on the widely-accepted understanding that turtle interactions were primarily associated with the *shallow-set* longlining associated with the swordfish fishery that operated primarily north of the archipelago. Plaintiffs simultaneously filed cross-motions to modify the injunction and in opposition to NMFS and HLA's motions, pressing for expansion of the geographic constraints of the longlining ban to protect the leatherback's status, which they alleged was "rapidly changing for the worse." *Id.*

[112] *See id.* at *3-7

what was perceived by HLA as an attack on longline fishing in Hawai'i.[113] Editorials, protests, and press campaigns launched by HLA generated significant public pressure, and a stay of execution was eventually ordered as the court agreed to seek a compromise agreeable to the involved parties.[114]

Eventually, the court allowed deep-set longlining activities proposed by HLA to resume, provided 100% of Hawaiian longline vessels carried NMFS-approved observers and any profits from accidental landings of swordfish were donated to charity.[115] Throughout these hearings, the court recognized precedent in modifying the injunction,[116] asserting that the court should "tailor its relief to fit each particular case, balancing the environmental concerns of NEPA against the larger interests of society that might be adversely affected by an overly broad injunction."[117] Ultimately, the rulings represented a judicial conciliation of motions, cross-motions, and opposition statements submitted by various parties involved in the case.

2. *Impact of the EIS*

NMFS released the final EIS/FMP on March 31, 2001, recommending a prohibition of shallow-set longline fishing activities.[118] The EIS ultimately corroborated plaintiffs' assertions and the court's 1999 holding that shallow-set longlining for swordfish represented an "unacceptable risk to several species of sea turtles."[119] The injunction resulted in a multi-year moratorium

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[113] *See* Dalzell (2001), *supra* note 46, at 35 (describing HLA's perception of the litigation as an attack on commercial longlining by conservation advocacy groups).

[114] *See* Dalzell (2000), *supra* note 40, at 4.

[115] *See* Ctr. for Marine Conservation v. Nat'l Marine Fisheries Serv., No. 99-00152, 2000 WL 33964305, at *1 (D. Haw. June 26, 2000); Ctr. for Marine Conservation v. Nat'l Marine Fisheries Serv., No. 99-00152, 2000 WL 33964307, at *2 (D. Haw. Aug. 4, 2000).

[116] *See Ctr. for Marine Conservation*, 2000 U.S. Dist. LEXIS 22516, at *8. (citing Env'l Def. Fund v. Marsh, 651 F.2d 983, 1005-06 (5th Cir. 1981) and Western Oil & Gas Ass'n. v. Alaska, 439 U.S. 922 (1978)).

[117] *Id.* (quoting Envtl. Def. Fund v. Marsh, 651 F.2d 983, 1005-06 (5th Cir. 1981)).

[118] *See* Dalzell (2001), *supra* note 46, at 34. NMFS' development and release of the EIS depended largely on the content of the BiOp, which was concurrently being formulated by two branches of NMFS, including fishery managers with WestPac and scientists in the NMFS Office of Protected Resources. *Id.* The new BiOp required the stringent consultation framework detailed in Section 7 of the ESA, and NMFS' development of the final EIS/FMP required integration with the BiOp in the presentation of alternatives and their associated impacts. *Id.* A draft EIS was released late in 2000 for public comment, but was incomplete as the BiOp had yet to be finalized, creating an internal race among NMFS to complete the necessary steps. *Id.* Issuance of the Final EIS/FMP included the turtle take limits outlined in the accepted *reasonable and prudent alternative* in the new BiOp. *Id.*

[119] Ctr. for Marine Conservation v. Nat'l Marine Fisheries Serv., No. 99-00152 DAE, 2001 WL 34077401, at *1 (D. Haw. Mar. 30, 2001).

on shallow-set longlining, though deeper-set longlining was allowed to continue.[120] The court asserted that the ban would "effectuate the purpose of the environmental laws under which this case was filed, namely to strike a careful balance between the preservation of endangered species, in this case several species of sea turtles, while minimizing to the greatest extent possible the economic impact upon the fishing industry."[121]

The final injunction terms required NMFS to conduct skipper education workshops on sea turtle resuscitation techniques, and to mandate twenty percent coverage of the Hawai'i-based deep-set longline fleet by NMFS observers.[122] Fleet vessels were also required to carry special nets for turtle retrieval, bolt-cutters for removing hooks from turtles, and to report to NMFS when incidental "take" of turtles and catch of swordfish occurred.[123] Both sides claimed victory. HLA general manager Scott Barrows claimed: "We won, and we did it by taking the high road."[124] Paul Achitoff from EarthJustice (representing plaintiff) asserted that "NMFS was finally forced to do the job Congress directed it to do: develop a way to manage the fishery that would not keep pushing the turtles toward extinction."[125]

3. Post-EIS and the re-opening of the swordfish fishery

Significant legal wrangling continued after the 2001 issuance of the EIS between the plaintiffs, HLA, WestPac and NMFS. In the litigation, WestPac, through NMFS, continued to seek modification of the injunction while they sought to develop "turtle-safe" fishing gear and alternative longlining methods.[126] Issuance of the Final EIS was followed by a court vacation of the 2002 BiOp, due to litigation initiated by HLA. As a result, WestPac hurried to implement an emergency measure that would allow continued experimentation with fishing gear. In October 2003, the court placed a stay

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[120] *Id.*

[121] *Id.*

[122] *See* Dalzell (2001), *supra* note 46, at 35.

[123] *Ctr. for Marine Conservation*, 2001 WL 34077401, at *2.

[124] Altonn et al., *supra* note 108.

[125] Achitoff, *supra* note 108, at B1.

[126] *See generally* Eric Gilman et al., *Reducing Sea Turtle Interactions in the Hawaii-Based Longline Swordfish Fishery*, 139 BIOLOGICAL CONSERVATION 19 (2007). Recent reviews of changes in hook type (J-hooks to Circle-hooks), bait type (squid bait to fish bait), and alteration of fishing practices have shown that gear modifications yield demonstrable results, reducing turtle capture rates by up to ninety percent. Andrew J. Read, *Do Circle Hooks Reduce the Mortality of Sea Turtles in Pelagic Longlines? A Review of Recent Experiments*, 135 BIOLOGICAL CONSERVATION 155 (2007). Circle hooks can reduce turtle mortality through lowering incidence of hook ingestion. *Id.* But, rigorous testing is required before widespread implementation, as interactions appear to be specific to the fishery. *Id.*

on the execution order until April 2004 to allow NMFS to again revise the BiOp in order to seek a compromise that would satisfy all the parties. The process illustrated a strained relationship between the longline industry, environmental activists, WestPac's fishery managers and NMFS scientists in the Office of Protected Species. Pursuant to the terms of the injunction, WestPac's new amendments to the FMP finally allowed the swordfish fishery to re-open in 2004,[127] requiring "restrictions on the types of hooks and baits that may be used, as well as other measures designed to address the adverse impacts of the fishery on sea turtles."[128]

The re-opening of the Hawaiian swordfish fishery[129] again resulted in legal action by environmental groups seeking to enjoin longlining.[130] Similar to the prior litigation, the case hinged on procedural requirements. Defendants obviated plaintiffs' legal strategy by highlighting procedures in the MSA pertaining to FMP development.[131] In presenting his analyses, Judge Ezra asserted that the plaintiffs' complaint "all harken back to one act: the re-opening of the fishery," and that "plaintiffs' claims are not 'pure NEPA' claims as they suggest," therefore the court's judicial review is limited to specific requirements under the MSA.[132] Though plaintiffs framed their arguments under NEPA, the MBTA, the ESA, and the APA, the judge determined that the question of law before the court was primarily a challenge of NMFS' approval of the FMP, a requirement under the MSA.[133] Judge Ezra granted the defendant's pre-trial motion to dismiss on the grounds that plaintiffs had failed to challenge the FMP's amendment by NMFS within

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[127] *See* MANAGEMENT MEASURES, *supra* note 101. *See also* 16 U.S.C. § 1852(a)(1)(H) (Supp. 2007) (giving Westpac authority over Pacific fisheries).

[128] Turtle Island Restoration Network v. Dep't of Commerce, 351 F. Supp. 2d 1048, 1050 (D. Haw. 2005), *aff'd*, 438 F.3d 937 (9th Cir. 2006).

[129] *See* Western Pacific Fisheries Rules, 69 Fed. Reg. 17329, 17330 (Apr. 2, 2004).

[130] *See Turtle Island*, 351 F. Supp. 2d 1048. The plaintiffs did not directly challenge the joint FMP/EIS document; instead, they alleged violations by defendants of the Migratory Bird Treaty Act, 16 U.S.C. §§ 703-12, NEPA, APA, and the ESA. *Id.* at 1050.

[131] *See id. See also* 16 U.S.C. §§ 1851-82 (2000 & Supp. 2007) (regarding FMPs).

[132] *Turtle Island*, 351 F. Supp. 2d at 1054; Blue Water Fishermen's Ass'n v. Nat'l Marine Fisheries Serv., 158 F. Supp. 2d 118, 121 (D. Mass. 2001). The court cited precedent set in *Blue Water Fishermen's Association v. National Marine Fisheries Service* in denying plaintiffs' challenges under various environmental statutes: "Couching the action in different statutory language is not a hook which can remove the prohibitions of the Magnuson-Stevens Act." *Id.* (quoting Blue Water Fishermen's Ass'n v. Nat'l Marine Fisheries Serv., 158 F. Supp. 2d 118, 122 (D. Mass. 2001)).

[133] *Turtle Island*, 351 F. Supp. 2d at 1054.

procedural time constraints (thirty days) provided under the MSA.[134] The ruling was subsequently upheld on appeal.[135]

B. Consequences of the Hawaiian Swordfish Fishery Litigation

Closure of the fishery, which was recommended in the final EIS issued by NMFS, resulted in significant economic and social impacts to the industry.[136] Owners lost between twenty and thirty percent of their revenue in the first two years after the ban on swordfishing.[137] Social impacts to the industry included deleterious effects on families, quality of life, and other cumulative impacts to the longline community structure.[138] During the moratorium on longlining, about one-third of Hawaiian longliners migrated permanently to California,[139] a practice typically undertaken seasonally by longline vessels. Some vessels even relocated outside of American law in Fiji, or became part of the growing longline fleet based out of Pago Pago, American Samoa.[140] For vessels that relocated permanently in California, the move not only resulted in significant economic strains on owners, fishermen, and their families, but it also added the risk of losing their permits in the limited-entry Hawaiian fleet.[141] Prior to 2003 in California, longliners were permitted to land their catch under the High Seas Fishing Compliance Act.[142] A new NMFS issuance in 2004 prevented landings of fish caught off the west coast, but not in the high seas.[143] The plaintiffs' attorney asserted collusion between NMFS and affected longliners in attempting to relocate vessels to the California region,[144] where an inchoate longline fishery had yet to be regulated by the Pacific Fishery Management Council, the RFMC that manages the fisheries of the west coast

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[134] *See id.*

[135] *See* Turtle Island Restoration Network v. Dep't of Commerce, 438 F.3d 937 (9th Cir. 2006).

[136] Diana Leone, *Fisheries Rules Eased: New Federal Rules Will Allow Longline Fishermen to Catch Swordfish and Expand Tuna Fishing*, HONOLULU STAR BULL., Mar. 27, 2004, at A1, *available at* http://starbulletin.com/2004/03/27/news/story1.html.

[137] *Id.*

[138] *See generally* Allen & Gough, *supra* note 42.

[139] *See* Dalzell (2001), *supra* note 46, at 36.

[140] *Id.*

[141] *Id.*

[142] 16 U.S.C. §§ 5501-09 (2000).

[143] *See* Taking of Threatened or Endangered Species, 68 Fed. Reg. 70219, 70220 (Dec. 17, 2003) (describing state restrictions disallowing longliners to fish within 200-nautical miles of the west coast).

[144] Achitoff, *supra* note 108, at B1. Achitoff notes that the open dates for the California longline industry match well with the close dates for the Hawai'i longline fishery, suggesting that the match was not an accident and may have been an intentional action by the managing agency. *Id.*

of the United States. At the time of the injunction, the Pacific Fishery Management Council had yet to create an FMP for the relatively small California-based longline fleet (approximately ten vessels); as such, commercial longliners in California were under a comparatively lax system of governance.[145] Subsequent litigation by environmental groups in California, including the plaintiffs in *Turtle Island Restoration Network v. National Marine Fisheries Service*,[146] required NMFS to comply with consultation processes in Section 7 of the ESA, when permitting fishery management actions under the High Seas Fishing Compliance Act.[147]

For those vessel owners that remained in Hawai'i, the only option was to invest approximately $30,000 to re-fit their vessels to deep-set longlining gear, which produced an enormous economic strain on the owners and fishing families.[148] The domestic landings of swordfish also decreased, and analyses estimated losses in excess of twenty-two million dollars per year.[149] Hawaiian fish dealers and other businesses associated with the fishing industry were also affected, and market relationships between fishers, suppliers, and purchasers were strained in the aftermath.

After the re-opening of the shallow-set longline fishery in 2004, NMFS' allocation of restricted shallow-set deployments (2,120 per year) among Hawaiian longliners was unclear to the vast majority of longline fishermen.[150] Beyond the confusion regarding allocations of shallow-depth longline sets, political disillusionment with HLA and socio-economic impacts from the fishery closure exacerbated tensions among the Vietnamese-American longlining community.[151] The combination of pressures from the aftermath of the fishery closure resulted in virtually no shallow-set longlining immediately after the re-opening in 2004.[152] This trend reversed in 2005, largely due to refinement in the NMFS allocation process of fishing sets. Currently, longliners are simply required to submit a "Notice of Intent" for the next year's allocation, and sets are equally divided among applicants with active

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[145] *See generally*, W. PAC. REG'L FISHERY MGMT COUNCIL, FISHERY MANAGEMENT PLAN FOR U.S. WEST COAST FISHERIES FOR HIGHLY MIGRATORY SPECIES (2007), *available at* http://www.pcouncil.org/hms/fmp/HMS_FMP_June07.pdf.

[146] 340 F.3d 969 (9th Cir. 2003).

[147] *See* Elizabeth P. McNichols, *Turtle Power: The Ninth Circuit Avoids a Tragedy on the High Seas*, 12 MO. ENVTL. L. & POL'Y REV. 57, 58 (2004).

[148] *See generally* Allen & Gough, *supra* note 42 (discussing the economic hardships faced by fishing families remaining in Hawai'i).

[149] *See* Junning Cai et al., *Economic Linkage Impacts of Hawaii's Longline Fishing Regulations*, 74 FISHERIES RESEARCH 232, 239 (2005).

[150] Allen Interview, *supra* note 49.

[151] *See generally* Allen & Gough, *supra* note 42.

[152] *See id.*

permits in the industry.[153] Shallow-set longlining continued unabated throughout 2005 as turtle interactions never exceeded the limits set forth in the FMP.[154] In 2006, however, the fishery reached the limit of seventeen leatherback mortalities in early March, resulting in a recommendation from WestPac to NMFS to close the fishery to keep from exceeding turtle mortalities outlined in the FMP.[155] After the fishery closed in spring of 2006, NMFS began advertising 'Notice of Intent' solicitations during the fall for the restricted number of shallow-depth sets (2,120 per year) allowed in the FMP, and swordfish longlining resumed on January 1, 2007.[156]

Following the injunction, a flurry of fisheries litigation ensued in Hawai'i and beyond. Spurred on by the injunction, environmental groups broadened their attack on what they perceived as mismanagement by WestPac and NMFS. Lawsuits were initiated under the Marine Mammal Protection Act ("MMPA")[157] for reclassification of the Hawaiian longline fishery as a Category I fishery, requiring stringent registration, reporting, and monitoring for interactions with protected marine mammals, such as the false killer whale (*Pseudorca crassidens*).[158] HLA initiated its own lawsuit in April 2001, challenging a NMFS BiOp issued in March 2001;[159] later, the HLA also attacked a joint NMFS and U.S. Fish and Wildlife Service BiOp on short-tailed albatross mitigation measures. HLA also filed an additional notice of intent to sue NMFS and the State of Hawai'i for not taking the proper precautions to prevent hooking of green sea turtles by shore fishers, primarily as a public relations measure to highlight what they felt was unfair targeting of the commercial fishing industry by environmental groups.[160] Outside of Hawai'i, similar challenges to NMFS BiOps on turtle takings were

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[153] Western Pacific Fisheries Rules, 69 Fed. Reg. 17329, 17330 (Apr. 2, 2004).

[154] *See id.* (declaring that under this revision of the FMP/EIS, sixteen loggerhead and seventeen leatherback turtle *mortalities* are allowed in the *shallow-set* Hawaiian longline fishery).

[155] Press Release, EarthJustice, Hawaiian Swordfish Fishery to Close Over High Sea Turtle Catch (Mar. 16, 2006) (on file with author).

[156] Interview with Dr. Stewart Allen, *supra* note 49.

[157] 16 U.S.C. §§ 1361-1407 (1997).

[158] *See, e.g.*, Hui Malamai I Kohala v. Nat'l Marine Fisheries Serv., 314 F. Supp. 2d 1029 (D. Haw. 2004), *vacated and remanded*, 156 Fed. Appx. 16 (9th Cir. 2005). In *Hui Malamai*, various environmental groups were unsuccessful in their attempt to require NMFS to re-classify the Hawaiian longline fisheries as Category I fisheries under the MMPA. A 2005 appeal was rendered moot when NMFS voluntarily re-classified the Hawaiian longline fishery as a Class I fishery under the MMPA. *Hui Malamai*, 156 Fed. Appx. at 17.

[159] *See* Haw. Longline Ass'n v. Nat'l Marine Fisheries Serv., 281 F. Supp. 2d 1, 5-11 (D.D.C. 2003) (mem.).

[160] *See* Dalzell (2001), *supra* note 46, at 35 (describing why HLA felt compelled to take action).

unsuccessful,[161] while other attacks on NMFS BiOps for endangered fishes in the Pacific northwest were initiated.[162] Closures promulgated by NMFS also resulted in legal backlash from the fishing industry, which perceived a widespread attack on the industry.[163]

Ironically, the probable environmental ramifications of the closure clearly are contrary to the stated goals of the plaintiffs. Managers involved in the longline industry protested that closing the shallow-set fishery to the tightly regulated Hawaiian longline fleet would result in exploitation of the fishery by non-regulated foreign vessels, resulting in more turtle mortalities and greater impacts on marine ecosystems, and would undermine legitimate efforts to minimize interactions via alteration of gear and practices.[164] Proponents of the closure continue to cite unsustainable practices that plague the longline fishery.[165]

V. CONCLUSION

The Hawaiian longline litigation illustrates the complicated interaction between statutory requirements in U.S. fisheries management. The closure of the longline fishery via a court-mandated injunction evidences the strength of NEPA's procedural requirements and the deference given to protected species listed under the ESA. NMFS' subsequent re-opening of the fishery illustrated the impact of the litigation, as some of the terms of the injunction were implemented into the long-term management strategy for the fishery. Closure of the fishery resulted in significant impacts to the fishery community, a litany of other legal challenges, and spurred the development of turtle-safe fishing technologies and practices. This study illustrates an increased willingness by the judiciary to become involved in U.S. fisheries management and intervene if federal agencies fail to comply with the purpose and procedures of applicable statutes.[166]

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[161] *See, e.g.*, Ocean Conservancy v. Gutierrez, 394 F. Supp. 2d 147 (D.D.C. 2005); Oceana, Inc. v. Gutierrez, 488 F.3d 1020 (D.C. Cir. 2007).

[162] *See, e.g.*, Nat'l Wildlife Fed'n v. Nat'l Marine Fisheries Serv., 481 F.3d 1224 (9th Cir. 2007); Nat'l Wildlife Fed'n v. Nat'l Marine Fisheries Serv., No. 01-640-RE, 2007 U.S. Dist. LEXIS 38010 (D. Or. 2007).

[163] *See, e.g.*, Blue Water Fishermen's Ass'n v. Nat'l Marine Fisheries Serv., 226 F. Supp. 2d 330 (D. Mass 2002).

[164] Takenaka Interview, *supra* note 41; Allen interview, *supra* note 49.

[165] *See, e.g.*, Robert Ovetz, *The Bottom Line: An Investigation of the Economic, Cultural and Social Costs of Industrial Longline Fishing in the Pacific and the Benefits of Sustainable Use Marine Protected Areas*, 30 MARINE POLICY 809 (2006).

[166] *See* David B. Joyce, *The Evolving Role of Federal Courts in Domestic Fisheries Management*, 59 U. MIAMI L. REV. 83 (2004); Marian Macpherson & Mariam McCall, *Judicial Remedies in Fisheries Litigation: Pros, Cons and Prestidigitation?*, 9 OCEAN & COASTAL L.J.

Despite various management strategies, multiple agency efforts, recent litigation, and repeated calls from scientists, the majority of marine fisheries experience high rates of bycatch, overfishing, and subsequent declines in marine ecosystem integrity. To affect a reversal in these conditions, management strategies must experience a paradigm shift. An integrated, international, and holistic approach to managing pelagic fisheries is required. The Hawaiian swordfish fishery litigation has proven to be instrumental in driving agencies toward ecosystem-based management approaches, either via the direct threat of litigation or through pro-active agency adherence to statutory requirements.

John N. Kittinger[167]

1 (2003) (criticizing the court's role in the litigation as an over-stepping of bounds by an activist judiciary).

[167] Ph.D. Candidate, Geography Department, National Science Foundation, Integrated Graduate Education, Research & Training (IGERT) Fellow (Ecology, Conservation & Pathogen Biology Program), University of Hawai'i at Manoa. The author sincerely thanks Professors Denise Antolini, Jon Van Dyke and Alison Rieser for their introduction to the realm of environmental law, marine policy and ocean governance. The author also thanks Brooks Takenaka, Stewart Allen, Eric Gilman, and Paul Dalzell for their assistance in understanding the dynamics of the Hawai'i longline fishery and in the development of this article.