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ARTICLES

COMMENTS

NOTES

From Sacred Places: The Nikko Taro and the Taj Mahal

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I. INTRODUCTION

Of all the impulses behind environmental protection, one of the most difficult for Americans is spiritual. We like to think of ourselves as rational people who do things for practical reasons like personal health and making money. We worship God in churches of our own construction. It was the people who lived in America before us who attributed spiritual values to nature, and we all know what happened to them. The idea of protecting places as sacred seems vaguely pagan, perhaps ridiculous, even un-constitutional.

Not so in the rest of the world, which is far older than we are and more linked to sites that are venerated because of their call to the human spirit and to spirits beyond. These places have always received special protection—in some cases absolute protection—and are now providing a separate avenue for the emergence of environmental law. The first case treated here concerns a grove of cedar trees, the Nikko Taro, which in the mid-1960s was confronted by one of the most aggressive construction programs in history. The resulting opinion is a wonder. The second case arises from the Taj Mahal, an unusual lawyer, and an equally unusual judiciary that took the case and ran farther with it than nearly any court, anywhere, since.

One case is long over, the other may never be over, but the environmental problems they confronted and the legal issues they raised are as contemporary as tomorrow. Environmental law is still evolving, and is now circling the globe. As it does, Nikko Taro and the Taj Mahal are stone markers on the way.

II. NIKKO TARO

Forty years ago, the High Court of Tokyo stopped the construction of a highway routed through a grove of cedar trees on the outskirts of Nikko, a

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tourist town about an hour and a half from the capitol. The decision had little precedent, not in Japan, not anywhere. It was supported by a slender legal argument, one so creative and, truth be told, judicially active, that it would have never prevailed in the United States at that time, nor probably today. Its analysis previewed an approach to environmental policy that western legislatures would only begin capturing a decade later, and that Japan itself is still approaching with great caution. But it is out there like a pole star.

The clash at Nikko Taro may have been a surprise but it was also inevitable. On the one hand were Japanese beliefs based on reverence for history and the natural world. On the other hand were new beliefs in modernization and a public works machine impervious to any influence, one of the largest construction programs in the world. No one said "no" to the Japanese Ministry of Construction. Indeed, nobody said "no" to the Japanese Ministry of anything. Saying "no" was not in the vocabulary, not of the legislature, not of people unfortunate enough to be in the way, and certainly not of the courts; which is part of why the case is so remarkable. The Ministry of Construction ran into values that went back a very long way.

A. The Shogun

"Build a small shrine in Nikko and enshrine me as the God. I will be the guardian of peacekeeping in Japan."[1]

The hero of this story died four hundred years ago. The Nikko Toshogu Shrine is dedicated to one of the most influential men in the story of Japan, which is saying a great deal. Indeed, it is dedicated to three men who, together, left a Bismarck-like legacy, conquering and consolidating the country, ending its civil wars, controlling the feudal lords and their samurai, centralizing the government, reducing the Emperor to a figurehead, and imposing moral and social order.[2] The last of the three was Tokugawa Ieyasu, who seized power in 1598 and never looked back.

Some lives are almost too large to imagine, even amidst the surreal violence and turmoil of samurai-driven, sixteenth century Japan.[3] Tokugawa Ieyasu was

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[1] Nikko Tourist Association, Ieyasu's Last Instruction and Toshogu Shrine, http://www.nikko-jp.org/english/nature/tousyouguu.html (last visited Jan. 22, 2009).

[2] *Id.* Built at the order of Shogun Tokugawa Ieyasu to Kugawa, the shrine also honors two of his illustrious predecessors, Minamoto Yorimato (deceased 1199) and Toyotomi Hideyoshi (deceased 1598). Japan-guide.com, Toshogu Shrine, http://www.japan-guide.com/e/e3801.html (last visited Jan. 22, 2009).

[3] The history of Tokugawa Ieyasu that follows is taken largely from Tokugawa Ieyasu 1543-1616, http://www.samurai-archives.com/ieyasu.html (last visited June 5, 2009) [hereinafter Ieyasu 1].

born into a family whose internal feuds murdered both his father and his grandfather. By the time he was six, Ieyasu had been sent off as a hostage to a wary ally, only to be kidnapped by yet another rival who threatened to put him to death unless his father agreed to forsake his alliances and change sides. His father refused, saying that the sacrifice of his son would only confirm his existing loyalties.[4] The bluff worked, and by the time Ieyasu was a teenager he was joining a cavalcade of battles, sieges, pacts, betrayals and political shifts that he prosecuted with luck (his armor was penetrated by a bullet in one battle[5]), high ritual (he is said to have sealed a pact with a rival warlord by, together, urinating on his armor[6]), and tactical cunning—a Japanese proverb has it that "Ieyasu won the Empire by retreating."[7]

Along the way Ieyasu had executed his first wife, forced his eldest son to commit suicide, and slaughtered his enemies and their families. After his final siege of the Osaka castle he ordered the deaths of every defending soldier that could be found. A visitor soon after described the sight of "tens of thousands of samurai," their heads "stuck up on planks of wood which lined the road from Kyoto all the way to Fushimi."[8] When the smoke had cleared, only Tokugawa Ieyasu remained standing. And he brought peace.

The Ieyasu legacy includes a castle to end all castles, now the Imperial Palace in downtown Tokyo,[9] and his subsequent celebration in books (the best-seller, Shogun, among others), films, and video games in which he appears as, among other things, heroic warrior, magical leader and the embodiment of evil.[10] More indelibly, however, it also includes the organization of Japanese society around a rigid caste system in which obedience was supreme and social movement impossible.[11] Economic development came in second as well; Japan maintained an extensive road network but wheeled wagons were not permitted

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[4] *Id.*

[5] *Id.*

[6] *Id.*

[7] A.L. SADLER, THE MAKER OF MODERN JAPAN 164 (1937).

[8] JOHANNES JUSTUS REIN, JAPAN: TRAVELS AND RESEARCHES UNDERTAKEN AT THE COST OF THE PRUSSIAN Government 299 (1884).

[9] Edo-Japan: A Virtual Tour—Edo-jo, The Grounds of the Edo Castle, http://www.us-japan.org/edomatsu/edojo/frame.html (last visited June 5, 2009).

[10] *See generally* Powell's Books, Shogun: The Life of Tokugawa Ieyasu, http://www.powells.com/biblio?isbn=9784805310427 (last visited June 5, 2009) (book); The Internet Movie Database, Ieyasu Tokugawa, http://www.imdb.com/character/ch0051397/ (last visited June 5, 2009) (film); Samurai Warriors 2, http://samuraiwarriors2.co.uk/ (last visited June 5, 2009) (videogame) (follow "Characters" hyperlink; then follow "Ieyasu Tokugawa" hyperlink).

[11] Tokugawa Japan, 1603-1868, http://www.wsu.edu/~dee/TOKJAPAN/SHOGUN.HTM (last visited June 5, 2009).

to use it, for their possible use by insurgents.[12] As might be expected from a leader who had risen from chaos, the primary principle was self preservation, and preservation of the existing order.

It worked for a very long time. Within these confines, under Ieyasu and his successor shoguns, Japan experienced a remarkable 250 years of calm and prosperity in which it flirted in trade with the early-adventuring Portuguese and Dutch, and with Christian missionaries as well. These affairs ended, however, with Japan turning inward and becoming self sufficient in agriculture, commerce, religion and culture, a country unto itself, and that sufficed.[13] Few civilizations *anno domino* could say the same.

Sensing the approach of death, Ieyasu ordered the construction of a small shrine at the base of the Nikko Mountains, in the cypress groves.[14] Nothing important stays small for long, however, and within years his successors were building a mega-shrine that has lasted to this day, a compound of more than fifty elaborate, baroque-looking structures adorned with carved monkeys, bears, owls and animals of all description and assorted outbuildings set among sculpted shrubs and trees.[15] The road from Nikko city to the Toshogu Shrine runs thirty-seven kilometers through two lines of towering cypress, 15,000 trees, planted in the 1600s.[16] Leaving the shrine, one crosses the Shinkyo, the Sacred Bridge, built in 1636 for the exclusive use of the Shogun and his emissaries to cross the Daiyagawa River.[17] This bridge, too, would play its role in the *Cedar Tree* lawsuit. In the precinct of the shrine stands a venerable giant named the Taro Cedar, over one hundred and fifty feet tall and nearly twenty feet around.[18] It has been there for six hundred years. In Japanese it is called

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[12] *Id.*

[13] *See* Japan-guide.com, Edo Period (1603-1867), http://www.japan-guide.com/e/e2128.html (last visited Mar. 20, 2009). There is evidence that, had Ieyasu lived longer, he would have taken a more open path with Europe and the West. *See* Louise Jury, *Portrait of a Warlord: Shogun the Facts Behind the Fiction*, INDEPENDENT (LONDON), May 6, 2005, at 18-19, *available at* http://findarticles.com /p/articles/mi_qn4158/is_20050506/ai_n14615357. Turning inward, instead, the country experienced an explosion of cultural life that was uniquely eastern. *Id.*

[14] Japan Atlas, Architecture: Nikko Toshogu Shrine, http://web-japan.org/atlas/architecture/arc05.html (last visited Mar. 25, 2009).

[15] *Id.* Construction of the elaborate shrine is said to have involved "4.5 million craftsmen and laborers working for 17 months at a cost of 200m [$370 million US] in today's money. The receipts and wages bills are still kept within the shrine complex." Jury, *supra* note 13, at 18.

[16] *See* Japan Atlas, Architecture: Nikko Toshogu Shrine, *supra* note 14.

[17] *See* Sacred Destinations: Shinkyo (Sacred Bridge), Nikko, http://www.sacred-destinations.com/japan/nikko-shinkyo-bridge.htm (last visited June 5, 2009).

[18] Toshogu Shrine Religious Org. v. Minister of Constr., 710 HANREI JIHO 23 (Tokyo High Court, July 13, 1973); *see also* JULIAN GRESSER ET AL., ENVIRONMENTAL LAW IN JAPAN 212-15 (1981).

the Nikko Taro. What it stands for goes back to places that are, today, almost incomprehensible to the Western mind.

B. The Shrine

> *The most impressive sight repeated in every place throughout the breadth of this country is nothing other than the union of forest and shrine. . . . Almost as though the Japanese "kami" is just a drop coalesced from the sacred flow, teeming with all of nature. The Japanese shrine is the most compressed architectural expression of the forest as the home of the sacred.*[19]

Shinto shrines are not churches where one goes to pray to the gods. They are way stations for the deities themselves, who spend most of their time at home in their natural precincts but are not above paying a visit to the people at these select locations.[20] Where possible, the shrines are set apart from the town. They are visited for official festivities and, more frequently, by individuals seeking peace. They are built within groves of trees. The roads to them are lined by trees. Even in the most congested cities, the shrines are surrounded by trees. These are not sacred buildings; they are sacred places in a long tradition only recently abandoned by western civilization.

Millennia before the time of temples and churches, the deities who ruled the earth were found out of doors, in the most striking places humans knew.[21] In extreme climates they might be found at a blowhole in the ice or a tropical cave, but in more temperate zones they inhabited deep stands of trees, the "very temples of the Gods" wrote Pliny the Elder.[22] The Romans marked these groves with stones and protected them from the axe, from even the gathering of leaves.[23] The Greeks carried soil up the barren rock of the Acropolis to grow cypress trees.[24]

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[19] Shinto Online Network Association, Civilization of the Divine Forest, http://jinja.jp/english/ci-1.html (last visited June 5, 2009).

[20] *See generally* Shinto Online Network Association, What is Shinto?, http://jinja.jp/english/s-0.html (last visited June 5, 2009). The description of Shinto shrines that follows is taken from this source.

[21] P.S. RAMAKRISHNAN ET AL., CONSERVING THE SACRED FOR BIODIVERSITY MANAGEMENT 100-03 (1998).

[22] C. PLINIUS SECUNDUS, THE HISTORY OF THE WORLD, Book XII (Philemon Holland trans., 1601), *available at* http://penelope.uchicago.edu/holland/index.html ("Trees were the very temples of the gods.").

[23] HESIOD, THE HOMERIC HYMNS AND HOMERICA 425 (Hugh Gerard Evelyn-White trans., W. Heinemann 1920) (1914) (describing sacred forests as the "holy places of the immortals[] and never mortal lops them with the axe").

[24] J.D. Hughes, *Sacred Groves of the Ancient Mediterranean Area: Early Conservation of Biological Diversity*, *in* CONSERVING THE SACRED FOR BIODIVERSITY MANAGEMENT, *supra* note

So it was with later Celts and Germans, who considered the oak a tree of divinity, and in the Baltics where deities guarded the groves and punished those who dared to whistle or shout within them.[25] Africa followed the same call, and even now, at the end of the twentieth century, there remain 2,000 sacred forests in Ghana alone.[26] A European traveler to Africa, visiting a rock ledge framed by tall trees and a cascading waterfall asked, "how do you know God is here? Can you see the figure of God?"[27] A hunter guide answered, "I cannot see the figure of God. But I know God is here."[28] The trees-God story is similar across India, Sri Lanka and the civilizations of the East. Around the world, however, it reached its zenith in Japan.

The Japanese islands may qualify, acre per acre, as the most beautiful landscape on earth. Certainly the Japanese think so. An 18th century poet wrote, "Our country, as a special mark of favor from the heavenly gods, was begotten by them, and there is thus so immense a difference between Japan and all the other countries of the world as to defy comparison."[29] The Nihonshoki, Chronicles of Japan, explain how it came to be that way.[30] One day, Susanoo-no-mikoto, the deity who founded Japanese culture, plucked off a hair from his beard and made a cedar tree. Hairs from his eyebrow, breast and buttocks soon followed and before long there were laurel and cypress and black pine, woods and then a country of trees. Which may help explain why two-thirds of one of the most densely-populated nations in the world remains covered in forest.[31] That, and the fact that the Tokugawa Shoguns imposed a massive reforestation program that has been maintained, through war and peace, to this day.[32] In the isolation of the Japanese islands, daily contact with the forests and a sense of human limits prompted a mix of beliefs based on animism, shamanism, and the worship of natural things, above all, the trees.[33] Gradually, a few centuries

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21, at 103. The Christian Bible's book of Genesis has Abraham building an altar in the holy oaks. *Genesis* 21:33 (King James) ("And Abraham planted a grove in Beersheba, and called there on the name of the Lord, the everlasting God.").

[25] Jay H.C. Vest, *Will-of-the-land: Wilderness among Primal Indo-Europeans*, 9 ENVTL. REV. 323-29 (1985).

[26] Mike Anane, *Religion and Conservation in Ghana, in* UNITED NATIONS NON-GOVERNMENTAL LIAISON SERVICE, IMPLEMENTING AGENDA 21: NGO EXPERIENCES FROM AROUND THE WORLD 99-107 (Leyla Alvanak & Adrienne Cruz eds., 1997).

[27] Shinto Online Network Association, What is Shinto?, *supra* note 20.

[28] *Id.*

[29] ALEX KERR, DOGS AND DEMONS: TALES FROM THE DARK SIDE OF JAPAN 13 (2001) (citing Hirata Atsutane (1776-1843)).

[30] The Shinto Online Network Association, What is Shinto?, *supra* note 20. The earth-story that follows is taken from this source.

[31] *Id.*

[32] JARED DIAMOND, COLLAPSE 294 (2005). The Japanese, instead, take every tree they can from other countries of the world where they are less revered.

[33] The Shinto Online Network Association, Civilization of the Divine Forest, *supra* note 19

after Christ, these beliefs would coalesce into Shinto, the dominant religion of Japan.[34]

Shinto confounds the western mind. It has no defining text, no powerful God, no set of commandments, no fixed prayers, not even an afterlife to inspire faith, or fear.[35] It is focused entirely on the here and now, on living a good life, for which there are but four guiding principles: tradition and family, cleanliness, ancestors, and a respect for nature.[36] Descriptions of Shinto emphasize the role of nature as the "manifestation of divine power."[37] To be in touch with nature is to be in touch with "kami," the divine spirits of Shinto.[38] The shrine made that connection, again with majestic trees. These beliefs remained pervasive but informal until, in the sixth century, Japan experienced its first great confrontation with the outside world: China.[39] Japan's response is worth noting for what would come centuries after and lead, among other things, to World War II and, later still, the confrontation between the highway industry and the shrine for Tokugawa Ieyasu at the foot of the Nikko mountain range. Japan would incorporate the invading influence. Then it would pour incredible energies into going it one better. Absorb and conquer.

And so at a time when Rome was dying, Constantinople was rising and packs of Goths roamed the woods of Europe, the Japanese were absorbing everything Chinese from city planning to silk robes to writing, painting and

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(describing Shinto as "religion of the forest"); Paul Watt, *Shinto & Buddhism: Wellsprings of Japanese Spirituality*, *in* ASIA SOCIETIES FOCUS ASIAN STUDIES, 1 ASIAN RELIGIONS (1982), *available at* http://www.askasia.org/frclasrm/readings/r000009.htm (describing early Shinto as "an amorphous mix of nature worship, fertility cults, divination techniques, hero worship and shamanism); Asia for Educators, Shinto, http://afe.easia.columbia.edu/japan/japanworkbook/religion/shinto.htm (last visited June 5, 2009).

[34] Japan-guide.com, Shinto, http://www.japan-guide.com/e/e2056.html (last visited June 5, 2009) (most sources, including this one, say Shinto is the predominant religion alongside Buddhism).

[35] Japan Reference, Shinto, http://www.jref.com/glossary/shinto_ traditions.shtml (last visited June 5, 2009).

[36] *See id.*

[37] N. Alice Yamada, *Japan: The land of Shinto*, TRINCOLL J., Apr. 4, 1996, *available at* http://www.trincoll.edu/zines/tj/tj4.4.96/articles/cover.html.

[38] *See* Hugh Johnson, *On Seeing the Forests for the Trees*, N.Y. TIMES, May 19, 1991.

> Today their shrine's sweeping tile roofs are gray rollers tapped and tossing in fjords of immense cliff like sugi [cedar trees]. They stand in great docs of granite among Piranesi staircases, among roaring runnels, with moss and ferns infiltrating wood and stone, steps and lanterns and the stony boles of the titanic trees, the main pillars of this incomparable temple.

Id.

[39] Japan-guide.com, Buddhism, http://www.japan-guide.com/e/e2055.html (last visited June 5, 2009).

song.[40] Not to be outdone by Confucian texts, they wrote their own books of Shinto and in them reasserted Japanese primacy over the world they knew.[41] The very name Shinto was taken from the Chinese "shin tao," meaning "the way of the Gods."[42] They absorbed Buddhism as well, with which, particularly in its view of the natural order, Shinto was handily compatible.[43] They blended Chinese beliefs with their own to the point that Shinto covered the current world, as in marriages, while Buddhism covered the next, as in funerals, a win-win accommodation.[44] All of which is reflected in the Shinto shrine.

It was not until more than 1000 years later that a completely different set of beliefs based on a vengeful God, only one deity and jealous of all others, with no sacred groves and an agenda to correct sinning mortals and conquer the natural world would confront Japan for a second, earth-shaking time with the tools of war and material progress. The outcome of that confrontation is still in play.

C. The Highway

"Asphalt blanketing the mountains and valleys . . . a splendid Utopia."[45]

As highway ideas go, the Nikko road had its merits. Even by the late 1950s, the town of Nikko was one of the most visited tourist attractions in Japan.[46] Its historic buildings, set against the mountains and the Nikko National Park and close to the famous Toshogu Shrine, were a sort of Williamsburg-cum-Colorado Rockies experience, throw in only a two hour drive from Tokyo.[47] The main road was inadequate for the traffic, however, and was pinched into an

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[40] Japanzone.com, Shinto, http://www.japan-zone.com/omnibus/shinto.shtml (last visited June 5, 2009).

[41] *See* Watt, *supra* note 33. The consolidation of Shinto had internal political ends as well, to "shore up support for the legitimacy of the Imperial House, based on its lineage from the Sun Goddess Amaterasu." *Id.*

[42] Religioustolerance.org, Religions of the World, Shinto, http://www.religioustolerance.org/shinto.htm (last visited June 5, 2009).

[43] *See generally* Senaka Weeraratna, Animal Friendly Cultural Heritage and Royal Decrees in the Legal History of Sri Lanka, http://online.sfsu.edu/~rone/Buddhism/BuddhismAnimalsVegetarian/AnimalFriendlySriLanka.htm (last visited June 5, 2009) ("Oh! Great king, the birds of the air and the beasts have an equal right to live and move about in any part of this land as thou. The land belongs to the people and all other beings and thou are only the guardian of it.").

[44] Religioustolerance.org, Religions of the World, Shinto, *supra* note 42.

[45] KERR, *supra* note 29, at 50.

[46] Japan Atlas, Architecture: Nikko Toshogu Shrine, *supra* note 14; Japan-guide.com, Nikko, http://www.japan-guide.com/e/e3800.html (last visited June 5, 2009); Japan-guide.com, Orientation, http://www.japan-guide.com/e/e3805.html (last visited June 5, 2009).

[47] Toshogu Shrine Religious Org. v. Minister of Constr., 710 HANREI JIHO 23 (Tokyo High Court, July 13, 1973).

unsupportable bottleneck—from over fifty feet to less than twenty feet—near the shrine.[48] To one side of the bottleneck was the historic Shinkyo Bridge and to the other a line of ancient trees, including the Taro Cedar.[49] A solution was urgent. Japan was preparing to host its first Olympic Games, and its international face was on the line. Foreign press and visitors were going to pour up to Nikko and nobody wanted them stuck in traffic and blaming the Japanese.

To its credit, the Ministry of Construction did consider alternative routes.[50] Basically, it could blow through the bottleneck, tunnel under it, or build a new road around the Shrine valley. According to its analysis, new routes would cost up to $1.3 billion yen (approximately $10 million) while the straight shot, Plan A, cost only $43 million yen (below $500 thousand), or less than one-twentieth of the price tag.[51] On any scale of economic rationality, taking a few trees made sense. Even the National Park Council, a governmental body with jurisdiction to protect the natural resources of the area, concurred with Plan A.[52] In the national interest, the Taro Cedar and fourteen other trees slightly less imposing would have to go.[53] In one sense, that is all this case was about.

In another sense, it was not what this case was about at all. Below the surface, it was about Japan accommodating itself to another huge intrusion, and how that accommodation would square with other long-held traditions of Japanese culture. Back before the time of the Tokugawa shoguns, the Portuguese had uncovered the possibilities of trade with Japan, and maintained a low level of commerce for many years.[54] As Japan turned inward, however, the commerce dried up, to the great irritation of the Western sea powers and their market agendas. In 1853, U.S. Admiral Perry sailed into Tokyo harbor with four warships and announced, quite unilaterally, an "open door" policy for Japan.[55] In what passed for diplomacy at the time, Perry gave Tokyo some time

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[48] GRESSER ET AL., *supra* note 18, at 212.

[49] Toshogu Shrine Religious Org., 710 HANREI JIHO 23, para 1.

[50] *Id.* para. 2.

[51] *Id.*

[52] *Id.* para. 5; *see also* GRESSER ET AL., *supra* note 18, at 215 (discussing Park Council's approval, which attached several hopeful but unenforceable conditions, such as minimizing the cutting of interfering trees); Mitsuo Kobayakawa, *Project Approval and Requirement of Article 20, Item 3 of Land Expropriation Law (the* Nikko Taro-Sugi *Case), in* 103 BESSATSU JURIST, para. 2 (1989).

[53] GRESSER ET AL., *supra* note 18, at 212.

[54] JAMES L. MCCLAIN, JAPAN, A MODERN HISTORY 42-43 (2002). The first Portuguese arrived, by accident (sailors blown off course) in 1543. Traders and Jesuit missionaries soon followed. THE WORLD BOOK OF KNOWLEDGE, JAPAN vol. J-K, at 44 (1987); Japan-guide.com, Muromachi Period: 1333-1573, http://www.japan-guide.com/e/e2134.html (last visited June 5, 2009).

[55] Sean McCollum, *"Barbarians" Open up Japan: Commodore Perry Broke Through*

to think about it and returned the next year with more gunships and an ultimatum.[56]

Faced with open-door-or-else, and enticed by the prospect of American technology and weaponry, Japan signed a number of trade treaties that, among other things, brought down the Tokugawa reign and restored the Emperor to power.[57] Once more, the absorb-and-conquer response, so successful with China, kicked in, this time to meet the mercantile culture of the west. Japan launched a boom in manufacture, science and technology rarely seen for speed and success.[58] Within a few decades, Japan had beaten the Soviet Union in head-to-head sea battles, was rivaling the western powers throughout the Pacific and headed full tilt towards World War II.[59] Japan had created a miraculous machine. The problem was it had no brakes, and it crashed.

The lessons of World War II were several, but near the top of the list was the realization that Japan had been out-produced on the assembly line, and then trumped on the technology front by the atomic bomb. Back to the drawing board; absorb-and-conquer. Within a few decades more, Japan was leading the world in the design and manufacture of electronic instruments, automobiles and the construction of highways. It had adopted more than a U.S.-style Constitution. It had adopted the post-war U.S. recipe for economic development: massive public works construction. In 1955 America began an interstate highway program that would become the largest construction project on earth.[60] As of 2007, the U.S. program remains uncompleted, by its very definition (the satisfaction of driving demand) it can never be completed, and Congress appropriates several hundred billion dollars every few years to keep it going.[61] The idea of moving people from A to B came in second. Highway money, political power, and construction jobs became their own rationale. The program had few checks and no balance. It was quintessentially American, and, for Japan, it afforded a model to be pursued and imitated like rock music and fast food. Japan was very good at imitating, and then going one better.

Japan's Secret World 150 Years Ago, N.Y. TIMES UPFRONT, Apr. 18, 2003, *available at* http://findarticles.com/p/articles/mi_m0BUE/is_13_135/ai_ n18615512/.

[56] *Id.*

[57] Nobutaka Ike, *Western Influences on the Meiji Restoration*, 17 PAC. HIST. REV. 1, 4-5 (1948).

[58] RICHARD R. NELSON, NATIONAL INNOVATION SYSTEMS: A COMPARATIVE ANALYSIS 79-81(1993).

[59] JOHN TOLAND, THE RISING SUN: THE DECLINE AND FALL OF THE JAPANESE EMPIRE 61 (1970).

[60] *See* Oliver A. Houck, *More Unfinished Stories:* Lucas, Atlanta Coalition, *and* Palila/Sweet Home, 75 U. COLO. L. REV. 331, 373-74 (2004) (describing rise of the U.S. federal aid highway program).

[61] *See Transportation Bill Cruises Through Senate*, TIMES PICAYUNE, Nov. 1, 1995 (senate approved $37.5 billion in transportation while cutting other programs).

D. The Paradox

"[T]he problem is not that traditional values have died but that they have mutated. Maladapted to modernity traditional values become Frankenstein's monster, taking on terrifying new lives."[62]

In his minor classic on modern Japan, Alex Kerr writes with love and despair of the rise and invincibility of what he terms the Japanese Construction State. Its chief actor is the Ministry of Construction, and its chief projects are highways and dams. Kerr's data are impressive. At eighty trillion yen, the Japanese construction market is the largest in the world, nearly twenty percent of the country's Gross National Product, compared to about eight percent in the United States.[63] Forty percent of the national budget goes to public works, versus less than ten percent in America.[64] The numbers on the consumption of concrete alone are staggering. In 1994, Japan out-produced the United States by thirteen million tons.[65] On a square foot basis, Japan was paving at a rate 30 times that of their American counterparts.[66] In roads, followed soon by automobiles, the Japanese were beating the Americans at their own game. And they were not stopping here. In 1996 the Shimuzu Corporation, one of the country's biggest construction firms, announced a new process for making cement on the moon.[67] The general manager of its Space Division affirmed: "It won't be cheap to produce small amounts of concrete on the moon, but if we make large amounts of concrete, it will be very cheap."[68]

At which point, in a landscape of limited dimensions, the Japanese road building system had to begin looking for new reasons to build. It found them in the politics of local rewards[69] professional contracts and bureaucracies whose primary means of demonstrating success were to spend all of their budgets and ask for more.[70] The buy-in was massive Kerr writes of the highway project syndrome:

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[62] KERR, *supra* note 29, at 37.

[63] *Id.* at 20.

[64] *Id.*

[65] *Id.* at 47.

[66] *Id.* By Kerr's data, in the decade 1995-2005 Japan will have spent three to four times more than the United States on public works, a country with twenty times more land area and more than twice the regulations. *Id.* at 17.

[67] *Id.* at 49.

[68] *Id.* (citing J. Ryall, *Next Big Tourist Destination—The Moon*, JAPAN TIMES, June 22, 1996 (quoting Matsumoto Shinji)).

[69] *Id.*

[70] *Id.* at 20 (explaining that a good percentage, traditionally about one to three percent of the budget of each public project, goes to the politicians who arrange it).

> Bureaucrats educated in the best universities plan them, consulting with the most respected professors; the finest engineers and landscape artists design then; architects draft far-reaching civil engineering schemes for the future; companies in the forefront of industry build them; leading politicians profit from them; opinion journals run ads in their pages in support of them; and civic leaders across the nation beg for more. Building these works and monuments consumes the mental energies of Japan's elite.[71]

As another reporter observes, the combination of money and politics was invincible:

> Almost all of the major highways are toll roads, and some make money. Many do not and some are incredible money losers. There have been cases of bridges costing billions and billions of yen, but hardly have ten vehicles passing over them per day. . . . There is strong economic logic for these highway investments, overwhelming in rural areas, for two groups. One of course is the construction companies which build these highways, and the other is the politicians of the long ruling Liberal Democratic Party. The relationship of the construction companies and the party are incestuous.[72]

The impacts were also massive: valleys paved for roads, hillsides covered with asphalt to prevent erosion, mountain passes leveled, tourist sites dwarfed by overhead lanes and cloverleaf ramps, each a tangible symbol of the modern way.[73] Highway construction was bankrolled by revenues from the Japanese postal service, whose "bulging coffers" made it the world's largest financial institution.[74] There were no brakes. Save, just perhaps, on the margins, at some unforeseeable point in the future, the restraints of environmental law.

What happened, one might ask, to the commitments of Shinto, the sacred forests and the Way of the Gods? At one level, the same submission to Western values that substituted T.V. dinners for rice and sake and the music of the Dead Presidents for *haiku*. Speaking of the need for a questionable transportation project in his district, a local mayor explained its purpose: "so that people can feel they have become rich."[75] They are joining the modern world. Another answer to the same question, however, is found in poetry, Shinto, and a different face of Japanese culture. Nature, in Japan, was never red in tooth and claw. That kind of nature was feared and propitiated, part of

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[71] *Id.* at 48. "Budgets that must be spent and programs that must expand in order to maintain the delicate balance among ministries—such is the background for the haunting, even weird aspect of Japan's continued blanketing of its landscape with concrete." *Id.* at 23.

[72] Roderick H. Seeman, New Highway Company Reform (2005), http://www.japanlaw.info/law2004/JAPAN_LAW_2004_NEW_HIGHWAY_COMPANY_REFORM.html (last visited June 6, 2009).

[73] KERR, *supra* note 29, at 48-49.

[74] *Id.*

[75] *Id.* at 29.

the dark side.[76] It was the enemy. Over time, Shinto and a myriad of traditions from bonsai tree sculpture to the tea ceremony, floral arrangements and white stone lawns—the very definition of the Japanese garden—evolved to put nature under detailed order.[77] Shinto's goal was harmony, and harmony required control.

From these roots rose two important consequences for a decision on the Nikko highway and the Taro Cedar. One was the imperative of the control of nature. Kerr writes of the problem current Shinto shrines face in the reactions of visitors to finding tree leaves on the ground.[78] The leaves are seen as dirty, messy, a violation of order, a loss of control. Local highway departments cut the limbs of trees on city streets—not dead limbs but live ones, not partially but the whole limb—because they drop their leaves.[79] Local residents complain of the disorderly croaking of frogs in parks and woodlands.[80] Highways surmount these anxieties quite completely; you can drive anywhere and look at nature from the health and safety of your car.

The second consequence was obedience. Japanese education teaches conformity from early childhood as lesson one, moving in unison, following the leader.[81] "[W]hen the Japanese talk about harmony it means a denial of differences and an embrace of sameness," says Dr. Miyamoto Masao, formerly of the Ministry of Health and Welfare.[82] The saying is learned: "the blade of grass that raises its head feels the sickle."[83] In such a circumstance what type of soul would raise a head to oppose a Ministry of Construction project or, for that matter, any government action affecting the environment?

The culture of obedience, in the context of the Nikko highway, was reinforced by yet a third force, the culture of the bureaucracy, an institution of impregnable power. Throughout Japanese history, the Emperor was the offspring of the chief deity, the sun itself of the land of the sun. Warlords of one vein or another were absolute monarchs for more than a millennium. Their officials were ranking Samurai: feared, respected and above all obeyed.[84] With modernization, Japanese government agencies inherited their mantle.

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[76] *Id.* (quoting Nakaoti Yutaka, Governor of Toyama Prefecture).

[77] *Id.* at 36-39.

[78] *Id.* at 32-33.

[79] *Id.*

[80] *Id.* at 33-34.

[81] *Id.* at 285.

[82] *Id.* at 290.

[83] Interview with Osamu Nagatomo, L.L.M. Candidate, Tulane Law School, in New Orleans, La. (May 10, 2004) (describing Japanese education and attitudes). Mr. Nagatomo is now a legal practitioner in Tokyo.

[84] GRESSER ET AL., *supra* note 18, at 230 ("From the peaks of lofty superiority, the bureaucracy surveyed the rest of society with vast distain—the maxim, officials honored, the people despised [Kanson minpi], epitomized the prevailing attitude.").

They were a closed aristocracy. While United States and other Western agencies were open to entry at all levels, Japanese ministries recruited at the bottom and employment was for life.[85] The judicial process was also at their disposal, and judicial review of their actions was unheard of.[86] Even today it is rather difficult to hear.[87] Citizen participation was minimal, and designedly so.[88] Government ministries, which of course knew best, were further supported by a cadre of retired employees now working for the same constituencies that the ministries did—architectural offices, construction firms—a practice not surprising to anyone familiar with the revolving doors of Washington, D.C. The name given to this cadre in Japan is rather unique: They are called "amakudari," which means "descended from heaven."[89]

Whatever the adherence to Shinto, then, the Construction State and its highway program reflected a cultural commitment to the control of nature, obedience to superiors, and the conviction that a tight concert of industry and government ruled. These cultural roots present an obvious challenge to the development of environmental law.

E. Precursors

> *Back in 1963 you would wash something, hang it out to dry and it would be black immediately. You would wash it again, and a third time . . . and yet we still shut up and took it didn't we? "For the sake of the country," "for the sake of industrial expansion." . . . There's nothing we can do. No one said anything. Even now you hear, "Those nine people [plaintiffs] know there's something in it for themselves"—that kind of thinking still exists.*[90]

It may be surprising for a westerner to learn that Japan's confrontation with environmental protection is not new, nor is recourse to the courts to address it. As would be expected, it arose each time from the country's fevered dedication to emulate the industry of its Western conquerors. No sooner had Admiral Perry succeeded in the "opening" of Japan than the new Meiji government embarked on full-court industrialization (working slogan: "increase of industrial products").[91] It was a "Copernican changing time," and in the frenzy feudal lords and local governments caught the wave by destroying their old

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[85] *Id.* at 133-35.

[86] *Id.*

[87] *Id.*

[88] *Id.* at 107.

[89] *Id.*

[90] *Id.* at 39.

[91] Shiro Kawashima, *A Survey of Environmental Law and Policy in Japan*, 20 N.C. J. INT'L L. & COM. REG. 231, 232-33 (1995).

castles (new allegiance ran to the Emperor only) and Buddhist temples (Shinto was declared the exclusive state religion).[92] Only later did the Emperor decree the protection of shrines and historic sites.[93]

The price for this all-at-once industrialization was massive, uncontrolled pollution on a people that had never experienced it. The first case arose in the late 1880's over contamination from the Furukawa Mining Company, which was exploiting a huge copper deposit on the Watarase River, upstream from the village of Yanaka.[94] With their fish poisoned and their fields dying, Yanaka villagers petitioned the government for a cleanup. In so doing they were challenging a plant responsible for forty-eight percent of the country's copper production, the nation's third most important export. They did not stand a chance. The legislature refused to act. When the villagers marched in protest, they were arrested and tried on criminal charges. Their leader, a member of the House of Representatives at the time, tried to appeal to the Emperor, for which he was imprisoned for blasphemy. Provoked by the public uproar, the government finally came up with a bizarre, if pragmatic, solution: it condemned the contaminated lands and then flooded them for a reservoir. "The villagers were . . . evicted with little or no compensation."[95] The outcome was hardly just, but the first alarm bell of an environmental problem had sounded.

A series of similar cases followed, most notably one in 1916 against Osaka Alkali, a copper refining company.[96] Local farmers sought damages for heavy crop losses, and the Supreme Court, while not requiring the company to adopt pollution controls, imposed civil liability for not adopting them.[97] The path was now cleared for lawsuits seeking money for damages. Following the Second World War, Japan launched its second, great industrialization offensive and it was not long before people suffering strange illnesses, in great numbers, started going to court. All pollution has its price, but the price tags in these cases were terrible. One case was called "*Toyama itai-itai*," as the victims of cadmium poisoning cried out "it hurts, it hurts!"[98] The responses to these complaints by government and industry set a mold of their own, in turn. Flat denial, concealed evidence, science for hire, blame-the-victims, and most reliably, stall-the-case-until-the-victims die. All the maneuvers later seen in U.S. litigation over industrial asbestos, contraceptive devices, cotton dust,

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[92] *Id.* at 233 n.4.

[93] *Id.*

[94] *Id.* at 4.

[95] Kawashima, *supra* note 91, at 235.

[96] GRESSER ET AL., *supra* note 18, at 12, 13; Kawashima, *supra* note 91, at 234-36.

[97] *See* Kawashima, *supra* note 91, at 236.

[98] GRESSER ET AL., *supra* note 18, at 30.

tobacco and automobile safety played out in Japanese courts, which faced similar issues of great complexity and social impact.[99]

Among the many such lawsuits filed, four reached notoriety and are known as the "Big Four" in Japanese legal history.[100] The most notorious was the discovery of Minamata Disease in families ingesting methyl mercury from the discharge of the Chisso Chemical Company in the Kumamoto Prefecture.[101] In 1967, the courts convicted Chisso of knowing endangerment and of active concealment of its data on the disease.[102] Petitions for damages, however, dragged on for twenty years without resolution.[103] Two more cases in this vein stemmed from pollution around Yokkiachi City: a Louisiana-scale complex of oil refineries and petrochemical and power plants.[104] People got sick, then they started dying.[105] The government would not act. The companies would not act. In the same year as the Minimata case, shortly after one of the Yokkiachi victims committed suicide, twelve others filed suit.[106] Meanwhile, yet another action was rising from villagers who had ingested cadmium released into the Jintsu River by the Mitsui Mining and Smelting plant.[107] Company doctors insisted that their illnesses were simply nutritional problems.[108] The government agreed. In 1968, a suite of victims filed suit. By the time the case was decided twenty-one of them had died.

The Big Four litigation was long, drawn-out, and in the end, for the plaintiffs, unsatisfactorily. They sought damages, because damage actions were all that were available to them, and damages for dead relatives are hardly anyone's first choice. In no case did the courts seek to enjoin or abate the pollution; that would have required more from courts than the judiciary was ready to deliver. On the positive side, however, these cases drew enormous media attention and public sympathy, educating, changing a mindset: there was a problem, the government and industry were not Gods, they had acted badly, they needed to deliver better answers.[109] These cases thrust the courts, willing or not, right into the mix and into the role of examining industrial actions, and, indirectly, governmental actions. The prevailing culture of harmony and

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[99] *Id.* at 9 (citing Japanese scholar Jun Ui); *see also id.* at 31-33, 39-40 (referring to tactics such as stonewalling and blaming the victim); *see also* Kawashima, *supra* note 91, at 239-41 (prolonged delays).

[100] GRESSER ET AL., *supra* note 18, at 55.

[101] *Id.* at 29-30; *see also* Kawashima, *supra* note 91, at 239-40.

[102] Kawashima, *supra* note 91, at 240.

[103] *Id.*

[104] GRESSER ET AL., *supra* note 18, at 29-30, 105-23.

[105] *Id.* at 30.

[106] *Id.*

[107] *Id.* at 55.

[108] *Id.* at 55-64. The description of the *Itai-Itai* case that follows is taken from this source.

[109] *Id.* at 34-36.

obedience had failed, conciliation had not worked and the machine was malfunctioning.[110] There was a judicial role.

Each of the Big Four cases, however, was in the early stages of its own awakening when, in 1963, the Nikko highway came along. Few people were worried about environmental protection of any kind, and even the victims remained largely in a blame-yourselves and pray-to-the-gods mode. All seemed quiet on the environmental front. But the next case out of the box would come from left field, indeed a throwback to the escapades of the old Meiji regime. People were going to destroy the trees of the Toshugo shrine. The shrine would sue, and it was not asking for money damages. It wanted to stop the road.

F. The Opinion

> *"The preservation of the environment and these values should be given the utmost consideration by the administrative agencies involved because these are factors that provide the people with a healthy and culturally satisfying life."*[111]

Stripped of its factual findings, the *Cedar Tree* opinion is quite short.[112] Six paragraphs of no more than thirty lines each, packed with as much meaning as a *haiku* poem. The opinion affirmed a trial court decision that was long on facts, but short on the law. For good reason: there was no law. On appeal, the Tokyo High Court was acting on a new sheet of paper. The only environmental agencies involved in the project, the Ministry of Health and Welfare and the Natural Park Council, had, albeit with apparent reluctance, agreed to the highway plan.[113] Nonetheless, the High Court reached conclusions that have since been captured as principles of national law in the United States and elsewhere, including international law. The court reached them on the basis of its gut, its sense of values, its sense of history, and its common sense about rational government decision making. It looked at the environmental approvals with skepticism, and it looked at the Ministry of Construction, the Colossus of Japan's domestic ministries, and saw feet of clay. It enjoined the project.

The first notable thing about the *Nikko Taro* opinion is the court's reach for law to apply. There was no environmental law at the time, zero. For its part, the Land Expropriation Law allowed government ministries to condemn lands, such as the hillside and trees adjoining the Toshogu Shrine, provided that the project "contribute[d]" to an "appropriate and reasonable use of land."[114] A

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[110] *Id.* at 37-38.

[111] *Id.* at 223.

[112] *Id.*

[113] *See id.* at 215.

[114] *Id.* at 212-13; *see also* Mark A. Levin, *Essential Commodities and Racial Justice: Using*

more permissive legal standard would be hard to find. The Ministry of Construction had been building highways and appropriating their rights of way for decades. To be sure, it had to pay compensation, but it had the right to take the land. Public roads were by definition and by legislative authorization "appropriate and reasonable" uses of land. However, they were national priorities. Even without this momentum, even under the generous "law to apply" standard of the U.S. Administrative Procedure Act,[115] a phrase such as "appropriate and reasonable" would be extremely difficult to enforce.[116]

Courts, it is widely said, do not exist to decide what is best for society.[117] Particularly so for the courts of Japan influenced by the civil law tradition the mantra of which is, all-we-do-is-apply-the-written-word. Deciding what is "reasonable" is for the other two branches of government.

And yet, the court held this condemnation to be inappropriate, unreasonable and unlawful. How could it do that? For one, because it very much wanted to. The saying goes in environmental litigation, "give me the facts, I'll give you the law," and the facts here dominate the opinion from the start. The early sentences of the opinion read: "The land in question is situated at the entrance to the Nikko National Park. It is an awesome composition of man-made beauty with the Sinkyo Bridge painted in red, shrines, the natural beauty of the surrounding forest of huge cedars, and the crystal stream of the Otani River."[118] Clearly, this was, in the words of the trade, an "educated court." It was looking for a hook to save the trees. It found what it needed in, of all places, the Expropriation Act.

In the court's view, the requirement that the highway be "appropriate and reasonable" meant more than that the Ministry could "identify some public benefits" derived from it such as accommodating increased traffic.[119] The

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Constitutional Protection of Japan's Indigenous Ainu People to Inform Understandings of the United States and Japan, 33 N.Y.U. J. INT'L L. & POL. 419, 457 n.137 (2001) ("The minister of Construction or the prefectural governor may authorize the project only when the project fulfills all of the below enumerated conditions: . . . (3) the project plan is one which will contribute to the appropriate and rational use of the land." (quoting [Land Expropriation Law], Law No. 219 of 1951, art. 20(3))).

[115] 5 U.S.C. § 552 (2007); *see also* Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 411 (1971) (articulating standards for judicial review based on the "law to apply").

[116] *See* Multiple-Use Sustained-Yield Act, 16 U.S.C. §§ 528-531 (1960); Michael C. Blumm, *Public Choice Theory and the Public Lands: Why Multiple Use Failed*, 18 HARV. ENVTL. L. REV. 405 (1994); *see also* Norton v. S. Utah Wilderness Alliance, 542 U.S. 55 (2004) (discussing how the degree of administrative discretion makes failure to act unreviewable).

[117] *See* Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 SUFFOLK U. L. Rev. 881 (1983).

[118] Toshogu Shrine Religious Org. v. Minister of Constr., 710 HANREI JIHO 23 (Tokyo High Court, July 13, 1973).

[119] *Id.* para. 1.

Ministry also had to find the highway "necessary"[120] and "worth the cost of such environmental deterioration and destruction."[121] The court was introducing two new standards, neither of them explicit in the statute, each of tremendous potential.

The first was necessity. Noting that one could build a highway practically anywhere—so much for deference to the Ministry of Construction—key to what is "necessary" was the availability of alternatives.[122] Here, the Ministry had alternative routes, and if the routes were more expensive to build then it might be possible to operate them as toll roads.[123] What emerged is a standard very similar to that of U.S. law, requiring highway projects to avoid taking parks and cultural sites unless there is "no feasible and prudent alternative."[124] Only there was nothing remotely similar to this provision in Japanese law. From the Expropriation Act, the Tokyo High Court invented one of the most powerful protections on the books. And that was only the beginning.

Turning to the "worth the cost" standard, the high court also found that the Ministry was wrong in concluding that the highway's benefits exceeded its costs.[125] Here, the court made its feelings plain: "We wonder," the court mused, if a route that avoided the valley completely would be economical "if the benefits of the preservation of the cultural value of the area were considered."[126] Once again, without the assistance of law, speaking to natural and cultural values, the court squeezed out a new concept for environmental decision-making, the weighing of environmental costs against benefits, subject to judicial review.[127]

There was more. The court put a heavy thumb on the scales. "The preservation of the environment and these values should be given the highest importance," it pronounced, "because these are factors that provide the people with a healthy and culturally satisfying life." Highest means first place. Had preservation of the environment been given priority consideration, it implied, preservation would have prevailed. Indeed, it added, a decision to take *all* automobiles away from this road and convert it into a "pedestrian walk" might

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[120] *Id.*

[121] *Id.*

[122] *Id.*

[123] *Id.*

[124] 23 U.S.C. § 138(a)(1) (2005); Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402 (1971) (rejecting highway location for failure to prove feasible and prudent alternative), *overruled on other grounds by* Califano v. Sanders, 430 U.S. 99, 105 (1977).

[125] *Toshogu Shrine Religious Org.*, 710 HANREI JIHO 23, para. 3.

[126] *Id.* para. 2.

[127] For a United States parallel, see *Alabama ex rel. Baxley v. U.S. Army Corps of Eng'rs*, 411 F. Supp. 1261 (N.D. Ala. 1976) (rejection of a Corps of Engineers construction project for failure to properly consider environmental costs in its benefit/cost ratio).

prevail.[128] Second-guessing an administrative decision does not get any closer to the administrator's shoulder than this. Can anyone even today, much less in the 1960's, imagine the Ministry of Construction of you-name-the-country abandoning a congested highway to pedestrians?

There was yet another failing. The Nikko highway was apparently being upgraded in conjunction with the construction of other roads in the Nikko area, some intended to accommodate increased tourism and others for industrial development.[129] As most close to the process know, highway planners like to build incrementally—you can't build a system all at once—and are reluctant to reveal the full impact, economic or environmental, of their plans.[130] Revelations only bring questions. The Tokyo High Court was onto to that game too. It called for review of the whole policy "concerning whether other roads should be constructed in the near future for industrial development or tourism in the undeveloped area behind Nikko."[131] Piecemealing would not be allowed. And so the court resolved one of the most chronic issues in the yet-to-be-born environmental review process, dealing with the whole project up front.

Most remarkably with the apparent precedent, the high court exhibited the independence that separates real judicial review from the rubber stamp. It took nobody's word for it. Not the Ministry of Construction, which ended up using the pending Olympic Games to defend its must-build position.[132] Court to Ministry: the Olympics will come and go, this site is forever.[133] Nor would the court take the word of the National Park Council, which had approved the project in part on the basis that some trees had been blown down by a storm, and so the destruction had already occurred.[134] The court visited the site and then had this to say to the Council: it is the trees that didn't blow down that matter, and there are still plenty of them. This court, at almost the same time that U.S. courts were beginning to gainsay the decisions of federal agencies,[135] was willing to make up its own mind. Convergent evolution, a half a world away.

A final aspect of the opinion is still unresolved. The plaintiff in *Nikko Taro* was the shrine itself, defending its property, but the court saw the issue written in larger letters. "Although the plaintiff has private ownership of the land," the

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[128] *Toshogu Shrine Religious Org.*, 710 HANREI JIHO 23, para. 2.

[129] *Id.* para. 3.

[130] *See* Atlanta Coal. on the Transp. Crisis, Inc. v. Atlanta Reg'l Comm'n, 599 F.2d 1333 (5th Cir. 1979) (discussing piecemeal nature of highway construction approvals).

[131] *Toshogu Shrine Religious Org.*, 710 HANREI JIHO 23, para. 3.

[132] *Id.* para. 4.

[133] *Id.*

[134] *Id.* para. 5.

[135] *See* Scenic Hudson Pres. Conference v. Fed. Power Comm'n, 354 F.2d 608 (2d Cir. 1965) (reversing and remanding decision of the Federal Power Commission on environmental grounds).

bridge, trees and shrine also had values that "should be shared and preserved for all the people as their common cultural heritage."[136] This is the aspirational language of environmental statutes and even constitutional provisions some years away. It would support new causes of action based on diffuse public interests, known as citizen suit standing. Another new door cracked ajar.

Suffice it to say, *Nikko Taro* was years ahead of its time. It demonstrated a most un-Japanese willingness to roll up its sleeves, separate out fact from fiction, create law, gainsay a government decision and actually enjoin the project's implementation. However, the question remained; would this decision blaze a new trail within Japan, or would it wander about, in the words of U.S. Chief Justice Vinson, "derelict[] on the waters of the law"?[137] The answer is very Japanese in its accommodation of ambiguity. The answer to both questions is yes.

G. Fall out

"We interpret [Nikko Taro] to be a virtually unprecedented judicial inquiry into the very substance of the planning process [or lack thereof] of the Ministry of Construction."[138]

Modern environmental law came to Japan and to the United States from similar impulses. By the late 1960's there was a widespread perception in both countries that industry and government were out of control, massively so, and needed public remedies.[139] Here the stories depart.

Born of civil litigation over industrial contamination, dying plaintiffs and horribly disfigured victims, Japanese courts took up the cudgel by devising remedies that, after years of delay basically centered on compensating victims. It was a way of having your industrial cake and eating it too. As the role of the government in these problems became more apparent, however, Japanese plaintiffs sought to challenge government decisions in order to *prevent* harm. Whereupon they fell into a Kafka-esque labyrinth of dead ends. Cases would be tried all the way to the Supreme Court only to discover that they had been

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[136] *Toshogu Shrine Religious Org.*, 710 HANREI JIHO 23, para. 1.

[137] Ala. Pub. Serv. Comm'n v. S. Ry. Co., 341 U.S. 341, 357 (1951).

[138] GRESSER ET AL., *supra* note 18, at 223.

[139] *See* text accompanying *supra* notes 85-104. For the American experience, see S. Rep. No. 91-296 (1969) (containing legislative history for the Environmental Policy Act of 1969, and listing a parade of horrors from, inter alia, industrial and chemical pollution); *see also* BARRY COMMONER, THE CLOSING CIRCLE: NATURE, MAN AND TECHNOLOGY (1971) (describing the interference of pollution with the web of life); RACHAEL CARSON, THE SILENT SPRING (1962) (revealing the effects of DDT and pesticides on water quality and wildlife). Both Commoner and Carson's pieces were contemporaneous with and contributed to the American response.

pled in the wrong form.[140] While Japanese procedure, on paper, provided judicial review for government actions, a recent analysis showed fully a quarter of plaintiffs rejected for lack of a "legal interest" in the matter. As in the United States prior to *Storm King* and its successors,[141] a plaintiff only has the right to sue for injuries to persons or property.[142] As most environmental cases do not involve damages to their private values, nobody in Japan reaches the courthouse door. Under rules like these, the ministries remain Gods.

Following *Nikko Taro*, Japanese citizens seeking relief against badly-sited waste dumps,[143] industrial outfalls,[144] highways,[145] airports,[146] urban renewal projects[147] and the like have gone down like so many dead bodies in the Big Four cases.[148] Most never got heard. Those heard were given money damages, when what they wanted instead was a safer location for the dump, or noise abatement at the airport[149] They did not always lose, and in one case against the Ministry of Construction hauntingly parallel to *Nikko Taro* they came close

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[140] *See* Kawashima, *supra* note 91, at 263; *infra* notes 219-20 and accompanying text. After a twelve-year dispute, the Supreme Court in 1981 permitted the recovery of a portion of the damages sought, but dismissed the injunction because the plaintiff petitioners had mistakenly chosen civil rather than administrative procedure. Kawashima, *supra* note 91, at 219; *see also id.* at 264 (citing the *Minamata* case and Frank K. Upham, *After* Minamata, *Cement Problems and Prosecuting Ugame Environmental Litigation*, 8 EULOGY L.Q. 213, 228-34 (1979)).

[141] *See also* Scenic Hudson Pres. Conference v. Fed. Power Comm'n, 354 F.2d 608, 615 (2d Cir. 1965) (confirming citizen standing); Sierra Club v. Morton, 405 U.S. 727 (1972) (denying "originated" standing but granting standing for individuals adversely affected, even aesthetically by government activities).

[142] GRESSER ET AL., *supra* note 18, at 133 (limits on standing); *see also id.* at 35 (injunctions only for property interests); Kawashima, *supra* note 91, at 264. These difficulties remain to this day. *See* Memorandum of Hiroshi Kobayashi to Oliver Houck, Standing Requirement in Japanese Environmental Litigation (Oct. 26, 2004) (on file with author) (describing recent cases denying standing to environmental plaintiffs).

[143] *See* GRESSER ET AL., *supra* note 18, at 149 (describing Yoshgida Town Historic Treatment Facility case).

[144] *Id.* at 160 (describing the Tagonoura Port Pollution case (pulp and paper industry discharges)).

[145] *Id.* at 151 (describing the Hanshin Highway case).

[146] *Id.* at 164 (describing the Osaka airport case).

[147] Memorandum of Osamu Nagatomo to Oliver Houck (May 10, 2004) (on file with author) (describing *Kunitachi Daigaku Dori* litigation).

[148] *See* Kawashima, *supra* note 91, at 261-70 (citing cases after *Nikko Taro*).

[149] *See* GRESSER ET AL., *supra* note 18, at 13-16, 55-132 (describing difficulties for Japanese plaintiffs and inadequacy of relief). In two separate cases, in October 1994 and December 1996, courts resolved air-pollution suits that were more than ten years old by stipulating that damages should be paid to nearby residents, while rejecting demands that the responsible companies be required to halt toxic discharges. In other words, according to Japanese law, you may—after a lapse of decades—have to pay for the pollution you are causing, but the courts rarely require you to stop. Nagatomo, *supra* note 147.

to winning,[150] but in the main, they lost. So how did *Nikko Taro* fare differently, and what difference did it make to the law?

One explanation for *Nikko Taro* is the importance of the plaintiff, the most revered shrine in Japan. The public and the media strongly protested the location of the highway, and courts read newspapers. Because the shrine owned the property it also had the requisite "legal interest," and since the highway was ready to roll there was no question of the suit being premature. Procedurally, then, the case fit into the narrow, approved box for citizen actions.

This said the reasoning of *Nikko Taro* has to be seen as groundbreaking, and unusual opinions come from unusual minds. The presiding magistrate, Kenzo Shiraizi, was more than a member of the Tokyo High Court. He was an administrative law scholar in the vein of U.S. appellate judges of the same era who were reaching, in the manner of convergent evolution, similar conclusions. Judge Shiraizi is famous not only for this opinion but for several others, at least two pitting individuals against transportation decisions, staking new ground for judicial review.[151] In a 1966 lecture, as the *Nikko Taro* case was winding towards his appellate court, he addressed the Tokyo Bar Association on "The Way of Administrative Litigation."[152] Reviewing recent law developments in the United States, England and Germany, he concluded that while, as judge, he would not interfere with the substantive discretion of state ministries, he would ensure proper procedure.

True, but not the whole truth. Because the *Nikko Taro* opinion did not stop with proper procedure, it went on into the very merits of a decision that Judge Shiraizi had told the Tokyo Bar was beyond his domain. There is no way, reading Nikko Taro, that whatever studies, consultation and procedural hoops the Ministry of Construction might jump through to justify taking those trees, the Tokyo High Court was going to allow that road to be built. For people who believe that courts should not be influenced by outcomes, this was a cardinal sin. To those who believe in protecting sacred places, it was a triumph.

There is one last shoe from *Nikko Taro* yet to drop. In reaching its decision, the court spoke powerfully of defending a public interest in the trees and shrine at stake. Suppose, however, that the Toshogu Shrine had accepted a payout

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[150] Kayano v. Kokkaido Expropriating Comm., 1598 HANREI JIHO 33 (Sapporo Dist. Ct., Mar. 27, 1997), *reprinted in* 38 I.L.M. 394 (Mark A. Levin. trans. 1999); *see also* Levin, *supra* note 115.

[151] E-mail from Tadashi Otsuka, Professor of Law, Waseda Univ. Sch. of Law, to Oliver Houck, Professor of Law, Tulane Univ. Sch. of Law (Oct. 25, 2005) (on file with author) (citing Gunma Chuo Bus, 14 Gyosaishu 2255 (Dec. 25, 1963) and Kojin Taxi, 14 Gyosaishu 166 (Sept. 18, 1963)). The Professor concludes that these decisions are considered "to have made a large contribution towards Japanese administrative litigation and jurisprudence." *Id.*

[152] *Id.*

from the Ministry of Construction for the removal of those historic cedars. In a society driven towards consensus and conciliation such a scenario is more than imaginable. Could anyone else defend the trees?

In Japan, the jury remains out. Unlike the United States, whose people fled a government they viewed as tyrannical, established a central government of their own only after great debate, adopted the safeguard of judicial review over government actions within a few years of its founding[153] and profess their faith in the "rule of law," Japan did none of these things. Few Far Eastern societies did. Rather, they developed systems in which the government made public decisions and in which grievances, including those arising from government action, were to be tolerated as long as possible and then conciliated. A Chinese scholar writes, "Due to the ancient Confucian concept of social harmony, law in general is not seen as an adequate mechanism to shape human behavior. Moreover," it continues "individual rights are considered to disturb the social order."[154] "Traditional philosophy," echoes a Japanese scholar a little more graphically, "sees the law as a makeshift technique good only for disciplining barbarians."[155]

This history goes a long way to explain the resistance to citizen enforcement of environmental laws against government and industry in Japan. In the culture, we are supposed to be working together. When the abuses become manifest and people start dying, private suits seeking monetary damages are tolerated. Lawsuits against the government itself, on the other hand, assault a fabric that has bound Japan together for centuries, and, it is possible, may in the long run turn out to produce significant environmental results. America was born in confrontation. It teaches the adversary process as Rule One in its schools of law, and it has developed a highly adversarial process for environmental policy. As recent history shows, a reluctant Administration can paralyze environmental progress altogether.[156] Perhaps Japan can squeeze more juice out of conciliation than the United States can from confrontation.[157]

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

[154] Stefanie Beyer, *Environmental Law and Policy in the People's Republic of China*, 5 CHINESE J. INT'L L. 185, 190 (2006).

[155] Tsuyoshi Kimoshita, Towards Comparative Law in The 21st Century—East and West in Legal Cultures and Modern and Post Modern Law (on file with author).

[156] *See* Oliver A. Houck, *Standing on the Wrong Foot*, 58 SYRACUSE L. REV. 23, 24 (2007) (describing resistance to implementing environmental law by the Reagan and Bush Administrations).

[157] *See id.* at 21 n.122 (listing more than 250 lawsuits challenging EPA Clean Water Act). One can certainly look at litigation over every standard uttered by the U.S. Environmental Protection Agency with a longing for a more conciliatory, non-confrontational approach. This said, the results of voluntary approaches in the United States have not been impressive. *See* Cary Coglianese & Jennifer Nash, *Government Clubs: Theory and Evidence from Voluntary Environmental Programs* (Univ. of Penn. Law Sch., Research Paper No. 08-49, 2008),

But probably not. The phenomenon of high-handed, mistake-prone and politically-manipulated government decisions is common to the world. Government agencies are not evil, but they are very human and they hold the high cards. Game plans for reconciling conflicts like those at the *Nikko Taro*, bridged by good faith and reason, are based more on hope than reality. Unless members of the public can challenge unreasonable government decisions before an impartial and independent body, public values lose. There is simply too much weight on the other side. The *reasoning* of *Nikko Taro* would let the public protect public values in Japan. But they have not happened yet.[158]

H. The Trees and the Bridge

"Highway Approved Near Sacred Site: Ireland approved a highway Wednesday that will pass near the Hill of Tara, an ancient site at the mythological heart of the country."[159]

The issue will not sleep. The Japanese highway program, like its big daddy in the United States and the ones coming in India and China, rolls on. Within this decade China's automobile market will have overtaken Japan's as the second largest in the world; within ten more years it will overtake the United States.[160] Japan's immediate problem, however, seems to be that it has laid so much pavement already that the economics of maintaining it have produced a $350 billion dollar shortfall, prompting a move to "privatize" the highway

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available at http://ssrn.com/abstract=1311340.

[158] In late 2005, the Supreme Court of Japan conferred standing on residents near to a proposed railway project, upsetting the "conventional theory" that "individual residents weren't allowed to seek nullification because urban development projects are not for the benefit of individuals." Fumio Tanaka, *Top Court Ruling Boost For Rights; Decision Helps Residents, Not Just Owners, Fight Public Projects*, DAILY YOMIURI (TOKYO), Dec. 9, 2005, at 3 (quoting an unidentified civil court judge). Called an "epoch-making ruling" by a professor of the Tokyo Institute of Technology, who explained that such "lawsuits can expose faults in the systems and administrative authorities' foul-ups," leading to "more democratic and scientific policy decision making." *Id.* It has to be noted that the accepted plaintiffs were property owners in close proximity to the project who alleged both property and personal injury. *See id.* How those without property interests would have fared remains, by this recent opinion, undecided. On the same front, a Tokyo district judge recently barred expropriation for a new expressway in the city, citing environmental impacts. Again, however, expropriation actions involve private property owners, and, further and somewhat ominously, the judge in the case, who is said to have been "developing a reputation as an activist judge," has since been transferred. Seeman, *supra* note 72. Old systems die hard. If indeed, they die at all.

[159] Shawn Pogatchnik, *Road Past Holy Hill Divides the Irish: Disputed Highway Will Ease Bottleneck*, TIMES-PICAYUNE, May 15, 2005, at A-23.

[160] Kevin M. McDonald, *Shifting Out of Neutral: A New Approach to Global Road Safety*, 38 VAND. J. TRANSNAT'L L. 743, 746-47 (2005).

system.[161] After much debate, however, what emerged was more government construction money. Even the idea of pushing highway contracts out for public bid was left on the cutting room floor. New roads, largely in rural areas, remain the holy grail. More *Nikko Taro* cases are almost certainly in the wings. Where else can new highways go?

One wonders what Shogun Tokugawa Ieyasu would make of all this. Here he was, the ultimate authoritarian chief-of-state. Along comes a challenge to one of his ministries. It is hard to imagine anyone even imagining such a challenge in his time. It is impossible to imagine anyone surviving it. And yet, the Toshogu Shrine was his own memorial, and according to Judge Shiraishi it belongs to all of the Japanese people.[162] As do fresh air and clean water. Tokugawa Ieyasu, meet Kenzo Shiraishi.

The Nikko Taro road still winds through a bottleneck at the Toshogu Shrine. Two narrow lanes curve towards the Sacred Bridge, thick with automobiles on weekends and flanked by tall cedars that reach out into the road and are still scarred by contact with moving fenders.[163] Which would be a misery, except that the Ministry of Construction, rather than try to rehabilitate its decision to widen this stretch of road, decided to build a bypass beyond the valley instead. The Olympics came and went, and were by all reports a success. The personnel of the shrine and the law firms and agencies involved in the *Nikko Taro* lawsuit have gone on as well. What remains is a remarkable judicial opinion, whose promise is largely, but not yet completely, fulfilled.

III. TAJ MAHAL

Our story begins in turmoil. By the late 1960s, the newly-independent nation of India, having united to throw off three centuries of British rule, was beginning to fall apart.[164] Mahatma Gandhi had died, then Jawaharlal Nehru

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[161] Seeman, *supra* note 72.

[162] After long negotiations, objects from the shrine have been lent for display to the Royal Armouries Museum in London, accompanied by two Shinto priests. Jury, *supra* note 13.

[163] Unfortunately the trees are also threatened by development runoff and acid rain, and are dying at the rate of about 100 per year. *Thousands of Cedars Provide Shade Along the 37-Kilometer Nikko Suginamiki in Tochigi Prefecture*, DAILY YOMIURI, June 30, 1998, at 3. Defenders of the tress have also resisted calls for tree pruning and clearing for safety reasons, following the murder of a young girl in the cedar stands. *Natural Monuments Stop Tochigi Residents from Making Area Safer After Killing*, MAINICHI DAILY NEWS, Dec. 16, 2005. Environmental protection knows little rest.

[164] The description of the political chaos, government reaction, and civil and political rights litigation that follows is taken from BIPAN CHANDRA, IN THE NAME OF DEMOCRACY: J.P. MOVEMENT AND THE EMERGENCY (2003); *see also* S.P. Sathe, *Judicial Activism: The Indian Experience*, 6 WASH. U. J.L. & POL'Y 29, 41–59 (2001); Adam M. Smith, *Making Itself at Home Understanding Foreign Law in Domestic Jurisprudence: The Indian Case*, 24 BERKELEY J.

died, followed by a war of partition with Pakistan, border clashes with China and a rapid slide towards feudal systems that predated the government by centuries and religions that took to the streets at the drop of an insult. In 1975, Prime Minister Indira Ghandi, Nehru's daughter, was back for a second try at leadership and hanging by a thread.[165] Sensing the thread about to snap, she declared a state of emergency and suspended the constitution, on which the ink was barely dry.[166] Opposition assemblies and organizations were banned.

Over the next eighteen months, more than 110,000 people were detained, most for political reasons, some without counsel, often without charges.[167] Private lawyers, many from opposition parties, took their cases to court. The Indian courts had no tradition of hearing such cases nor of reversing government decisions, particularly ones that reeked of politics, but this time was different. The provocations were egregious. The lawyers started winning, and an era of civil rights litigation was born.[168] As in the United States, half a world away, environmental rights would follow.

The story resumes in 1983, at a party for young lawyers in the capital city of Delhi.[169] Several had been engaged in the civil rights struggle, including a newcomer from the country by the name of Mahesh Chander Mehta. As Mehta tells it, a man came up to him, visibly angry, and declared that lawyers had become too "greedy,"[170] they were not interested in helping the country. When asked what his problem was, the man replied, "The Taj Mahal is dying—the marble cancer—I have gone to so many lawyers and nobody has taken my case."[171] Mehta, curious but no more and without the slightest background in environmental issues, gave the man his address and asked him to send whatever he had, if he indeed had anything, to back up his claim. That moment, Mehta

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INT'L L. 218, 234-35 (2006); *see generally* P.N. Dahr, INDIRA GHANDI: THE "EMERGENCY" AND INDIAN DEMOCRACY (2008).

[165] Smith, *supra* note 164, at 236.

[166] *Id.*

[167] *Id.* (citing A. Noorani, *Liquidation of Personal Liberty*, 12 ECON. & POL. WKLY 730, 731 (1977)).

[168] *Id.* (citing Noorani, *supra* note 167, at 731).

[169] M.C. Mehta, Address at the Environmental Law Conference, Univ. of Or. Sch. of Law (Mar. 2003) [hereinafter *Mehta Presentation*]. The description of M.C. Mehta and his first encounter with the Taj Mahal that follows is taken from this source. Additional information on M.C. Mehta may be found at *Person of the Year*, FIRST CITY MAG., 1999; Vinod Behl & Onkar Singh, *The Green Crusader*, SUNDAY OBSERVER, Mar. 13, 1994; *Delhi's Green Warrior*, ASIA WEEK, Aug. 25, 1995; Vir Sing, *Environment: Bringing The Polluters to Justice*, EARTH TIMES/ASIA, Feb. 16, 1977; Susan P. Evangelista, Biography of Mahesh Chandler Mehta: The 1997 Ramon Magsaysay Award for Public Service, http://www.rmaf.org.ph/Awardees/Biography/BiographyMehtaMah.htm; *MC Mehta Visits TLS*, TULANE ENVTL. NEWS, Fall, 2003, at 7.

[170] *Mehta Presentation*, *supra* note 169, at 3; *MC Mehta Visits TLS*, *supra* note 169, at 7.

[171] *Mehta Presentation*, *supra* note 169, at 3.

recalls, changed the course of his life. He went home pondering the accusation. It was true, lawyers *were* a greedy lot. He was a religious man, and he felt the injury. Sometime later, a packet of information on the Taj Mahal came in the mail.

What followed is one of the most remarkable journeys in the annals of environmental history. Mehta went on to become, by any objective measure, the most successful environmental lawyer in the world, and the Supreme Court of India became the most active in environmental protection any nation has yet seen, and will likely ever see. It could have started anywhere. Or, quite possibly, it could have never started at all. As it happened, it started with one of the most celebrated human achievements in the world, the Taj Mahal.

A. The Taj

> *"Neither words nor pencil could give to the most imaginative reader the slightest idea of the all-satisfying beauty and purity of this glorious conception. To those who have not seen it, I would say: 'Go to India. The Taj alone is well worth the journey.'"*[172]

The Taj Mahal is a capsule of Indian history surrounded by facts, fictions and remaining mysteries. It defines India in a way that few countries can emulate. Ask a stranger what image pops to mind upon hearing the word "America," the Rocky Mountains, the Statue of Liberty, or the Marlboro Man could as easily follow, perhaps in reverse order. But when one mentions India, it would be the Taj, which attracts more than three million visitors a year[173] and may adorn the cover of more books on world heritage and architecture than any building save, perhaps, the Acropolis.[174] The essence of the Taj is its fusion of two cultures whose mere co-existence seems improbable, to say nothing of their joint contribution to something that, despite the best efforts of writers, photographers and poets, remains indescribably beautiful. Perhaps this is what makes the Taj so enduring. In a world of perpetual conflict, it conveys hope.

The hope springs from another day. Leaping backwards from computer commerce, past the wars of independence, the British occupation, the rule of Muslims, the rule of Hindus, the time of Christ, and to as many centuries before Christ as we have now lived since, some five thousand years ago, Assyrian

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[172] FREDERICK SLEIGH ROBERTS, FORTY-ONE YEARS IN INDIA ch. XX, para. 48 (2005).

[173] Mehta v. Union, A.I.R. 1997 S.C. 723. Those recent estimates put the figure at 3 million visitors in 2004. *See* Buzzle.com, The Taj Mahal: History and Facts, http://www.buzzle.com/articles /the-taj-mahal-history-and-facts.html (last visited Apr. 1, 2009).

[174] A 2007 "global poll" places, once again, the Taj Mahal with an updated "seven wonders of the world," in company with the Roman Coliseum, Machu Pichu, and the Great Wall of China. Barry Hatton, *Wonders of World Get Update*, TIMES PICAYUNE, July 8, 2007, at A-3.

herdsmen left the Caspian Sea, scaled the Hindukush mountains, and came down into a fertile basin with rich soil and permanent, snow-fed streams.[175] The first major river they crossed they called the Indus, which would name the country they were occupying, as the mountains named their religion. They resisted, and absorbed, the incursions of Alexander the Great, and then Genghis Kahn, until, in the 13th century; another religion and another empire arrived with Mohammed of Ghor. For the next five hundred years, a wave of Islamic dynasties overlay a culture of Hinduism, finally broken in turn, in the 1750s, by the armies of the British East India Trading Company. By that time, the Taj Mahal was in its heyday, and the man who built it had been dead for two hundred years.

The story of the birth of the Taj invites wonder, skepticism, and faith. We take for known that, in 1526, a young prince from the obscure state of Samarkand in Central Asia soldiered into northern India, consolidating it under his command and establishing a ruling lineage whose power, by the time of the British invasion, stretched across the Asian plains from Afghanistan to Burma.[176] The reigns of monarchs are precarious everywhere, however, and the fifth emperor, Shah Jahan, came into power in 1627 through a bloody coup against his weaker brother, who was supported by his father's powerful widow,[177] a scene equally at home in medieval England and Japan. Legend has it that Shah Jahan was fond of socializing with his subjects in public places.[178] On one such occasion, it is said, he spotted a gorgeous beauty selling silks and glass beads at the market. It was love, he declared, and he soon took Arjumand Banyu Begum to be his second wife with the name Mumtaz Mahal ("Chosen Person"). They were inseparable, she followed him even on his military adventures, and died giving birth to their seventeenth son while on campaign with her husband in 1629. Her dying wish was that he erect a memorial in her honor, one that would endure.

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[175] The early history of India that follows is taken from STANLEY WOLPERT, A NEW HISTORY OF INDIA 24-60 (6th ed. 2000); JOHN F. RICHARDS, THE NEW CAMBRIDGE HISTORY OF INDIA—THE MUGHAL EMPIRE 6-7 (1993). The pre-Assyrian societies were essentially town-centered, each city with its citadel where religious and governmental activities took place. Theodore A. Mahr, *An Introduction to Law and Law Libraries in India*, 82 L. LIBR. J. 91 (1990).

[176] *See* WOLPERT, *supra* note 175, at 165-66; RICHARDS, *supra* note 175.

[177] MUNI LAL, SHAH JAHAN 190-203 (1986).

[178] *Id.*; *see also* DAVID CARROL, THE TAJ MAHAL 15 (1977). An early European reference to this epic love affair is that of a French traveler in 1663. *See* Francois Bernier, *Letter to Monsieur de la Mothe le Vayer, Written at Delhi the First of July 1663, in* TRAVELS IN THE MOGHUL EMPIRE, A.D. 1657-1668, at 293 (1891) ("Chah-Jehan raised [the Taj] to the memory of his wife Tage Mehale, that extraordinary and celebrated beauty, of whom her husband was so enamored it is said that he was constant to her during his life, and at her death was so affected as nearly to follow her to the grave."). The description of the Shah and his wife that follows is taken from LAL, *supra* note 177, and CARROL, *supra*.

It took twenty-two years. The Taj was set on the banks of the Yamuna River in the town of Agra, about 150 miles north of New Delhi, the work of 20,000 laborers and close to one billion dollars in treasury.[179] The central dome measures sixty feet in diameter and rises 180 feet into the air, constructed by the use of a brick scaffold so massive that the construction foremen estimated it would take two years to dismantle it.[180] Legend, one of many, has it that instead, after completion of the Taj, the Shah decreed that anyone who wished could take bricks from the scaffold, following which it was dismantled overnight.[181] Legend also has it the Shah ordered the hands of skilled craftsmen mutilated, so that they could not repeat their work.[182] Other legend says that the Taj was only phase one of a structure that would continue on the far side of the Yamuna, the Black Taj,[183] and yet another that the Shah did not really build the Taj at all but, rather, expropriated the palace of the local maharaja, which he then converted to a mausoleum.[184] Others claim that it was formerly a Hindu temple.[185] Still others contend that the Shah was not so much in love with his wife as with power, and the Taj was simply a status symbol, complete with a fortress-like wall.[186] Beautiful things, like beautiful people, spawn doubters. Some of them may even own a piece of the truth, but these truths are secondary.

The essential truth about the Taj is that it was designed by Islamic architects and built by Hindu workers, fusing these two traditions in an immortal way.[187] Starting with a basic Hindu structure that featured flat walls and ceilings and an abundance of idols and symbols, it superimposed an Islamic penchant for rounded domes, spires and minarets. It scrapped the idols in favor of elaborate surface decorations, geometric, arabesque, and calligraphy. The interior space was arranged in courts for solitude and prayer, garnished with tiny

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[179] IBN HASAN, THE CENTRAL STRUCTURE OF THE MUGHAL EMPIRE AND ITS PRACTICAL WORKING UP TO YEAR 1657, at 81 (photo. reprint 1967) (1936); CARROL, *supra* note 178, at 15.

[180] Mehta v. Union, A.I.R. 1997 S.C. 723, para. 10.

[181] *Id.*

[182] *Id.* para. 14.

[183] *Id.* para. 13; *see also* Taj Mahal, Black Taj Mahal Myth, http://www.tajmahal.org.uk/legends/black-taj.html (last visited June 27, 2009).

[184] Marvin H. Mills, An Architect Looks at the Taj Legend, http://www.geocities.com/Athens/Ithaca/3440/tajm.html (last visited June 27, 2009) (contending that the structure could not have been built in the time allotted, and that its configuration indicates that it was superimposed on an existing palace).

[185] *Id.*

[186] *Id.* (observing that both the Shah and his wife were "cruel, self-centered and vicious" as evidence that the Taj was not a monument to love); *see* Manish Chand, Love is Fine but Taj is a Monument of Power as Well, http://www.indiaenews.com/art-culture/20061203/30997.htm (last visited June 27, 2009) (citing Austrian historian, Ebba Koch).

[187] RICHARDS, *supra* note 175, at 123-24.

watercourses. The result was both square and rounded, land and water, exterior and interior, open and secret, secular and religious, frankly Islamic but with enough Hindu to appease, as enigmatic as the smile of the Sphinx.

Built to endure, the Taj lasted for several hundred years without maintenance of any kind. For reasons that are in dispute, the British, who had no qualms about looting the national treasures of Egypt and other sites of conquest, and who even stripped the brickwork from the famous Red Fort in Delhi for transport back to England, did not dismantle the Taj as well.[188] It is said by some that they tried, but concluded that it would cost more than they could sell it for.[189] All agree, however, that in the early 1900s Lord Curzon, then Governor-General of India, was deeply moved by the Taj and ordered its restoration to the complex we see today.[190] But for one development. Looters would not destroy this great monument to a lost queen. It was something far more insidious, largely invisible and nearly beyond the capacity of India to reverse.

B. Marble Cancer

From afar, the Taj Mahal is as beautiful as the poets promise—a glowing tribute to obsessive adoration and a symbol of India around the world. But up close, the picture begins to crumble. Acid rain and condensation from the former Mughal capital's coke-fueled factories and, environmentalists say, a nearby oil refinery are eating away the marble and turning what remains the color of unloved teeth. The famous canals and watercourses stink. Garbage abounds. And attempts at preservation have proved ineffective, clumsy and lacking in either funds or purpose.[191]

By the 1960s, Agra had become a sprawling industrial city of over ten million people, two million cars and diesel trucks and buses, nearly 300 major industries including refineries, foundries, glass works, brick kilns, tanneries, and countless smaller operations with one thing in common: fueled by coke, coal, and petroleum, they all discharged carbons and sulfur into the air which came to rest on the marble faces of the Taj Mahal.[192] From there, it was your

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[188] CARROL, *supra* note 178, at 133–34.

[189] *Id.* (describing attempt at demolition); Saurabh Sinha, *East India Co. Tried to Sell Taj Mahal*, TIMES INDIA, Aug. 20, 2005; Amy Waldman, *The Taj Mahal is a Glorious Survivor*, N.Y. TIMES, May 16, 2004; (documenting alleged attempts to sell).

[190] Mehta v. Union, A.I.R. 1997 S.C. 723, paras. 14-15; *see also* CARROL, *supra* note 178, at 134.

[191] Meenakshi Ganguly, *At the Taj Mahal, Grime Amid Grandeur: Pollution and Commerce Endanger One of the World's Most Beautiful Buildings*, TIME, Sept. 6, 2001, at 6.

[192] *Id.*; *see also Mehta*, A.I.R. 1997 S.C. para. 5; T.K. Rajalakshmi, *Toxins and the Taj*,

basic Introduction to Chemistry in action. Oxides of carbon and sulfur eat marble.[193] The rates are steady, measurable and visible to anyone trying to decipher the worn inscription on a gravestone in Vermont or examining the face of a gargoyle on a French cathedral. Air pollution destroys more building stone and statuary than any other weathering process in the world.[194] But the weather helps, too. Each layer of carbons tends to leave its own shield, which would prevent further erosion, except for the rains—monsoon rains in this case—that wash the shield away and re-open fresh marble for fresh destruction.[195] In Mehta's words: "marble cancer."

It was worse inside. The interior walls gave off a "yellow pallor" that was, in places, "magnified by ugly brown and black spots."[196] The rot was most aggressive in the inner chamber, where the tombs of Shah Jahan and Mumtaz Mahal were found.[197] It was the ultimate sacrilege.

More than industrial pollution was attacking the Taj. Some six and a half million tons of trans-India truck traffic ran through Agra, not far from the monument grounds.[198] The city of New Delhi and every smaller town between the capital and Agra were dumping nearly 300 million tons of raw sewage into the Yamuna River, which then carried down to the Taj.[199] In fact, the river ran under it, squeezing human wastes into the foundations of the mosque.[200] There were plans to build shopping malls and restaurants on the fringe of the monument to capture more tourist dollars.[201] Indeed, there were concessions sprouting up inside the walls.[202] The state of the Taj revealed a larger problem, the state of India.

COURIER, July/Aug., 2000, *available at* http://www.unesco.org/courier/2000_07/uk/signe.htm.

[193] *Mehta*, A.I.R. 1997 S.C. para. 5; *see also* Thomas C. Meierding, *Marble Tombstone Weathering and Air Pollution in North America*, 83 ANNALS ASS'N AM. GEOGRAPHERS 568 (1993). There is, apparently, no antidote to this form of erosion save that of reducing the pollution. *See* Michael Reddy, *Preserving and Protecting Monuments and Historic Sites*, 23 ENVTL. SCIENCE & TECH. 264 (1989), *available at* http://wwwbrr.cr.usgs.gov/projects/SW_corrosion/teachers-pupils/index.html.

[194] Meierding, *supra* note 193.

[195] *Mehta*, A.I.R. 1997 S.C. para. 9 (citing report of National Environmental Engineering Research Institute).

[196] *Id.* para. 5.

[197] *Id.*

[198] *Id.*

[199] DAVID L. HABERMAN, RIVER OF LOVE IN AN AGE OF POLLUTION 92 (2006); *DJB Blamed for Poor Yamuna Water Quality*, HINDU, Aug. 6, 2004, *available at* http://www.hindu.com/2004/08/06/stories/2004080608410400.htm.

[200] HABERMAN, *supra* note 199.

[201] *See* Sean Farrell, The Taj Mahal: Pollution and Tourism (2002), http://www.american.edu/TED/taj.htm (last visited June 27, 2009).

[202] *Id.*

The Second World War showcased the power of big government and big industry, and India, as Japan, would take the bait. True, Indian culture was steeped to the point of reverence in the natural world,[203] but these beliefs were routed by the demands of a seething population with appalling rates of poverty and disease. Mahatma Gandhi, reacting to centralized British rule, had envisioned a country based on village republics and small-scale industries;[204] Jefferson democracy abroad. Like Jefferson, however, Gandhi's policies were swept away by those of his successor, Jawaharlal Nehru, who based his "tryst with destiny" on the Western and Soviet models of heavy industry and massive government public works, the bigger the better.[205] He called his dams the "Temples of Modern India."[206] He offered subsidies for new factories.[207] He offered rich incentives for foreign investment.[208] By the mid 1990s India was even into the hazardous waste disposal business, importing toxics from nearly fifty countries.[209] Mining and manufacturing jumped 160 percent.[210] Other industrial output topped 250 percent.[211] It was working.

Then, in 1972, came the first wave of environmental concerns from a first-ever, far-away conference in Stockholm, Sweden, a meeting that would rattle the world.[212] India, as many developing countries, viewed the new movement with frank skepticism. It looked as if the developed world, having raped its

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[203] India is a nation of many religions, but Hinduism, followed by Buddhism, predominates. Both faiths teach a reverence for nature. Hindu sacred texts, beginning with the Vedas (c. 1750 – 600 BC) speak of the sanctity of earth, and the epic Mababharata (c. 500 – 200 BC) warns that when humans despoil nature, "the lives of the living will be ruined with the world." Vashudha Narayanan, *Water, Wood and Wisdom: Ecological Perspectives from the Hindu Traditions*, 130 DAEDALUS 179, 180 (2001) (quoting THE MAHABHARATA: THE BOOK OF THE FOREST (J.A.B. van Buitenen trans., The University of Chicago Press 1978)); *see also* 1 SOURCES OF INDIAN TRADITION (Ainslie Thomas Embree ed., Columbia University Press 1988) (1958).

[204] E. F. SCHUMACHER, SMALL IS BEAUTIFUL: A STUDY OF ECONOMICS AS IF PEOPLE MATTERED (1973).

[205] *See* Raghav Gaiha & Vani Kulkarni, *Is Growth Central to Poverty Alleviation in India?*, 52 J. INT'L AFF. 145 (1998); *see also* Morris D. Morris, *Growth of the Large Scale Industry to 1947*, *in* 2 THE CAMBRIDGE ECONOMIC HISTORY OF INDIA 553 (Dharma Kumar ed., 1989).

[206] *See* Paul R. Brass, *The Politics of India Since Independence*, in THE NEW CAMBRIDGE HISTORY OF INDIA 248-49 (1990).

[207] A. Vaidyanathan, *The Indian Economy Since Independence*, *in* 2 THE CAMBRIDGE ECONOMIC HISTORY OF INDIA, *supra* note 205, at 947.

[208] *Id.*

[209] A. Grover, *India Report*, 1 ASIA PAC. J. ENVTL. L. 91 (1996); *see also* Asha Krishnakumar, *Importing Danger*, FRONTLINE, Dec. 6-19, 2003, *available at* http://www.hinduonnet.com/ fline/fl2025/stories/20031219001908600.htm.

[210] RESERVE BANK OF INDIA, REPORT ON CURRENCY AND FINANCE FOR THE YEAR 1973-1974, at 63 (1974).

[211] *Id.*

[212] *See* L.B. Sohn, *The Stockholm Declaration on the Human Environment*, 14 HARV. INT'L L.J. 3 (1973).

own resources and profited from rampant industrialization, was now trying to limit the competition. In her address to the conference, Prime Minister Indira Gandhi spoke from the heart:

> On the one hand the rich look askance at our continuing poverty—on the other, they warn us against their own methods. We do not wish to impoverish the environment any further and yet we cannot for a moment forget the grim poverty of large numbers of people. Are not poverty and need the greatest polluters? . . . [T]he environmental problems of developing countries are not the side effects of excessive industrialization but reflect the inadequacy of development.[213]

Harmony with nature was well and good, but India's first priority was to grow the economy. The government genuflected towards the high-sounding declarations of the Stockholm convention, enacting framework laws for the management of air, water, and forestry, but their provisions were so vague, their sanctions so small, and their implementation so lackluster that they were laws in name only.[214] The brick kilns, tanneries, refineries, and motor traffic contaminating Agra continued to boom, unabated and uncontrolled, as they did around the entire country. Until a country lawyer newly arrived in Delhi walked up the steps of the India Supreme Court to file petition on behalf of himself and the Taj Mahal.

C. The Gathering Storm

> *"God directed me to the right path. It was all predestined and based on circumstance. After this incident, I just started walking, that is all."*[215]

This is the way history happens. A remarkable man came along at just the right time; a different individual, a difference of a few years, either way, and the outcome could be very different.

Mehta's story retells the log-cabin narrative of America a century before. Born into a devout and Hindu family, he grew up in a small village in

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[213] Indira Gandhi, Prime Minister of India, Address at the United Nations Conference on the Human Env't (June 14, 1972), *in* SHYAM DIVAN & ARMIN ROSENCRANZ, ENVIRONMENTAL LAW & POLICY IN INDIA 31-32 (2d ed., 2001).

[214] *See* C.M. ABRAHAM, ENVIRONMENTAL JURISPRUDENCE IN INDIA 65-70 (1999); *see also* Jasmeet Kaur Madham, *India*, *in* TERRI MOTTERSHEAD, ENVIRONMENTAL LAW AND ENFORCEMENT IN THE ASIA PACIFIC RIM 215 (2002); Harish Salve, *Justice Between Generations: Environment and Social Justice*, *in* HARISH SALVE, SUPREME BUT NOT INFALLIBLE: ESSAYS IN HONOR OF THE SUPREME COURT OF INDIA 360 (2000); Armin Rosencranz & Michael Jackson, *The Delhi Pollution Case, The Supreme Court of India and the Limits of Judicial Power*, 28 COLUM. J. ENVTL. L. 223, 232-34 (2003). The consensus among those observers was that the environmental agencies, whatever other handicaps they faced, simply lacked the will to act.

[215] *Person of the Year*, *supra* note 169.

Kashmir.[216] The public school was five miles away, a journey he trekked daily and in all weather, fording two rivers along the way. He broke from family tradition to leave home for college, working part time, taking ten years to finish his law degree and absorbing new notions about social justice along the way. Odd jobs followed: an accountant for a shoe store, then public school teacher, then headmaster, and finally an all-in-one newspaper reporter, editor and publisher. He emerged from these experiences with a farmer's appetite for work, a teacher's sense of human beings, and a journalist's passion for the facts, all of which would mark his approach to the mega-lawsuits ahead. Ahead of him lay more than forty successful cases before the supreme court on issues ranging from tannery discharges to the Ganges River to bus pollution in Delhi and environmental education in the public schools. These are where his cases came from.

The year 1983 turned out to be the pivot point in Mehta's life. He married Radha, a freelance writer and social activist, and moved to the capitol. An aspiring lawyer with a few labor and civil cases under his belt, he had no experience before the supreme court, where he was determined to practice. Shortly thereafter, the materials on the state of the Taj came in the mail. Stung by the accusation against his profession, Mehta dug into them and then went many leagues beyond. He read Mogul history, then books on the Taj itself, then studies on pollution and environmental law. Reading only went so far, however, and so a few months later, accompanied by his wife and a noted environmental scientist, he made a pilgrimage to the site. He examined the walls, saw the degradation, felt it with his fingers, toured the city of Agra, smelled the air, smelled the water, saw millions of people living in the same conditions that were corroding the face of the mosque, and was converted to the cause. He began to prepare his brief.

Here we have the second great circumstance. The Supreme Court of India, for the first time in its history, was ready for such a case. Barely so, and certainly not intentionally so, it had been moving on a tangent towards environmental protection for several years. It had started with civil rights and, as had the United States Supreme Court in the infamous *Plessey v. Ferguson*[217] and *Dred Scott v. Sanford*[218] decisions, it got off on the wrong foot by ignoring the Prime Minister's high-handed emergency orders, declaring them beyond judicial review.[219] The opinion was seen by both academics and the public as

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[216] *Id.* The description of Mehta's background that follows is taken from this source and others cited *supra* note 169.

[217] 163 U.S. 537 (1896).

[218] 60 U.S. 393 (1856).

[219] Jabalpur v. Shivakant Shukla, A.I.R. 1976 S.C. 1207. While Jabalpur upheld the executive emergency power, it had the year before struck down an attempt to amend the Constitution to legitimize the contested election of Prime Minister Indira Ghandi, thereby

cowardly—a capitulation by the one remaining institution in the country that still enjoyed general respect.[220] Smarting from the rebuke, the court did not tarry in making amends. In a series of subsequent opinions it reversed course.[221] Relying on a specific constitutional guarantee that "[n]o person shall be deprived of his life or personal liberty except according to procedure established by law,"[222] the court expanded the concept of personal liberty from the notion of arrest and imprisonment to "wider meanings" that included restraints on movement and conduct.[223] A constitutional provision must be construed, explained the court, "not in a narrow and constricted sense, but in a wide and liberal manner."[224] It should be "flexible enough to meet the newly merging problems and challenges."[225] One such new challenge would soon walk in the door.

Having staked out this broadened constitutional doctrine, the court proceeded to open the door for all the people of India to use it. Unlike the Supreme Court of the United States, the Indian court could hear cases of first impression, as a trial court, on matters of "fundamental rights."[226] Moreover, one could petition the court to hear such cases by filing a special writ.[227] One of the first things the court did was to relax the requirements for these writs to virtually anything written on paper; a letter to the justices would suffice.[228] It then reached out to admit the pleas of unions on behalf of all workers "to whom a life of basic human dignity ha[d] been denied" and who, by reason of "their poverty and social and economic disability" were "unable to approach the courts."[229] The court reached beyond cases of personal injury to recognize harms to the public at large, noting, "[S]ocial justice is due to the people and therefore the people must be able to trigger off jurisdiction vested for their benefit to any public

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asserting its supremacy in the realm of constitutional law. Indira Ghandi v. Raj Narain, A.I.R. 1975 S.C. 2299.

[220] *See* S.P. Sathe, *supra* note 164, at 43-48 (discussing case and reaction to it by the public, and, subsequently, the Court).

[221] The reversal began with a series of civil rights cases, lead among them *Maneka Ghandi v. Union of India*, A.I.R. 1978 S.C. 597, invalidating the government's impoundment of a citizen's passport without due process of law. *See id.* at 54–56. Another seminal challenge was the *Judges Transfer Case*, A.I.R. 1982 S.C. 149, which permitted private lawyers to challenge the transfer of judges for allegedly political reasons.

[222] INDIA CONST. art. 21.

[223] *Maneka Ghandi*, A.I.R 1978 S.C. 621, 709.

[224] Mullin v. Adm'r Union Territory of Delhi, A.I.R. 1981 S.C. 746.

[225] *Id.*

[226] INDIA CONST. art. 32; *see also* Smith, *supra* note 164, at 237.

[227] INDIA CONST. art. 32.

[228] *See* Dun v. State of Uttar Pradesh, A.I.R. 1988 S.C. 2187; Desai v. Union of India Writ Petition, A.I.R. 1988 S.C. 988 (complaint from journalist).

[229] People's Union for Democratic Rights v. Union of India, A.I.R. 1982 S.C. 1473.

functioning."[230] The court's ability to try its own cases led to independent investigations of government conduct by court appointees and technical committees.[231] It began to compel government agencies to take remedial actions.[232] It also created more committees to monitor compliance.[233] The machinery for adjudicating complex environmental cases was taking shape.

Spurred forward by a handful of progressive justices, the language and vision of the court in these early opinions were revolutionary. They saw the new public law cases as non-adversarial in the traditional sense; instead, these were "cooperative or collaborative efforts" by the petitioner, government authorities and the court to secure "legal rights and social justice."[234] Public law was a "social audit," and the court would not be deterred by fears that "all and sundry [would] be litigation-happy and waste their time and money and the time of the court" with frivolous cases.[235] Rather, given the power of "lachrymose millionaires" who enjoyed "five star advocacy" to protect their interests, "the les miserables" were entitled to "all procedural indulgence," including active fact-finding by the court itself, to level the playing field.[236] In cases beginning with political rights, then labor rights, then rights to honest government, therein lay the judicial role. Environmental rights were next in line, and along came M.C. Mehta.

D. The Storm Breaks

If the hand of destiny was behind Mehta and the Taj Mahal, however, nobody seemed to know it. The petition was filed in the summer of 1984. It was submitted under the court's newly-expanded, anyone-can-apply writ jurisdiction, and it claimed injury both to the Taj buildings and to the people of

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[230] Judges Transfer Case, A.I.R. 1982 S.C. 189. For the wide range of "representative" standing afforded to groups to protect the interests of the affected public, see Sathe, *supra* note 164, at 78-79.

[231] *See* DIVAN & ROSENCRANZ, *supra* note 213, at 143–45; *see also* Greenpeace, Bhopal Disaster, http://www.greenpeace.org/usa/campaigns/toxics/justice-for-bhopal (last visited June 27, 2009) (citing cases and describing new mechanisms of investigation).

[232] DIVAN & ROSENCRANZ, *supra* note 213, at 147.

[233] *Id.* at 145.

[234] P.U.D.R. v. India, A.I.R. 1984, S.C. 1477, 1478. In one case involving rickshaw operators, the Court addressed a measure restricting licenses to owners not by striking down the law but by negotiating a scheme whereby those who did not own their own rickshaws could obtain loans from the Punjab National Bank to acquire them. Sathe, *supra* note 164, at 78-79. The Court was not content with addressing the lawfulness of a problem; it was going to solve it.

[235] Fertilizer Corp. Kamgar Union v. Union of India, A.I.R. 1981 S.C. 344, 354-56 (Iyer, J., concurring).

[236] JUSTICE KRISHNA IYER, JUDICIAL JUSTICE: A NEW FOCUS TOWARDS SOCIAL JUSTICE 145 (1985).

Agra who were experiencing the same corrosive pollution every day of their lives.[237] It rested on Article 21 of the Constitution guaranteeing life and liberty, the same rights invoked in the previous political and civil rights cases, but applying this guarantee to air pollution was a stretch. The court would be moving into unchartered waters with these environmental claims. Friends advised Mehta not to bother.[238] The India Supreme Court would sit like "statues," one told him.[239] They would not engage in dialogue with him, and they would dismiss his case. It almost happened.

The psychological turning point for this lawsuit, and for all of environmental policy in India, came a few months later with one of the most horrific industrial accidents yet experienced in any country of the world. In the middle of the night in the City of Bhopal with the population fast asleep, Union Carbide plant in Bhopal leaked 40 tons of deadly gas across the city.[240] A later court would write: "The prevailing winds on the early morning of December 3, 1984 were from the Northwest to Southeast. They blew the deadly gas into the overpopulated hutments adjacent to the plant and into the most densely occupied parts of the city. The results were horrendous."[241] No one is sure how many perished. Estimates of deaths directly attributable to the leak range upwards of two thousand.[242] Over two hundred thousand people suffered injuries.[243] Businesses closed, crops and cattle died.[244] The failure of the Indian government to pay attention to these risks lay exposed like dead children in the cellar.

With great reluctance, a United States federal judge sent an ensuing lawsuit by victims and their families back to India for trial, knowing that the remedies would be inadequate.[245] They were. Union Carbide eventually paid out an average of $1,500 per individual,[246] relief that shocked India into action.

India's formal response was to create an elaborate environmental law bureaucracy. Within a few years it had adopted a new Environmental Protection Act and detailed regulations that empowered authorities to regulate, inspect and enforce controls on pollution and a wide range of natural areas.[247]

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[237] *Id.*

[238] *Mehta Presentation*, *supra* note 169.

[239] *Id.*

[240] *In re* Union Carbide Corp., 634 F. Supp. 842, 844 (S.D.N.Y. 1986).

[241] *Id.*

[242] *Id.*

[243] *Id.*

[244] *Id.*

[245] *Id.* at 867.

[246] Union Carbide settled the transferred case in India for $470 million. The payout for over 8,000 lives and 300,000 injuries came to an average of $1,500 per person. Editorial, *Champagne and Toxic Gas*, SAN JOSE MERCURY NEWS, Nov. 28, 1984, at B10.

[247] DIVIAN & ROSENCRANZ, *supra* note 213, at 143-45 (describing the resulting state of

This done, the government went back to sleep. The pollution of Agra, the contamination of the country and rampant development went forward as if none of this had occurred. The bureaucracy, however, was about to experience the jolt of its life.

It may seem hard to ignore the Taj Mahal, but the court nearly did. Young and inexperienced, attorney Mehta drew a conservative panel of justices that behaved exactly as his friend had predicted.[248] Perhaps his inexperience saved him. He simply would not take no for an answer. As a first step he had filed his writ, but the court had to *accept* the writ for the case to go forward, and it was apparently in no mood to do so. "We do not know what you are doing here," they told him. "Even the lawyers who practice here do not know what you are doing," they said. They seemed ready to vote. Sensing Mehta's desperation, perhaps out of sympathy, one judge was prompted to ask exactly what he expected the court to do, but, after a minute or two of confused explanation, the justices were ready to vote again. He was wasting their time.

Mehta became emotional. He had spent more than 200 hours preparing this case, he said, and they had a duty to listen. "Who are you to tell us about our duties," asked a justice, at which point Mehta replied that as judges they had legal duties but as citizens of India they had a second constitutional duty, that of all citizens to protect the environment and the lives of the people. Indeed, he continued, given the stakes involved here, the court should be taking this case on its own initiative. The court was not fulfilling this duty, he was emboldened to say, nor providing him, the petitioner, justice.

One doubts that a seasoned supreme court advocate would have dared go this far. One doubts that the court would have accorded a seasoned advocate this amount of leeway either, which bordered on disrespect. Instead, however, the court invited him, once again, to say his piece. And so, Mehta began anew, a third time, to explain his pleadings. He spoke for the next half hour. There were no interruptions. When he was done, the justices conferred, in whispers, on the high bench while Mehta waited below. At last, they smiled at him and said, "yes, we will take notice of this matter." They accepted the writ.

The world of environmental policy in India just made a seismic shift. Indeed, it was about to turn upside down and, as might be expected, Mehta, having tasted a bit of success, would be pushing all the way. He was not the only lawyer to bring environmental cases to the court, but he would bring his share, some of them so imaginative they make one blink others so big that they remain, today, among the most complex legal proceedings in the country.[249]

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environmental legislation and administrative structures).

[248] *See Mehta Presentation, supra* note 169; *M.C. Mehta Visits TLS, supra* note 169; Interview with M.C. Mehta, in New Orleans, La. (Mar. 22, 2003). The description of Mehta's day in court that follows is taken from these sources.

[249] *See* description of *Ganges* and *Taj* cases, *infra* notes 275 and 280, over which the court

The *Taj* case opened the door—two doors, really—one to the lifetime marriage of M.C. Mehta to environmental policy and the other, by the simple fact of accepting the writ, to supreme court protection of the environment. The *Taj* case itself would remain hanging—accepted but untried—for nearly a decade before the court came to grips with it again. Meanwhile, through the door came other cases involving new environmental and public injuries.[250] These lawsuits, in turn, and the court's approach to them, would set the mold for the Taj Mahal. Perhaps the most important of these cases involved the Ganges River and, once again, our mutual friend.

E. The Ganges

"Ganga was sunken, and the limp leaves
Waited for rain, while the black clouds
Gathered far distant, over Himanvant . . .
Datta. Dayadhvam. Damyata.
Shantih shantih shantih."[251]

The Ganges is the work of nature and the Taj Mahal is the work of human beings, but they have one thing in common: they are both sacred places. Hindu myth presents the river as a goddess, worshipped as the consort of Shiva.[252] It is said to cleanse the souls of sinners, and every Hindu desires his last rites to be performed on its banks.[253] The ancient texts declare that "impure objects like urine, feces, spit or anything which has these elements, blood or poison" should not be cast into it.[254] M.C. Mehta was a Hindu. "There was a time when milk, incense and flowers were considered to be the moot offerings to such a venerated river," he declared.[255] Today, he continued, the offerings were "huge quantities of refuse, rubbish and poisonous effluents."[256] It was another sacrilege. In 1985, within a year of the Taj filing, Mehta would be back before the India Supreme Court asking it to clean up the holy river of India.

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has retained continuing jurisdiction.

[250] *See infra* notes 301-05 and accompanying text.

[251] T.S. ELIOT, *The Wasteland*, *in* COLLECTED POEMS, 1909-1962, at 51, 68 (1963).

[252] Payal Sampat, *The River Ganges' Long Decline*, WORLD WATCH, July-Aug. 1996, at 5; Narayanan, *supra* note 203, at 179.

[253] Mehta v. Union of India, A.I.R. 1998 S.C. 1073, 1038.

[254] Narayanan, *supra* note 203, at 184 (quoting *Manu Smriti* 4:56, *in* GEORG BUHLER, THE LAWS OF MANU 32-33 (1964)).

[255] *Mehta Presentation*, *supra* note 169.

[256] *Id.*

The trigger this time was not a stranger at a party for lawyers. In late 1984, the Ganges caught fire.[257] Nobody could miss the news. A mile long stretch of the river burned for thirty hours with flames leaping twenty feet into the air. Apparently, the candles of mourners cremating their dead on the river bank set a thick chemical sheen from nearby factories ablaze. There was more than religion at stake here. One tenth of all humanity, over a half a billion people, depended on the Ganges for their survival.[258] Into the river poured toxins from over 50,000 industries each year, along with sewage from 300 townships, six million tons of chemical fertilizers, and nine thousand tons of pesticides as notorious as DDT.[259] Fecal coliform counts on the river near the pilgrimage city of Varansasi exceeded World Health Organization standards by 10,000 times.[260] Not surprisingly, one third of all deaths in India rose from water-borne diseases.[261] Compared to the Ganges, coming to grips with Agra and the Taj Mahal would be a picnic.

Its defenses breached by the *Taj* petition the year before, the court accepted this one with less cavil and, in the exercise of its original jurisdiction, went directly to trial. Out of caution, and to make his case manageable, Mehta had sued only the two industries most directly connected to the fire, the national government, and two officials whose negligent performance, in his view, had led to the disaster.[262] Initially, he asked only that the court "regulate the regulator," and force the government environmental agencies to do their job.[263] He based his case, again, on Article 21, which by that time had been stretched in a case involving stone quarry workers to environmental conditions of the workplace.[264] The Ganges would take the Article one step further, beyond the conditions of workers to the general public and the river itself.

To Mehta's surprise, the court was not only inclined to follow him but, with his encouragement, was willing to up the ante as well. The pollution of which Mehta complained was hardly restricted to these two factories. Rather, it implicated the discharges from thousands of industrial activities stretched across 250 townships and eight states.[265] But how, mused the justices, could

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[257] M.C. Mehta, *Harnessing the Law to Clean Up India*, MULTINATIONAL MONITOR, July-Aug., 1995, at 29.

[258] Sampat, *supra* note 252, at 24.

[259] *Id.*

[260] *Id.* at 5; *see also* Jill McGivering, *Clean-Up for Filthy Ganges*, BBC NEWS, 2003, http://news.bbc.co.uk/2/hi/south_asia/2860565.stm (interviewing Manoj Nodkarni, Centre for Science and Environment).

[261] Dehradun v. State of Uttar Pradesh, A.I.R. 1985 S.C. 652.

[262] Mehta v. Union of India, A.I.R. (1988) S.C.R. 530, 534.

[263] *Mehta Presentation*, *supra* note 169.

[264] Rural Litig. & Entitlement Kendra v. State of Uttar Pradesh, A.I.R. 1985 S.C. 652.

[265] *Mehta*, A.I.R. (1988) S.C.R. at 555.

interests so numerous and dispersed even be served with legal process?[266] Mehta had an answer. He suggested that they use newspapers and television networks, directing all industries to appear.[267] Whether captured by the magic or propelled by the momentum of their prior cases, the court bought this novel procedure as well, and soon hundreds of factories and manufacturing plants of all shapes and sizes began coming to court. At one point there were more than 1,200 lawyers for the defense. The only petitioner was Mehta. As it evolved, the case was no longer about forcing the regulators to do their duty. Facing their continuing failure, the court was about to do it instead.

What followed was a litigation program more reminiscent of mass tort actions than constitutional law. The court grouped the defendants geographically, separated out the cases against agencies and townships, and then focused on tanneries, distilleries, and other industrial sectors, nineteen categories by journey's end.[268] Every step of the way, aided and abetted by Mehta, the court was innovating procedures, evidence, and substantive law. It accepted data on pollution of the Ganges from open sources, magazines, and academic reports.[269] It took industry reports to establish that pollution control technologies were available, and then required them.[270] It conducted no cost-benefit analysis.[271] The financial capacity of industries was "irrelevant."[272] Just as all enterprises had to pay the minimum wage in order to exist, reasoned the court, so they should have to pay to treat their wastes.[273]

As a test category, the tanneries came first, and provided what Mehta would later call the "turning point."[274] Those that did not adopt control technologies, within a short and specified period of time, were ordered to close, and forbidden to re-open until they complied.[275] Tanneries on the Ganges began to close. No discretion was left to government agencies. Instead, they too had their orders to monitor compliance and report their findings to the court.[276] The court retained jurisdiction over the case, and kept the pressure on both industry and state control boards. Over the next ten years, it ordered the closure of eighty-four plants in Uttar Pradesh and thirty more in West Bengal.[277]

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[266] *Mehta Presentation*, *supra* note 169.

[267] *Id.*

[268] *Id.*

[269] *See* DIVAN & ROSENCRANZ, *supra* note 213, at 144.

[270] *Mehta Presentation*, *supra* note 169, at 7.

[271] *Mehta*, A.I.R. (1988) S.C.R. at 552-55.

[272] *Id.*

[273] *Id.*

[274] *Mehta Presentation*, *supra* note 169.

[275] *Mehta*, A.I.R. (1988) S.C.R. 530.

[276] *Id.*

[277] *S.C. Orders Closure of 84 Industries in U.P.*, HINDU (INT'L ED.), Jan. 2, 1995, at 13.

The court's language was equally strong. "We are conscious," wrote Justice Singh in one of the early Ganges opinions, "that the closure of tanneries may bring unemployment, loss of revenue but the life, health and ecology have greater importance."[278] There was a time when U.S. courts spoke on environmental issues in similar terms, but they were enforcing detailed legislative programs.[279] Armed with the constitution, a hellish set of facts and a government in default, the Supreme Court of India was striking out on its own. The *Taj* had cracked the door. The Ganges rushed in. And, in turn, marked the way for a final decision on the Taj Mahal.

F. The Taj *Opinion*

> *The Taj . . . is the "King Emperor" amongst the World-Wonders. . . . The elegant symmetry of its exterior and the aerial grace of its domes and minarets impress the beholder in a manner never to be forgotten. It stands out as one of the most priceless national monument[s], of surpassing beauty and worth, a glorious tribute to man's achievement in Architecture and Engineering.*[280]

Any judicial opinion that begins with an ode to the subject of the case, followed by three paragraphs of its celebration in poetry and prose, rather tips its hand. This judgment, however, was a long time coming.

It took more than a decade. It took thirteen years, in fact, if one counts from the time Mehta first learned of the plight of the Taj Mahal, and twelve from the time he took his first walk up the steps of the India Supreme Court to argue his way past the gatekeepers and onto the docket. The court was apparently sufficiently sympathetic, perhaps intrigued, to keep the case around, but its jurisprudence had not yet ripened to the point that it could deal with the case. Nor, in 1984, was Mehta ready for the challenge. By 1992, the Ganges litigation and several others of considerable magnitude had forged new mechanisms to approach the matter of this ancient wonder and its menaces, and a judicial attitude that, by God, it was time to make things happen. The *Taj* opinion, like the structure itself, is the culmination of these several things.

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[278] *Mehta*, A.I.R. (1988) S.C.R. at 555.

[279] *See* Ass'n of Pac. Fisheries v. EPA, 615 F.2d 794 (9th Cir. 1980) (approving Clean Water Act standards that would eliminate a significant number of dischargers); BASF Wyandotte v. Costle, 598 F.2d 637 (1979) (rejecting benefit/cost test for water standards); Lead Indust. Ass'n v. EPA, 647 F.2d 1130 (D.C. Cir. 1980) (approving air standards without demonstration of economic or technological feasibility).

[280] Mehta v. Union of India, A.I.R. 1997 S.C. 723, para. 1.

The court began hearing testimony in 1992, based on the allegations in Mehta's petition.[281] Perhaps lectured by the Ganges, it did not jump into the business of law enforcement with both feet. It tried, instead, a regulate-the-regulator approach, relying on studies unearthed by Mehta going back fifteen years on the degradation of the monument. In January 1993, it ordered the National Pollution Control Board to survey the area, inventory the polluting sources, issue notices to them to ensure that "necessary anti-pollution measures have been undertaken, and report back to the court by May."[282] Given the state of the Taj and its surrounding air pollution, the court may have been a bit disingenuous about ensuring that pollution controls were in place. Of course they were not. On May 3, the Board reported that it had identified 511 industries in the area, some as large as the Mathura oil refinery, as well as 168 foundries, twenty rubber factories and fifty-five chemical plants.[283] It stated that 507 of these industries, a whopping ninety-nine percent, had no air pollution controls at all.[284] Indeed, 212 did not even respond to the notice.[285] At which point, it seemed clear that the fine-sounding legislative environmental programs and their bureaucracy were not operating on a full tank of gas.

The court took over, and for the next three years issued a series of commands to state agencies and directly to individual industries that more resembled battle orders from general headquarters than judicial opinions. The major pollution sources were industrial, and the problem was their use of coke and coal. So the court got into the energy business, inquiring about the availability of propane and natural gas, weighing their costs, directing the location and rapid construction of a new gas pipeline, summoning the responsible agency heads and CEOs of the oil and gas companies directly with the quaint observation: "With a view to save time and Red-Tape we are of the view that it would be useful to have direct talk with the highest authorities who can take instant decision in the matter."[286] It was a forced march. The deadlines were tight, three days from today, a week from today,[287] but the court's focus was still investigative, hoping that the government would take charge. It was the "primary duty," it continued to say, of the Indian government and its Ministry of Environment and Forests to "safeguard" the monument.[288]

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[281] *Id.* para. 5.

[282] *Id.* para. 6.

[283] *Id.* para. 7.

[284] *Id.* para. 8.

[285] *Id.*

[286] *Id.* para. 10; *see also id.* paras. 9, 12.

[287] *See id.* para. 10 (requiring the Department of Industries to file a list of all air polluting industries within the Taj region "within a week from today"); *see also id.* para. 11 (requiring the Department of Environment and Forests to identify an authority to prepare of survey within three weeks, and the Court registrar to send notice of this order within three days).

[288] *Id.* para. 13.

In 1995, with more apparent hope than optimism, it ordered the Ministry to review the latest information on the Taj and "indicate in positive terms the measures which the Ministry is intending to take to preserve the Taj Mahal."[289] The court made clear that, in its view, the relocation of polluting industries was essential, and that could not be done without the "positive assistance" of the Ministry, the national government and the state of Uttar Pradesh.[290] It had "personally requested" the Minister himself to examine the matter and present a scheme for relocation.[291] "Nothing positive has come before us."[292] One can sense the exasperation. Still, it deferred to the regulators to take action. "It is of utmost importance that the pollution in the Taj Trapezium be controlled," the court reiterated.[293] "We want [a] positive response from the Ministry."[294] One last chance for an administrative solution.

It did not work. Whether by intention or simple paralysis, there was "no helpful response from the Government of India."[295] It will be important to remember, when assessing the Supreme Court of India's actions in this case and in environmental cases more generally, what it was facing here. The situation seemed urgent. When pushed hard, the responsible government agencies would collect information. But they would not act.

Finally, in its opinion of December 30, 1996, the court put the hammer down. Citing Article 21 of the Constitution, three additional articles,[296] three statutory programs[297] and three principles of international law,[298] the justices declared that the pollution affecting the Taj should be "eliminated at any cost."[299] Not even a "one percent chance" could be taken when— human life aside—"the preservation of a prestigious monument like the Taj is involved."[300] It ordered the conversion of some 292 industrial plants to natural gas, or their relocation from the area.[301] It ordered government assistance for the relocation, and the creation of a new agency to facilitate the process.[302] It

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[289] *Id.*
[290] *Id.*
[291] *Id.*
[292] *Id.*
[293] *Id.*
[294] *Id.*
[295] *Id.* para. 14.
[296] *Id.* para. 46.
[297] *Id.* para. 51.
[298] *Id.* para. 29 (including the Precautionary Principle, the Polluter Pays Principle, and Sustainable Development).
[299] *Id.* para. 30.
[300] *Id.*
[301] *Id.* paras. 31, 32.
[302] *Id.* para. 32.

ordered the construction of a by-pass to funnel traffic away from the area,[303] a green belt of protection around the monument, the removal of intruding concessions[304] and first steps to clean up the Yamuna River.[305]

Turning to the social impacts and at Mehta's suggestion, the court also looked to the employees affected by plant closures and relocations and directed that they continue to receive wages and benefits during the transition.[306] They would even receive an additional "shifting bonus" of one year's salary to help them resettle.[307] It had already put a new public drinking water supply project in motion and on schedule.[308] Now it went on to require that the Mathura refinery set up a fifty-bed hospital and two mobile units to provide medical treatment for residents within breathing distance of the plant.[309] Theirs was the whole package—abatement, new fuels, relocation, government assistance, worker assistance and public health. It might not work, but no one could blame them for not taking their best shot. In fact, the backlash to follow would come from exactly the opposite direction.

G. The Future

> *"It is too pure, too holy to be the work of human hands. Angels must have brought it from heaven and a glass case should be thrown over it to preserve it from each breath of air."*[310]

One longs for a happy ending. But these cases are simply too big and too human. The court's running orders of battle on the Taj have, indeed, closed many polluting facilities, relocated others, established a green belt, removed the most invasive of the souvenir shops, brought natural gas into the city, and accelerated construction of a bypass to route truck traffic away from the area.[311] It has required new reports, engaged itself in decisions as minute as monitoring stations and parking lots, directed an allocation of Taj entrance fees to the city for its improvement, and issued contempt citations against actors it believed were responding too slowly, or not at all.[312]

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[303] *Id.* para. 35.
[304] *Id.*
[305] *Id.*
[306] *Id.* para. 32.
[307] *Id.*
[308] *Mehta Presentation, supra* note 169, at 6, 12-13.
[309] *Mehta*, A.I.R. 1997 S.C. 723, para. 35.
[310] *Id.* para. 3.
[311] *Id.* paras. 32, 35.
[312] *See* Mehta v. Union of India, (1998) 8 S.C.C. 711.

And yet, the air of Agra remains lethal, the Yanuma still stinks, and the marble faces continue to erode. The Archeological Survey of India has begun applying packs of brown mud to the Taj walls in an attempt to save them.[313] Having rid itself of small concessions, the monument has been turned over for management to the Tata Group, which climbed its way to the top of the Indian business world by manufacturing automobiles.[314] In a word, much remains to be done, and there is reason to worry about what is being done. There is also reason to worry about who is doing it, and who is not doing it, and how long this scenario can last.

As the court itself stated in its *Taj* opinions, its Ganges opinions, and others not described, this is a job for the government of India, not the judiciary. Time and again, the court has gathered the information and then asked the government to act. Time and again, it got excuses for inaction in return. In another Mehta case treating chronic air pollution in the capitol city of Delhi, at levels so unhealthy that they kill—not injure, kill—an estimated 10,000 people a year, the Delhi Health Minister's response to the court's inquires was that these levels did not increase the risks of heart or lung disease.[315] Each time, the court has had to move from government denial of the problem, to grudging acceptance, to the performance of routine, step-and-fetch-it duties. A news report on the Ganges litigation captures the problem:

> There are limits to what a gung ho court can do in the face of an indifferent bureaucracy. The boards in the Ganga states appear resigned to doing no work except for a knee-jerk response to judicial orders. Besides, the word on the street is that the Supreme Court's orders are misused by dishonest board officials to line their own pockets. Unless a bribe is paid, an unfavorable report is made to the court.[316]

To some, and to the court itself as it was wading into these cases, this depressing scenario is exactly the reason it had to act. Either it waded in or 10,000 more people in Delhi died each year, countless more from contact with the Ganges, which continued to catch fire, and the Taj Mahal corroded slowly into a lump of stone. To others, however, the depth and complexity of the job were exactly why the court should have never have taken the plunge.

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[313] Emily Atwood, Note, *Preserving the Taj Mahal: India's Struggle to Salvage Cultural Icons in the Wake of Industrialization*, 11 PENN ST. ENVTL. L. REV. 101, 116 n.10 (2002).

[314] Tata, Tata Motors, http://www.tata.com/company/profile.aspx?sectid=a4Nd8IHyrqI= (last visited June 27, 2009).

[315] Rosencranz & Jackson, *supra* note 214, at 232–34 (reciting a similar history of government resistance to its own, and the court's, public health mandates).

[316] *See* DIVAN & ROSENCRANZ, *supra* note 213, at 147, 149 (citing Shyam Divan, *Cleaning up the Ganga*, ECON & POL. WKLY., July 1, 1995, at 1557).

The arguments against "judicial activism" are the same anywhere.[317] In India, they are only more acute. It is said that courts lack the technical capacity to control pollution, and this is true. On the other hand, as revealed in this case, the obstacles to pollution control are more institutional than technical and, where expertise is required, this court proved that it could come up to speed in hurry.

It is also said that as an unelected institution, court actions of this type are undemocratic and should be best left to elected officials,[318] and this also is true. On the other hand, the laws and the constitution itself on which this court relied were passed through democratic processes; what this and other courts are doing is validating those processes by explaining their results

It is further said that, by plunging so deeply into the management of issues that carry big social and economic price tags—relocation, jobs—the court risks losing the popular support on which its credibility depends, a risk the court itself has acknowledged.[319] On the other hand, there is strong public support for cleaning up the Taj, the Ganges, and the airshed of Delhi, and there has been no other place for the victims to go.

It is said as well—and this appears to be the bottom line for most critics—that the court's preoccupation with environmental rights is exaggerated and misplaced, and that what courts should do instead is facilitate economic development from which, then, social justice will flow. This was Indira Gandhi's message to the Stockholm Convention in 1972, and it is a powerful

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[317] *See* Rosencranz & Jackson, *supra* note 214, at 244-53; Sathe, *supra* note 164, at 88-107; Mijin Cha, *A Critical Examination of the Environmental Jurisprudence of the Courts of India*, 10 ALBANY L. ENVTL. OUTLOOK J. 197 (2005); *see also* Atwood, *supra* note 313, at 116–17; e-mail from Chopra Shudhir, Prof. of Law, Katholieke Univesitait Leuven to Oliver A. Houck, Prof. of Law (Feb. 28, 2005) (on file with author) (stating "The problem with the Indian decision is that it did not stop the activity, only created a much more corrupt system where many lawyers of administration now take a huge cut. Second, it has established a bad precedent in law, what was meant to be solved by proper legislation has been left with judges who cannot legislate the details"). Each commentator expresses reservations about how far the Court can and should go. None suggest an alternative, however, given the prevailing reluctance of the executive branch to enforce the law. *See id.* "Perhaps the answer lies more in ethics and attitude than in economics or science based regulation." *Id.* This may be true, but the political question on all environmental issues is what to do in the meantime. *Id.*

[318] *See* Scalia, *supra* note 117.

[319] *See* Bandhua Mukti Morcha v. Union of India, A.I.R. 1984 S.C. 802.

> There is always the possibility, in public interest litigation, of succumbing to the temptation of crossing into the territory which properly pertains to the legislature or to the Executive Government. In contrast with policy making by legislation . . . no such viable impact can be perceived when judicial decrees are forged and fashioned by a few judicial personages in the confines of a court.

Id.; *see also* Balco Employees Union (Regd.) v. Union of India, [2001] 4 L.R.I. 957, para. 44 (refusing to interject the Court into "policy" determinations).

one.[320] On the other hand, the world has come to realize that the delayed price of uncontrolled development is terribly steep, and the damages are often irreversible. You lose the Taj, you don't get it back. In this regard, the Taj may be the world's largest and most visible canary in the coal mine. Written on its walls, beyond the calligraphy, is the message that something is very wrong.

For his part, M.C. Mehta walks on, continuing a journey that will soon span a quarter of a century and has only broadened with time. In a case involving a gas leak, he introduced the principle of strict liability for hazardous activities.[321] In another, treating a back-room transfer of a park reserve to a government functionary for the construction of a tourist hotel, Mehta won a ruling on public trust that will now be another cornerstone, beyond legislation and the Constitution, for new environmental protections.[322] Throw in, as a remedy, the imposition of punitive damages against the official for personal misconduct.[323] In one of his more amazing petitions, he persuaded the court under yet another constitutional provision to require that all citizens be educated on the need for environmental protection.[324] In furtherance, the court directed the broadcast of environmental messages in the media, environmental education in schools and colleges and the production of documentaries on stewardship, pollution, and the natural world.[325]

Perhaps with an eye towards support for its own initiatives, the court explained that "if the laws are to be enforced" and the "malaise" of the public addressed while protecting the environment, it was necessary that "people be aware of the vice of pollution and its evil consequences."[326] It continued, "[w]e are in a democratic polity where dissemination of information is the foundation of the system. Keeping citizens informed is an obligation of the government."[327] Judicial activism? Surely so. But in a world where government information seems so largely directed to political and self-promotional ends, perhaps refreshingly so.

Mehta is a deeply religious man.[328] He made his mark with litigation, but he takes teaching as a mission. He has started his own environmental education center, lectures at the university level, and has trained a small but steady stream of environmental advocates. He continues with the seemingly endless

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[320] See text accompanying *supra* note 200.

[321] M.C. Mehta v. Union of India, A.I.R. 1987 S.C. 965.

[322] M.C. Mehta v. Kamal Nath, [1997] 1 S.C.C. 388.

[323] *See Mehta Presentation*, *supra* note 169.

[324] *See* M.C. Mehta v. Union of India, Writ Petition No. 860 of 1991 (2003), *available at* www.downtoearth.org.in/html/sc_directive.htm.

[325] Mehta v Union of India, A.I.R. 1992 SC 382.

[326] *Id.*

[327] *Id.*

[328] Interview with M.C. Mehta, *supra* note 248.

proceedings on the Taj Mahal, the Ganges and the air pollution in Delhi, any one of which would exhaust most people. He has his legends, not all of the friendly.[329] Then again, there are many legends of the Taj Mahal as well. They are both still standing, however, Mehta and the Taj, and despite the corrosion of a world hell bent on other objectives, they remain in their own ways surprisingly resilient and the fusion of beautiful things.

IV. CONCLUSION

A. Reflections on Sacred Places

There is something powerful going on in *Cedar Tree* and the *Taj Mahal*. In both cases, objects held sacred faced down the most intractable pressures of the industrial world, including a public works colossus that had never lost a battle, probably never even lost a skirmish, and in the case of the *Taj*, pollution problems so pervasive, debilitating and diffuse that they seemed beyond control by any agency of government, to say nothing of the courts. Lawsuits against lesser adversaries lose every day. Instead, the High Court of Tokyo manufactured environmental law out of little more than an expropriation statute, and the Supreme Court of India made not only law but, in effect, an agency of itself to solve the problem. Either approach would give the United States Supreme Court, which put environmental law on the map of America forty years ago, serious pause. Courts are not supposed to do this.

So why did the courts in India and Japan do it? Certainly not because they were inherently more willful and aggressive than our own. Indeed, both judicial systems rose from far more conservative traditions. Quite obviously, and they stated it quite openly, they were responding to something deeper that is very much at the heart of environmental law and, at the same time, its challenge to the industrialized world. Spiritual values went to court and won. Courts are not supposed to do this either. All the more so in the United States.

America has a difficult time relating the spiritual with the environment. For every Ralph Waldo Emerson, Henry David Thoreau and John Muir, who wrote of the forests as "God's First Temple,"[330] there is presidential candidate Patrick Buchanan charging that environmentalists had "turned Easter into Earth Day

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[329] One Indian scholar told the author that Mehta and other environmental advocates were filing cases in order to enrich themselves. Interview with Professor Chopra Sudhir, in New Orleans, La. (Apr. 4, 2004). A similar allegation against Indian plaintiff lawyers was made by the prominent Indian writer Khushwant Singhj. Mehta brought suit and forced a public apology. Susan P. Evangelista, *Biography of Mahesh Chander Mehta*, 1997, http://www.rmaf.org.ph/Awardees/Biography/BiographyMehtaMah.htm.

[330] STEWART L. UDALL, THE QUIET CRISIS 114 (1963) (citing John Muir, Sacramento Record-Union, Feb. 9, 1876)).

and worship dirt,"[331] and columnist George Will affronted by conflating humans with "the swine from which the species has only recently crept."[332] Perhaps the most perplexing dynamic in the climate change debate is the fierceness with which the very notion is rejected by fundamentalist Christians, to whom, one might suppose, saving God's earth would matter. Instead, the polar bear on its shrinking ice floe has become one of the most reviled objects on A.M. talk radio.[333] Why so much hate over the bear? It is not, I think, because they are enamored of coal fired power plants or the oil and gas industry. What they fear is worshiping the bear. Some strains of the environmental movement get close.[334]

These fears have gone to court in lawsuits challenging government environmental protections,[335] and even Earth Day educational programs,[336] as "establishing" religion in violation of the First Amendment. While these claims have found more favor with their constituents than with the judiciary, more difficult establishment issues have arisen with federal protections for areas of public land sacred to Native American people. Sensing danger in supporting religious practices, courts have tended to rest their holdings on the "voluntary" nature of the restrictions and the cultural, rather than the religious, values at hand.[337] No one can safely say where the "establishment" line may lie

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[331] Colman McCarthy, *Restoring the Natural Balance*, WASH. POST, Nov. 17, 1996.

[332] George Will, *Pondering History's "Might Have Beens,"* TIMES-PICAYUNE, Feb. 23, 1998, at B-7.

[333] The Rush Limbaugh Show, Record Cold Raises No Questions: Polar Bear Photo a Fraud, http://www.rushlimbaugh.com/home/daily/site_020507/content/0205071.guest.html (last visited June 27, 2009).

[334] One such movement invokes Gaia, an ancient Greek goddess of the earth, to promote a spiritual interconnectedness of the earth and its components. *See* David Spangler, *The Meaning of Gaia: Is Gaia a Goddess, or Just a Good Idea?*, EARTH & SPIRIT, Winter 1990, at 44. For a fundamentalist view, see Jennifer Rast, Gaia Worship: The New Pagan Religion, Oct. 6 2002, *available at* http://contenderministries.org/UN/gaia.php; Robert H. Nelson, *Environmental Religion: A Theological Critique*, 55 CASE W. RES. L. REV. 1 (2004). "[E]nvironmentalism is a religion in the same sense Marxism is a religion." Spangler, *supra*, at 57.

[335] *See* Michael Kiefer, *Forest Grump, a Prominent Southwestern Environmental Group is at the Center of a Squirrelly Federal Lawsuit*, PHOENIX NEW TIMES, Nov. 25, 1995 (discussing a "conservative think tank" that sues the U.S. Forest Service for making decisions based on "the religion of 'Deep Ecology'").

[336] Altman v Bedford Cent. Sch. Dist., 245 F.3d 49, 58 (2d Cir. 2001) (holding Earth Day exercises featuring a Hindu god and "listening to nature" tape did not violate the establishment clause).

[337] *See* Natural Arch & Bridge Soc'y v. Aston, 209 F. Supp. 2d 1207 (D. Utah 2002) (park sign and brochure explaining spiritual significance of area to Native Americans did not constitute establishment); Bear Lodge Multiple Use Ass'n v. Babbitt, 175 F.3d 814 (10th Cir. 1999) (discussing a suit challenging voluntary program to refrain from recreational use during Native American religious season dismissed for lack of standing). *But see* Buono v. Norton, 371 F.3d 543 (9th Cir. 2004) (holding Christian cross on public land violated establishment clause).

here, but more recent opinions supporting faith-based government programs may have moved it significantly to the rear.[338]

Another First Amendment question has been whether government actions impairing these sites violate its guarantee of "free exercise" of religion. Tribal cultures have depended on and rigorously worshiped natural subjects as diverse as Chinook Salmon, Chimney Rock and the Oldman River as it emerges onto the plains of Alberta. Sacred sites were also found on peaks and in deep groves where the dead were buried and contact made with the spirit world. One such grove in the Pacific Northwest was the target of a U.S. Forest Service timber road.[339] Against the advice of its own cultural history panel, which found the grove an "indispensible part" of tribal religious practices, the Service decided to plough through it instead.[340] A route avoiding the area would have cost more money. In a much-criticized opinion, a Supreme Court majority granted that the road would "virtually destroy" the tribe's ability to practice its religion,[341] but decided that to protect the grove for this reason would violate the First Amendment, legitimizing no end of resistance to federal programs. "Nothing in this decision", the majority went on to assure its readers, "should be read to encourage governmental insensitivity to the religious needs of any citizen."[342] An assurance the dissent found fatuous.[343]

From a constitutional standpoint, then, sacred sites are not only unprotected in U.S. law, they may not be capable of being protected. The last legal shot to stop the Tellico Dam on the sacred homeland of the Cherokee Indian Nation was based on the religious values of Tonnassee, their equivalent of

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[338] *See* Zelman v. Simmons-Harris, 536 U.S. 639 (2002) (approving government voucher assistance to school district composed overwhelmingly of religious schools); *see also* Bowen v. Kendrick, 487 U.S. 589 (1988) (holding government grants to religious organizations to counsel on teenage sexuality do not facially violate establishment clause); Hein v. Freedom from Religion Foundation, 127 S. Ct. 2553 (2007) (holding that there was no taxpayer standing to challenge grants to groups for "faith based" services).

[339] Lyng v. Nw. Indian Cemetery Protective Ass'n, 485 U.S. 439 (1988).

[340] *Id.* at 442.

[341] *Id.* at 451.

[342] *Id.* at 453.

[343] *Id.* at 476-77.

> Having thus stripped respondents and all other Native Americans of any constitutional protections against perhaps the most serious threat to their age-old religious practices, and indeed to their entire way of life, the Court assures us that nothing in its decision 'should be read to encourage governmental insensitivity to the religious needs of any citizen.' I find it difficult, however, to imagine conduct more insensitive to religious needs than the Government's determination to build a marginally useful road in the face of uncontradicted evidence that the road will render the practice of respondents' religion impossible.

Id. (citation omitted).

Jerusalem.[344] They lost. It took a tiny fish, instead, to enjoin the dam. And then, only for a while.

The turmoil over these issues finally reached Congress, which in 1978 enacted the American Indian Religious Freedom Act.[345] When this law failed to stop further incursions,[346] Congress added more teeth to the Act, requiring a free speech-like analysis keyed to the importance of the government interest and the least offensive means to achieve it.[347] On that scale, the forest road above would surely fail. But on the same scale, where would the Nikko Taro highway lie? Before the test could fairly breathe, however, in 1977 the Supreme Court struck down the Act as an unwarranted trespass on state affairs.[348] Lurking behind whatever protections remain for sacred places is the question whether they go so far as to establish a permissible religious servitude on the American landscape.

One is left with a curious phenomenon. The United States, one of the most overtly religious cultures in the western world, is in deep conflict over the spiritual base of its environmental beliefs, and the legal protections that result from these beliefs. There is nothing like the Toshogu Shrine in America. Nor for that matter, the Taj Mahal. We, likewise, have no sacred trees or natural places of any kind. We do approach the Grand Canyon, Niagara Falls and the Statue of Liberty with certain awe, but one can easily imagine another dam on the Colorado River in the name of sustainable energy, or perhaps a proposal to move the Statue to accommodate large container ships. Despite the innate appeal of clean air and clean water, the federal laws protecting them were propounded for utilitarian values, as they would need to be in order to survive Commerce Clause scrutiny. We are forced to defend even the Endangered Species Act on the same, dubious, interstate-commerce ground.[349] Perhaps the closest America has come in environmental law to recognize its spiritual roots is the national wilderness system, whose very definition, "where man himself is

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[344] *See* Sequoyah v. Tenn. Valley Auth, 480 F. Supp. 608 (E.D. Tenn. 1979), *aff'd*, 620 F.2d 1159 (6th Cir. 1980), *cert. denied*, 449 U.S. 953 (1980).

[345] 42 U.S.C. § 1996 (1994).

[346] *See* text accompanying *supra* notes 316, 321; *see also* Badoni v. Higginson, 638 F.2d 172 (10th Cir. 1980) (discussing an attempt to restrict access to Rainbow Bridge); Frank Fool's Crow v. Gullet, 706 F.2d 856 (8th Cir. 1983) (discussing an attempt to prevent expansion of parking lot in Black Hills).

[347] Religious Freedom Restoration Act, Pub. L. No. 103-141, 42 U.S.C. §§ 2000bb to -4 (1993), *invalidated by* City of Boerne v. Flores, 521 U.S. 507 (1997).

[348] *Flores*, 521 U.S. at 507.

[349] *See* Nat'l Ass'n of Home Builders v. Babbitt, 130 F.3d 1041 (D.C. Cir. 1997) (commerce clause supports ESA, by a vote of 2-1). For an argument that environmental legislation is better predicated on the General Welfare clause, see Oliver Houck, Environmental *Law and the General Welfare*, 16 PACE ENVTL. L. REV. 1 (1998).

a visitor who does not remain,"[350] speaks as if it were written by Emerson himself. One would wonder where Congress gets off protecting wilderness at all.

And yet, spirituality drives much of the American environmental movement. The health concerns behind the control of pollution are primary and real, but they alone do not explain the energy and commitment that confront willful contamination and mindless development in every corner of the country, in one form or another, every day. These people hope to win, but they are not counting on it. They are in it, even though being in it is very hard, even though they burn out, because they feel down to their bones that destroying the environment is wrong, simply and morally wrong. This was the feeling that propelled the *Nikko Taro* and *Taj Mahal* decisions as well. This feeling, and it is undeniably spiritual, unites environmentalists around the globe.

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[350] 16 U.S.C. § 1131(c) (1964).

Do We Need to Impair or Strengthen Property Rights in Order to "Fulfill Their Unique Role"? A Response to Professor Dyal-Chand

Gideon Kanner*

I. INTRODUCTION

"It cannot be doubted that among civil rights intended to be protected from discriminatory state action by the Fourteenth Amendment are the rights to acquire, enjoy, own and dispose of property."[1]

"We see no reason why the Takings Clause of the Fifth Amendment, as much a part of the Bill of Rights as the First Amendment or Fourth Amendment, should be relegated to the status of a poor relation. . . ."[2]

In contrast with these Supreme Court pronouncements and the reasoning on which they are based, the thesis of Professor Rashmi Dyal-Chand's article is that demoting property rights to "poor relation" status will somehow fulfill their role as "guardian of every other right."[3] Just how diminishing the status of a basic Bill of Rights guarantee can fulfill rather than undermine its role, Professor Dyal-Chand does not explain, thus bringing to mind the Vietnam era line "We had to destroy the village in order to save it." Given the ongoing controversy over the use of government's power to take private property, not only for legitimate public uses, but also for plainly private ones (even if the latter are semantically disguised as a "public benefit"), it seems appropriate to begin with a few words on the role of property in society—curiously, a subject Professor Dyal-Chand does not address in his article.

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[1] Lynch v. Household Fin. Corp., 405 U.S. 538, 543 (1972) (quoting Shelley v. Kraemer, 334 U.S. 1, 10 (1948)) (internal quotation marks omitted).

[2] Dolan v. City of Tigard, 512 U.S. 374, 392 (1994).

[3] Rashmi Dyal-Chand, *"A Poor Relation?" Reflections on a Panel Discussion Comparing Property Rights to Other Rights Enumerated in the Bill of Rights*, 16 WM. & MARY BILL RTS. J. 849, 861 (2008) ("[P]erhaps it is not at all wrong for property rights to serve as the 'poor relation' precisely so that they may fulfill their role as the 'guardian of every other right.'" (citation omitted)).

If there is anything that recent world history has taught, it is that on the whole, societies that protect individual rights in property by a rule of law tend to be not only more successful and more prosperous, but also more respectful of their citizens' personal and political liberties than societies in which private property rights are nonexistent or insecure. Also, in spite of the familiar efforts to pit property rights against environmental concerns, it is generally liberal-democratic western societies in which private property rights are protected by a rule of law that have enacted extensive environmental regulations and have strived to undo past environmental neglect. They are now more proactive in protecting environmental values than those that have historically failed to protect their citizens' property rights.[4]

To state the obvious, liberty means that, within reasonable legal limits, people can do what they want, and one of the things they want very much is to better their economic condition, a process in which reliably protected property rights are essential. But people who lack enforceable property rights know that their prosperity exists at the sufferance of the government, so unsurprisingly, they tend to modify their behavior so as not to bring upon themselves the wrath of government functionaries who wield power over them.[5] In particular, economic security is deemed essential for people whose function is to advance and debate competing ideas. That is why federal judges—and, come to think of it, law professors—enjoy tenure which enables them to make controversial decisions and advance novel ideas without endangering their "iron rice bowl."

The New Deal/Great Society fantasies—the "Nirvana fallacy"[6]—that envision a wise, benign government sorting it all out with laws and regulations that lessen the adversities of life, and advance the public weal by redistributing the wealth of the undeserving rich, those who have had to deal with the regulatory government apparatus know to be a triumph of wishful thinking over reality. It is tacitly based on the premise that, to borrow the expression of Richard Babcock, the late dean of the nation's land-use bar, the experts who formulate land-use regulations are a group of fair-minded geniuses with an average IQ of 150, who sit around debating public policy and selflessly

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[4] The environmental devastation in the former Soviet Union, to take an obvious example, is legendary. *See* MARSHALL T. GOLDMAN, THE SPOILS OF PROGRESS: ENVIRONMENTAL POLLUTION IN THE SOVIET UNION (1972); *see also* Don Lee, *Chinese Hope Pre-Games Environmental Cleanup is a Fresh Start*, L.A. TIMES, Aug. 6, 2008, at A4 ("Clear, blue skies are rare in many Chinese cities, which have some of the dirtiest water and filthiest air in the world.").

[5] *See* Tom Bethell, *The Mother of All Rights; Without Secure Property, the Islamic World Can't Escape Tyranny and Stagnation*, REASON, Apr. 1, 1994, at 41, *available at* http://www.thefreelibrary.com/The+mother+of+all+rights%3B+without+secure+property,+the+Islamic+world...-a015112825 (noting that the absence of enforceable property rights in the Middle East correlates with the prevalence of autocratic governments).

[6] *See* Steven J. Eagle, *Does Blight Really Justify Condemnation?*, 39 URB. LAW. 833, 841 (2007).

advance the public weal. The rough and tumble reality of local land-use politics is quite different.

Government regulations have to be administered by people, and while some government functionaries subscribe to the public service ethic and conduct themselves accordingly, others do not. Still others get a rush from wielding power over people, or at least they are ever ready to sacrifice the rights of others to advance the policies of their employer,[7] and their career goals. On the whole, people who fill government posts are no smarter or more insightful than others, and their decisions, like those of others, can sometimes represent bad policy, inept implementation of good policy, or just plain dunderheadedness. The regulatory culture is frequently driven by the same human motivations, biases, and passions as other institutions—prominent among those being the pursuit of perceived self-interest[8] which in the regulators' minds is often equated with bureaucratic empire building.[9] Ultimately, the real difference between government functionaries and others is that the former can compel obedience to their notions irrespective of their soundness, whereas the latter have to rely on persuasion which stimulates public discourse and puts new ideas to the task of achieving a free society's acceptance rather than being imposed by fiat. To sum up, in many ways government is like fire—no society worthy of the name could exist without it, but no rational society would want to leave it unconstrained.

Nor can it be overlooked that as a regulatory entity matures, it can become a political captive of the very interests it is supposed to regulate and restrain. The result is that government regulations it administers de facto aid the regulated, instead of controlling them. The current ongoing catastrophe in the financial

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[7] *See* Robbins v. Wilkie, 551 U.S. 537, 127 S. Ct. 2588 (2007) (harassment of land owner by federal functionaries seeking to coerce him to convey property gratis to the federal government).

[8] Professor James Buchanan received the Nobel Prize in economics for demonstrating that, for all the familiar platitudes about acting in the public interest, government officials tend to act in pursuit of their own self-interest, the same as everyone else. JAMES BUCHANAN & GORDON TULLOCK, THE CALCULUS OF CONSENT: LEGAL FOUNDATIONS OF CONSTITUTIONAL DEMOCRACY (1962); *see also* STEVEN J. EAGLE, REGULATORY TAKINGS 20 (LEXIS Publ'g 2001) (1996).

[9] An instructive example is provided by Richard F. Babcock and Charles L. Siemon in their book *The Zoning Game Revisited*, where they describe the motivation of a functionary of the California Coastal Commission who targeted the Sea Ranch, the very best, most environmentally sensitive, prize-winning residential development in California, for especially harsh treatment because "[i]f he could lick Sea Ranch, he could beat any [development] proposal." RICHARD F. BABCOCK & CHARLES L. SIEMON, THE ZONING GAME REVISITED 242 (1985).

markets, caused to a significant extent by regulatory failures, provides the proverbial "Exhibit A."[10]

For all these reasons, it is a part of American political culture to view government with wariness, as evidenced by the checks and balances doctrine. The joke, "I'm from the government and I'm here to help you," is now firmly embedded in our culture, and not without reason.[11] Moreover, with reference to the long-standing problems of eminent domain law and practices, my observations, based on some forty years of active involvement in that field, suggest that government lawyers and other functionaries involved in government land acquisition often take advantage of their position by suggesting or even openly arguing that providing genuinely just compensation to condemnees will jeopardize the public fisc,[12] thus introducing inappropriate considerations into the valuation process and encouraging a judicial culture of pro-government result orientation.[13]

To the extent all this impacts on personal lives, property plays an important role in protecting the individual from government excesses because it provides not only a place of personal security and repose but also a sphere of individual autonomy that is secure from government intrusion. Indeed, it is those lower down on the socio-economic scale, who lack the influence and power that large

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[10] For example, the recent collapse into insolvency of the IndyMac Bank was preceded by an event in which "the Office of Thrift Supervisor's West Coast director allowed IndyMac's parent company to backdate an $18 million contribution to preserve its status as a 'well-capitalized' institution." Edmund L. Andrews, *Irregularity Uncovered at IndyMac*, N.Y. TIMES, Dec. 22, 2008, at B1. As of this writing, it is becoming apparent that though the Securities and Exchange Commission was specifically and repeatedly warned of Bernard L. Madoff's Ponzi scheme that eventually embezzled some $50 billion, it did nothing to stop it. Michael Lewis & David Einhorn, *The End of the Financial World as We Know it*, N.Y. TIMES, Jan. 3, 2009, at WK.

[11] The quoted phrase has been judicially characterized as "the ten most terrifying words in the English language." Garcia-Aguilar v. U.S. Dist. Court, 535 F.3d 1021, 1023 (9th Cir. 2008).

[12] People *ex rel.* Dept. of Pub. Works v. Graziadio, 42 Cal. Rptr. 29, 29 (Cal. Dist. Ct. App. 1964) (holding that it was not prejudicial error for the condemnor's trial counsel to urge the jury to keep in mind as it was arriving at a verdict that it was spending its own money).

[13] *See, e.g.*, Temple City Redevelopment Agency v. Bayside Drive Ltd., 53 Cal. Rptr. 3d 728, 733 (Cal. Ct. App. 2007) (trial judge refused to apply explicit provisions of a fee-shifting statute, stating that this would confer a "windfall" on the condemnee, when on the facts of the case, application of the statute actually saved the government money); Comm'r of Transp. v. Vega, 949 A.2d 1288 (Conn. App. Ct. 2008) (notwithstanding explicit statutory provisions, trial court refused to award condemnee interest and appraisal fees); McElwee & Son, Inc. v. Se. Pa. Transp. Auth., 948 A.2d 762 (Pa. 2008) (trial court ignored much uncontradicted evidence and found interference with access to the subject property to be minor and temporary, when in fact it was massive and prolonged); *see also* Estate of Kirkpatrick v. City of Olathe, 178 P.3d 667 (Kan. Ct. App. 2008) (denying compensation for damaging of the owner's land, notwithstanding that a statute provided for payment).

accumulations of wealth can buy, who are more in need of reliable protection by (and from) government than their wealthy counterparts. To paraphrase a line from an old California tort case, a poor man is just as entitled to protection of what he owns as a rich man—and much more in need of it.[14]

That idea is what inspired William Pitt's famous observation:

> The poorest man in his cottage bid defiance to all the forces of the Crown. It may be frail; its roof may shake; the wind may blow through it; the storm may enter; the rain may enter; but the King of England cannot enter—all his force dares not cross the threshold of the ruined tenement![15]

That statement not only celebrates the role that private property plays in protecting its owners from government intrusion but also dramatizes the fact that the institution of property serves to protect the poor along with the wealthy.

Finally, people are territorial creatures[16] who strongly feel that an invasion of their turf is a just cause for resorting to violence[17]—a *casus belli*—and therefore takings of their property engender strong feelings on their part. The existing eminent domain legal regime does not fully take that reality into account, nor its long-term corrosive effects on the public perception of the legal system, which is widely perceived as facilitating condemnors' economic goals with scant regard for legitimate concerns and feelings of condemnees. People who are called upon to surrender their property for genuinely needed public uses—schools, hospitals, defense installations, roads, etc.—are capable of summoning their civic values and accepting their fate as an unavoidable consequence of living in a civilized society. But in urban redevelopment cases, people who find themselves evicted from their homes and businesses (the former often under conditions of undercompensation, and the latter usually without any compensation) for the avowed benefit of wealthy business entities that are out to grow even wealthier at their expense,[18] have every reason to

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[14] Robinson v. Pioche, Bayerque & Co., 5 Cal. 460, 461 (Cal. 1855) ("A drunken man is as much entitled to a safe street, as a sober one, and much more in need of it.").

[15] Miller v. United States, 357 U.S. 301, 307 (1958) (quoting THE OXFORD DICTIONARY OF QUOTATIONS 379 (2d ed. 1953)).

[16] *See* Michael M. Berger, *To Regulate or Not to Regulate—Is That the Question? Reflections on the Supposed Dilemma Between Environmental Protection and Private Property Rights*, 8 LOY. L.A. L. REV. 253, 265-66 nn.54-57 (1975) (providing a collection of authorities).

[17] *See* Davis v. Mills, 194 U.S. 451, 457 (1904) ("Property is protected because such protection answers a demand of human nature, and therefore takes the place of a fight.").

[18] Aaron v. Target Corp., 269 F. Supp. 2d 1162 (E.D. Mo. 2003), *vacated on other grounds*, 357 F.3d 768 (8th Cir. 2004) (Target store taking in over $30,000,000 annually decided to expand at the expense of its landlord). As one observer has aptly noted, the use of eminent domain to eliminate "blight" has become a marketing tool for governments seeking to lure bigger businesses. Dean Starkman, *Take and Give: Condemnation is Used to Hand One Business Property of Another*, WALL ST. J., Dec. 2, 1998, at A1. For a vivid description of the sort of political infighting underlying a municipal decision whether to proceed with a

resent the government that does that to them, and—adding insult to injury—argues that by doing so it is promoting a "public benefit."

This article, therefore, follows Professor Dyal-Chand's lead as well as the theme of the 2006 Brigham-Kanner Symposium of which he wrote, and focuses on the status of property rights in the context of eminent domain, where the government acts avowedly to take those rights, which is "where the rubber meets the road," as a popular commercial put it[19]—where constitutional policy and legal formulations collide with economic reality and prevailing moral precepts. By way of early warning to the reader, let me make it clear at the outset that in so doing, I have no intention of emulating many of my academic colleagues who tend to discuss legal problems in theoretical and philosophical terms. I prefer the irreverent advice of the late Professor Fred Rodell who counseled candor in assessment of unsound court decisions and observed that law reviews should be as useful to lawyers as lead pipe is to plumbers.[20]

Last but not least, though I recognize, as I must, that the Supreme Court has at different times enforced some constitutional rights more effectively than others, I hew to the quaint notion that on principle, the Constitution is by its own terms the "supreme law of the land," not an ideological smorgasbord from which those constrained by it may choose which of its provisions to enforce and which to neglect or disregard. The obvious danger with the latter approach is that fundamental rights that are cherished today may fall into disfavor tomorrow as a new crop of judges mounts the woolsack, to the consternation of those who lecture us today on how constitutional rights that are not to their liking should be treated as the law's "poor relations."

II. WEALTH CREATION IS NOT A ZERO-SUM GAME

In his article, Professor Dyal-Chand joins Professor Eric Kades, who spoke at the 2006 Brigham-Kanner symposium, suggesting a formal demotion of property rights to the status of a constitutional "poor relation," claiming that this would somehow enhance rather than impair their effectiveness as the "guardians of every other right."[21] Just how diminishing a right can enhance it goes without explanation. In the end, Professor Dyal-Chand bases his position on the familiar concern that extreme concentrations of property in the hands of

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redevelopment project and if so, what kind and by which redeveloper, see *Johnson v. City of Minneapolis*, 667 N.W.2d 109 (Minn. 2003).

[19] Audio file: Firestone Centennial, Where the Rubber Meets the Road, http://www.firestone100.com/history/audio.html (last visited Mar. 27, 2009).

[20] Fred Rodell, *Goodbye to Law Reviews—Revisited*, 48 VA. L. REV. 279, 285 (1962).

[21] Dyal-Chand, *supra* note 3, at 861. The quoted phrase comes from the title of Professor James W. Ely's book, *The Guardian of Every Other Right.* JAMES W. ELY, THE GUARDIAN OF EVERY OTHER RIGHT (2d ed. 1997).

some to the exclusion of all others are undesirable and are properly dealt with by the use of eminent domain.[22] But that scenario, apart from being unrealistic in today's America, tacitly presupposes that the creation of wealth is a zero-sum game in which gain by some necessarily impoverishes others, a proposition that does not hold true in free societies. Modern experience has taught that large accumulations of wealth often come from new ideas and technologies that provide employment and entrepreneurial opportunities to others and thereby create new wealth for many.[23] Trite though it may be, the Horatio Alger scenario continues to retain force. To take an obvious example, Bill Gates started out as a geeky college dropout but became a multi-billionaire, not by robbing others of their assets, but by developing a new technology that became available to everyone and that has enhanced human lives and prosperity to an astonishing degree. It was his success that inspired many others to pursue their technological inventiveness and entrepreneurial talents to create new wealth: the computer industry and its many personal fortunes.

The social evil in the situations deplored by Professor Dyal-Chand is not that those who have accumulated great wealth have done so, but rather that the system he envisions denies the opportunity to accumulate property to all others. The short answer to that concern is two-fold. First, the problem with eminent domain that agitates today's Americans does not arise from property redistribution from the haves to the have-nots, but rather from the opposite: a massive transfer of wealth *from the middle class to the very rich.* Second, even on its own premise, the problem envisioned by Professor Dyal-Chand can be dealt with by law if, where, and when it occurs.[24] It is neither necessary nor desirable to demote everyone's property rights to second-class status merely because under some circumstances some of them may be abused by some property owners. Indeed, that would be irrational. To invoke a familiar metaphor, one need not burn down the house to roast a pig.[25]

A. Hawaii Housing Authority v. Midkiff, *the Keystone of Professor Dyal-Chand's Argument, is Based on a Faulty Legislative Finding that Failed to Reflect Reality, and Caused the Opposite from Its Intended Effects to Occur*

To make his point, Professor Dyal-Chand presents his readers with an extrapolated version of *Hawaii Housing Authority v. Midkiff.*[26] He posits a place where "the vast majority of land is owned by just a few families," so that "most citizens in the jurisdiction merely rent the land on which their homes are

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[22] Dyal-Chand, *supra* note 3, at 861; *see infra* note 33.

[23] *See infra* note 169 and accompanying text.

[24] *See infra* note 36 and accompanying text.

[25] Int'l Salt Co. v. United States, 332 U.S. 392, 403 (1947).

[26] 467 U.S. 229 (1984).

located, rather than owning it outright."[27] Whether land redistribution under such extreme circumstances has arguable merit may be a proper subject of debate, but that is *not* what *Midkiff* was about, and Professor Dyal-Chand concedes that his hypothetical example is only "closely based" on *Midkiff*.[28] *Midkiff* upheld legislation authorizing redistribution of freehold titles to lessees of parcels on which their homes stood because the Court uncritically accepted the legislature's dubious "finding"[29] that the local land market had malfunctioned and therefore redistribution of fee simple titles from land lessors to their residential tenants would cure prevailing high housing costs said to be brought about by a land "oligopoly"[30] on the island of Oahu.[31] But the market had not "malfunctioned." Rather, it was responding rationally to prevailing conditions, most of which were brought about by government land ownership patterns and regulatory policies.[32] The legislation in question could not

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[27] Dyal-Chand, *supra* note 3, at 860.

[28] *Id.* at 861.

[29] Note that by 1992 the Supreme Court had grown somewhat disenchanted with "legislative findings" and observed that barring a "stupid staff," a legislature could always come up with an "artful harm preventing rationalization." Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1025 (1992).

[30] *Midkiff*, 467 U.S. at 242. As anyone who has tried to find a precise definition of "oligopoly" learns in a hurry, it is a term that is not usually defined in quantitative terms. *Midkiff* was no exception. As Professor Richard Epstein put it, "No antitrust expert thinks 'oligopoly' because there are 'only' seventy or twenty-two or eighteen landowners in a given market. Why then allow the legislature to so find?" RICHARD EPSTEIN, TAKINGS 181 (1985). Professor Epstein also noted that Hawai'i's extensive network of state land use regulations facilitates the very oligopolistic practices that the land reform statutes were said to counteract. *Id.*

[31] *Midkiff*, 467 U.S. at 242. The Court acknowledged that the government owns about half of the land on Oahu (making its holdings unavailable for construction of badly needed housing). *Id.* at 232. The Court had to resort to asserting that a market is "malfunctioning" when large numbers of would-be home buyers cannot buy homes "*at fair prices*." *Id.* at 242 (emphasis added). Unfortunately, judged by that standard, the Oahu market "malfunctioned" a lot more *after* the judicial ministrations in the *Midkiff* case than it had before, as house prices immediately skyrocketed. *See infra* note 32 and accompanying text.

[32] The *Midkiff* opinion failed to note that a major reason—perhaps *the* reason—for the shortage of new housing on Oahu was (and still is) the prevailing anti-development land-use regulatory climate that inhibits construction of dwellings even on privately owned land. DAVID L. CALLIES, REGULATING PARADISE: LAND USE CONTROLS IN HAWAI'I 173-74 (1984); Leroy O. Laney, *Cost of Living*, *in* THE PRICE OF PARADISE 23, 30 (Randall W. Roth ed., 1992).

> Blame for the primary contributor to high cost of living—housing—has been leveled at foreign speculation, a strong economy and a growing population. Yet it is on the supply side that we find the real villain. Supply of new housing—the only viable way housing prices can be reduced significantly—is restricted by local land-use policies and a prolonged development process.

Id. Thus, *Midkiff* and the legislation it construed addressed a problem that could not possibly be solved in this fashion since the legislation neither created nor encouraged new housing. The

possibly bring about lower home prices or an increase in the supply of housing.[33] Nor could it stabilize prices of existing homes, and to that extent was not rational. Among other reasons, other things being equal, fee simple titles are inherently more expensive than limited duration leasehold interests. There was thus no way that rational lessees who gained fee simple titles under *Midkiff*, and who were required to pay full market value for them, would turn around and sell their newly minted freehold titles for less than prevailing

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proof of the pudding is that *Midkiff* was decided in 1984, but by 1990, far from stabilizing, Oahu home prices more than doubled, going from a median of $159,000 to $345,000. Sumner J. La Croix, *Cost of Housing*, *in* THE PRICE OF PARADISE, *supra*, at 135. To understand how it happened, see *id.* at 136-37; *see also* Gideon Kanner, Kelo v. New London*: Bad Law, Bad Policy and Bad Judgment*, 38 URB. LAW. 201, 214-15 (2006); Debra Pogrund Stark, *How Do You Solve a Problem Like in* Kelo*?*, 40 J. MARSHALL L. REV. 609, 624-30 (2007).

[33] The *Midkiff* legislation applied only to land *that was already subdivided and improved with occupied homes built on sites leased to the homeowners*. *Midkiff*, 467 U.S. at 233. Thus, not a square inch of the large agricultural and commercial land holdings on Oahu could be redistributed for *new* housing under the legislation in issue, and the beneficiaries of the *Midkiff* redistribution already owned and occupied generally upscale homes to which they thus gained fee simple title. *No one who did not already own and occupy a home could gain one under the Midkiff legislation which therefore could do nothing to increase the supply of homes and lower the cost of housing*. It could only improve the position of those who already owned homes located on leased land. The beneficiaries of *Midkiff* were largely affluent suburbanites in the best parts of town (notably Kahala and Hawai'i Kai), not "the people." It is the latter who, ironically, wound up paying more for lesser housing as home prices on Oahu soared following *Midkiff*, when many "Kahala refugees" sold their homes (after acquiring fee title under *Midkiff*) to eager, open-handed Japanese investors and speculators, and flush with the cash generated by those sales, fanned out across Oahu in search of suitable upscale replacement housing, bidding its prices up in the process. This caused the familiar ripple effect on the cost of homes lower down on the economic scale. *See* Charlotte Low Allen, *The Golden Land Rush*, INSIGHT, Oct. 29, 1990, at 15-19 (describing the "land rush" that resulted as Japanese buyers eagerly snapped up the newly available freehold titles to homes in the best parts of Oahu); *see also* John Duchemin, *Rediscovering Hawaii*, HONOLULU ADVERTISER, Nov. 5, 2000, at 1G.

Finally, *Midkiff* provided an outstanding example of the law of unintended consequences in action. The Hawai'i Housing Authority's Supreme Court brief argued that the redistribution law would prevent speculation and keep individuals from buying more than one house, but as it turned out, once the lessees gained individual freehold titles to their home sites, many of them promptly sold their homes to free-spending Japanese buyers whose Yen currency was rising at the time, causing a tidal wave of speculation. James Mak & Marcia Y. Sakai, *Foreign Investment*, *in* THE PRICE OF PARADISE, *supra* note 32, at 33, 34-36. One Japanese investor, Genshiro Kawamoto, bought some 100 East Oahu homes without leaving the back seat of his limousine, *id.* at 35, thus becoming a large-scale landlord and partially restoring the *status quo ante*. *See* Tom Forlong, *Yen for Paradise: Hawaii Hit by a Wave of Speculation*, L.A. TIMES, Apr. 26, 1988, at A1 ("Though some buyers want vacation homes, many are speculators looking for fast profits. *In either case*, many of the properties they buy are left vacant much of the time, a painful condition in a city where housing is already in short supply." (emphasis added)).

So much for the government helping out by interdicting speculation, lowering housing prices, and fixing a "malfunctioning" market.

market value, which is to say for less than what they just paid for them. Thus, the legislative supposition that the statute in question would lower housing costs on Oahu was not merely wrong, but positively irrational.

More important for purposes of the present discussion, what happened on Oahu was not a land redistribution from the powerful haves to the downtrodden have-nots, as in Professor Dyal-Chand's hypothetical case, but rather a political battle in which prosperous, influential suburbanites, largely in the upscale parts of the island, prevailed over the legitimate interest of Bishop Estate, a charitable trust that had leased home sites to them *at below-market rents*, and used the proceeds to support the Kamehameha Schools which provide quality education to native Hawaiian children.[34] And so, perhaps in Professor Dyal-Chand's hypothetical land, where "a market for residential real estate really does not exist,"[35] genuine redistributions of land from the genuinely oligopolistic haves to the serf-like have-nots might be defensible as a matter of necessity.[36] But that is not what *Midkiff* was about, and it most certainly is *not* what the ongoing post-*Kelo* controversy over economic redevelopment takings is about.

I acknowledge, as I must, that in *Midkiff* the State of Hawai'i was held to have the power to redistribute titles as it did. That's "the law." But that does not require us to swallow whole the Court's dubious depiction of the economic

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[34] As long as the Bishop Estate kept land rents low ($13 per month for thirty years), *see* James Mak, *Leasehold Conversion*, *in* THE PRICE OF PARADISE, *supra* note 32, at 189, 190, the lessees thought that this arrangement was just fine. It was only after Oahu land values rose and land rents were adjusted accordingly, that many lessees decided to get in on the land appreciation gravy train and developed a desire for fee simple ownership. "[T]ens of thousands of owner-occupants of leasehold single-family houses and condominiums in Hawai'i constitute a powerful interest group that elected officials cannot ignore. When the proverbial gorilla asks for your lunch, it's hard to say no." *Id.* at 192. A fortiori so when the "gorilla" asks for someone else's lunch. The lessees' motivation was thus understandable, but intellectual honesty requires one to acknowledge that this was a case of pursuit of self-interest, if not rent seeking, by a politically powerful group, not some sort of rectification of the plight of housing have-nots. To add insult to injury, the drafters of the law in question had the *chutzpa* to try and take advantage of Bishop Estate's policy of charging low land rents, and provided a compensation formula that was based on below-market rents. That part of the law was held unconstitutional by the trial court, and the State of Hawai'i had the good sense not to appeal from that ruling. *Midkiff*, 467 U.S. at 235 n.3.

Curiously, most of the *Midkiff*-stimulated discussion of land ownership patterns on Oahu has failed to take note of the fact that there was also an anti-trust action brought against the Bishop Estate, in which the courts found that its land holdings involved no illegal practices. Souza v. Estate of Bishop, 821 F.2d 1332 (9th Cir. 1987).

[35] Dyal-Chand, *supra* note 3, at 860.

[36] *See* People of Puerto Rico v. E. Sugar Assocs., 156 F.2d 316 (1st Cir. 1946) (approving, inter alia, condemnation of large sugar cane plantations and their breakup into small farm parcels to be redistributed to landless *agregados* (squatters) for subsistence farming).

reality before it, nor to suppose that the legislation in issue was rational, or that it was anything other than an exercise in political expediency that does not withstand examination, and—most important—that predictably, it neither could nor did achieve its stated goals.[37] But insofar as the present discussion is concerned, the *Midkiff* problem, either as presented to the courts or as embellished by Professor Dyal-Chand in the grand finale to his article,[38] bears no resemblance to the *Kelo* problem which has given rise to the current widespread controversy over misuse of eminent domain to effect private gain rather than public use, and which has done so at the expense of the poor and the lower middle-class in order to benefit wealthy corporations.

Considering the deficiencies of the *Midkiff* opinion, I am unable to improve on the *bon mot* of a California legal wit who observed that we may be bound by higher judicial authority, but we are not bound and gagged,[39] so we remain free to criticize judicial decision-making when it is plainly unsound.

B. Land Redistribution, as in Midkiff, *is the Opposite of the Land Consolidation Prevalent in* Kelo*-Style Redevelopment Cases*

What has aroused the American public to the extent it has, is quite the opposite from the scenarios of either *Midkiff* or Professor Dyal-Chand's hypothetical community. The American public is incensed over the misuse of eminent domain in ways that, far from redistributing property from the haves to the have-nots, is more in the nature of reverse Robin Hoodery:[40] a forcible transfer of property from the lower middle class to the very rich, that accomplishes, not a redistribution but a consolidation of land holdings, from

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[37] Significantly, when the *Midkiff* case was before the U.S. Court of Appeals, Judge Cecil Poole presciently noted in his concurring opinion that the statute in question could only aggravate the shortage of buildable land on Oahu and would result in inflation of home values because its provisions contrasted sharply with its professed goals. Midkiff v. Tom, 702 F.2d 788, 806 (9th Cir. 1983) (Poole, J., concurring), *rev'd*, 467 U.S. 229 (1984). He was proven right by subsequent events.

[38] Dyal-Chand, *supra* note 3, at 861.

[39] BERNARD WITKIN, MANUAL ON APPELLATE COURT OPINIONS 168-69 (1977). In the words of Justice Robert Gardner of the California Court of Appeal, widely admired for his blunt candor and his curmudgeonly wit: "I fully recognize that under the doctrine of stare decisis, I must follow the rulings of the Supreme Court, and if that court wishes to jump off a figurative Pali, I, lemming-like, must leap right after it. However, I reserve my First Amendment right to kick and scream on my way down to the rocks below." People v. Musante, 162 Cal. Rptr. 158, 159 (Cal. Ct. App. 1980) (Gardner, J., concurring).

[40] It is appropriate to note that his depiction in motion pictures notwithstanding, Robin Hood robbed the rich, all right, for that's where the money was, but he kept the loot for himself and his merry men, and gave nothing to the poor in whose name he supposedly performed his deeds of derring-do. Anthony Garavente, *Latest Robin Hood Movies Miss the Target*, L.A. TIMES, July 15, 1991, at F3.

diverse individual ownership into large commercial tracts owned by large, municipally favored redevelopers.[41] Adding insult to injury, such retransfers to private redevelopers are often for nominal consideration or simply *gratis*.[42] To make matters even worse, in the usual case, such takings occur under conditions of conceded undercompensation of the displaced persons, thus irreparably harming them and making a mockery of the constitutional promise of *just* compensation.[43]

Most important from a governance point of view, the decline of American cities (whose revival is the *raison d'etre* of modern urban redevelopment) is unlikely to be reversed by current redevelopment practices because it was brought about by socio-economic mega-trends and major government policy initiatives. Beginning in the mid-1940s, these trends and initiatives have aggressively encouraged and financed a wholesale migration out of cities into the suburbs, unsurprisingly causing what is now known as "sprawl," and leaving behind blighted urban neighborhoods, abandoned by their erstwhile inhabitants.[44] Once large-scale government-guaranteed low cost financing of suburban homes became available, and builders responded by constructing and selling affordable tract homes on a no-money-down basis, the rest was a no-brainer. The price of new entry-level suburban homes built after World War II was often so low that the cost of ownership was less than the cost of renting, and the appreciation in home prices often covered the cost of ownership, thus effectively providing the buyers of those homes with free or nearly free

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[41] It is a familiar feature of redevelopment laws that "diversity of ownership" is listed as a criterion of "blight" said to justify the taking of the diversely owned homes by eminent domain, and the conveyance of their razed sites to a single redeveloper for consolidation into a large commercial building site. *See, e.g.*, City of Norwood v. Horney, 830 N.E.2d 381, 388 (Ohio Ct. App. 2005) (similar language quoted therein), *rev'd*, 853 N.E.2d 1115 (Ohio 2006).

[42] Thus in *Kelo*, the municipal plan called for leasing a ninety-acre waterfront tract (taken from Suzette Kelo and her neighbors) to the redeveloper for ninety-nine years at $1 per year. Kelo v. City of New London, 545 U.S. 469, 476 n.4 (2005). This is what is known in the redevelopment business as "land write-down."

[43] Much has been written about the prevailing inadequacy of compensation payable to the evicted property owners in eminent domain cases, *see infra* note 87 and accompanying text, but at this point it should suffice to quote Professor Merrill, who hit the bull's-eye in one sentence: "The most striking feature of American compensation law—even in the context of formal condemnations or expropriations—is that just compensation means incomplete compensation." Thomas W. Merrill, *Incomplete Compensation for Takings*, 11 N.Y.U. ENVTL. L.J. 110, 111 (2002). Also, in most condemnation cases that go to trial or settle before it (except in Florida and Louisiana), the property owners whose land is taken have to pay their lawyers, appraisers and other experts out of their "just compensation" award, thus insuring that their net recovery never reaches the level of even the judicially formulated, parsimonious measure of "fair market value" that at best ignores the condemnees' incidental economic losses and that in most cases provides no recompense at all for their business losses.

[44] JANE JACOBS, THE DEATH AND LIFE OF GREAT AMERICAN CITIES 402 (1992).

housing. That was the case with the first house I bought (in 1956) in the San Fernando Valley; my all-inclusive monthly payments were about $70 (or $840 per year), while the market value increased by more than that amount—in 1958 I sold that house for some $2000 more than what I had paid for it. Thus, among my contemporaries, it was incontestable that buying and living in a suburban home was not only more agreeable than living in a city apartment, but also cheaper.

The motivation for this out-migration from cities was later reinforced by a dramatic deterioration of urban habitats, evidenced by the urban riots of the 1960s,[45] the rise in urban crime (and a corresponding decline in law enforcement of the 1970s),[46] as well as the catastrophic decline in the safety and quality of urban public schools aggravated by involuntary student bussing,[47] to say nothing of urban redevelopment that became an engine of destruction of large numbers of low and moderate cost urban dwellings, displacing hundreds of thousands of people annually.[48] As Jane Jacobs put it: "The cataclysmic use of money for suburban sprawl, and the concomitant starvation of all those parts of cities that planning orthodoxy stamped as slums, was what our wise men wanted for us; they put in a lot of effort, one way or another, to get it. We got it."[49]

In other words, the unfortunate condition of the cores of many American cities, which is said to justify urban redevelopment, is the direct consequence of

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[45] DAVID FRUM, HOW WE GOT HERE: THE 70's, at 335 (2000); *see also* Roger Biles, *Thinking the Unthinkable About Our Cities, Thirty Years Later*, 25 J. URB. HIST. 57 (1998) (study conducted by the Department of Housing and Urban Development (HUD) concluded that American cities were facing a choice between becoming "armed camps," or seeing much of their populations move to the suburbs. President Lyndon Johnson got wind of that study and ordered it classified for thirty years. Nothing was done, and the urban population has continued moving out of cities to the suburbs).

[46] Sam Roberts, *The Year New York Lived Really Dangerously*, N.Y. TIMES, May 15, 2005, § 1, at 3; FRUM, *supra* note 45, at 19 ("Americans responded to crime the way they always have responded to bad situations: by hitching up their wagons.").

[47] *See generally* FRUM, *supra* note 45 (describing the assorted urban pathologies that afflicted American cities in the 1970s and, unsurprisingly, motivated city dwellers to move out to the suburbs). Frum makes specific reference to school quality and involuntary student bussing. *See id.* at 251-65; *see also id.* at 255 ("Parents voted with their feet because it was the only vote they were permitted.").

[48] Chester W. Hartman, *Relocation: Illusory Promises and No Relief*, 57 VA. L. REV. 745 (1971) (between 1950 and 1968, 2.38 million urban housing units were destroyed by redevelopment); ADVISORY COMMISSION ON INTERGOVERNMENTAL RELATIONS, COMMISSION REPORT: RELOCATION: UNEQUAL TREATMENT OF PEOPLE AND BUSINESSES DISPLACED BY GOVERNMENT 11-13 (1965) (explaining that by the mid-1960s, some 111,000 families and 17,800 businesses were being displaced by urban redevelopment *annually*).

[49] JACOBS, *supra* note 44, at 405.

government policies adopted after World War II, that candidly favored suburbs and—political rhetoric notwithstanding—have disfavored cities.[50] Perversely, urban redevelopment as practiced has contributed to urban decline by tearing down large numbers of badly needed urban low and moderate cost dwellings.[51] What began as "slum clearance" in short order became a destroyer of urban "blight," a term so elastic as to earmark perfectly usable and badly needed low cost housing for destruction. By now, the continued use of redevelopment can do nothing to reverse the demographic mega-trends of the past half-century as urban populations continue to leave cities for the suburbs. Redevelopment usually succeeds, if at all, in creating a few urban shopping malls or downtown office buildings[52] that are populated by commuting suburbanites who wouldn't be caught dead living in the city. Thus, older American cities sport a few highly visible skyscrapers in their downtown areas, but these do little or nothing for the rest of the city which continues to decline.[53] In spite of a recent

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[50] This policy, embraced and promoted by both ideological wings of America, goes back to the 1930s. *Id.*

[51] *See generally* Hartman, *supra* note 48.

[52] *See, e.g.*, BERNARD FRIEDEN & LYNN SAGALYN, DOWNTOWN INC. (1991); *see* George Lefcoe, *Redevelopment Takings After* Kelo*: What's Blight Got to Do With It?*, 17 S. CAL. REV. L. & SOC. JUST. 808, 836 (2008) (bragging about a few redevelopment successes but failing to acknowledge that these successes involved individual projects, not cities whose populations continue to leave for the suburbs); *see also infra* note 53.

[53] *See* Rick Lyman, *Surge of Population in the Exurbs Continues*, N.Y. TIMES, June 21, 2006, at 10; Beth Barrett, *People Leaving Los Angeles County in Droves*, L.A. DAILY NEWS, Apr. 15, 2005, at 1; Pam Belluck, *City of Homes and Hoops Faces a Long Road Back*, N.Y. TIMES, Mar. 12, 2006, at 14 ("Springfield, the third-largest city in Massachusetts, certainly seems down in the dumps, the victim of decimated industrial base, middle-class flight and seemingly intractable poverty, all greatly aggravated by years of government mismanagement and corruption that have left it at risk of bankruptcy."); Tom Breckenridge, *Cuyahoga Residents Are Saying "Goodbye,"* PLAIN DEALER, Mar. 15, 2006 (Cleveland has lost 58,000 people since 2000); Lisa Chamberlain, *Cleveland Pulls Back from the Edge*, N.Y. TIMES, Sept. 28, 2005, at C9 ("[D]owntown Cleveland is almost completely devoid of major retailers, and the office vacancy rate has climbed 10 percent in 2000 to 20 percent in 2005, even though not a single new commercial office building has been built in more than 10 years."); Edward I. Glaeser, *Can Buffalo Ever Come Back?*, N.Y. SUN, Oct. 2007, at 19-21 ("Probably not—and government should stop bribing people to stay there."); Danny Hakim, *Governor Sets His Sights on Revitalizing Buffalo*, N.Y. TIMES, Oct. 11, 2007, at A25 ("Buffalo is one of the poorest cities in the country, and its problems reflect a deep decline in manufacturing that will be difficult to overcome."); Andrew Jacobs, *A City Revived but with Buildings Falling Right and Left*, N.Y. TIMES, Aug. 30, 2000, at A14 (reporting that in Philadelphia, in spite of its thriving downtown, old, rotten buildings have been literally falling down in less favored parts of the city); Kirk Johnson, *For St. Louis, Great Expectations but a Slow Rolling Renaissance*, N.Y. TIMES, Apr. 8, 2005, at A13 ("[F]or St. Louis, which lost half of its population in the decades after World War II, . . . the good times still remain largely unrealized."); David Lamb, *Once Gilded City Buffing Itself Up*, L.A. TIMES, June 15, 2003, at A26 (describing the deterioration of Hartford); Carol D. Leoning et al., *D.C. Revitalization Promised, Not Delivered*, WASH. POST, Feb. 24,

trickle of empty nesters and yuppies who tend to move into trendy areas of what one commentator has aptly called "hip cool cities," the trend continues—the net migration is still out of, not into cities, and so far redevelopment has not only failed to stem that outgoing population tide but has intensified it.[54]

III. IT IS THE DEPRIVATION OF THE OWNERS, NOT THE TRANSFER OF THEIR PROPERTY TO THE TAKER THAT CONSTITUTES A TAKING

In discussing the proceedings of the third annual Brigham-Kanner Conference held at William & Mary College on October 6-7, 2006, Professor Dyal-Chand emphasized the views of Professor Kades, suggesting that private property may properly receive a diminished degree of constitutional protection because, as he puts it, "the Bill of Rights makes only one right, the right to own property, alienable, indeed even by force."[55] Nevertheless, Professor Dyal-Chand perfunctorily notes the existence of a competing point of view, devoting an entire sentence to it.[56]

Professor Dyal-Chand gives prominence to Professor Kades' view that because property rights are made involuntarily alienable by the Fifth Amendment, "the status of property rights as 'poor relation' is arguably dictated by the Constitution itself."[57] Not so. If nothing else, the Constitution contains no less than a half-dozen provisions protecting various property

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2002, at A1; Carol D. Leoning et al., *Risky Ventures, Little Accountability*, WASH POST, Feb. 25, 2002, at A1 (after spending $200 million on community revitalization, little or nothing accomplished); Patrick McGreavey & T. Christian Miller, *NoHo: A Lesson in Public Spending*, L.A. TIMES, Jan. 30, 2000, at A1; Stephanie Simon, *Detroit's Core is Working on a Comeback*, L.A. TIMES, July 14, 2003, at A12 (reporting on Detroit's effort to "come back" by building casinos while some 10,000 vacant buildings remain in that city whose population has been fleeing for decades and has recently dropped below one million). This litany (or is it a dirge?) could go on, but I believe I have made my point.

[54] Joel Kotkin, *The Ersatz Urban Renaissance*, WALL ST. J., May 15, 2006, at A14.

> Even amidst a strong economic expansion, the most recent census data reveal a renewed migration out of cities. This gives considerable lie to the notion, popularized over a decade, that cities are enjoying a historical rebound. . . . Not only are perennial losers—Baltimore, Philadelphia, Cleveland and Detroit—continuing to empty out, but some of our arguably most attractive cities, like Boston, San Francisco, Minneapolis and Chicago, have lost population since 2000.

Id. And it is not another "white flight." Sam Roberts, *Census Shows More Black Residents Are Leaving Major U.S. Cities*, N.Y. TIMES, Sept. 12, 2007, at A20.

[55] Dyal-Chand, *supra* note 3, at 852-53, 860.

[56] *Id.* at 860 ("Yet another view of the Takings Clause, quite different from Professor Kades', is that it protects property more than any other right in the Bill of Rights by requiring compensation when property rights are regulated to the point of being 'taken.'").

[57] *Id.*

rights,[58] so that whether or not you like Professor Kades' oxymoronic concept of involuntary alienation,[59] of which more presently, that fact suggests a greater, not lesser, degree of protection extended by the constitutional text to property rights than to other rights that do not receive a similarly multi-faceted degree of constitutional protection.

More important doctrinally, both the premise (that the Takings Clause makes property rights alienable) and the conclusion drawn from it (that therefore there is a textual constitutional basis for assigning to property rights a second-class constitutional status) are erroneous. Alienability of property[60] has nothing to do with the Takings Clause. It is basic that the right to convey or alienate property is highly valued as a matter of policy and efficiency; hence, the familiar rule against unreasonable restraints on alienation, which is not constitutional in nature.[61] Moreover, in addition to that, the Court has held that the right to dispose of property is protected by the Fourteenth Amendment.[62] But in so

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[58] These include the Impairment of Contracts Clause, the Third Amendment (forbidding the quartering of soldiers in private homes in peacetime); the Fourth Amendment (securing people's rights in their "houses, papers and effects" from unreasonable government searches and seizures); the Fifth Amendment (protecting people from deprivations of property without due process of law, and against uncompensated takings for public use); and the Eighth Amendment (protecting against excessive bail and fines). After June 26, 2008, this list should also include the Second Amendment right to own firearms. District of Columbia v. Heller, ___ U.S. ___, 128 S. Ct. 2783 (2008).

[59] It seems to me that to speak of a forcible transfer of title from a property's rightful owner to another as "involuntary alienation" is like calling rape an act of "involuntary seduction." There seems to be some sort of evil magic in the field of land use and eminent domain that inspires people to use oxymorons. Another example is the term "involuntary dedication" which was used until recently to describe exactions. *See, e.g.*, Denver v. Denver Buick, Inc., 347 P.2d 919, 933 (Colo. 1959); Gary S. Gaffney, *Recent Developments in Condemnation Law*, 20 NOVA L. REV. 831, 851 (1996). Note that when the Supreme Court got around to dealing with this subject, it was less euphemistic, acknowledging that, far from being a "dedication" (i.e., a gift), an exaction of this kind could amount to an "out-and-out plan of extortion." Nollan v. Cal. Coastal Comm'n., 483 U.S. 825, 837 (1987) (quoting J.E.D. Assocs., Inc. v. Atkinson, 432 A.2d 12, 14-15 (N.H. 1981)) (internal quotation marks omitted).

[60] It may be useful to keep in mind that "alienate" is a two-bit term for "convey." BLACK'S LAW DICTIONARY 73 (7th ed. 1999). "When we talk about property changing hands, the best choice of verb is *convey* or *transfer* rather than any of these legalistic words [like alienate or abalienate]." BRYAN A. GARNER, A DICTIONARY OF MODERN LEGAL USAGE 42 (1995) (emphasis added).

[61] *See generally* Wellenkamp v. Bank of Am., 582 P.2d 970 (Cal. 1978); CAL. CIV. CODE § 711 (West 2009). The rule against unreasonable restraints on alienation traces back to the thirteenth century Statute *Quia Emptores*, thus preceding the Fifth Amendment by several centuries. Carma Developers (Cal.), Inc. v. Marathon Dev. Cal., Inc., 826 P.2d 710, 717 (Cal. 1992).

[62] *See* Hodel v. Irving, 481 U.S. 704, 716 (1987); Lynch v. Household Fin. Corp., 405 U.S. 538, 543 (1972).

doing, the Constitution does not create property rights—it only protects such property rights as have been established under state law.

Moreover, the word "alienation" contemplates a transfer of property *to* another, whereas in takings law it is the deprivation of the [former] owner, not any corresponding accretion or transfer of a right to the taker, that constitutes a taking within the meaning of the Fifth Amendment. The Supreme Court was explicit on that point:

> The courts have held that the deprivation of the former owner rather than the accretion of a right or interest to the sovereign constitutes the taking. Governmental action short of acquisition of title or occupancy has been held, if its effects are so complete as to deprive the owner of all or most of his interest in the subject matter, to amount to a taking.[63]

This is a logical judicial formulation because the [former] property owners have no control over what the taker does or fails to do with their property after they lose it. It may be put to some proper or improper use, or no use at all, or sold at a profit,[64] but in any case, it has been taken from its rightful owners who are therefore entitled to the constitutionally mandated just compensation irrespective of whether the taker acquires title or some other property interest in their former properties. Alienation (i.e., the conveyance or transfer of title *to* the taker *vel non*) is not decisive of whether a taking has occurred.[65] As Justice Holmes put it: "[T]he question is what has the owner lost, not what has the taker gained."[66]

Thus, the notion of "involuntary alienability" ascribed to the Fifth Amendment by Professor Kades is doctrinally in error, and beyond that, it is simply irrelevant to the determination of whether a taking has occurred.

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[63] United States v. Gen. Motors Corp., 323 U.S. 373, 378 (1945). This must be distinguished from situations in which the taking is of some of the owner's rights but not others. In that situation courts say that the condemnor must pay only for what it takes, not for what the owner retains. *See* Mitchell v. United States, 267 U.S. 341, 346 (1925) (holding that inasmuch as the owner's business was not taken, the government was required to pay only for the land that it took).

[64] *See* Gideon Kanner, *We Don't Have to Follow Any Stinkin' Planning—Sorry About that, Justice Stevens*, 39 URB. LAW. 529 (2007).

[65] Thus, in *City of Monterey v. Del Monte Dunes*, 526 U.S. 687 (1999), the Supreme Court affirmed the award of just compensation for a taking by the city that took the form of extended denial of use of Del Monte Dunes' property. Nonetheless, nothing was "alienated" to the city in exchange for its money. Del Monte Dunes retained title to its land and sold it—not to the city that was guilty of the uncompensated taking—but to the State of California in an effort to salvage what it could from the city's regulatory overreaching. *Id.* at 700.

[66] Boston Chamber of Commerce v. Boston, 217 U.S. 189, 195 (1910).

IV. CONSTITUTIONAL RIGHTS OTHER THAN PROPERTY CAN ALSO BE LAWFULLY EXTINGUISHED BY THE GOVERNMENT, AND TO THAT EXTENT ARE NOT SUPERIOR TO PROPERTY RIGHTS

Property ownership and use are not the only constitutionally protected rights that may be taken from a citizen. Life and liberty are also subject to involuntary government extinguishment. The Constitution provides that citizens may be deprived of them provided they receive due process of law, just as property may be taken provided the taking is for public use and just compensation is paid. Examples of this parallelity are provided not only by criminal law and civil forfeiture laws,[67] but also by the fact that the government may conscript its citizens, subject them to harsh military discipline that is antithetical to civilian notions of personal liberty,[68] and send them into mortal combat without their consent. Thus, all rights are "forcibly alienable" in the sense that individuals may be lawfully deprived of them by the government under some circumstances.

However, some rights, though capable of being extinguished or taken, are inherently incapable of being conveyed (or alienated) to another in the conventional legal sense. Life, for example, may be taken by the government through execution or by the individual through suicide. But it cannot be alienated—one cannot somehow transfer one's life to another. The same is true of liberty. One cannot surrender one's liberty to another—that would be slavery, and even then the liberty of the recipient could not be enhanced by such a transfer. Thus, when the Declaration of Independence referred to life and liberty but not property as "unalienable," it was only being linguistically correct. Life and liberty cannot be alienated. Property, on the other hand, is alienable—it *can* be transferred to another. The Fifth Amendment has nothing to do with that.

V. THE TAKINGS CLAUSE IS NOT THE SOURCE OF THE GOVERNMENT'S POWER TO TAKE PRIVATE PROPERTY

Moreover, Professor Kades is mistaken in suggesting that the Takings Clause makes property rights alienable, involuntarily or otherwise. The sovereign power to acquire property from private persons for government purposes, involuntarily when necessary, does not originate in the Constitution at all—it is an inherent attribute of sovereignty that exists by virtue of the state's existence,

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[67] *See* United States v. James Daniel Good Real Prop., 510 U.S. 43, 53 (1993).

[68] *E.g.*, Goldman v. Weinberger, 475 U.S. 503 (1986) (Air Force officer who was an ordained orthodox rabbi, serving as such, may be lawfully forbidden to wear a *yarmulke* (a small religious skullcap required by his religion)).

along with the power to wage war and conduct foreign relations, the taxation power, and the police power.[69] Sovereign states can take private property for public use irrespective of the existence of any eminent domain clauses in their constitutions, or for that matter, irrespective of whether they have a constitution at all.[70]

The British, to take an obvious example, have a well-developed body of eminent domain law (called "compulsory purchase")[71] that is not dissimilar to ours, even though Great Britain lacks any written constitution. In the United States, North Carolina has no Takings Clause in its state constitution,[72] but that does not prevent it from taking private property by eminent domain under its state law.[73] In other words, before the Bill of Rights was enacted, the government had the power to take private property, and the Fifth Amendment added nothing *to the existence of that power.* It only provided additional self-executing protection to private property by imposing a duty to pay just compensation and limiting takings to public uses.[74] One would think that this suggests a textually higher, not lower, regard on the part of the authors of the Fifth Amendment for the importance of private property, particularly given their strongly voiced commitment to the principle that the primary purpose of government is to protect private property.

Though for reasons extraneous to the constitutional text the procedures used by the government in acquiring private property can be harsh,[75] and the measure of "just compensation" formulated by courts leaves much to be desired as a measure of justice, on principle, the Fifth Amendment imposes a condition to the exercise of eminent domain (public use) and a remedy to the property owners whose property is taken (just compensation). The constitutional text protecting other constitutional rights does not specify a remedy for their

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[69] Robert Kratovil & Frank J. Harrison, Jr., *Eminent Domain—Policy and Concept*, 42 CAL. L. REV. 596, 596 (1954) ("The Federal Constitution contains no express grant of the power of eminent domain, but that power has nonetheless existed in the federal government from its beginning.").

[70] Kohl v. United States, 91 U.S. 367, 371-72 (1876). The sovereign right to take property goes back to biblical times. *See* 1 *Chronicles* 21:18-25 (King James) (relating King David's acquisition of Ornan's threshing floor as the site of the ark of the covenant, upon payment by the King of 600 shekels in gold).

[71] *See* KEITH DAVIES, THE LAW OF COMPULSORY PURCHASE AND PROPERTY VALUATION (1978).

[72] 1A NICHOLS ON EMINENT DOMAIN § 4.8, at 4-46 (3d ed. 1964).

[73] De Bruhl v. State Highway & Pub. Works Comm'n, 102 S.E.2d 229, 232 (N.C. 1958).

[74] First English Evangelical Lutheran Church v. County of Los Angeles, 482 U.S. 304, 315 (1987).

[75] *See* Comment, *Eminent Domain Valuations in an Age of Redevelopment: Incidental Losses*, 67 YALE L. J. 61, 62-63 (1957).

violation.[76] There is thus no justification to be found in the Fifth Amendment for the treatment of individual property rights as second-class rights. Quite the contrary—though said by the Court to be "coterminous" with the state police power,[77] the exercise of the taking power requires compensation, as opposed to other applications of the police power that are inherently not compensable.[78]

VI. THERE IS NO TEXTUAL BASIS FOR RELEGATING PROPERTY RIGHTS TO THE STATUS OF A "POOR RELATION"

There is nothing in the Constitution requiring or even legitimately allowing the courts to transmogrify "public use" into "public purpose," "public benefit," "public advantage," or "public welfare,"[79] a terminology which is no more than thinly veiled semantic obfuscation that at times tries to dress up the economic benefits to plainly private, money-making enterprises as somehow a "public" use.[80] As the expression goes, you can put lipstick on a pig, but it's still a pig.

Nor is there anything about the Just Compensation Clause that allows, much less requires, judges to provide concededly unjust[81] partial compensation in takings cases. Likewise, there is nothing in the Constitution that requires judges to limit "just compensation" to value in exchange,[82] i.e., "fair market

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[76] Indeed, during the intellectual battle fought during the 1980s over the proper remedy for uncompensated regulatory takings—whether invalidation of the offending regulation as a denial of substantive due process, or payment of just compensation—the proponents of invalidation espoused the due process theory, *see* Fred F. French Investing Co. v. City of New York, 350 N.E.2d 381, 384-85 (N.Y. 1976), because the text of the Due Process Clause does not specify compensation as the remedy for its violation, whereas the Takings Clause does, and their objective was to deny an effective remedy to over regulated property owners and avoid having to pay damages. *See* Robert I. McMurry, *Just Compensation or Just Invalidation: The Availability of a Damages Remedy in Challenging Land Use Regulations*, 29 UCLA L. REV. 711 (1982).

[77] Haw. Hous. Auth. v. Midkiff, 467 U.S. 229, 240 (1984) ("The 'public use' requirement is thus coterminous with the scope of a sovereign's police powers.").

[78] ERNST FREUND, THE POLICE POWER: PUBLIC POLICY AND CONSTITUTIONAL RIGHTS 556-47 (1904).

[79] *See* ELLEN FRANKEL PAUL, PROPERTY RIGHTS AND EMINENT DOMAIN 92-94 (1987).

[80] An egregious example of this technique may be found in *In re Minneapolis Community Development Agency*, 582 N.W.2d 596, 598 (Minn. Ct. App. 1998), where the court equated public use with bringing a mid-priced department store into an area already served by other stores.

[81] Comment, *supra* note 75, at 61 n.4, 62-64 (noting "admitted inequities of the market value formula"). For the Supreme Court's concession that the judicially formulated "fair market value" measure of compensation fails to reflect what a seller would insist on as the price in a voluntary market transaction, see *United States v. General Motors Corp.*, 323 U.S. 373, 379 (1945).

[82] The difference between value in use and value in exchange was spotlighted by Justice Cardozo in *Jackson v. State*, 106 N.E. 758, 758-59 (N.Y. 1914), where he aptly pointed out that

value" so ingeniously defined as to disregard factors that buyers and sellers in voluntary market transactions would concededly consider.[83] Fair market value inherently fails as a measure of just compensation because strictly speaking, it is not compensation at all—i.e., it does not even purport to recompense the condemnees for all their objectively demonstrable economic losses that a taking of their property usually inflicts.

In part, all this reflects American judges' historical but textually and morally unjustified efforts to facilitate the use of eminent domain to create public works on the cheap, and to encourage efficient exploitation of natural resources by private entrepreneurs[84] while limiting the "just compensation" that is payable when private property is taken (and, in some states, damaged) for public use.[85] These judicial choices are frequently rooted in factually unwarranted suppositions about the economics of takings—what one commentator aptly called "fearful judicial guesstimates"[86] of unaffordability of public projects that

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an old piece of industrial equipment that is in place and functioning may be just as useful and hence just as valuable to its owner as a new one, but once removed by the condemnor it may only command scrap value (or perhaps not even that; one may have to pay to have it hauled away).

[83] *Gen. Motors*, 323 U.S. at 379.

[84] Strickley v. Highland Boy Gold Mining Co., 200 U.S. 527 (1906) (mining); Clark v. Nash, 198 U.S. 361 (1905) (irrigation); *see also* Kanner, *supra* note 32, at 222-24. Ironically—or perhaps more accurately, hypocritically—in the area of foreign relations, the United States lectures other countries to use expropriation sparingly because of its questionable wisdom even when adequate compensation is paid. Harry Scheiber, *Property Law, Expropriation, and Resource Allocation by Government: The United States, 1789-1910*, 33 J. ECON. HIST. 212, 250 (1973) (citing a 1972 White House paper entitled *Economic Assistance and Investment Security in Developing Nations*); *see* Steven J. Eagle, *Private Property Development and Freedom: On Taking Our Own Advice*, 59 SMU L. REV. 345 (2006) (commenting on U.S. institutions advising the former Soviet bloc countries to institute a strong property rights regime).

[85] *See* Scheiber, *supra* note 84, at 235-37 (discussing the origins of this judicial policy). California courts have been candid about their anti-condemnee bias, confessing that it is their policy to keep condemnation awards down, in order to prevent a conjectured "embargo" on public projects, even though no evidence supporting such fears has been adduced. *See generally* Gideon Kanner, *"[Un]equal Justice Under Law": The Invidiously Disparate Treatment of American Property Owners in Taking Cases*, 40 LOY. L.A. L. REV. 1065, 1098 nn.135-37 (2007).

[86] Michael R. Klein, *Eminent Domain: Judicial Response to the Human Disruption*, 46 U. DETR. J. URB. L. 1, 35 (1968). These judicial fears are unfounded because (a) rational government behavior requires that the cost of a proposed public project be considered and honestly estimated before, not after, the decision to proceed with the project is made; (b) the cost of public projects is the same regardless of whether the condemnees are fully compensated or not (the only question being who will bear that cost); and (c) evidence of a condemnor's ability *vel non* to pay full compensation for the economic harm inflicted by its proposed project is inadmissible (and given frequent overruns, cannot be determined until after the project is built), so that these judicial fears are necessarily unsupported by evidence, and on the whole are simply wrong as attested to by the huge government overruns and expenditures on all sorts of

would presumably have to be forgone if compensation for all demonstrable economic losses inflicted on the displaced condemnees were paid to them.[87]

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wasteful projects that serve no legitimate purpose or fail altogether. There is evidently plenty of money to waste, but not to compensate fully people harmed economically by government projects. *See, e.g.*, Gideon Kanner, *Making Laws and Sausages: A Quarter Century Retrospective on* Penn Central Transportation Co. v. City of New York, 13 WM. & MARY BILL RTS. J. 679, 762-65 nn.449-50 (2005). In Louisiana, the state constitution requires that a condemnee be compensated "to the full extent of his loss," which includes not only fair market value but also damages for incidental economic losses suffered by condemnees as well as their litigation expenses, that courts in other states deem to be unaffordable and noncompensable. State Dept. of Transp. & Dev. v. McKeithen, 976 So. 2d 832, 839 (La. Ct. App. 2008). Yet there has been no indication that Louisiana has had to declare an "embargo" on public works. *Hoffman v. Brandt*, 421 P.2d 425, 429-30 (Cal. 1966), provides a useful comparison of these judicial "fearful guesstimates" with the rule prevailing in general civil litigation, that brands as misconduct lawyers' arguments urging that damages awarded against the liable parties be kept down because of the latter's limited financial condition.

[87] This form of judicial bias originated in nineteenth century judicial notions of limited compensability, that were formulated by compliant courts acting to facilitate takings for railroads, notably in California where there was a virtual revolving door between the state supreme court and railroad management. KEVIN STARR, INVENTING THE DREAM: CALIFORNIA THROUGH THE PROGRESSIVE ERA 200 (1986); 1 J. EDWARD JOHNSON, HISTORY OF THE SUPREME COURT JUSTICES OF CALIFORNIA, 1850-1900, at 87 (1963); *see* Kanner, *supra* note 85, at 1134-36 (citing the writings of Professor Harry Scheiber); *see also* Klein, *supra* note 86, (because of the constitutional nature of American eminent domain law, courts had a free hand to choose compensation policy and they chose the path of undercompensation); Comment, *supra* note 75, at 69 ("The conflict in eminent domain 'between the people's interest in public projects and the principle of indemnity to the landowner' was resolved in favor of a broad public use doctrine and a restrictive definition of compensation." (quoting United States *ex rel.* Tenn. Valley Auth. v. Powelson, 319 U.S. 266, 280 (1943))); Emerson G. Spies & John C. McCoid, II, *Recovery of Consequential Damages in Eminent Domain*, 48 VA. L. REV. 437, 450 (1962) ("Denial of recovery for consequential loss in eminent domain proceedings cannot be attributed entirely to history. In part it seems to be the product of present and conscious [judicial] decision[s].").

For exploration of historical undercompensation prevalent in eminent domain law, see Curtis J. Berger & Patrick J Rohan, *The Nassau County Study: An Empirical Look Into the Practices of Condemnation*, 67 COLUM. L. REV. 430 (1967), which provides a conscience-searing study compiling statistics that "convey explicit rebuke to a system which took advantage of nearly everyone, but saved the greatest hardships for those—the docile, duressed, uncounseled—most entitled to solicitousness." *Id.* at 457; *see generally* W. Harold Bigham, *"Fair Market Value," "Just Compensation" and the Constitution: A Critical View*, 24 VAND. L. REV. 63 (1970); Nathan Burdsell, *Just Compensation and the Seller's Paradox*, 20 BYU J. PUB. L. 79, 82 (2005); Michael DeBow, *Unjust Compensation: The Continuing Need for Reform*, 46 S.C. L. REV. 579 (1995); James Geoffrey Durham, *Efficient Just Compensation as a Limit on Eminent Domain*, 69 MINN. L. REV. 1277 (1985); Frank A. Aloi & Arthur Abba Goldberg, *A Reexamination of Value, Good Will, and Business Losses in Eminent Domain*, 53 CORNELL L. REV. 604, 647 (1968); Gideon Kanner, *Condemnation Blight: Just How Just is Just Compensation?*, 48 NOTRE DAME L. REV. 765, 770-87 (1973); Frank S. Sengstock & John W. McAuliffe, *What Is the Price of Eminent Domain? An Introduction to the Problems of Valuation in Eminent Domain Proceedings*, 44 U. DETR. MERCY L. REV. 185, 191 (1966)

But these are unsupported exercises in judicial speculation of the parade-of-horribles genre. Nothing illustrates this point better than *United States ex rel. T.V.A. v. Powelson*,[88] where the Court uttered its famous *shibboleth* that "[t]he law of eminent domain is fashioned out of the conflict between the people's interest in public projects and the principle of indemnity to the landowner,"[89] thus postulating a tension between the requirements of the Just Compensation Clause and the government's ability to create needed public projects.[90] As it turned out, *Powelson* proved to be just about the most inappropriate vehicle imaginable for such an assertion. The acquisition of land for construction of Tennessee Valley Authority's (TVA) dams not only cost the government nothing,[91] but after figuring in the economic benefits flowing to it from the sale

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(noting courts' "inarticulate desire" to limit cost of public improvements); Lynda J. Oswald, *Goodwill and Going-Concern Value: Emerging Factors in the Just Compensation Equation*, 32 B.C. L. REV. 283 (1991); Michael Risinger, *Direct Damages: The Lost Key to Constitutional Just Compensation When Business Premises are Condemned*, 15 SETON HALL L. REV. 483 (1985).

Though not commented on as often as it was in the 1960s, when mass condemnations first hit American society, the problem of displacing hundreds of thousands of people from their homes annually is still with us. It remains such not only because of the parsimonious nature of judicially-formulated rules of compensability and the effectiveness of condemnors' lobbying efforts resisting legislative reform, but also because of the unfortunate, widespread custom of condemning agencies which frequently make "lowball" precondemnation offers that are not only below fair market value but often below their own appraisals. *See, e.g.*, City of Naperville v. Old Second Nat'l. Bank of Aurora, 763 N.E.2d 951 (Ill. App. Ct. 2002) ($250,000 offer where the city's own appraisal called for $500,000); JEA v. Williams, 978 So. 2d 842 (Fla. App. 2008) (original offer—$62,000; eventual *consensual* settlement—$2,000,000). Condemnors do so in the often justified expectation that most prospective condemnees, being uninformed and lacking the requisite litigation resources, will accept the low offers. Although, available data indicate that property owners who reject those offers and litigate their compensation do much better in front of both judges and juries. *See* studies referenced in Kanner, *supra* note 85, at 1105-10, 1146-48.

[88] 319 U.S. 266 (1943).

[89] *Id.* at 280.

[90] I find it irresistible at this point to observe that I have never seen nor heard of expressions of judicial concerns about any supposed "conflict" between the "people's interest in public projects" and payments to highway building contractors and concrete suppliers, even though those exceed the cost of rights of way which is only a fraction of the total cost of public projects.

[91] Though this article is not concerned with eminent domain valuation, it should be noted that in the typical condemnation of an entire private ownership, the cost to the government is zero (except for transactional costs) because in paying "fair market value" it only exchanges one asset (money) for another asset (a tract of land at its judicially determined fair market value) so that its balance sheet remains unchanged. This is a fortiori true in cases in which the taken property is devoted to revenue-generating uses.

of hydroelectric power generated by dams built on the taken land, it turned out to be hugely profitable to it and to industry.[92]

The misuse of eminent domain as an engine that drives private profit ambitions under the guise of helping failed cities has emerged as a major problem that is gnawing on today's American civic values and is understandably undermining judicial legitimacy in the eyes of the public. Irrespective of whether the Court's *Kelo* decision is seen as new law or merely an application of precedent in a new way, it served as a loud wake-up call to the American public. The people have at long last come to understand what modern "urban redevelopment" is not (it isn't "slum clearance" and it has little

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[92] In her book *Cities and the Wealth of Nations*, Jane Jacobs describes how by using hydroelectric dams, the Tennessee Valley Authority (TVA) was able to generate cheap electrical power at a 50% advantage over competing power generators. JANE JACOBS, CITIES AND THE WEALTH OF NATIONS 116-17 (1984). This attracted so much industry that it exhausted TVA's available hydroelectric power generation capacity, motivating it to build coal-fired power plants to meet the demand, generating additional electrical power at a 30% cost advantage to its customers. *Id.* at 117. Thus, TVA became the largest power producer and its dams provided a windfall to industry, so that any judicial suggestion that fully indemnifying the land owners displaced by TVA's dams would impair the "people's interest in public projects" proved to be simply absurd. *Powelson*, 319 U.S. at 280.

Jacobs further notes that apart from industry benefiting from cheap electricity, the improvement of general conditions in the area (after initial success) proved questionable in the long run. JACOBS, *supra*, at 117. As time went on, demand for coal for the new TVA generating plants inspired extensive strip mining in Kentucky and West Virginia, causing serious environmental degradation. *Id.* "The scale and ruthlessness of the strip mining were fully in keeping with the prodigious power production that the coal fed. Topsoil and forests were ravaged, valleys choked with debris. Floods grew in fury, compounding the damage." *Id.*

"*Public* benefit?" It was certainly a benefit to TVA and to the industry it served, as well as to coal mine operators. But it exacted a high price from those who lost their land to TVA's dams and had to live with the adverse effects of air pollution from the coal-fired power plants and the environmental degradation caused by the strip mining. Even the promised "just compensation" could be illusory. *See* Felicity Barringer, *Decades Later, Simmering Debate on a Road Heats Up*, N.Y. TIMES, Feb. 21, 2006, at A12 (TVA took hundreds of acres of rural land in the 1940s and promised a new county road to replace one that it flooded, but it failed to deliver on its promise). And so, all things considered, TVA's acquisition of land for its dams was a proverbial "steal." The compensation paid by the TVA, far from endangering "the people's right in public projects," allowed the TVA to make a killing at the condemnees' expense, to say nothing of the economic benefits flowing to industrial consumers of the electrical power generated by it, who got a bargain for their money.

Finally, there is a substantial body of belief that the mass construction of dams throughout the country was ill-advised and on the whole a detriment rather than a benefit. *See* MARC REISNER, CADILLAC DESERT: THE AMERICAN WEST AND ITS DISAPPEARING WATER (Penguin Books 1993) (1986); *see also* Felicity Barringer, *Pact Would Open River, Removing Four Dams*, N.Y. TIMES, Nov. 14, 2008, at A18.

to do with genuine blight elimination).[93] It is a large-scale real estate marketing and development scheme. It uses (or more accurately, misuses) the coercive power of government to redistribute wealth from the deserving middle class and the few poor who own modest dwellings in downscale parts of town that are targeted for redevelopment, to the undeserving rich who, whatever else can be said about them, have no need of public subsidies, the megabuck public subsidies to wealthy owners of professional sports arenas being the proverbial "Exhibit A." That they receive them anyway, often to the tune of hundreds of millions of dollars paid by a debt-ridden society that goes ever deeper in debt to pay them,[94] is indefensible. It is an ongoing national scandal.[95]

A. NIMBY and the Rise of Anti-Property Culture

In the twentieth century, hostility to private property rights grew ideologically as well as economically, not only in advancing the 1930's

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[93] *See* George Lefcoe, *Finding the Blight That's Right for California Redevelopment Law*, 52 HASTINGS L.J. 991, 1003-04 (2001) (explaining that what redevelopers seek are not blighted areas. Those are populated by the poor and thus lack a potential clientele for the upscale businesses to be established on the redeveloped land. Rather, redevelopers seek "blight that's right"—i.e., land that is sufficiently downscale to justify a colorable claim of being blighted, thus justifying its condemnation, but sufficiently upscale to be attractive to patrons of new businesses sought to be built on the taken land by redevelopers). After *Kelo*, Professor Lefcoe has dropped the pretense and in his later article conceded that blight has nothing to do with his preferred policy—the title of that article says it all: *Redevelopment Takings After* Kelo*: What's Blight Got to Do With It?* Lefcoe, *supra* note 52.

[94] In California, bonded redevelopment indebtedness has gone up from $5 billion in 1985 to $81 billion in 2006, an increase of $20 billion between 2004 and 2006 alone. MUNICIPAL OFFICIALS FOR REDEVELOPMENT REFORM, REDEVELOPMENT: THE UNKNOWN GOVERNMENT 12 (2007); *see also* Marc B. Mihaly, *Living in the Past: The* Kelo *Court and Public-Private Economic Redevelopment*, 34 ECOLOGY L.Q. 1, 58 (2007) ("[P]ublic entities rarely make money on these projects. They must devote all the increased tax revenues from the project to tax-increment financing . . . .").

[95] To take a dramatic example, in the notorious *Poletown Neighborhood Council v. City of Detroit*, 304 N.W.2d 455 (Mich. 1981), the impoverished city of Detroit, the municipal basket-case of urban America, spent over $200 million, plus a twelve-year, 50% tax abatement (saving General Motors $5.4 million annually), to subsidize a new Cadillac plant for General Motors, then the country's largest corporation, charging it only $6.5 million for that land. ARMOND COHEN, LINCOLN INST. OF LAND POLICY, POLETOWN, DETROIT: A CASE STUDY IN "PUBLIC USE" AND REINDUSTRIALIZATION # 82-5, at 3 (1982). The employment figures at the Poletown Cadillac plant built on the taken land never reached the projected 6,000-job level, mostly hovering under one-half of that figure. Carla T. Main, *How Eminent Domain Ran Amok*, POL'Y REV., Oct./Nov. 2005, at 18. This lavish subsidy to General Motors proved to be to no avail in the long run; General Motors is now on the verge of bankruptcy, while Detroit continues its inexorable decline as its population continues to flee.

avowedly Marxist-influenced New Deal policies,[96] but more recently in advancing environmental concerns as justification for the subordination of private rights in property to the asserted public good of preservation.[97] This approach often presents us with a false choice; it pits private property rights against environmental values even when the environmental gain is nonexistent or small and private losses great, or when the two can be reconciled, or constructively compromised. Moreover, this approach disregards the constitutional mechanism that allows for protection of environmental values while also respecting private rights by providing constitutionally required compensation in extreme cases.[98] In other words, environmental protection is not cost-free. It exacts a price, and no morally acceptable reason has been advanced why that cost should fall randomly on people who happen to own vacant land, while their neighbors get to enjoy the use of their improved property, plus the benefits of environmental preservation gratis. This process has affected a massive, though illegitimate, transfer of wealth from land owners to owners of existing desirable homes. The regulatory constriction of supply of housing was instrumental in causing the escalation in home prices that eventually contributed to the ongoing housing market collapse, because—

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[96] United States v. Carolene Prods. Co., 304 U.S. 144, 152-53 n.4 (1938).

[97] *See* JAMES V. DELONG, PROPERTY MATTERS: HOW PROPERTY RIGHTS ARE UNDER ASSAULT—AND WHY YOU SHOULD CARE (1997); BERNARD FRIEDEN, THE ENVIRONMENTAL PROTECTION HUSTLE (1979). Much has been written on this subject and I have no intention of rehearsing these arguments, pro and con, all over again. *See* Gideon Kanner & Michael M. Berger, *The Need for Takings Law Reform: A View From the Trenches—A Response to Taking Stock of the Takings Debate*, 38 SANTA CLARA L. REV. 837 (1998). Suffice it to say that in theory the effect of the Takings Clause is that, as Justice Stevens put it in *Kelo*, the government can "do what it wants, so long as it pays the charge." Kelo v. City of New London, 545 U.S. 469, 487 (2005). But the problem is that when the government thus does what it wants it does not "pay the charge" and decisional law gives no indication that Justice Stevens would have it otherwise. And given the tidal wave of money flowing out of Congress, that is being frittered away on all sorts of dubious public and private projects through congressional earmarks and otherwise, there is no reason to believe that there is a shortage of funds with which to acquire property genuinely required for environmental preservation. *See, e.g.*, Damien Cave, *Florida Buying Big Sugar Tract for Everglades*, N.Y. TIMES, June 25, 2008, at A1; Carol Williams, *Deal Could Restore Everglades*, L.A. TIMES, June 25, 2008, at A1 (stating that Florida will pay a sugar company $1.75 billion for 187,000 acres blocking path of the Everglades river of grass). In the words of the Massachusetts Supreme Court:

> In this conflict between the ecological and the constitutional, it is plain that neither is to be consumed by the other. It is the duty of the department of conservation to look after the interests of the former, and it is the duty of the courts to stand guard over the constitutional rights.

Comm'r. of Natural Res. v. S. Volpe & Co., 206 N.E.2d 666, 671 (Mass. 1965).

[98] *See, e.g.*, Mount Laurel Twp. v. MiPro Homes, L.L.C., 910 A.2d 617 (N.J. 2006) (allowing the compensated taking of privately owned vacant land in order to preserve it in its undeveloped condition as community open space).

however improvident it may have been—would-be home buyers were motivated to take on ever-greater mortgage debts to secure their perceived share of the American dream—home ownership—while lenders recklessly pandered to such public aspirations by offering unsound financing.

Then there is the "dark side" of it all. Environmental concerns are regularly misused as camouflage for enactment of land-use regulations that are intended to benefit influential local homeowners in upscale communities as much as or more than the environment. As Professor Frieden put it:

> Environmental opposition to homebuilding has almost no connection to mainstream conservation issues, such as reducing pollution and eliminating environmental health hazards. Housing proposals seldom conflict with these goals. . . . Stopping homebuilding usually accomplishes nothing for the public environment. It protects certain tightly regulated communities against change, but shifts development to other places where there is less resistance. *The net environmental gain for the metropolitan area is zero, and sometimes less than zero.*[99]

In other words, many regulations ostensibly inspired by environmental concerns willfully confuse a high level of amenities in upscale suburbs with environmental values.[100] Of course, this is not to suggest that most environmental regulations serve such devious purposes, but many do, especially at the local land-use level, and those are the ones that create controversy.[101] As Professor Frieden noted, we must distinguish between broadly applicable environmental laws that tend to protect the quality of air and water, require remediation of polluted soil, etc., as opposed to land-use regulations that typically deal with lot size, density, floor-area ratios and the like. The latter typically apply only to one or a few parcels of land and affect the environment peripherally, if at all.

This is nothing new. As far back as 1924, U.S. District Judge David C. Westenhaver, who presided over the trial of the first zoning case to reach the

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[99] FRIEDEN, *supra* note 97, at 9 (emphasis added). The environmental gain is "less than zero" when those "other places" are farther removed from the urban center, as they often are, requiring additional road and infrastructure construction and longer commutes with their associated energy consumption, traffic congestion and air pollution. *Id.*

[100] In the years I have taught Land-Use Controls, it was a reliable and amusing annual event to see the reaction of some of my upper-crust students when they were told that an environmentally desirable community relies heavily on compact multi-family housing and public transportation, and looks nothing like their upscale suburbs with their large homes on large lots, where taking a public bus would be considered utterly *déclassé*.

[101] *See, e.g.*, City of Monterey v. Del Monte Dunes, Ltd., 526 U.S. 687, 695 (1999) (the pretext for denying Del Monte Dunes the right to build dwellings on its land *in accordance with existing zoning* was the ostensible protection of Smith's Blue Butterfly, an endangered species, that had never been seen on the subject property).

Supreme Court,[102] concluded at the end of his opinion striking zoning down as an unconstitutional deprivation of property that "[i]n the last analysis, the result to be accomplished is to classify the population and to segregate them according to their income or situation in life."[103] Judge Westenhaver had a point: while the nuisance rationale of zoning and its separation of incompatible land uses has prophylactic virtues, there is no legitimate police power justification (at least none known to me) whereby considerations of public health, safety, welfare and morals require that better, more desirable parts of town be zoned for large, multi-acre-plus lots and large homes, while other, undesirable areas are zoned for quarter-acre lots or multi-family residential uses.

As subsequent events made clear, Judge Westenhaver's observation hit the mark. Zoning (and various associated land-use regulations), whatever else they may have accomplished,[104] have ever since been used extensively as exclusionary devices,[105] often protecting established, wealthy suburbanites from what they perceive as a threatened influx of competing seekers of the good life into their enclaves of wealth and privilege and as a threat to their property values.[106] This is not to debate here the wisdom of zoning, but only to note that apart from its nominally constructive uses it has also had a "dark side" and that it is therefore proper to inquire whether the surrender of power over individual lifestyles to the lowest form of political life, and the corruption frequently associated with zoning activities, are worth it, given that in the end zoning has

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[102] Ambler Realty Co. v. Vill. of Euclid, 297 F. 307 (N.D. Ohio 1924), *rev'd.*, Vill. of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926).

[103] *Ambler Realty Co.*, 297 F. at 316. Judge Westenhaver's decision was eventually reversed by a razor-thin 5-4 vote that came only after the Supreme Court had originally voted 5-4 to uphold it, but reversed itself after Justice Stone had a private discussion with Justice Sutherland (the author of the majority opinion) and persuaded him to change his vote. *See* Alfred McCormack, *A Law Clerk's Recollections*, 46 COLUM. L. REV. 710, 712 (1946).

[104] There is a substantial body of respectable scholarly opinion that views zoning as undesirable or at least outweighed by its downside. This is a fortiori true of Euclidian (i.e., horizontal) zoning. *See* commentaries collected in Kanner & Berger, *supra* note 97, at 877 n.150. This is no place to deal with that topic, but *I must stress the fact that Houston has no zoning but looks not much different than other American cities of that size in that region. See* RICHARD F. BABCOCK, THE ZONING GAME 25-28 (1966).

[105] Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252 (1977); *see* DENNIS J. COYLE, PROPERTY RIGHTS AND THE CONSTITUTION: SHAPING SOCIETY THROUGH LAND USE REGULATION 22-23 (1993) (describing historical uses of zoning as an exclusionary device used against new immigrants and disfavored ethnic groups—a problem that is still with us); *see also* Dews v. Town of Sunnyvale, 109 F. Supp. 2d 526 (N.D. Tex. 2000).

[106] BABCOCK & SIEMON, *supra* note 9, at 116-20. "To most real estate brokers and promoters, and to some land economists, lawyers, and judges, zoning is a means of maximizing the value of property." *Id.* at 116.

given us cities that are not significantly different from, and often not as good as Houston, which has no zoning.

In order to protect the exclusivity of suburban "tight little islands"[107] it became necessary for the NIMBYs to offer something more than their self-serving desire to "keep 'em out" and to present some sort of socially acceptable doctrinal basis for their position, other than their naked self-interest. And what better rationale to offer than the professed desire to advance "good planning"[108] and environmental values? But to do that it also became necessary to construct an argument designed to neutralize the legitimate claim of owners of unimproved land, who have a constitutional right to put their property to reasonable use by building on it.[109] In turn, that inspired a formulation of a strategy of derogating property rights of those disfavored by the brave, new land-use regime, i.e., the would-be newcomers to the community and owners of vacant land who want to improve it. I do not propose to revisit that old battleground here, except to refer the reader to what I have had to say about it in the past.[110] For present purposes it suffices to say that by this political mechanism the NIMBYs have been able to advance a widely accepted image whereby, in spite of their wealth and influence, they present themselves as victims of "greedy developers" out to make "obscene profits" by "raping the land."[111] This approach enabled the NIMBYs to claim entitlement to opposing

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[107] Lawrence Gene Sager, *Tight Little Islands: Exclusionary Zoning, Equal Protection, and the Indigent*, 21 STAN. L. REV. 767 (1969); *see also* ADVISORY COMMISSION ON REGULATORY BARRIERS TO AFFORDABLE HOUSING, "NOT IN MY BACK YARD"—REMOVING BARRIERS TO AFFORDABLE HOUSING (1990).

[108] Guess what kind of community good planning promotes? According to Justice Douglas in *Village of Belle Terre v. Boraas*, 416 U.S. 1, 9 (1974): "A quiet place where yards are wide, people few, and motor vehicles restricted are legitimate guidelines in a land-use project addressed to family needs." In other words, the sort of place where God would live if He could only afford it. *See* Agins v. City of Tiburon, 447 U.S. 255, 261 (1980) (endorsing an upscale city's large-lot zoning (one to five acres per dwelling) as a proper technique of staving off the "ill effects of urbanization," but exhibiting no concern for the creation of urban sprawl and the adverse environmental effects this approach promotes, nor for the failure to provide for housing for anyone save the wealthy); *see also* Agins v. City of Tiburon, 598 P.2d 25, 35 (Cal. 1979) (Clark, J., dissenting) (presciently predicting that California's undue judicial tolerance of confiscatory land-use regulations would inevitably lead to a socio-economic cleavage between wealthy Californians and others).

[109] *Compare* Nollan v. Cal. Coastal Comm'n., 483 U.S. 825, 833 n.2 (1987), *with* FRED BOSSELMAN ET AL., THE TAKING ISSUE: A STUDY OF THE CONSTITUTIONAL AUTHORITY TO REGULATE THE USE OF PRIVATELY OWNED LAND WITHOUT PAYING (1973), a work commissioned for the Council on Environmental Quality, attacking Justice Holmes' regulatory taking doctrine voiced in *Pa. Coal Co. v. Mahon*, 260 U.S. 393 (1922), and urging the Supreme Court to overrule it. *See* Kanner, *supra* note 86, at 778-82.

[110] Kanner, *supra* note 86, at 672-78.

[111] As Richard Babcock put it with his incomparable insight and wit: "Anyone that challenges [zoning] is, if not a money-grubbing parvenu, obviously a wild-eyed dreamer intent

any and all development plans on their turf.[112] Failing that, they embrace a somewhat more candidly elitist position of purporting to defend their exclusive "good" suburbs from intrusion by "ticky-tacky" housing,[113] de facto defined by them as housing selling for less than existing homes.[114] Underlying it all is a fierce determination to maximize local property values of those already on the inside to the exclusion of all others. To that end, as Robert Michalski, City Attorney of Palo Alto, California, put it:

> Many planning commission hearings have taken on the character of an oriental bazaar where applicants wheel and deal with the commission on conditions and restrictions to be imposed by zoning. Some hearings are more like ancient circuses in the coliseum of Rome in the days of Nero except that the Christians then got a better deal from the lions than some applicants do from the planning commission.[115]

In short, in the process of advancing their economic and social interests, affluent American suburbanites have been co-opted into espousing seemingly

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upon foisting his ideas of social mobility upon the few remaining enclaves of gracious living." BABCOCK, *supra* note 104, at 21.

[112] *See* Iris Schneider, *Homeowners of Encino are "Only Against 99% of Everything,"* L.A. TIMES, Mar. 20, 1991, at 5B ("People say we're against everything, . . . But we're only against 99% of everything." (quoting board member Gerald Silver) (internal quotation marks omitted)).

[113] The term "ticky-tacky" comes from *Little Boxes*, a popular song by Malvina Reynolds. Hers was one of the greatest propaganda achievements of all time. Reynolds, a second-generation leftist, composed it to deride American suburbia. The evil genius of Reynolds' approach was not that she criticized suburbia (which, sociologically speaking, can be "a target-rich environment," to borrow a military term), but rather that she managed to invert social values and depict the benign American society in which homeownership is widespread, and where the inhabitants of those "little boxes" are "doctors and . . . lawyers, and business executives," whose children go to the university, as a bad, bad place—"[a]nd they're all made of ticky-tacky, and they all look just the same." Ontario Coalition Against Poverty, Little Boxes, http://www.ocap.ca/songs/littlbox.html (last visited Mar. 28, 2009). Nonetheless, the song was popularized by Pete Seeger, a talented leftist folk singer, *see* History.sandiego.edu, Little Boxes, http://history.sandiego.edu/GEN/snd/littleboxes.html (last visited Mar. 28, 2009), and has been mindlessly repeated over the years, often by people who as the beneficiaries of this supposedly "ticky-tacky" society, are the target of Reynolds' snideness, usually with no appreciation on their part of the irony implicit in their embrace of Reynolds' message.

[114] *See, e.g.*, Kimberly Blanton, *Affordable Housing Gets Cool Reception on Vineyard*, BOSTON GLOBE, Sept. 30, 2008 (stating that residents of Martha's Vineyard are opposing the construction of eleven "low-cost" ($350,000) homes to provide housing for employees of local businesses); Scott Wilson, *In Howard, Community Battles the Company That Built It*, WASH. POST, Oct. 22, 1997, at B1 (describing the insistence of zoning officials in Maryland that a proposal to build moderately-priced, mid $200,000 homes be changed to increase the cost to no less than $320,000 and up per home).

[115] BABCOCK, *supra* note 104, at 91 (quoting Robert Michalski, *Zoning—The National Peril*, *in* THE ANNUAL PLANNING CONFERENCE OF THE AMERICAN SOCIETY OF PLANNING OFFICIALS 64 (1963)).

counterproductive ideas that if taken at face value and applied broadly would diminish the protection afforded by law to their own, not inconsiderable property rights. Of course, such anti-property rhetoric is intended to impair property rights of others, while self-righteously protecting and advancing the speaker's own, just as Judge Westenhaver had it eighty years ago.[116] As Professor Frieden put it by way of example:

> Marin County, a wealthy suburb north of San Francisco, is the best place to look for an understanding of what it means to stop suburban growth in the name of environmental protection. It means closing the gates to people who may want to move in and, where possible, even to people who may want to visit; turning to state and federal governments for help in paying for the costs of exclusivity; and maintaining a tone of moral righteousness while providing a better living environment for the established residents."[117]

Thus, vociferous but insincere disparagement of property rights of others has entered the American discourse in the context of land-use and beyond.[118] Richard Babcock, noted the seeming self-contradiction of this strategy when he observed that "it is a curious phenomenon that the titans of industry who abhor government regulation and place full-page ads in the *Wall Street Journal* extolling the virtues of the marketplace are among the most zealous devotees of zoning."[119] Though I admire Babcock's understanding of and commentary on zoning, I find nothing "curious" about that phenomenon. It is simple self-interest, writ large—an effort to exclude those lower on the socio-economic scale from invading the enclaves of privilege where "titans of industry" tend to live. As the ever-reliable Babcock observed, "[t]he resident of suburbia is

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[116] Ambler Realty Co. v. Vill. of Euclid, 297 Fed. 307, 316 (N.D. Ohio 1924) (noting that the true object of zoning was "to regulate the mode of living of persons" and "[i]n the last analysis . . . to classify the population and segregate them according to their income or situation in life"), *rev'd*, Vill. of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926).

[117] FRIEDEN, *supra* note 97, at 37.

[118] A distressing aspect of this development is that it has legitimized project opponents' use of farcical arguments that descend into utter absurdity but are made by the NIMBYs and entertained by the regulators with what purports to be a straight face. For egregious examples see Kanner, *supra* note 86, at 700 n.88, 706 n.113. *See also* BABCOCK & SIEMON, *supra* note 9, at 33-36. My all-time favorite, unlikely to be dethroned from its lofty position in the annals of absurdity, was the formal demand by a homeowners' group in Northridge, California, that the city preserve unused a parcel of land because it was once the site of the procreative exertions of a Hereford stud bull named Sugwas Feudal. Tracey Kaplan, *Is Site Historic or Just a Bum Steer*, L.A. TIMES, Feb. 6, 1993, at B3 ("Neighbors opposed to a church project say the land was a significant Hereford breeding site that needs protection.").

[119] BABCOCK & SIEMON, *supra* note 9, at 56; *see* William Tucker, *Environmentalism and the Leisure Class*, HARPER'S, Dec. 1977, at 49 ("Protecting birds, fishes, and above all, social privilege.").

concerned not with *what* but with *whom*,"[120] and "he regards the zoning ordinance as an essential weapon in his battle with the forces of darkness."[121]

In short, the elite have been able to use land-use regulations to advance their own social and economic goals and to strengthen their own property rights by securing for themselves exclusivity and wealth (in the form of rising home values), while publicly appearing to weigh in on the side of the environmentalist/anti-property rights movement. By now, that strategy has percolated downward through socio-economic strata; inhabitants of better middle class suburbs have concluded that what is good for the "titans of industry" is also good for them, especially when dealing with a diminished supply and increasing demand for desirable homes. Though this strategy resulted in severe curtailment of availability of affordable housing,[122] the rhetoric used by the NIMBYs and its influence, have served their cause well by giving their publicly espoused positions a sheen of legitimacy. But it has also created a process whereby established affluent suburbanites are able to impede the influx of newcomers into "our community," on the basis of disparagement of property rights of land owners. All this helped create an intellectual atmosphere in which emotional attacks on property rights in general gained an unwarranted degree of legitimacy. Few seem to appreciate the irony of wealthy individuals who live in seven-figure homes, marching shoulder-to-shoulder with radical proponents of abolition of core property rights.[123] It is thus a

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[120] BABCOCK, *supra* note 104, at 31.

[121] *Id.* at 21.

[122] WILLIAM A. FISCHEL, REGULATORY TAKINGS: LAW, ECONOMICS AND POLITICS 232-40 (1995) (describing how severe land-use regulations led to a dramatic escalation of California home prices); *see also* John J. Delaney, *Addressing the Workforce Housing Crisis in Maryland and Throughout the Nation*, 33 U. BALT. L. REV. 153 (2004).

[123] For a vivid example of this phenomenon, see the opinion of the New York Court of Appeals in *Penn Central Transp. Co. v. City of New York*, 366 N.E.2d 127 (N.Y. 1978), which, without affording the parties any opportunity to brief or otherwise address the matter, sua sponte, subordinated well established precepts of property law to the notions of Henry George, a nineteenth century crackpot and anti-Chinese bigot who challenged the concept of private property ownership and believed that increases in value of property should be captured by the government through confiscatory taxation. JOHN ARTHUR GARRATY & MARK C. CARNES, 8 AMERICAN NATIONAL BIOGRAPHY 850 (1999). But instead of stimulating a critical debate among the *bien pensant* land-use mavens, this judicial intellectual misadventure resulted in accolades. Norman Marcus, who was ecstatic over the city's victory, had to concede that the New York Court of Appeals wrote from a "neo-Henry Georgian perspective," based on George's "quasi-Marxist work" overtly intended to take private property without compensation; i.e., to allow "public rather than private interests to capture the land value increments." Norman Marcus, *The Grand Slam Grand Central Terminal Decision: A* Euclid *for Landmarks, Favorable Notice for TDR and a Resolution of the Regulatory/Taking Impasse*, 7 ECOL. L. Q. 731, 739, n.37 (1978); *see also* John J. Costonis, *The Disparity Issue: A Context for the Grand Central Terminal Decision*, 91 HARV. L. REV. 402, 415-16 (1977) (fawning over the New York

"curious phenomenon," to borrow Babcock's words, that some of the wealthiest Americans who would bare their fangs and go to the barricades in defense of *their own* property rights, are ever ready to disparage the property rights of others, thus creating an ideological "odd couple" effect—an alliance of some of the wealthiest Americans with out-and-out radicals. And as long as the former can plausibly claim to toil in the cause of saving the breeding grounds of the Stevens Kangaroo rat rather than protecting their own exclusive socio-economic turf, and get away with it, who's to stop them?[124]

The upshot of it all is a sort of institutionalized cognitive dissonance: on the one hand "the law," as enacted by state and federal legislatures, is chock full of provisions encouraging and mandating the construction of adequate supplies of affordable dwellings, but at the same time "the law" administered by local regulatory bodies, particularly in desirable areas, does what it can to frustrate their construction.

VII. MAJOR EMINENT DOMAIN CASES DECIDED BY THE SUPREME COURT IN THE LAST CENTURY HAVE FAILED TO ACHIEVE THEIR STATED GOALS

It is highly significant that of the three major right-to-take cases decided by the Supreme Court on constitutional grounds in the past century, none achieved its stated goals. *Berman v. Parker*,[125] the Washington D.C. slum-clearance case, was supposed to improve the condition of the poor by clearing slums and providing new housing, *of which at least one-third was required to be low-cost housing renting for a maximum of $17 per month per room.*[126] But it did not happen.[127] The housing actually built there, instead of bettering the lot of the slum dwellers whose plight figured so prominently in Justice Douglas' opinion as a justification for the taking, turned out to be aesthetically sterile and so

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Court of Appeals *Penn Central* decision, though noting that among the "daring strokes" used by Chief Judge Charles Breitel, author of the *Penn Central* opinion, was his "evocation of the ghost of Henry George"). For my concededly acerbic commentary on that opinion and its failure to maintain a connection to legal doctrine or to justify its departure from it, see Kanner, *supra* note 86, at 722-37.

The moral to be drawn here is that when it comes to land-use regulations, there is no limit to the absurdities that can be advanced and embraced by otherwise bright and well informed people, as a means of reaching desired results.

[124] As an astute land-use student of mine once observed, judges overwhelmingly come from the segment of society that is the primary beneficiary of these doings, so it is unrealistic to expect them to turn against their own kind.

[125] 348 U.S. 26 (1954).

[126] *Id.* at 30-31.

[127] Of the 5900 new residences built in the "new" Southwest Washington area, only 310 were classified as affordable to the displaced original inhabitants of the area. Main, *supra* note 95, at 3, 16 (citing Jane Jacobs' amicus curiae brief in the *Kelo* case).

pricey that by 1969 it inspired a rent strike by affluent tenants.[128] The condition of unfortunate slum dwellers whose plight formed the rationale for Justice Douglas' stirring prose, far from being improved, only worsened as they were pushed out of their admittedly shabby homes and, since no relocation benefits were available at the time, had to move into worse slums elsewhere in the District of Columbia, that commanded higher rents. All this took place under the noses of the Justices who either failed to take note of this gross departure from the representations made to them in *Berman*, or simply did not care.

Hawai'i Housing Authority v. Midkiff, which resulted in a dramatic escalation of home prices in Hawai'i, contrary to its stated goal of housing cost reduction, is dealt with *supra*, and there is nothing to add to that discussion here, except to reiterate Judge Poole's prescient observation while *Midkiff* was in the Court of Appeals, that the legislation in issue could not achieve its stated purpose because its means were antithetical to its objectives.[129]

Finally, *Kelo v. City of New London* turned out to be an out-and-out disaster in which, for all the brave judicial talk about the quality and thoroughness of municipal planning, the Fort Trumbull redevelopment project was not even able to secure financing (well before the current financial crisis), and now, almost a decade after its inception, is going nowhere in spite of an expenditure of some $80 million in public funds.[130] With a track record like that, it may not be inappropriate for the Court to stop and reflect on just exactly what it has done, and to what extent it has by degrees become, not a protector of constitutional rights, but a facilitator of their violation to no purpose except the sought-after enrichment of influential private parties marching under the borrowed banner of "public use." It seems appropriate to allude here to the practice of seventeenth century physicians who bled their patients, and when the patients grew weaker, bled them some more.[131] Presumably, those physicians stopped bleeding their patients when they died, and if you will bear with my metaphor just a bit longer, the recent death of the New London redevelopment project is sending a similar message, leaving only the question of whether the Court wants to receive it.

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[128] Joann Lublin, *Tenants' Revolt Hits Luxury High Rise; Target is FHA*, WALL ST. J., Aug. 13, 1969, at 12. I lived in that area in the early 1960s and can attest to the fact that new dwellings built by redevelopers in the "new" Southwest catered to the upper middle class and the well to do with nary a poor person to be seen.

[129] Midkiff v. Tom, 702 F.2d 788, 806 (9th Cir. 1983) (Poole, J., concurring).

[130] *See* William Yardley, *After Eminent Domain Victory, Disputed Project Goes Nowhere*, N.Y. TIMES, Nov. 21, 2005, at A1; *see also* Editorial, *Lessons Learned from Fort Trumbull Controversy*, DAY, Mar. 6, 2009.

[131] *See* ANDREW WEAR, KNOWLEDGE & PRACTICE IN ENGLISH MEDICINE, 1550-1680, at 379 (2000).

In spite of its immediate adverse result for condemnees, *Kelo* has had an unanticipated positive effect in two ways. First, it energized the American people, causing them to express their support for reform in eminent domain law like never before. In that sense, the city of New London won the battle but lost the war. Second, having belatedly realized just how extreme the Court's right-to-take jurisprudence has become, state courts have grown increasingly reluctant to follow suit.[132] After forty-plus years in the profoundly immoral and intellectually dishonest eminent domain game, my pessimism can be boundless, but even so, it appears that at the state level things have improved somewhat for condemnees, even if some of the hailed post-*Kelo* legislative "reform" ranges from the insignificant to the deceptive.[133] Still, the people have had their say, and time will tell to what extent their will will be reflected in future legislation and its interpretation by the courts.

A. The People Have Spoken

Apart from constitutional values, there are powerful policy reasons that call for strong protection of property rights from government overreaching. Well-regarded commentators,[134] as well as the courts themselves,[135] have repeatedly recognized the merits of Professor James Ely's thesis that property is the guardian of all other rights[136] because people who are not secure in the enjoyment of their land and other property are vulnerable to overreaching government policies. In today's world, even freedom of speech and of the press are dependent on the media's ability to own and use their property, not only in the form of printing plants and broadcast facilities, but also intellectual

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[132] *See, e.g.*, City of Norwood v. Horney, 830 N.E.2d 381, 388 (Ohio Ct. App. 2005), *rev'd*, 853 N.E.2d 1115 (Ohio 2006); Bd. of County Comm'rs of Muskogee County v. Lowery, 136 P.3d 639 (Okla. 2006); R.I. Econ. Dev. Corp. v. Parking Co., 892 A.2d 87 (R.I. 2006).

[133] *E.g.*, Will Lovall, *The* Kelo *Blowback: How the Newly-Enacted Eminent Domain Statutes and Past Blight Statutes are a Maginot Line-Defense Mechanism for All Non-Affluent and Minority Property Owners*, 68 OHIO ST. L. J. 609 (2007); Gideon Kanner, *Illusory Protection*, L.A. DAILY J., June 3, 2008, at 6; *see also* Main, *supra* note 95, at 22 (characterizing some of the post-*Kelo* posturings by politicians as "comic relief").

[134] *See, e.g.*, Charles A. Reich, *The New Property*, 73 YALE L. J. 733, 771 (1964) ("[P]roperty performs the function of maintaining independence, dignity and pluralism in society . . . Indeed, in the final analysis the Bill of Rights depends on the existence of private property.").

[135] United States v. James Daniel Good Real Prop., 510 U.S. 43, 61 (1993) (it is an essential principle that "individual freedom finds tangible expression in property rights"); Lynch v. Household Fin. Co., 405 U.S. 538, 552 (1972) (personal rights and property rights are interdependent and neither can have meaning without the other).

[136] ELY, *supra* note 21; *see* Eagle, *supra* note 84, at 351.

property, without which they could not operate economically, and their freedom to communicate effectively would be infringed.[137]

Although Professor Dyal-Chand goes through an on-the-one-hand-but-on-the-other-hand discussion of whether what the public thinks about the misuse of eminent domain is important in formulating the contours of takings law,[138] on balance his discussion suggests that he does not think highly of this particular exercise in democracy. He suggests that perhaps the people do not understand the problem and should therefore be educated to appreciate what the use of eminent domain does for them.[139] To suppose that, of course, is his prerogative, but I believe that by and large, the people are not nearly as stupid as this supposition might have it; they can differentiate between takings for genuine, necessary public works and "economic redevelopment" that lines the pockets of influential redevelopers at the expense of the indigenous lower middle-class and poor population. They can tell that *Kelo*-style use of eminent domain is not good for them. They have at long last come to understand reality. Whatever may be said by way of legal analysis, the reality of today's use of eminent domain for economic redevelopment is a de facto redistribution of property to the very rich from those below them on the socio-economic scale, and as such is profoundly immoral. Be all that as it may, I must comment on two startling aspects of Professor Dyal-Chand's detailed discussion of this point.

First, I note Professor Dyal-Chand's statement that "takings law and practice regularly do provide for relatively broad procedural rights."[140] Say what?! In fact, though the government must give notice to the owner *when it chooses to file an eminent domain action* (how else could it prosecute a condemnation lawsuit?),[141] it need not file one, in which case condemnees are not entitled to due process (i.e., notice and hearing), before their property is taken by physical

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[137] DELONG, *supra* note 97, at 309-28. For an example of a taking of intellectual property by the government engaging in industrial piracy, see *Tektronix, Inc. v. United States*, 552 F.2d 343 (Ct. Cl. 1977), which held that the aggrieved patent owner was only entitled to a royalty, not to the measure of damages that would be awarded in a tort action against a private industrial pirate.

[138] Dyal-Chand, *supra* note 3, at 855-57.

[139] *Id.* It should be emphasized that the public benefits flowing from genuine public works created through the use of eminent domain do not pose much of a political problem. It is its misuse to benefit influential private parties at the expense of powerless home owners and small business people that is agitating the American public.

[140] *Id.* at 865.

[141] *See* Schroeder v. City of New York, 371 U.S. 208 (1962); Walker v. Hutchinson, 352 U.S. 112 (1956). That due process requirement has not stopped the government from taking an occasional shot at trying to secure a condemnation judgment without notice to the condemnees; *see* United States v. 320.0 Acres of Land, 605 F.2d 762, 780 n.22 (5th Cir. 1979); City of Passaic v. Shennett, 915 A.2d 1092 (N.J. Super. Ct. App. Div. 2006).

seizure.[142] Even when a condemnation action is filed, a taking of the subject property can take place without notice or hearing, by the condemnor unilaterally filing a declaration of taking (or in state practice, requesting an ex parte order for immediate possession, known as quick-take), thereby transferring title and the right of possession to itself with no right on the part of the land's owners to a pre-deprivation hearing.[143] In some states, the taking process is altogether non-judicial; the necessary document accomplishing the taking is filed administratively, unilaterally transferring title and the right of possession to the taker, without notice or hearing or any judicial act, thus relegating the property owners to petitioning a court for post-deprivation relief if they challenge either the unilaterally determined compensation award or the right to take.[144] As the U.S. Court of Appeals put it, the government can simply seize private property and say to the displaced owner "sue me."[145] Whatever that may be, it is not a case of "relatively broad procedural rights,"[146] so I hope that Professor Dyal-Chand can be persuaded to reconsider his position on this point.

Second, Professor Dyal-Chand observes that the Supreme Court is a counter-majoritarian institution whose decisions are not informed by what the people think,[147] and that perhaps what the public needs is some education "to demonstrate the value of eminent domain to those members of the public who feel that decisions like *Kelo* produce no public benefit."[148] Putting aside the

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[142] *See* Stringer v. United States, 471 F.2d 381, 384 (5th Cir. 1973); United States v. Herrero, 416 F.2d 945, 947 (9th Cir. 1969); *see also* United States v. Dow, 357 U.S. 17, 21 (1958) (the government may seize private property and say to its owners "sue me").

[143] *See, e.g.*, 40 U.S.C. § 3114 (2003).

[144] 6 NICHOLS ON EMINENT DOMAIN § 24.02 (rev. 3d ed. 2002). As it happens, that is the procedure followed by Connecticut, which gave us the *Kelo* case. *See* CONN. GEN. STAT. ANN. § 8-132 (West 2008). That is why Suzette Kelo and her neighbors were plaintiffs rather than defendants, as would be the case in the majority of states where private property is condemned by the government in a judicial proceeding filed by it. *See, e.g.*, UNIFORM EMINENT DOMAIN CODE §§ 401-402 (West 1974).

[145] *Stringer*, 471 F.2d at 384. Then there is the power of legislative expropriation whereby Congress can simply pass a bill declaring that a particular parcel of property now belongs to the government, relegating its (former) owner to a lawsuit for compensation in the U.S. Court of Federal Claims. This procedure was used to create the Redwoods National Park and more recently the Manassas Battlefield National Monument. *See* JACQUES B. GELLIN & DAVID W. MILLER, THE FEDERAL LAW OF EMINENT DOMAIN 6 n.11 (1982).

[146] Dyal-Chand, *supra* note 3, at 855.

[147] *Id.*

[148] *Id.* Considering the disastrous aftermath of *Kelo* and the failure of the supposedly well-planned redevelopment project that New London successfully sold to the Supreme Court in justification of its position, I would think that it would take intensive brain-washing rather than education to get the people to embrace that moral, civic, and fiscal disaster as a "benefit." More fundamentally, Professor Dyal-Chand confuses the exercise of eminent domain for necessary

dollop of Big Brotherism implicit in the suggestion that the public needs to be "educated" to embrace what it despises, Professor Dyal-Chand thus conflates the [beneficial] use of eminent domain to create needed public projects with its use to enrich redevelopers, and through them municipalities that are unwilling to impose taxes necessary for their well-being. The plain fact is that *Kelo* produced *no* benefit—the Fort Trumbull redevelopment project has been a failure that wasted over $80 million in public funds with nothing to show for it.[149] These events illustrate that *Kelo*-style redevelopment is nothing more than a not-so-thinly disguised private business venture that though financed with public funds, does not thereby shed its familiar exposure to risk of failure that all new businesses share.[150] Thus, the people have justified problems with the misuse of eminent domain for private enrichment—not with its use for the creation of genuine, needed public works.

Perhaps more important, Professor Dyal-Chand's assertion fails to note that recent Supreme Court decisions in this field have been based, not on any independent, judicial determination of whether the facts before it satisfy the constitutional "public use" limitation, but rather on the Court's abject deference to whatever the local municipal functionaries decide by way of planning of their project.[151] I am not aware of any other area of constitutional law where the Court so completely surrenders its conceded decision-making authority to local, sometimes unelected government functionaries whose self-serving decisions interpreting constitutional language the Court deems to be "well-nigh conclusive."[152] Thus, since under prevailing Court doctrine "public use" is

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public works with its use to further the commercial fortunes of redevelopers. There is comparatively little opposition to the first of these categories, and a great deal to the second one—and rightly so.

[149] Yardley, *supra* note 130, at A1. The Fort Trumbull land taken in the *Kelo* case has been razed but remains largely vacant with no imminent plans for it improvement in sight. Scott Bullock, *The Truth About* Kelo, 55 RIGHT WAY 12, 13 (2008) ("The preferred developer for part of the site, Corcoran Jennison just missed its latest deadline because it has not been able to secure financing for the project in spite of repeated efforts to do so. The project has been an unmitigated disaster.").

[150] *See* Pasadena Redevelopment Agency v. Pooled Money Inv. Bd., 186 Cal. Rptr. 264 (Cal. Ct. App. 1982) (requiring state taxpayers to bail out a failed redevelopment project).

[151] Kelo v. City of New London, 545 U.S. 469, 483 (2005) (giving extreme deference to the record showing that "[t]he city has carefully formulated an economic development plan"). As noted *supra*, at note 130, that "carefully formulated" plan turned out not to be worth the proverbial paper it was written on.

[152] Berman v. Parker, 348 U.S. 26, 32 (1954). While court opinions on this subject contain much judicial language about the vastness of legislative power to determine what "public use" means, in most eminent domain cases the decision to condemn, certainly the decision of what property and how much of it to take and for what specific purpose, is made, not by the legislature, but by local, often unelected administrative bodies such as state highway commissions which were set up as independent bodies precisely to insulate them from

defined by the political/democratic process, it is difficult to see why, in that context, the people's voice should not be heeded.

What emerges from Professor Dyal-Chand's favored approach is a sort of a vintage Alphonse and Gaston comic strip routine in which he would have the condemnor-municipality defer to the Court as the "ultimate arbiter of constitutional meaning"[153] even as the Court simultaneously defers to the self-serving decision of that municipality, which it deems to be "well-nigh conclusive,"[154] thus reducing the serious process of constitutional review to a farcical exercise in circularity.

The American public overwhelmingly disapproves of the *Kelo* decision, with negative responses to polls running into the 90%-plus range—figures that are unheard of in polling on other subjects of public interest.[155] In making this point I do not mean to suggest that the Court should follow the polls, certainly not where explicit constitutional language is involved. On the other hand, where the Court surrenders its decision-making powers to local politicians who are driven by a desire to placate business enterprises that are likely to bring money into the community and thereby compromise their ability and willingness to give fair consideration to the legitimate interests of prospective condemnees, a more sensitive judicial approach is amply warranted. Under those circumstances it is difficult to see why clearly voiced manifestations of civic values held by the populace should be downgraded. This is a fortiori true where the judicial decision making ascribes meaning to constitutional language that is at variance with its ordinary, plain meaning. To put it plainly, if we say with the *Kelo* Court that the meaning of the phrase "public use" is largely (if not entirely) to be defined by the political process, what is wrong with heeding the voice of the people?

It seems plain to me that the phrase "public use" is antithetical to "private gain," even if that gain is ultimately taxed and produces government revenues *as do all private economic gains*. In any event, the word "public" must mean *something*—it could not have been inserted into the Fifth Amendment as an act of the Founders' absent-mindedness. Construing it so that the "public use" requirement is deemed satisfied with private gain that may or may not produce secondary economic trickle-down effects, does not pass muster, no matter how one tortures the English language. By that reasoning, *every* private, profit-making business owned by an optimistic proprietor who anticipates a profitable

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legislative, political influences.

[153] Dyal-Chand, *supra* note 3, at 855.

[154] *Berman*, 348 U.S. at 32.

[155] For a compilation of polling data, running as high as 93% against the *Kelo* holding, see Castle Coalition, The Polls Are in, http://www.castlecoalition.org/index.php?option=com_content&task=view&id=43&Itemid=143 (last visited Feb. 27, 2009).

future—which is to say, most if not all business proprietors—would qualify as a "public use."

Significantly, and by way of response to Professor Dyal-Chand's view, judicial interpretation of constitutional law that governs eminent domain has not been a case of legal doctrine *über alles*—as opposed to policy choices, the Court has over the years frequently looked to policy factors[156] as well as to "evolving standards of decency" in resolving issues of constitutional law.[157] In that context, it may not be inappropriate to suggest that the benefits of contemporary standards of decency should extend not only to convicted murderers, child rapists[158] and army deserters,[159] but also to citizens who have done nothing wrong and whose "sin" is that they happen to own property that is coveted by a well connected redeveloper holding out an uncertain and unenforceable prospect of increased municipal revenues.

If we say with the Court that the law should be kept abreast of "the diverse and always evolving needs of society,"[160] no reason appears why those evolving needs of society should not also reflect the need to accommodate the effects of the impact of enormous changes in the use of eminent domain that have come about in the past century and the need for adjusting compensability criteria so that they reflect modern, urban reality rather than bygone nineteenth century rural conditions.

Nor is it apparent why the need for decent treatment of individuals confronted by the growing power of an ever larger and more powerful government should not be reflected in the evolving law. The Court has never explained why the avowedly policy-based rules that evolved in the context of nineteenth century takings of land for railroad easements, usually across vacant farm land, should continue to be rigidly applied over a century later when the impact of modern mass condemnations can displace hundreds of thousands of people annually from their urban homes and businesses and cause widespread incidental losses that were nonexistent in the nineteenth century.

The suggestion that the remedy of the adversely affected property owners is to resort to the democratic process in an effort to change pertinent statutes is unhelpful because precious few owners of land within a redevelopment project area have the political savvy and the economic resources to mount a city-wide referendum, assuming that one is available under local law.[161] Professor Dyal-

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[156] *See* Norman Williams, Jr., et al., *The White River Junction Manifesto*, 9 VT. L. REV. 193, 234-36 (1984) (discussing the Supreme Court's practice of using policy considerations in formulating constitutional law doctrine).

[157] *See supra* notes 151-52 and accompanying text.

[158] Kennedy v. Louisiana, 128 S. Ct. 2641 (2008).

[159] Trop v. Dulles, 356 U.S. 86 (1958).

[160] Kelo v. City of New London, 545 U.S. 469, 480 (2005).

[161] *Compare* Gibbs v. City of Napa, 130 Cal. Rptr. 382 (Cal. Ct. App. 1976), *and* Strand v.

Chand's suggestion that those aggrieved by the present state of eminent domain law should "elect officials whom they could trust"[162] is naïve at best and disingenuous at worst. It is redolent of Marie Antoinette's notorious dictum, "Let them eat cake."[163] By that reasoning every constitutional claim, no matter how meritorious, could be turned away with the suggestion that the aggrieved parties had best elect officials whom they could trust not to violate the constitution. Besides, as a practical matter, proponents of redevelopment projects usually paint rosy pictures of future benefits to the community, thereby providing an irresistible temptation to local officials to partake of the proverbial "free lunch"—i.e., a pursuit of future community benefits without the inconvenience of raising taxes. The majority of a city's voters at large, personally unaffected by the proposed taking that usually targets a small area, have no incentive to vote against the proposed project. This is the sort of situation in which recourse to the democratic process is unavailable or ineffective, and therefore the constitutional rights in issue should receive a more sensitive degree of judicial protection if they are to perform their purpose of limiting the power of government. The extent of constitutional protection actually available to the affected property owners by the text of the Fifth Amendment should be informed by these considerations.

Finally, when it comes to appreciating public understanding of the importance of private property rights, it seems appropriate to note that it is not just the American public that is being heard from. It bears observing before concluding this point, that the world's population has made its judgment on the issue of desirability of protected property rights, and is voting with its feet. The have-nots of the world are migrating in large numbers—legally and illegally—to First World countries. They do so not only to escape the often kleptocratic and repressive regimes in their home countries, but mostly for economic reasons: to gain a higher degree of enjoyment of property and with it a higher standard of living which back home is reserved to those with government connections.[164] In short, they migrate in large numbers to avail themselves of the economic opportunities that the West's regime of legally enforceable protection of private property rights it provides.[165]

Escambia County, 992 So. 2d 150 (Fla. 2008), *with* Dyal-Chand, *supra* note 3, at 857.

[162] Dyal-Chand, *supra* note 3, at 857.

[163] ANTONIA FRASER, MARIE ANTOINETTE 135 (2006).

[164] *See* Bethell, *supra* note 5.

[165] *See Chunnel Rail Freight Suspended*, RAILWAY AGE, Apr. 2002, at 24. For example, "French National Railways suspended the operation of freight services through the Channel Tunnel to and from Britain for a time in March because French authorities were unable to step up security at the Frethun freight yard near Calais to prevent illegal immigrants from boarding freight trains destined for Britain." *Id.*

The quest for property, notably land, has been a motivating force throughout the history of the United States, beginning with the trans-Atlantic migration of landless Europeans seeking to gain personal freedom and to acquire property in storied America.[166] Though the frontier may be gone, that motivation continues to be true today, except that today's immigration comes from Central America and Asia as well as Europe, and the sought-after property takes the form of the fruits of business entrepreneurship, rather than land. Perhaps those "huddled masses yearning to breathe free"[167] are thinking of something that Professor Dyal-Chand evidently does not fully appreciate. As those immigrants of old used to say, in America, there is gold in the streets.[168] There is indeed, as incontestably attested to by the many immigrants from all over the world who come to America with nothing and prosper, or even make fortunes that enrich themselves and add to the country's prosperity,[169] thereby reinforcing the important lesson that an enduring legal regime that protects individual property rights also nurtures the individual and improves the condition of society. What we should strive to accomplish is to preserve everyone's opportunity to reach for that figurative "gold in the streets"—to accumulate property lawfully,

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[166] *See* Main, *supra* note 95, at 10-12. There is a wonderful New Yorker cartoon on this subject. It depicts two Pilgrims standing at the rail of a sailing ship heading for America, with one of them saying to the other: "Religious freedom is my immediate goal, but my long-range plan is to go into real estate." Donald Reilly, NEW YORKER, June 3, 1974, http://cartoonbank.com/assets/1/43771_m.gif (last visited Mar. 28, 2009).

[167] Emma Lazarus, *The New Colossus* (1883), *reprinted in* POEMS FOR AMERICA 71 (Carmela Ciuraru ed., 2002). Note that Lazarus, though a Socialist, foreshadowed the immigrants' prosperity by concluding her famous poem with the line "I lift my lamp beside the golden door." *Id.*

[168] The late Nineteenth and early Twentieth century Jewish immigrants from central Europe referred to America as the *goldene medine* (golden realm). Ursula Zeller, *Between Goldene Medine and Promised Land: Legitimizing the American Jewish Diaspora*, 66 CROSS CULTURES 1 (2003). They did so in spite of the harsh life that awaited new immigrants in turn-of-the-century urban America, where their faith was eventually vindicated as they prospered in the *goldene medine*. *Id.* Likewise, in the Chinese tradition, America is referred to as *gam saan* ("land of the Golden Mountain"). *See* Pat K. Chew, *Asian Americans: The "Reticent" Minority and Their Paradoxes*, 36 WM. & MARY L. REV. 1, 94 (1994):

> My mother's memories of a conversation between her, when she was a young child, and her father, on the eve of his sailing from a Guangdong Province village in southern China to San Francisco, California in 1916[:] "'Tell me Papa, why do you have to go away, why do you have to leave me?' 'Because, child, America is the land of golden mountains, where opportunity and prosperity is for everyone. I must go—so that you will have a future.'"

Id.

[169] *See, e.g.*, Amy Zipkin, *First, $99. Then, Millions*, N.Y. TIMES, Sept. 7, 2008, at BU12 (Gurbaksh Chahal, a penniless teenage Punjabi immigrant dropped out of school, started an Internet advertising tracking service, and eventually sold it for $300 million).

whether in the form of a family home or a business enterprise, without fear that it will be taken for the enrichment of another, more politically favored, party.

It is property ownership that provides individuals with security and society with stability, and enables people to strive to better themselves as well as their progeny. It provides them with a stake in their community and gives them motivation to better conditions in it.[170] Those who would have it otherwise, whether they concede it or not, are actually plumping for increased power by an unaccountable government over all aspects of individual lives.

To disregard all that and to relegate property rights of the individual to second-class status while de facto encouraging the new robber barons to go after them for commercial gain would be folly because doing so would place in jeopardy the many rights and liberties that we all enjoy. DeLong put it well:

> In the end, the old civil liberties argument applies. The weapons you wield to take from others today will be turned against you tomorrow. The holders of the new property—financial assets, intellectual concepts, copyrights, suburban real estate—are all going to find that their legal protections are gone. The doctrines they use to seize endangered species habitat or wetlands or historic structures can now be turned against them by anyone politically stronger. . . . [The question is] how you would distinguish between a law seizing endangered species habitat and a law commandeering your vacation home to house the homeless,[171] or a law demanding that you devote some percent of your time as a professional to causes stamped worthy by government regulation.[172] Here is the answer: there is no distinction. You professionals and knowledge workers are growing dependent on raw power, not on law. You have been cutting down the forest of laws to get at the devil, and the winds are starting to blow."[173]

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[170] Eagle, *supra* note 84, at 351.

[171] *See* Christy v. Lujan, 490 U.S. 1114, 1115 (1989) (White, J., dissenting) (noting that prohibiting a rancher from defending his sheep by lethal force against attacks by endangered grizzly bears, was on principle no different than allowing the homeless to enter grocery stores and help themselves to the storekeepers' stock of food while enjoying legally provided impunity), *cert. denied,* Christy v. Hodel, 857 F.2d 1324 (9th Cir. 1988).

[172] *See* Cunningham v. Superior Court, 222 Cal. Rptr. 854 (Cal. Ct. App. 1986) (discussing at length the pros and cons of compelling attorneys to represent indigent litigants without compensation).

[173] DELONG, *supra* note 97, at 339. The last phrase of the quoted passage is an allusion to St. Thomas More's line in the play (and motion picture) *A Man for All Seasons,* where he rebukes his son-in-law, Roper, for proclaiming himself ready to cut down all the laws in England to get at the devil. To which More replies:

> [A]nd when the last law was down[,] and the Devil turned round on you—where would you hide, Roper, the laws all being flat? This country is planted thick with laws from coast to coast—Man's laws, not God's—and if you cut them down—and you're just the man to do it—d'you really think you could stand upright in the winds that would blow then? Yes, I'd give the Devil benefit of law, for my own safety's sake.

ROBERT BOLT, A MAN FOR ALL SEASONS 56 (Samuel French, Inc. 1990) (1960).

VIII. CONCLUSION

To the extent this article takes note of judicial departures from prevailing moral standards by procedural and economic mistreatment of property owners whose land is taken by eminent domain without full compensation and at times without due process of law, that is not a recognition on my part of the legitimacy of such unfortunate judicial behavior, but rather an effort to spotlight its illegitimacy. As illustrated by many critical commentaries, and as well understood by professionals with significant experience in the practice of eminent domain law, the treatment of property owners by American condemning authorities and American courts does not withstand scrutiny on logical, moral or economic grounds.[174]

> The fact is that an ever increasing amount of shameless, senseless and needless damage and havoc are wreaked on the lives and fortunes of citizens and taxpayers whose only fault is that they own real property which is coveted by one or more of the myriad agencies which, wisely or not, have been entrusted with the terrible power which we call eminent domain.[175]

The fact that judges do what they do while intoning insincere platitudes about "political ethics,"[176] "fairness and equity,"[177] and about providing "full and perfect" compensation[178] that is supposed to leave the condemnees "in the same position pecuniarily" that they would have been in had their property not been taken[179] (followed by judicial confessions that none of it is true, that, as the California Supreme Court put it, these expressions make up in idealism what they lack in universal application, and are only "panoramic"[180] so they must not be relied on by consumers of judicial prose)[181] does not reflect on the status of property rights but rather on the morality and impartiality of judicial performance.

In other words, for reasons that lack textual, doctrinal or moral legitimacy as well as any sound factual basis—reasons that are rooted in judges' sometimes voiced and sometimes concealed[182] desire to limit condemnees' recovery in

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[174] *See supra* note 87 and accompanying text.

[175] William C. Bryant, *Eminent Domain—Its Use and Misuse*, 39 U. CIN. L. REV. 259 (1970). Significantly, the author of this harsh language spent his career as a condemnors' lawyer.

[176] United States v. Cors, 337 U.S. 325, 332 (1949).

[177] United States v. Commodities Trading Corp., 339 U.S. 121, 124 (1950).

[178] United States v. Miller, 317 U.S. 369, 373 (1943).

[179] *Id.*

[180] County of Los Angeles v. Ortiz, 490 P.2d 1142, 1146 (Cal. 1971).

[181] Cmty. Redevelopment Agency v. Abrams, 543 P.2d 905, 909 (Cal. 1975).

[182] *See* Bacich v. Bd. of Control, 144 P.2d 818, 823 (Cal. 1943) (noting that in formulating eminent domain rules of compensability, courts do so as a matter of policy "the nature of which,

spite of the Constitution's "just" compensation requirement[183]—property owners are already the subject of shabby judicial treatment when it comes to eminent domain and land-use law and practices. In that context, Professor Dyal-Chand's call for further impoverishment of their ostensibly constitutionally protected property rights would seem to call for a particularly strong, persuasive effort on his part. Instead, his case not-so-tacitly assumes that the reader of his prose is already committed to his ideological anti-property position and to make its point relies on a vision of socio-economic conditions that more closely resemble the dark side of nineteenth century Britain than twenty-first century America, ignoring in the process the real problems that plague today's eminent domain practices (e.g., the enrichment of wealthy redevelopers at the expense of lower middle class property owners). Ironically, while ostensibly advancing the case of the have-nots, Professor Dyal-Chand defends a process that is widely used to permit the very rich to abuse the lower middle class and the poor, as somehow a social benefit. Jane Jacobs put it well: "The economic rationale of current city rebuilding is a hoax. The economics of city rebuilding do not rest soundly on reasoned investment of public tax subsidies, as urban renewal theory proclaims, but also on vast, involuntary subsidies wrung out of helpless site victims."[184]

This is something that, given his all-too-evident *Weltanschauung*, one would think Professor Dyal-Chand would oppose. But since he does not, and indeed favors it, it falls to me to make it clear to him that the beneficiaries of large-scale eminent domain takings that have fueled the ongoing national controversy have been, not the downtrodden have-nots as in his hypothetical example, but rather industrial and commercial giants such as General Motors,[185] Chrysler,[186] Nissan,[187] AM General,[188] Pfizer pharmaceuticals,[189] Otis Elevator,[190] the New

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although at times discussed by the courts, is usually left undisclosed").

[183] The California Supreme Court can be something less than hospitable to claims of property owners in takings actions. *See* Redevelopment Agency v. Gilmore, 700 P.2d 794, 803 n.12 (Cal. 1985) ("This court has sometimes taken a skeptical view of the United States Supreme Court's suggestion [sic] that the landowner must be placed 'in as good [a] position pecuniarily' as if he had not lost his land to eminent domain." (citations omitted)).

[184] JACOBS, *supra* note 44, at 7-8.

[185] Poletown Neighborhood Council v. City of Detroit, 304 N.W.2d 455 (Mich. 1981), *overruled by* Wayne County v. Hathcock, 684 N.W.2d 765 (Mich. 2004).

[186] City of Detroit v. Vavro, 442 N.W.2d 730 (Mich. Ct. App. 1989) (holding that what is good for General Motors is good for Chrysler).

[187] David Firestone, *Black Families Resist Mississippi Land Push*, N.Y. TIMES, Sept. 10, 2001, at A20 (reporting that in addition to condemning a 2.5 square mile site for a Nissan plant, the state offered Nissan "incentives" of "$400 million in spending and tax rebates," and assumed the cost of a $17 million vehicle preparation building, plus an $80 million job training program for Nissan workers, plus $60 million in new and improved roads). Reading these dispatches gives one an eerie feeling of perhaps having wandered into the Mad Hatter's tea party. Even as the American automobile industry is teetering on the brink of bankruptcy, and is

York Times,[191] the New York Stock Exchange,[192] Bank of America,[193] mega-developers like Donald Trump[194] and Bruce Ratner,[195] as well as a clutch of megabuck owners of other professional sports franchises,[196] to say nothing of

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laying off tens of thousands of American automobile workers, Mississippi and other states are spending their public treasure subsidizing our industry's Japanese competitors who are doing right well driving our industry to the wall. Is this "public use"?

[188] Nicole Stelle Garnett, *The Neglected Political Economy of Eminent Domain*, 105 MICH. L. REV. 101, 130 (2006) (describing the acquisition of private land for General Motors and AM General, makers of Hummer SUVs, under threat of condemnation). Since that time, sales of Hummers have plunged catastrophically by nearly 50% *G.M. Sends Financial Data on Its Hummer Unit*, N.Y. TIMES, Oct. 18, 2008, *available at* http://query.nytimes.com/gst/fullpage.html?res=9A0CE3D91131F93BA25753C1A96E9C8B63, thus illustrating again—if further proof were needed—that economic redevelopment is a purely private entrepreneurial activity carrying the familiar market risks of failure.

[189] Kelo v. City of New London, 545 U.S. 469 (2005).

[190] Yonkers Cmty. Dev. Agency v. Morris, 335 N.E.2d 327 (N.Y. 1975). Note however that in this case, poetic justice of sorts was eventually meted out to the city. *See* City of Yonkers v. Otis Elevator Co., 844 F.2d 42, 43 (2d Cir. 1988) (shortly after Yonkers condemned Morris' land for Otis, Otis changed its mind and shut down its Yonkers plant, leaving the city holding the bag).

[191] W. 41st St. Realty L.L.C. v. N.Y. State Urban Dev. Corp., 744 N.Y.S.2d 121 (N.Y. App. Div. 2002). The ninety-nine-year ground lease in this case provides that after thirty years the New York Times and its redeveloper may buy the subject property for nominal consideration. New York State Urban Development Corp., Notice of Public Hearing 5 (Sept. 24, 2001) (on file with author). As it happened, the New York Times has suffered a business downturn and was forced to sell its interest in the new building. *See* Gideon Kanner, *Bad News for the Times*, L.A. DAILY J. Mar. 20, 2009, at 6.

[192] *In re* Fisher, 730 N.Y.S.2d 516 (N.Y. App. Div. 2001); *see* Charles V. Bagli, *45 Wall St. Is Renting Again Where Tower Deal Failed*, N.Y. TIMES, Feb. 8, 2003, at B3 (reporting a loss of $109 million by the City of New York as a result of its unsuccessful attempt to condemn a site and finance a new building for the New York Stock Exchange, that was frustrated by 9/11).

[193] *See* Charles V. Bagli, *Hearing Splits on Public Help for a Proposed Office Tower*, N.Y. TIMES, Nov. 21, 2003, at B2 (noting a subsidy to the Bank of America for a new building, of $650 million in bonds and $56.4 million in tax breaks).

[194] Casino Reinvestment Dev. Auth. v. Banin, 727 A.2d 102 (N.J. Super. Ct. Law Div. 1998).

[195] Ratner is the redeveloper of the new New York Times building and the Brooklyn Atlantic Yards project, and principal owner of the New Jersey Nets. Goldstein v. Pataki, 516 F.3d 50, 53-54 (2d Cir. 2008). The Atlantic Yards project is to include a new stadium for the New Jersey Jets, to be "generously leased" to their owner. *Id.* at 64.

[196] *See* Charles V. Bagli, *Stadium Games: Give and Take and Speculation; What the Teams Want and What the City Gets*, N.Y. TIMES, Jan. 16, 2005, *available at* http://query.nytimes.com/gst/fullpage.html?res=9505EEDA1538F935A25752C0A9639C8B63 (subsidies to those teams are estimated to total "at least $1.1 billion," a process characterized by the *N.Y. Times* as "thievery"); Patrick McGreevy, *Subsidies May Aid L.A. Live*, L.A. TIMES, June 14, 2008, at B1 (reporting a diversion by California state officials of $30 million from proceeds of bonds authorized by voters *for affordable housing*, but to be spent instead on "sprucing up the street" next to a new, multi-million dollar entertainment project located next to the Staples arena); *see*

mass merchandisers like Costco,[197] Target[198] and Best Buy,[199] shopping mall developers,[200] large automobile dealers,[201] race track operators[202] and casinos.[203]

No reasonable person, at least none that I know or can visualize, can say *with a straight face* that these mass condemnations, avowedly intended to make the very rich even richer at the expense of powerless members of society, are "public" uses within the meaning of the English language or the Fifth Amendment, and that the private gains generated for the redevelopers are merely "incidental" to the greater public good.[204] They plainly are not. The courts' attempts to convince us that the private enrichment tail is not wagging the public-use dog has not only failed to persuade the people,[205] but has brought

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also Editorial, *Green Thievery in the South Bronx*, N.Y. TIMES, June 14, 2008, at A26; Danny Hakim, *New High in '06 on Borrowing for Pet Projects*, N.Y. TIMES, Jan. 14, 2007, § 1, at 24.

[197] 99 Cents Only Stores v. Lancaster Redevelopment Agency, 237 F. Supp. 2d 1123 (C.D. Cal. 2001).

[198] Aaron v. Target Corp., 269 F. Supp. 2d 1162 (E.D. Mo. 2003), *vacated on other grounds*, 357 F.3d 768 (8th Cir. 2004).

[199] Hous. & Redevelopment Auth. v. Walser, Auto Sales, Inc., 641 N.W.2d 885 (Minn. 2002). After the taking, property tax revenues have risen from $700,000 to $3.2 million as a result of the construction of the Best Buy facility on the taken land, but—surprise, surprise!—"under the TIF agreement, Best Buy gets to keep the difference for 25 years." Terry Pristin, *Eminent Domain Revisited: A Minnesota Case*, N.Y. TIMES, Oct. 5, 2005, at C10.

[200] BERNARD J. FRIEDEN & LYNNE B. SAGALYN, DOWNTOWN, INC.: HOW AMERICA REBUILDS CITIES (1991); *see* Kaufmann's Carousel, Inc. v. City of Syracuse Indus. Dev. Agency, 750 N.Y.S.2d 212 (N.Y. App. Div. 2002).

[201] Frank Clifford, *Pirating the Auto Retailers*, L.A. TIMES, Nov. 9, 1990, at A1.

[202] John Gibeau, *The Money Chase*, 85 A.B.A. J. 58, 59 (1999).

[203] Casino Reinvestment Dev. Auth. v. Banin, 727 A.2d 102 (N.J. Super Ct. Law Div. 1998).

[204] The "public" use proposed by the condemnor (but rejected by the *Banin* court) was to provide a convenient parking lot where heavy rollers patronizing Donald Trump's Atlantic City casino could discreetly park their limousines while courting Lady Luck at his gaming tables. *Id.* at 103-06. And as for the "public benefit" of it all, to the extent that Atlantic City was supposed to be revived by takings of beachfront land and turning it over to builders of large hotel/casinos, that effort proved to be something less than a thumping success. Serge F. Kovaleski, *Casinos Reaping Anti-Blight Cash*, N.Y. TIMES, Jan. 28, 2007, § 1, at 1 (reporting disbursements of tens of millions of dollars from the New Jersey Casino Reinvestment Development Authority's funds *that were to be used for community improvement*, to casinos); *see also* Serge F. Kovaleski, *Casinos Reaping Anti-Blight Cash*, N.Y. TIMES, Jan. 29, 2007, at A1 ("[D]espite the authority's disbursements, Atlantic City continues to grapple with blocks of dilapidated buildings and seamy motels that draw drug dealers and prostitutes, all within the shadows of towering, brightly lighted casinos."). So much for community revitalization through redevelopment.

For an insight into "high finance" wheeling and dealing involving acquisition of land for Atlantic City casinos, see *City of Atlantic City v. Cynwyd Invs.*, 689 A.2d 712 (N.J. 1997).

[205] The interpretation of the phrase "public use" does not involve arcane legal principles as in parsing of the rule against perpetuities or the like. Rather, it involves the meaning of ordinary words in the English language, whose understanding is within the ken of any intelligent English-speaking person. While some problems as to where to draw the line in marginal cases

about a tidal wave of justified public criticism of the judges' handiwork. Not even the Supreme Court's majority in *Kelo* could bring itself to say with a straight face that New London's efforts to cater to the Pfizer corporation by providing upscale living and shopping facilities for Pfizer's well educated and well paid workforce at the expense of the indigenous lower middle-class population of Fort Trumbull, qualified as genuine "public use," so Justice Stevens' majority opinion took refuge in the semantic device of asserting that "public purpose" is a "more natural interpretation," no less, of "public use."[206] By now, I get tired of saying this, but it is a certainty that were Justice Stevens to drop in on his neighbor to borrow a lawnmower, he would *not* say, "Can I purpose your lawnmower?" No way.

Thus, the new robber barons and their municipal and judicial allies are now advancing the remarkable notion that when a wealthy corporation is able to persuade a congenial municipal government that it expects to make oodles of money using land forcibly taken from the lower middle-class, and that some of that money may[207] eventually trickle down to the community, that is a "public

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may be intellectually challenging (as they can be in virtually all other areas of the law), in the typical condemnation case no legal education is required to distinguish public use from private gain, and community benefits from private enrichment that consumes Kings' ransoms in public funds but at most promises only hoped-for, trickle-down economic effects with no assurance that they will occur. It is for that reason that the people feel that their intelligence is being insulted when judges and redevelopment groupies try to tell them that taking unoffending private homes or small businesses for monetary gain by corporate giants who plan to make fortunes, is a "public use."

[206] Kelo v. City of New London, 545 U.S. 469, 480 (2005).

[207] As has been the case in numerous redevelopment projects, the vaunted city plans relied on by courts in such condemnation cases may be chimerical no matter how well they sound, not only because redevelopment deals often divert any increased revenues to the redeveloper or to servicing of the TIF bonds issued to finance the project, but also because the condemnors can simply change their mind and devote the subject land to other uses or simply sell it at a profit. *See* Lynda Oswald, *Can a Condemnee Regain Its Property if the Condemnor Abandons the Public Use?*, 39 URB. LAW. 671 (2007); *see also* Kanner, *supra* note 64. Moreover, redevelopment is an entrepreneurial activity that carries risks of failure and is therefore inappropriate for public bodies to undertake by risking public funds. *See* Regus v. City of Baldwin Park, 139 Cal. Rptr. 196, 204-05 (Cal. Ct. App. 1977). Thus, we are learning that in spite of the puffery surrounding the use of redevelopment to create shopping malls, the current recession is causing a downturn in the shopping mall business. Terry Pristin, *A Squeeze on Retailers Leaves Holes at Malls*, N.Y. TIMES, Sept. 9, 2008, at C5.

Even as the Supreme Court was considering *Kelo*, some of New London's vaunted plans were being abandoned. Kate Moran, *Developer Says Fort Trumbull Hotel Plans Not Viable Since 2002: Project Became Unrealistic Without Pfizer Commitment*, DAY, June 12, 2004, at C4. Since then they have come a cropper altogether. After the razing of Suzette Kelo's neighborhood to the ground, nothing has been done in New London to translate those "careful" municipal plans into reality. The proof of the pudding is that the municipally chosen redeveloper was not able to obtain financing, and the subject land has been sitting vacant and

use." With all due respect to all concerned, that is a positively Orwellian misuse of language because under it, a proposal for *any* commercial activity whose owners plan to be successful (and what owners aren't?), is enough to make the private commercial use of the subject property after its taking a "public use." The suggestion that large corporations that benefit from redevelopment projects at the expense of the public pursue those projects *primarily* for the sake of "public benefit," with considerations of private gain being merely *incidental*[208] to their greater public-spirited purpose, is simply absurd. They are in it for the money, as was Willie Sutton, the premier bank robber of his time, who famously explained that he robbed banks because "that's where the money is."[209] The linguistic jiggery-pokery used to justify private economic redevelopment as "public" also perverts the meaning of language. This appears to be an appropriate point at which to invoke the teachings of Confucius, who counseled that the most important function of government is rectification of names—to see to it that things are called by their proper names because otherwise judgments are not just and the people are at a complete loss.[210]

To reiterate, a great virtue of the law that protects private property is not that it safeguards the haves, a problem that Professor Dyal-Chand's essay seems concerned with. The truly rich of this world make out nicely, thank you very much, no matter who rules.[211] It is the poor and middle-class Americans who

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off the tax rolls. Ted Mann, *Fort Trumbull: Searching for a New Direction*, DAY, June 23, 2008; JEFF BENEDICT, LITTLE PINK HOUSE 377 (2009) ("The former Fort Trumbull neighborhood is a barren wasteland of weeds, litter and rubble.").

[208] County of Los Angeles v. Anthony, 36 Cal. Rptr. 308 (Cal. Ct. App. 1964) (holding economic benefits to private, profit-making entrepreneurs, resulting from condemnation of property for their use are permissible when incidental to a public purpose). Symbolically, the private promoters of the motion picture museum for which Anthony's home was taken were unable to raise financing for it so it was never built.

[209] Federal Bureau of Investigation, FBI History, http://www.fbi.gov/libref/historic/famcases/sutton/sutton.htm (last visited Apr. 28, 2009).

[210] THE ANALECTS OF CONFUCIUS, Book 13, v. 3 (James R. Ware trans., 1980).

[211] When the Council on Environmental Quality (CEQ) proposed in 1973 that the American land-use regime be superseded by a system resembling the British Town and Country Planning Act of 1947 (under which all uses of land, save existing ones, were expropriated, *see* Arthur Shenfield, *The Mirage of Social Land Value: Lessons from the British Experience*, 44 APPRAISAL J. 523 (1976)), members of the Citizens Advisory Committee that made the recommendation that development rights thenceforth be deemed to belong to the public, not private land owners, were hardly radical proles. The committee was headed by Laurance Rockefeller and was largely composed of big-time bankers, developers and a prominent politician. Gladwin Hill, *Authority to Develop Land is Termed a Public Right*, N.Y. TIMES, May 20, 1973, at 21; *see* PAUL, *supra* note 79, at 26-28. For a rejoinder to the CEQ regulatory approach, from the left-of-center perspective, see Richard A. Walker & Michael K. Heiman, *Quiet Revolution for Whom?*, 71 ANNALS AM. GEOGRAPHERS 67 (1981).

suffer most from unrestrained, large-scale use of eminent domain for redevelopment,[212] and are thus most in need of protection of what property they do own. Thus, a moral society that takes its constitutional limitations seriously should prefer the right of a Suzette Kelo to be left alone to live undisturbed in her iconic "little pink house" on the New London waterfront, to the likes of the Pfizer corporation with its speculative (and as it turned out, unsuccessful) commercial development ambitions.[213] Pfizer can take care of itself. The Suzette Kelos of this world need protection from commercial predators, and it is their government's duty to provide it.[214]

> The dichotomy between personal liberties and property rights is a false one. Property does not have rights. People have rights. The right to enjoy property without unlawful deprivation, no less than the right to speak or the right to travel, is in truth a "personal" right, whether the "property" in question be a welfare check, a home, or a savings account. In fact, a fundamental interdependence exists between the personal right to liberty and the personal right in property. *Neither could have meaning without the other.*[215]

Professor Ely got it right. Apart from being essential to the preservation of people's prosperity and security, private rights in property secure personal and community values, as well as individual liberty,[216] and therefore should not be relegated to the status of a constitutional "poor relation," certainly not for the

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[212] *See* Hartman, *supra* note 48, at 745; Henry W. McGee, Jr., *Urban Renewal in the Crucible of Judicial Review*, 56 VA. L. REV. 826 (1970) (describing the negative impact of urban condemnations on the poor populations and the judicial refusal to provide relief); Charles Martin Sevilla, *Asphalt Through the Model Cities: A Study of Highways and the Urban Poor*, 49 U. DET. MERCY L. REV. 297 (1971).

[213] After the Supreme Court ruled in favor of New London, approving the city's planning based on close cooperation with Pfizer's plans, federal regulators withheld approval from one of Pfizer's promising new drugs, causing Pfizer to cut its work force by 10% and lay off some 10,000 employees. Avery Johnson, *Pfizer Overhaul Faces Timing Dilemma*, WALL ST. J., Jan. 23, 2007, at A2 ("Pfizer Inc.'s new chairman and chief executive, Jeffrey B. Kindler, rolled out widely anticipated plans to restructure the drug giant yesterday, but the problems the industry bellwether faces—from flat sales to disappointing research results—have few quick fixes in sight."). This demonstrated once again that "economic redevelopment" has nothing to do with *public* use, but is simply a private entrepreneurial activity that is able to harness the government's coercive power for its benefit, and in the end is inevitably subject to uncertain market conditions that include a risk of failure, the same as other commercial activities.

[214] Marbury v. Madison, 5 U.S. 137, 163 (1803) ("The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury. One of the first duties of government is to afford that protection.").

[215] Lynch v. Household Fin. Corp., 405 U.S. 538, 552 (1972) (emphasis added).

[216] Commenting on the distinction between personal and property rights, Judge Learned Hand observed: "Just why property itself [is] not a 'personal right' nobody took the time to explain." Learned Hand, *Chief Justice Stone's Conception of the Judicial Function*, 46 COLUM. L. REV. 696, 698 (1946).

sake of enrichment of rent-seeking commercial entities that receive obscene subsidies that our overextended, debt-ridden public sector increasingly cannot afford.

Keeping Indian Claims Commission Decisions in Their Place: Assessing the Preclusive Effect of ICC Decisions in Litigation Over Off-Reservation Treaty Fishing Rights

Michelle Smith* and Janet C. Neuman**

I. INTRODUCTION: INDIAN CLAIMS COMMISSION DECISIONS AND PRECLUSION OF FUTURE CLAIMS

Congress established the Indian Claims Commission (ICC) in 1946 as a forum to adjudicate claims by Native American tribes against the United States.[1] Between 1946 and its termination in 1978, the Commission decided 610 tribal claims and awarded over 800 million dollars in compensation to 170 tribes.[2] Although the ICC's remedial authority was limited to monetary relief for claims arising prior to 1946,[3] recently, tribes seeking to establish or enforce treaty rights have been confronted with arguments that their current claims are precluded by those earlier ICC findings and settlements.[4]

Indeed, the evidence used by the ICC to quantify monetary compensation due to tribes, and the settlements actually received by tribes, do often implicate treaty claims that tribes have asserted in subsequent litigation; this is because

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[1] Indian Claims Commission Act of 1946, Pub. L. No. 79-726, 60 Stat. 1049 (1946) (originally codified at 25 U.S.C. § 70 and 28 U.S.C. § 1505) (omitted from 25 U.S.C. § 70 on termination of Commission on Sept. 30, 1978) [hereinafter ICCA or the Act].

[2] LINDA S. PARKER, NATIVE AMERICAN ESTATE: THE STRUGGLE OVER INDIAN AND HAWAIIAN LANDS 133 (1989).

[3] ICCA, *supra* note 1, § 2 (limiting claims to those accruing before the Act's date; directing the Commission to make proper deductions and offsets from the "quantum of relief"); *id.* § 19 (directing the Commission to submit "the amount thereof" with its final determination); *id.* § 22 (providing authority to Congress to appropriate "such sums as are necessary to pay the final determination"); *see also* United States v. Dann, 470 U.S. 39, 45 (1985) (inferring that the ICC was limited to providing monetary compensation); State *ex rel.* Martinez v. Kerr-McGee Corp., 898 P.2d 1256, 1258 (N.M. Ct. App. 1995) ("The ICC's jurisdiction was limited to monetary compensation for loss; it could not vindicate or establish Indian title by declaratory or injunctive relief.").

[4] *See, e.g.*, Arizona v. California, 530 U.S. 392 (2000) (state parties raised preclusion argument against tribe).

the scope of treaty rights is often dependent upon underlying land ownership, which was also a key issue in ICC cases.[5] For example, the determination of the quantity of water impliedly reserved for an Indian reservation is often directly tied to the amount of land owned by or reserved for the tribe.[6] Thus, parties have argued that courts should preclude a tribe from asserting water rights necessary to support land for which the tribe already received compensation.[7] Additionally, some of the specific factual findings made by the ICC can be relevant in current litigation. For example, the ICC routinely used findings about a tribe's "aboriginal territory"—original land holdings to which a tribe had exclusive possession—to determine what territory had been lost to the United States and thus what compensation was due.[8] This same determination can be relevant, though not necessarily conclusive, to findings about a tribe's historic land use patterns made for the purpose of determining a tribe's "usual and accustomed" fishing locations.

This article analyzes when ICC decisions are appropriately given preclusive effect—particularly whether the ICC's finding of a tribe's "aboriginal territory" should limit the locations where a tribe may assert retained rights, such as off-reservation fishing rights, in subsequent litigation. This article argues that courts should not give ICC holdings preclusive effect in this type of litigation. Preclusion is inappropriate because usual and accustomed fishing sites were not limited to a tribe's exclusive aboriginal territory. Furthermore, the ICC decisions did not, and could not, fully recognize tribal rights *retained* by treaties—especially when the treaty rights are not dependent on land ownership. Thus, ICC holdings, while properly preclusive of any relitigation of issues specifically adjudicated and resulting in a final judgment, should not be preclusive as to retained off-reservation treaty rights, such as the right to fish at usual and accustomed locations.

Section II describes the ICC, detailing its history, purpose, and jurisdiction. Section III examines Native American treaties, distinguishing between rights given up by the treaties and rights reserved by the tribes. Section IV discusses

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[5] *See, e.g.*, Or. Dep't of Fish & Wildlife v. Klamath Indian Tribe, 473 U.S. 753 (1985) (holding that the conveyance of land title also extinguished appurtenant hunting and fishing rights; but hunting and fishing rights that were independent of ownership might survive title extinguishment).

[6] *See infra* notes 87-95 and accompanying text. While there are new emerging theories on the appropriate method of quantification, the "practicably irrigable acreage" standard is still used in the majority of cases. *See* FELIX S. COHEN ET AL., COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 19.03[5][b] (4th ed. 2005).

[7] *See infra* Section V.B. and accompanying discussion of *Arizona v. California*, 530 U.S. 392 (2000).

[8] *See generally* Nez Perce Tribe of Indians v. United States, 18 Ind. Cl. Comm. 1, 121-31 (1967), *available at* http://digital.library.okstate.edu/icc/v18/iccv18p001.pdf (detailing the evidence supporting the tribe's exclusive and long standing occupation of certain territory).

the preclusion doctrines, considering their requirements, scope, and limitations. Section V analyzes the way courts have approached the intersection of ICC decisions, treaty rights, and preclusion principles, finding that some courts have given ICC decisions overly broad preclusive effect. This article concludes that preclusion principles must be applied narrowly in order to keep ICC decisions in their proper place.

II. THE HISTORY, PURPOSE, AND JURISDICTION OF THE INDIAN CLAIMS COMMISSION[9]

The Indian Claims Commission Act (the Act), passed in 1946, established the Indian Claims Commission to hear claims brought by tribes against the United States.[10] The ICC consisted of one Chief Commissioner and two Associate Commissioners, all appointed by the President with "advice and consent of the Senate."[11] Prior to the creation of the ICC, the doctrine of sovereign immunity had prevented the tribes from bringing claims against the United States, and tribes had long desired some forum in which to raise their grievances.[12] Even though a general Court of Claims was established in 1855, Indian tribes were not allowed to bring claims in that venue unless they received explicit permission from Congress to do so under special legislation.[13]

Tribal claims were primarily based on treaties. However, tribes also desired restitution—both monetary and equitable—based on moral claims, such as

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[9] For a detailed history of the long effort to establish a forum to hear Indian claims, see generally H.D. ROSENTHAL, THEIR DAY IN COURT: A HISTORY OF THE INDIAN CLAIMS COMMISSION (1990).

[10] ICCA, *supra* note 1, § 2 (authorizing the Commission to hear five different categories of claims). The establishment of the ICC was widely supported. The tribes saw the ICC as the opportunity to resolve their claims against the United States. In addition, parties who supported federal withdrawal from Native American affairs saw the ICC as a "major step in the termination process." COHEN ET AL., *supra* note 6, § 1.06; *see also* PARKER, *supra* note 2, at 134 (noting connection between ICC and termination policy).

[11] ICCA, *supra* note 1, § 3(a). Commissioners held office "during their good behavior," removable by the President only for cause. *Id.* § 3(b). The Commission was housed in the District of Columbia. *Id.* § 5.

[12] *Id.* § 2 (authorizing Commission to hear claims "with respect to which the claimant would have been entitled to sue . . . if the United States was subject to suit"); *see also* MICHAEL LIEDER & JAKE PAGE, WILD JUSTICE: THE PEOPLE OF GERONIMO VS. THE UNITED STATES 52-53 (1997) (describing the problem of sovereign immunity).

[13] Similar to the Indian Claims Commission, created almost 90 years later, the Court of Claims could only provide monetary relief. In addition, in 1863 Congress amended the Court of Claims jurisdiction to exclude claims by Tribes based on treaties. *See* Act of Mar. 3, 1863, Ch. 92, § 9, 12 Stat. 765 (1863). Instead, these entities would need to obtain a special jurisdictional act from Congress before any claim could be brought before the Court of Claims. LIEDER & PAGE, *supra* note 12, at 53. Even the authority for special statutes was delayed until 1881. ROSENTHAL, *supra* note 9, at 15-17.

claims of unfair or dishonorable dealings by the government or requests to reform treaties due to fraud, duress, or mistake.[14] Some tribes were successful in petitioning Congress to pass special jurisdictional statutes waiving the government's sovereign immunity in particular cases.[15] However, this process proved impracticable and inadequate for most tribes, for several reasons.[16] First, in order to obtain relief tribes essentially had to prove their case twice: first to Congress to get the permission to sue and second to the Court of Claims.[17] Their success in making their case to Congress shifted with the political winds. For example, one request for special legislation received four different recommendations from the Executive Department over a six-year period—two favorable and two unfavorable—even though the terms of the proposed bill remained essentially the same.[18] Even Congress felt "harassed" by the piecemeal settlement proposals.[19]

Second, the jurisdictional statutes obtained by tribes were often crafted too narrowly to provide adequate relief, particularly given the Court of Claims' unwillingness to liberally construe grants of jurisdiction authorizing claims against the United States.[20] Finally, the process proved prohibitively expensive

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[14] *See* ICCA, *supra* note 1, § 2, which eventually incorporated some of these grounds. Tribal assertion of such claims did not end with the ICC's termination. *See* PARKER, *supra* note 2, at 132 (describing increasing tribal activity beginning in the 1970s and 1980s to seek land restoration, prevent additional alienation and mis-use of land or resources, recover or affirm historic fishing, hunting, gathering, access, and water rights, and obtain monetary compensation for lands taken).

[15] *See* LIEDER & PAGE, *supra* note 12, at 57 (noting that between 1880 and 1946 Tribes recovered a total of $37,753,953 in 134 cases); *see also* COHEN ET AL., *supra* note 6, § 1.06 (noting that Congress enacted 142 special jurisdictional statutes between 1836 and 1946); *see, e.g.*, Special Jurisdictional Act of June 3, 1920, Pub. L. No. 66-237, 41 Stat. 738 (granting the Sioux Tribe the right to sue in the Court of Claims under all claims arising under "any treaties, agreements, or laws of Congress, or for the misappropriation of any funds or lands of said tribe. . . and [the court the right] to hear and determine all legal and equitable claims . . . of said tribe against the United States"); Special Jurisdictional Act of Sept. 3, 1935, ch. 839, secs. 1-8, §§ 2, 3, 6(c), 6(e), 7, 49 Stat. 1085 (1938) (authorization to sue for the Menominee Tribe).

[16] *See* LIEDER & PAGE, *supra* note 12, at 53-56 (noting that Tribes encountered a cumbersome congressional approval process, had limited financial resources to hire a lawyer to do the research necessary to furnish documentation demonstrating that the Tribes' claims were meritorious, and usually received an unfavorable outcome); *see also* PARKER, *supra* note 2, at 133 (noting that some of these attempts lasted 40 years).

[17] LIEDER & PAGE, *supra* note 12.

[18] *Id.* at 55.

[19] *See, e.g.*, United States v. Dann, 470 U.S. 39, 45-46 (1985) (quoting Congressman Henry Jackson, Chairman of the House Committee on Indian Affairs during consideration of the ICCA as stating that, "[T]he very purpose of this act, the reason we are coming to Congress, is that we are being harassed constantly by various individual pieces of legislation").

[20] *See* LIEDER & PAGE, *supra* note 12, at 58 (noting that both the Court of Claims and Supreme Court distinguished between moral and legal claims and found only the latter to be within the jurisdictional grants; claims brought under a theory of fraud or duress or alleging

for most tribes.[21] As two scholars noted, "[i]t would be hard to imagine any more effective legislative and judicial ways to stack the deck" against a tribe's struggle to recover for wrongs committed by the government.[22]

To remedy the injustice inflicted upon the tribes, demonstrate the government's commitment to dealing with tribes fairly, and conclude tribal claims against the United States, Congress eventually passed the Indian Claims Commission Act in 1946.[23] Congress originally envisioned that all claims would be resolved within a ten-year period; however, the ICC's jurisdiction was extended five times due to the overwhelming number of claims filed and the complexity of the factual issues involved.[24] The Commission was finally dissolved in 1978.[25] Although the Commission moved slowly, by September of 1978 it had decided 546 dockets, finding over 800 million dollars in compensation due to the tribes.[26] Congress ultimately authorized the payment of $818,172,606.64 for ICC awards.[27]

The Indian Claims Commission Act gave the Commission jurisdiction to hear five types of claims.[28] These included claims based on both legal and

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payment of an unconscionably low amount for ceded lands were generally found to be moral claims and outside of the jurisdictional grant, and stating that "the practical impact of this . . . was to block tribes from recovering anything for many of the most egregious actions committed against them by the United States").

[21] *Id.* at 54 (describing expense of pursuing claims and tribes' lack of resources).

[22] *Id.* at 58.

[23] ICCA, *supra* note 1. According to President Truman's signing statement:

> This bill makes perfectly clear what many men and women, here and abroad, have failed to recognize, that in our transaction with the Indian tribes we have at least since the Northwest Ordinance of 1787 set for ourselves the standard of fair and honorable dealings, pledging respect for all Indian property rights. . . . It would be a miracle if in the course of these dealings—the largest real estate transaction in history—we had not made some mistakes and occasionally failed to live up to the precise terms of our treaties and agreements with some 200 tribes. *But we stand ready to submit all such controversies to the judgment of impartial tribunals. We stand ready to correct any mistakes we have made.*

Harry S. Truman Library & Museum, Statement by the President Upon Signing Bill Creating the Indian Claims Commission, *available at* http://trumanlibrary.org/publicpapers/index.php?pid=1740&st=&st1= (emphasis added); *see also* ROSENTHAL, *supra* note 9, at 92-93 (detailing the history of the Indian Claims Commission Act, culminating with President Truman's signing statement, which had been drafted by Secretary of Interior Julius Krug).

[24] *See* LIEDER & PAGE, *supra* note 12, at 65.

[25] 25 U.S.C. § 70 (1978).

[26] PARKER, *supra* note 2, at 133. Sixty-eight dockets remained after the termination of the ICC. *See id.* These claims were transferred to the general Court of Claims for resolution. Act of Oct. 8, 1976, Pub. L. No. 94-465, § 2, 90 Stat. 1990. Thus, several cases discussed in this article are Court of Claims decisions.

[27] *See* PARKER, *supra* note 2, at 133.

[28] ICCA, *supra* note 1, § 2. The Act gave the Commission jurisdiction to hear:

- claims in law or equity arising under the Constitution, laws, treaties of the United

moral grounds.[29] Congress attempted to include a broad jurisdictional grant to ensure that the ICC achieved the congressional goal of finality. Indeed, a House Report noted: "[i]n order that the decisions reached under the proposed legislation shall have finality it is essential that the jurisdiction to hear claims which is vested in the Commission be broad enough to include all possible claims."[30] However, at the same time, Congress only authorized the Commission to grant one remedy—monetary damages.[31]

ICC litigation was divided into two phases: a liability phase and a valuation phase.[32] Parties were able to appeal the ICC's findings after both the liability and valuation phases.[33] During the liability phase, the Commission heard extensive evidence about the tribe's land holdings prior to the arrival of Europeans.[34] The Commission used this information to determine a tribe's "aboriginal territory," which in turn was used in the valuation phase to calculate the amount of money owed to the tribes for land ceded to or taken by the

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States, and Executive orders of the President;

- all other claims in law or equity, including those sounding in tort, with respect to which the claimant would have been entitled to sue in a court of the United States if the United States was subject to suit;
- claims which would result if the treaties, contracts and agreements between the claimant and the United States were revised on the ground of fraud, duress, unconscionable consideration, mutual or unilateral mistake, whether of law or fact, or any other ground cognizable by a court of equity;
- claims arising from the taking by the United States, whether as the result of a treaty or cession or otherwise, of lands owned or occupied by the claimant without the payment for such lands of compensation agreed to by the claimant; and
- claims based upon fair and honorable dealings that are not recognized by any existing rule of law or equity.

Id.

[29] *See* LIEDER & PAGE, *supra* note 12, at 66. The ICCA gave the ICC jurisdiction to hear claims that treaties, contracts, agreements would not have been entered but for "fraud, duress, or unconscionable actions" and "claims based up on fair and honorable dealings that are not recognized by any existing rule of law or equity." *Id.* at 66-67. The inclusion of these provisions was important given the trust relationship between the United States and the Tribes. *Id.* at 67.

[30] H.R. REP. NO. 79-1466, at 1355 (1945).

[31] *See supra* note 3.

[32] *See* State *ex rel.* Martinez v. Kerr-McGee Corp., 898 P.2d 1256, 1261 (1995) (describing the ICC's bifurcated proceedings); JUDITH V. ROYSTER & MICHAEL C. BLUMM, NATIVE AMERICAN NATURAL RESOURCES LAW: CASES AND MATERIALS 127 (2002) (describing ICC litigation as: "[f]irst, establish the claim to the land. Second, determine the fair market value of the land as of the time of cession [to the United States]. And third, compare this price with the amount actually paid by the government, including any offsets").

[33] *Martinez*, 898 P.2d at 1261 (describing bifurcation and appeal process).

[34] *Id.* (describing liability phase).

United States.[35] The ICC would only recognize "aboriginal title" where the tribe had "actual, exclusive and continuous occupancy 'for a long time' prior to the loss of the property."[36] In particular, the ICC required tribes to show *exclusive* possession before it would consider the land within a tribe's aboriginal territory. Aboriginal title would not be recognized in areas that other tribes also used, unless two or more tribes inhabited the same territory amicably or others' use of the territory was sporadic and did not undermine one tribe's "ownership."[37] For instance, in *Navajo Tribe of Indians v. United States*, the Commission drew the boundaries of the Navajo Territory to exclude land where the Utes, Apaches, or other tribes also lived and claimed territory.[38]

The ICC has been criticized by scholars, tribes, and attorneys on several grounds.[39] First, the use of western legal and land ownership principles as the

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[35] *See generally* Nez Perce Tribe of Indians v. United States, 18 Ind. Cl. Comm. 1, 121-31 (1967), *available at* http://digital.library.okstate.edu/icc/v18/iccv18p001.pdf (detailing the evidence supporting the Nez Perce's historical occupation of certain territory prior to determining the area's market value as of the treaty date).

[36] *Id.* at 128 (citation omitted); *see also* Sac & Fox Tribe of Indians of Okl. v. U.S., 315 F.2d 896, 903 (Ct. Cl. 1963) (no aboriginal title based on finding that the tribes had only recently driven other Indians out of the area in question); Quapaw Tribe of Indians v. United States, 120 F. Supp. 283, 285 (Ct. Cl. 1954) (affirming the ICC's determination that the tribe had not established by sufficient evidence that it had exclusively possessed and occupied an area from time immemorial), *overruled in part by* United States v. Kiowa, Comanche & Apache Tribes of Indians, 166 F. Supp. 939 (Ct. Cl. 1958); Snake or Piute Indians v. United States, 112 F. Supp. 543, 551 (Ct. Cl. 1953) ("[T]he issue is whether appellant exclusively used and occupied in the Indian manner, to the exclusion of all other Tribes or bands, the land in question or some definite part of it, not only at the time of the alleged taking or deprivation of use, but for a long time prior thereto."); Navajo Tribe of Indians v. United States, 23 Ind. Cl. Comm. 244, 249 n.2 (1970), *available at* http://digital.library.okstate.edu/icc/v23/iccv23p244.pdf ("The status of aboriginal ownership is not accorded Tribes at the very instant they first dominate a particular territory . . . . The rights of aboriginal title must have time to take root, transforming a conquered province into domestic territory." (quoting *Sac & Fox Tribe*, 315 F.2d at 905)).

[37] *See Sac & Fox Tribe*, 315 F.2d at 903; *see also Nez Perce Tribe of Indians*, 18 Ind. Cl. Comm. at 129 (holding that although there was "evidence relating to the presence of other Indians within the areas . . . . [t]he Commission does not believe that the presence of visiting Indians for the purpose of attending such ceremonies acted to in any way lessen the validity of the Nez Perce claim of Indian title to the areas").

[38] *Navajo Tribe of Indians*, 23 Ind. Cl. Comm. at 250, 252. Regardless of how the ICC viewed the Navajos' territory, however, their disputes over ownership and occupancy with neighboring tribes have continued. *See generally* Sekaquaptewa v. MacDonald, 575 F.2d 239 (9th Cir. 1978) (discussing ongoing dispute between the Navajo and Hopi tribes).

[39] *See, e.g.*, LIEDER & PAGE, *supra* note 12; John D. O'Connell, *Constructive Conquest in the Courts: A Legal History of the Western Shoshone Lands Struggle—1861 to 1991*, 42 NAT. RESOURCES J. 765 (2002); Deborah Schaaf & Julie Fishel, Mary and Carrie Dann v. United States *at the Inter-American Commission on Human Rights: Victory for Indian Land Rights and the Environment*, 16 TUL. ENVTL. L. J. 175 (2002). *But see* Randy V. Thompson & Brandon Thompson, *50 Years Past Its Deadline . . . Why are Indian Tribes Still Suing Over Ancient Treaties?*, CERA NEWS, May, 2002, http://www.citizensalliance.org/ (follow "50 Years Past the Deadline—Part II of III" hyperlink) (last visited Mar. 31, 2009).

foundation of tribal compensation has been subject to criticism.[40] Tribes conceived of land ownership differently than their western counterparts. As one author noted, tribes "maintained a metaphysical relationship with the land and [did not] conceive[] . . . of land in terms of absolute ownership."[41] For instance, many tribes did not recognize exclusive rights to the land; instead many bands had a right to use all the resources available.[42] In addition, tribes viewed their land as the center of their way of life. Thus, "[w]hen the United States took part or all of a tribe's aboriginal land, it didn't just take something of monetary value; rather, it took a crucial means for the tribe to maintain its identity."[43] The tribe, however, was unable to seek compensation for the loss of cultural identity that resulted from the taking of their aboriginal land base.[44]

Although Congress gave the ICC the jurisdiction to hear "moral" claims, which conceivably could encompass claims for loss of culture, the ICC commissioners were unable to devise a way to integrate this type of claim into the western legal system. In fact, claims seeking compensation for loss of identity or culture were uniformly dismissed.[45] The ICC found it relatively easy to fit claims for land takings (with or without treaties) into western legal theory and to award compensation based on the market value of the land and associated resources.[46] Other claims, indirectly based on treaties, also made up many of the claims which were resolved by the ICC, as the commissioners conceived treaty rights as a form of property rights, compensable within a western legal system.[47]

A second criticism is that the ICC did not properly determine whether the parties asserting the claims were sufficiently representative of all tribal members.[48] Section 10 of the Act states that "[a]ny claim . . . may be presented

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[40] *See generally* LIEDER & PAGE, *supra* note 12, at 266-69.

[41] PARKER, *supra* note 2, at 23; *see generally id.* at 15-23 (discussing Indian land tenure systems and how they differed from each other and from a traditional exclusive ownership system). Another example of the disparate view of land ownership is provided by a statement attributed to Tecumseh, a Shawnee leader: "[S]ell a country! Why not sell the air, the clouds and the great sea, as well as the earth? Did not the Great Spirit make them all for the use of his children?" Thompson & Thompson, *supra* note 39.

[42] *See generally* PARKER, *supra* note 2, at 15-23 (describing common rights to use land and resources as more of a usufruct than ownership).

[43] LIEDER & PAGE, *supra* note 12, at 269.

[44] *Id.* at 266-69.

[45] *Id.* at 267.

[46] *Id.* at 266-69; *see also* Sac & Fox Tribe of Indians v. U.S., 315 F.2d 896, 901 (Ct. Cl. 1963) (discussing land claim, with or without valid treaty).

[47] Such treaty claims included actions to enforce promises of protection, education, food, and clothing. *Cf., e.g.*, Snake or Piute Indians v. United States, 112 F. Supp. 543, 562 (Ct. Cl. 1953) (discussing an unratified treaty's reference to protection of the Indians' persons and property, education, food, and clothing, among other things).

[48] O'Connell, *supra* note 39, at 769-70.

. . . by any member of an Indian tribe, band, or other identifiable group of Indians as the representative of all its members."[49] This provision opened the door to any tribal member purporting to pursue a claim on behalf of the tribe. The statute does not indicate whether or how the ICC was to determine whether the claimant was truly representative of a tribe. Because ICC determinations of a tribe's takings claim binds all members' claims to the land, this determination should have been particularly important. Adequate representativeness is a key pre-requisite for applying common law preclusion, precisely because preclusion means that the result of the first case will bind even those persons who were not themselves parties to that action.[50]

Third, lawyers who represented tribes before the ICC were paid contingency fees fixed by the Commission in amounts up to ten percent of the amount of the tribe's recovery.[51] As a result, lawyers were only compensated in proportion to the amount of money won by the tribes, which in turn was linked to the amount of land the attorney could prove the United States had taken.[52] This gave tribal lawyers a clear incentive to prove that land title had been extinguished to significant amounts of land. A lawyer who handled a landmark Indian case in the Supreme Court contends that the United States also had a clear incentive not to vigorously contest the claims of tribal ownership presented to the ICC because upon extinguishment of Indian title, the United States would obtain clear title to the land at nineteenth century prices.[53] In other words, "there was a unity of interest in the ICC between the claims attorneys and the government to agree that the Indians' lands had been taken, and that consensus saved the ICC the work of determining if, when, and how each tract was taken."[54]

Fourth, although finality of Indian claims was a primary goal of Congress in creating the Commission, Congress only provided the ICC with the authority to award monetary compensation to tribes.[55] The ICC did not have the power to grant the declaratory or injunctive relief necessary to recognize and enforce treaty rights retained by the tribes, such as returning land to the tribes.[56] Most

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[49] ICCA, *supra* note 1, § 10.

[50] *See, e.g.*, Hansberry v. Lee, 311 U.S. 32 (1940) (refusing to apply res judicata because plaintiffs in earlier action did not have the same interest as the plaintiffs in the second case); RESTATEMENT OF JUDGMENTS § 41(2) (1942) (stating the rule that person "represented" by a party to an action is bound by the judgment and explaining characteristics of representation).

[51] ICCA, *supra* note 1, § 15; *see also* O'Connell, *supra* note 39, at 770.

[52] *See generally* O'Connell, *supra* note 39, at 700-70.

[53] *Id.* (John D. O'Connell was the lawyer for Mary Dann and Carrie Dann and the Western Shoshone Sacred Lands Council between 1973 and 1992). Moreover, these awards did *not* include interest. *See* ROSENTHAL, *supra* note 9, at 27-29.

[54] O'Connell, *supra* note 39, at 771.

[55] *See supra* note 3; *see also* LIEDER & PAGE, *supra* note 12, at 68 ("If the goal of Congress . . . was to give the tribes a fair chance to win money for past wrongs, they could take great pride in their accomplishment.").

[56] *See* PARKER, *supra* note 2, at 140 (noting the Commission "did not possess the authority

tribes who brought claims to the ICC accepted monetary awards for their lost treaty rights and extinguished land title.[57] Some tribes, however, refused monetary compensation available from the ICC and went to Congress seeking return of tribal lands, and a few of these tribes were successful in achieving land restitution, after considerable effort.[58]

In spite of all of these criticisms of the ICC's limitations, in 1985 the Supreme Court gave short shrift to the question of the preclusive effect of ICC decisions and held that compensation received by a tribe from the ICC for land takings conclusively extinguished the tribe's title.[59] In *United States v. Dann*, the Court sidestepped the claim of continued ownership by Mary and Carrie Dann, members of the Western Shoshone Tribe, to lands continuously occupied by their tribe. The *Dann* Court did not explicitly address the preclusion issue, as it had granted certiorari only on the narrow question of "whether the certification of the [ICC] award and appropriation under §724a constitutes payment under §22(a)" of the Indian Claims Commission Act.[60] The Danns argued that payment had never been effected because the money for the ICC award was still being held in a government trust account without any approved distribution plan as required by law.[61] The Court decided this narrow question against the Danns, holding that payment had been made upon deposit into the

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to return [land]"); *see also* State *ex rel.* Martinez v. Kerr-McGee Corp., 898 P.2d 1256, 1260 (N.M. App. 1995) (noting ICC's limited jurisdiction and remedial authority).

[57] *See* PARKER, *supra* note 2 (discussing the 546 claims resolved by the ICC and paid by Congress).

[58] For example, the Taos Pueblo in New Mexico fought a difficult and often-discouraging battle for more than 60 years for the restoration of the Blue Lake watershed, a significant sacred site. *See generally* R.C. GORDON-MCCUTCHAN, THE TAOS INDIANS AND THE BATTLE FOR BLUE LAKE (1991) (telling a fascinating tale of the Pueblo's efforts from 1906, when the sacred watershed was taken from them and made part of the Carson National Forest, until 1970, when President Nixon signed a bill restoring the land to the Pueblo. The Pueblo pursued an ICC claim as well as a legislative resolution, while making it clear all along that the ICC decision would be used only to affirm the Pueblo's aboriginal rights to a considerable land area as the Pueblo was not interested in a monetary award); *see also* PARKER, *supra* note 2, at 139-42 (describing Taos Pueblo's effort); *id.* at 132-67 (describing other efforts). The Oglalla Sioux also refused to accept compensation for land taken by the United States. The Tribe instead maintained that the land could not be sold at any price and that the imposition of Western legal techniques (e.g., treaties, conquest, and claims awards) had not extinguished title. They wanted recognition that the land was still held by the Tribe. *Id.* at 134.

[59] United States v. Dann, 470 U.S. 39, 45 (1985) (finding the Danns, members of the Western Shoshone Tribe, precluded from asserting continuing land ownership because the Tribe had received monetary compensation from the ICC).

[60] *Id.* at 44.

[61] *Id.* at 41-44. In fact, the Court noted in its *Dann* decision, without irony, that the reason no distribution plan had been created for the Western Shoshones' ICC award was "owing to the refusal of the Western Shoshone to cooperate in devising the plan." *Id.* at 42-43.

trust account, even though the funds had still not been distributed several years later.[62]

As to the Danns' claim of continuing tribal aboriginal title, the Court implicitly held, without discussion, that any such claim was precluded by the ICC award.[63] The Court noted that the Indian Claims Commission Act's purpose was to "dispose of the Indians claims problem with finality,"[64] citing the statute's language that "payment of any claim . . . shall be a full discharge of the United States of all claims and demands touching any of the matters involved in the controversy."[65] In other words, the Court held that since payment had been made, though not accepted, any assertion of continued tribal ownership was precluded.[66]

Many of the criticisms directed at the ICC generally have also been leveled at the *Dann* case.[67] A primary criticism of the *Dann* decision is that pursuing the takings claim before the ICC was not supported—and indeed was actively opposed—by many Western Shoshone tribal members.[68] A major reason for

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[62] *Id.* at 44-45, 50.

[63] *Id.* at 45-47.

[64] *Id.* at 45 (quoting H.R. REP. No. 79-1466, at 10 (1945)).

[65] *Id.* at 45 (quoting 25 U.S.C. § 22(a) (1976), but focusing the discussion on the narrow payment question rather than on the meaning of the rest of the provision).

[66] *But see* Seneca Nation of Indians v. New York, 26 F. Supp. 2d. 555, 566-68 (W.D.N.Y. 1998) (holding that monetary compensation provided in an ICC judgment did not preclude a subsequent claim by the tribe against a state for declaratory relief that the state illegally appropriated tribal land, because the ICC did not have the jurisdiction to quiet title to the land and could not provide the declaratory relief the tribe was currently seeking). Furthermore, the *Dann* Court left open the question of whether the Danns retained *individual* aboriginal title. *Dann*, 470 U.S. at 50. On remand, the Ninth Circuit held that the Danns could prove individual rights of title or occupancy under certain limited conditions, and remanded the case to the district court for further fact finding. United States v. Dann, 873 F.2d 1189, 1199-1200 (9th Cir. 1989).

[67] *See, e.g.*, O'Connell, *supra* note 39. O'Connell writes a stinging criticism of the entire ICC proceeding involving the Western Shoshone; his arguments cast a significant shadow on the correctness of the *Dann* case. *Id.*; *see also* Schaaf & Fishel, *supra* note 39, at 180:

> In its ruling, the Supreme Court did not discuss how the ICC acquired legal authority to extinguish Western Shoshone land rights. The Court did not consider the extent to which gradual encroachment had actually occurred on Western Shoshone lands or that such gradual encroachment does not ordinarily suffice under U.S. law to extinguish Indian land rights. Nor did the Court take into account the numerous Western Shoshone allegations of fraud in the ICC proceedings and their attempts to withdraw the claim when they came to understand that they could only receive money and not confirmation of land rights. The Supreme Court simply ignored such considerations in favor of an unmitigated application of the statutory bar of the Indian Claims Commission Act . . . .

Id. (footnotes omitted).

[68] O'Connell, *supra* note 39, at 771, 774-76. The Shoshone elders also described what they felt to be an even more serious threat, an effort by attorneys to prosecute on their behalf a claim against the United States in the Indian Claims Commission (ICC) for a supposed nineteenth-century "taking" of all Western Shoshone lands. They feared that for them to pursue that claim

this opposition was the fact that the ICC could not confirm or enforce tribal land rights, but could only give the tribe monetary compensation for loss of land.[69] The conflict of interest created by the contingent fee system for lawyers representing tribes, and the clear incentive for the United States to settle taking claims may also have played out in the *Dann* litigation. As one lawyer noted, some of the land the ICC found irretrievably lost to the United States was still, in fact, used and occupied by tribal members.[70]

Although these criticisms of the Court's holding in *Dann* are well taken, the holding stands. Lower courts have followed *Dann*, and even extended the holding in some cases.[71] Given the limited basis of the *Dann* preclusion discussion and its narrow holding, such extension is unwarranted, particularly as to off-reservation rights, which were not at issue in *Dann*. The following discussion will demonstrate why ICC decisions should not be given preclusive effect to prevent litigation enforcing off-reservation treaty fishing rights. The next section discusses rights retained by Native Americans, with emphasis on rights not appurtenant to particular lands, including rights to fish at usual and accustomed fishing sites.

III. NATIVE AMERICAN RIGHTS RESERVED BY TREATY

Treaties signed between the United States and tribes usually had one main theme: tribes "relinquished land to the United States" in exchange for certain promises.[72] The purpose of these treaties was to confine tribes to delineated land reservations, thereby opening up more land for white settlers.[73] Nearly all treaties provided that the tribe would retain reservation lands as permanent homelands; the treaties also recognized the tribe's sovereignty and contained

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and accept money for their land would be to abandon their treaty rights and to sell their Mother Earth. They described a twenty-year-long battle to stop the ICC claim. *Id.* at 766. In fact, at one point, the Shoshone tried to stay the ICC proceedings in order to pursue a separate action to confirm title in their name to certain lands, but the Commission refused the stay and eventually entered a decision. *Id.* at 778-79.

[69] *Id.* The dispute over pursuit of the ICC claim continued after the Commission's decision and was still ongoing at the time of the Supreme Court case, with the Tribe refusing to cooperate in a distribution plan for the funds and thus refusing to accept the payment. *See Dann*, 470 U.S. at 41-44.

[70] O'Connell, *supra* note 39, at 771-72.

[71] *See, e.g.*, W. Shoshone Nat'l Council v. Molini, 951 F.2d 200, 202 (9th Cir. 1991) (holding that the ICC award extinguished title against the State of Nevada, as well as against the United States, and that all aboriginal rights to hunt and fish were extinguished along with title); United States v. Pend Oreille Pub. Util. Dist. No. 1, 926 F.2d 1502, 1507-08 (9th Cir. 1991) (holding that ICC award barred Kelispo Tribe from asserting title against the State of Washington).

[72] STEPHEN L. PEVAR, THE RIGHTS OF INDIANS AND TRIBES 47 (3d ed. 2002).

[73] *Id.*

promises by the United States to ensure the well-being of tribal members.[74] Most treaties did not expressly list rights which the tribes retained. Instead, as the Supreme Court noted in an early case, treaties were not a "grant of rights to the Indians, but a grant of right[s] from them."[75] Thus, tribes are presumed to have retained rights not explicitly abrogated by a treaty, an act of Congress, or an Executive Order.[76]

Furthermore, a handful of treaties expressly provided that the tribe retained certain off-reservation hunting and fishing rights.[77] Most treaties between the Pacific Northwest tribes and the United States contained these provisions, explicitly giving tribal members the right to fish at their "usual and accustom[ed] places" in common with the citizens of the territory.[78] Litigation of off-reservation fishing rights usually focuses on the scope, location, and

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[74] *See, e.g.*, Treaty with the Ottawas, art. VII, Nov. 17, 1807, 7 Stat. 105, 106 (stating that signatory Indian nations "acknowledge themselves to be under the protection of the United States"); Treaty with the Kaskaskias, art. II, Aug. 13, 1803, 7 Stat. 78 ("The United States will . . . afford [the Kaskaskia Tribe] a protection as effectual against the other Indian tribes and against all other persons whatever as is enjoyed by their own citizens.").

[75] United States v. Winans, 198 U.S. 371, 381 (1905).

[76] *Id.*; *see also* Menominee Tribe v. United States, 391 U.S. 404, 410-11 (1968) (holding that the statute terminating the Tribe's reservation did not expressly provide for the termination of fishing and hunting rights, thus the Tribe retained them).

[77] This discussion focuses primarily on treaties between Northwest Tribes and the United States; however, some other Tribes also retained off-reservation fishing rights. For instance, the Midwestern Chippewa Tribe's Treaty reserved "[t]he privilege of hunting, fishing, and gathering the wild rice, upon the lands, the rivers and the lakes included in the territory ceded, is guarantied [sic] to the Indians, during the pleasure of the President of the United States." Treaty with the Chippewas, art. V, July 29, 1837, 7 Stat. 536; *see also* Lower Brule Sioux Tribe v. South Dakota, 711 F.2d 809, 821-26 (8th Cir. 1983); Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. Voigt, 700 F.2d 341, 355-58 (7th Cir. 1983) (holding that express treaty rights to hunt and fish will not be abrogated except by express and unambiguous statement by Congress or by compelling evidence).

[78] The Northwest treaties, also known as "Stevens Treaties," all of which contain an express reservation of fishing rights, include the following: Treaty with the Qui-nai-elts, Etc., art. III, July 1, 1855, Jan. 25, 1856, 12 Stat. 971; Treaty with the Flathead, Etc., art. III, July 16, 1855, 12 Stat. 975; Treaty with Indians in Middle Oregon, art. I, June 25, 1855, 12 Stat. 963; Treaty with the Nez Perces, art. III, June 11, 1855, 12 Stat. 957; Treaty with the Walla Wallas, Etc., art. I, June 9, 1855, 12 Stat. 945; Treaty with the Yakamas, art. III, June 9, 1855, 12 Stat. 951; Treaty of Neah Bay, art. IV, Jan. 31, 1855, 12 Stat. 939; Treaty of Point No Point, art. IV, Jan. 26, 1855, 12 Stat. 933; Treaty of Point Elliot, art. V, Jan. 22, 1855, 12 Stat. 927; Treaty of Medicine Creek, art. III, Dec. 26, 1854, 10 Stat. 1132. Some treaties note that the off-reservation fishing rights are in common with all citizens of the territory, while others specify that they are in common with the citizens of the United States. *Compare* Treaty with the Qui-nai-elts, Etc., art. III (tribes share in common with "citizens of the United States"), Treaty with the Flathead, Etc., art. III, Treaty with the Indians in Middle Oregon, art. I, Treaty with the Nez Perces, art. III, *and* Treaty with Walla Wallas, Etc., art. III, *with* Treaty with the Yakamas, art. III (tribes share in common with the "citizens of the [t]erritory"), Treaty of Neah Bay, art. IV, Treaty of Point No Point, art. IV, Treaty of Point Elliot, art. V, *and* Treaty of Medicine Creek, art. III.

exercise of the rights, rather than on the existence of the rights themselves.[79] The tribe has the burden of proving its usual and accustomed fishing locations.[80] Courts have defined "usual and accustomed" as meaning "every fishing location where members of a tribe customarily fished from time to time at and before treaty times, however distant from the then usual habitat of the tribe, and whether or not other tribes then also fished in the same waters."[81] This standard does not require either land ownership or even exclusive use by a single tribe.[82] Thus, unlike the criteria used by the ICC to designate "aboriginal territory," which reflects traditional Eurocentric concepts of ownership by requiring exclusive possession by one tribe, the criteria used to define usual and accustomed fishing sites only require a showing of use.[83]

Tribes may also have off-reservation hunting and fishing rights based on aboriginal land use.[84] These rights can exist even absent an express reservation by a treaty or executive order due to the presumption discussed earlier.[85] Although these rights may have been extinguished if Congress completely abrogated all of the tribe's rights to the land to which the aboriginal rights attached, such tribal rights should not be extinguished absent plain and unambiguous language.[86]

The Supreme Court has also held that Congress impliedly reserved water rights sufficient to fulfill the purpose of an Indian reservation.[87] When

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[79] PEVAR, *supra* note 72, at 224-26.

[80] United States v. Brookfield Fisheries, 24 F. Supp. 712, 713 (1938) (discussing the burden to establish fishing locations).

[81] United States v. Washington, 384 F. Supp. 312, 332 (W.D. Wash 1974).

[82] *Id.* (noting that a usual and accustomed fishing site can be found regardless of whether other Tribes fished in the same area); *see also Brookfield Fisheries*, 24 F. Supp. at 716 (granting the Yakima nation, the Umatilla, Walla Walla, and Cayuse Tribes the right to fish in the same "place").

[83] *See generally* Michael C. Blumm & James Brunberg, *Not Much Less Necessary than the Atmosphere They Breathed: Salmon, Indian Treaties, and the Supreme Court—A Centennial Remembrance of* U.S. v. Winans *and Its Enduring Significance*, 46 NAT. RES. J. 489 (2006) (discussing the parameters of Indian treaty fishing rights).

[84] *Brookfield Fisheries*, 24 F. Supp. at 716.

[85] Aboriginal rights are not expressly reserved by treaty, however, aboriginal rights will continue until Congress abrogates title to the land and sets it aside for a "purpose inconsistent with tribal ownership." PEVAR, *supra* note 72, at 216-18.

[86] *Id.* Tribes also clearly retain the right to hunt and fish *on* reservation even without an explicit reservation in a treaty, as rights are implicitly reserved to tribes as sovereigns. *Id.* at 217 (noting the tribe retains the right to hunt and fish on land owned by the tribe regardless of whether the right to do so was expressly recognized by the United States, or the land was within the tribe's original territory); *see also* COHEN ET AL., *supra* note 6, § 18.03[1]; *see* Menominee Tribe v. United States, 391 U.S. 404 (1968); *see also* Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. Voigt, 700 F.2d 341, 364 (1983).

[87] Winters v. United States, 207 U.S. 564, 577 (1908). The Court recognized reserved rights for the Fort Belknap Tribe in Montana. It found an implied congressional intent to reserve water because without water the purpose of the reservation, to promote the transition to

quantifying reserved water rights courts focus on two questions. First, water rights are impliedly reserved only to support the purpose for which Congress reserved the land.[88] Courts determine congressional intent by analyzing the language of the treaty or executive order which created the reservation.[89] Some courts have read treaty language broadly and found that the purpose of the reservation is to provide a permanent homeland.[90] Other courts have determined that Congress usually intended to encourage the tribe's transition to an agricultural society and thus have interpreted many treaties as embodying an agricultural purpose.[91]

The second inquiry is how much water is necessary to fulfill the purpose of the reservation. The quantity of water reserved is often limited by the amount of land reserved to the tribe, thus the tribe cannot assert water rights for lost land.[92] The correlation between the land reserved, the reservation's purpose, and the quantification of the amount of water necessary to fulfill that purpose is particularly apparent when courts find an agricultural purpose for the reservation and then utilize the "practicably irrigable acreage" standard to quantify the amount of the water right.[93] Stated simply, under this method of quantification the water necessary to fulfill the agricultural purpose of the reservation is based on the amount of land that can feasibly be irrigated to produce profitable crops.

When the purpose of the reservation is to provide a permanent homeland, the criteria used to quantify water necessary to fulfill the purposes are more complex, including such factors as the tribe's history and traditions, cultural preservation, geography, topography, natural resources, economic base, past water use, the suitability of water requests, and the present and projected future

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an agrarian community, would not be fulfilled.

[88] *Id.* (recognizing that when Congress reserved land from the public domain it impliedly reserved enough water to fulfill the purpose for which the land was reserved); *see also* Colville Confederated Tribes v. Walton, 647 F.2d 42, 47 (9th Cir. 1981); *In re* Gen. Adjudication of all Rights to Use Water in the Gila River Sys. & Source, 35 P.3d 68 (Ariz. 2001); Confederated Salish & Kootenai Tribes of the Flathead Reservation v. Stults, 59 P.3d 1093, 1099 (Mont. 2002); *In re* Gen. Adjudication of all Rights to Use Water in the Big Horn River Sys., 753 P.2d 76, 101 (Wyo. 1988).

[89] *See Winters*, 207 U.S. at 564 (analyzing the language of the statute creating Fort Belknap to determine why Congress reserved the lands).

[90] *See, e.g., In re Gen. Adjudication of all Rights to Use Water in the Gila River Sys. & Source*, 35 P.3d at 68.

[91] *In re Gen. Adjudication of all Rights to Use Water in the Big Horn River Sys.*, 753 P.2d at 101.

[92] *But see Colville Confederated Tribes*, 647 F.2d at 50 (holding that an Indian allottee may convey or sell his right to reserved waters to a non-Indian allottee who purchases the land).

[93] Arizona v. California (*Arizona I*), 373 U.S. 546, 599 (1963), *disavowed on other grounds by* California v. United States, 438 U.S. 645 (1978); Arizona v. California (*Arizona II*), 460 U.S. 605, 611 (1983) (noting that water was only reserved to the extent needed to irrigate reservation land which is practicably irrigable).

population.[94] However, under this standard, too, the amount of land reserved to the tribe will likely affect the quantity of water that can be claimed. Thus, when the quantity of water reserved is tied to land ownership parties may properly raise the issue of a tribe's continued ownership of land in water rights adjudications, and thus preclusion on the ownership question may be appropriate.[95] However, it is important to keep preclusion in its proper place when considering tribal reserved rights. The next section further explains the elements of the preclusion doctrines relied upon by parties opposing tribal assertion of continuing rights.

IV. PRECLUSION PRINCIPLES: THEIR PURPOSES AND REQUIREMENTS

There are two common law preclusion doctrines which limit the relitigation of claims under certain circumstances: claim preclusion and issue preclusion. Common law preclusion principles are often implicated in lawsuits filed by or on behalf of tribes seeking recognition or enforcement of treaty rights when the doctrines are raised defensively against the tribes asserting treaty rights.[96] Litigants opposing tribal claims have also argued that a special doctrine of statutory preclusion should be applied in the context of the Indian Claims Commission Act to limit subsequent claims made by tribes.[97]

Parties resisting tribal suits contend that ICC judgments, which awarded compensation to tribes for ceded lands, should preclude any subsequent claims which implicate, in any way, the rights previously compensated by an ICC award or settlement.[98] Although these arguments have been raised often, there is no clear consensus among courts on the effect previous ICC judgments should have on claims presently being asserted.[99] Some courts are willing to apply principles of preclusion liberally to prior ICC judgments.[100] Other courts

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[94] *In re Gen. Adjudication of all Rights to Use Water in the Gila River Sys. & Source*, 35 P.3d at 79-80.

[95] See *infra* Section V for a discussion of this use of preclusion.

[96] *See, e.g.*, State *ex rel.* Martinez v. Kerr-McGee Corp., 898 P.2d 1256 (N.M. Ct. App. 1995) (ICC settlement raised preclusively against Tribe's claim for reserved water rights).

[97] *See* Arizona v. California (*Arizona III*), 530 U.S. 392, 416 (2000).

[98] *Id.* at 413-18 (discussing states' preclusion arguments).

[99] *See id.* at 393 (refusing to apply collateral estoppel or issue preclusion to prior ICC settlement because it did not satisfy the traditional preclusion requirements); Devils Lake Sioux Tribe v. North Dakota, 917 F.2d 1049, 1056 (8th Cir. 1990) (declining to apply collateral estoppel to previous ICC judgment because of the ICC's limited jurisdiction); *Martinez*, 898 P.2d at 1256 (finding the tribe's claim for reserved water rights was not precluded by a prior ICC settlement). *But see* Dep't of Ecology v. Yakima Reservation Irrigation Dist., 850 P.2d 1306, 1324-25 (Wash. 1993) (applying claim preclusion to prevent a tribe's claim); W. Shoshone Nat'l Council v. Molini, 951 F.2d 200 (9th Cir. 1991) (using preclusion principles to prevent relitigation of aboriginal and treaty hunting and fishing rights).

[100] *Molini*, 951 F.2d at 202; *Yakima Reservation Irrigation Dist.*, 850 P.2d at 1324-25.

have refused to give ICC judgments preclusive effect unless (1) the United States is a party in the later suit, (2) the claim or issue was actually asserted or could have been asserted in the ICC litigation, and (3) the claim or issue was actually decided by the ICC.[101]

The three types of preclusion are discussed further below. It is critical to understand the purposes and elements of the preclusion doctrines in order to apply them properly in the context of litigation by tribes who previously filed claims with the ICC.

A. Claim Preclusion and Issue Preclusion

Claim preclusion, or res judicata, precludes re-litigation of any claim that parties asserted or could have asserted in an earlier action which was finally decided. The Supreme Court notes that claim preclusion is available when "a final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were or could have been raised in that action."[102] Preclusion principles developed to reduce duplicative litigation, prevent harassment of defendants, and conserve judicial resources.[103] Notably, however, outside the context of the ICC, courts typically have not found claims precluded by a previous judgment if the party was unable to assert the claim in the previous action due to the limitations of the first forum.[104] For instance, in *North v. Walsh*, the D.C. Circuit Court of Appeals held that a Freedom of Information Act (FOIA) request for certain documents was not precluded when the party making the FOIA request had also requested some of the same documents by subpoena during an earlier grand jury proceeding because the party could not have made a civil FOIA request in that proceeding, and furthermore would not have had access to the direct action for judicial enforcement of such a request.[105] Similarly, in the ICC context, because the

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[101] *See, e.g., Martinez*, 898 P.2d at 1259-60; *Arizona III*, 530 U.S. at 393.

[102] Allen v. McCurry, 449 U.S. 90, 94 (1980). For example, X brings a breach of contract claim against Y. Y asserts a counterclaim claiming that X in fact breached the contract first, and the court holds for Y. X could not subsequently re-file seeking to raise a claim that the same contract was void because of fraud or duress. Most courts would find the second action barred by the doctrine of claim preclusion because the claim could have been raised in the first suit. *See also* RESTATEMENT (SECOND) OF JUDGMENTS § 19 (1982).

[103] *Allen*, 449 U.S. at 54.

[104] RESTATEMENT (SECOND) OF JUDGMENTS, § 26(7)(c); 18 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 4412 (1982).

[105] 881 F.2d 1088, 1100 (D.C. 1989). The court noted that court enforcement of a FOIA request must be triggered by a complaint and no complaint could have been brought in the grand jury proceeding. *Id.* at 1094. The court cited the Restatement Second of Judgment section 26(c) & comment "c" which stated that "subsequent action on the same claim but under a different theory of recovery or demand for relief is not precluded where a formal barrier blocked presentment of that theory or demand in the first action." *Id.* at 1093. The court

original court was one of limited jurisdiction and was limited in the types of claims it could hear, the parties should not be precluded from subsequently raising that claim.[106]

Issue preclusion, or collateral estoppel, bars re-litigation of specific factual or legal issues which were actually decided and necessary to a previous final judgment even if the second claim is based on a different cause of action. Unlike claim preclusion, which bars relitigation of any claim which *could* have been litigated in the previous action, issue preclusion requires that the same issue actually *was* litigated.[107] To determine whether an issue should be precluded from relitigation, courts consider whether: (1) the same issue was involved in both actions; (2) the issue was actually litigated; (3) the parties had a full and fair opportunity to litigate the issue; (4) the issue was actually decided by a disposition that is sufficiently final, on the merits, and valid; and (5) the issue was necessary to the disposition of the first action.[108] In other words, issue preclusion is applicable when "an issue of fact or law is actually litigated and determined by a valid and final judgment, and the determination is essential to that judgment."[109] In order for issue preclusion to apply, a judgment on the merits in some form must have been entered in the previous case.[110] If there is no such final judgment then the issue has not been "actually litigated" and future litigation of any issue will not be precluded. Thus, a consent decree, settlement, or default judgment will not normally be given preclusive effect in a subsequent litigation.[111] In addition to these two common

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stressed that while the request was the same in part, the issues raised were different, and issue preclusion did not apply in this case. *Id.* at 1095-96. Instead the court affirmed that preclusion only applies if "the litigant or his privies could have raised the issue *in* the earlier action." *Id.* at 1095.

[106] *See* Lower Sioux Indian Cmty. v. United States, 626 F.2d 828 (Ct. Cl. 1980). The court held that the Tribe's claims for an accounting of annuities due under treaties was not barred. *Id.* at 831. The statute granting jurisdiction to adjudicate the claims only gave the court limited jurisdiction. *Id.* at 830. Here the court found the tribe would have been unable to raise the claim before and was therefore not precluded from asserting it now. *Id.* at 830-31.

[107] *See* RESTATEMENT (SECOND) OF JUDGMENTS § 27 ("When an issue of fact or law is *actually litigated and determined* by a valid and final judgment, and the determination is essential to the judgment, the determination is conclusive in a subsequent action between the parties, whether on the same or a different claim." (emphasis added)).

[108] *Id.* § 27 cmt. a. The Restatement states:

> (a) *Subsequent action between the same parties.* The rule of issue preclusion is operative where the second action is between the same persons who were parties to the prior action, and who were adversaries . . . with respect to the particular issue, whether the second action is brought by the plaintiff or by the defendant in the original action.

Id. (citation omitted).

[109] *Id.* § 27.

[110] *Id.* § 27 cmt. d.

[111] 18 WRIGHT ET AL., *supra* note 104, § 4443:

> In most circumstances, it is recognized that consent agreements ordinarily are intended to

law preclusion doctrines, tribes have also faced an additional statutory preclusion argument based on the terms of the Act itself.

B. Statutory Preclusion

The statutory preclusion argument is based on the language of section twenty-two of the Indian Claims Commission Act, which says in its entirety:

> When the report of the Commission determining any claimant to be entitled to recover has been filed with Congress, such report shall have the effect of a final judgment of the Court of Claims, and there is hereby authorized to be appropriated such sums as are necessary to pay the final determination of the Commission.
>
> The payment of any claim, after its determination in accordance with this Act, shall be a full discharge of the United States of all claims and demands touching any of the matters involved in the controversy.
>
> A final determination against a claimant made and reported in accordance with this Act shall forever bar any further claim or demand against the United States arising out of the matter involved in the controversy.[112]

Litigants opposing tribes argue that the Act, by these terms, created a special regime of preclusion.[113] They argue that Congress intended the ICC to conclusively decide all Native American claims, and thus tribes should not be able to re-litigate claims or issues that were decided by the ICC, that could have been decided, or that relate in any way to the claims presented to the ICC.[114] The argument contends that tribes are precluded from raising their claims not only against the United States, but against anybody.[115] In addition, in the context of issue preclusion, parties have argued that the statute allows courts to give preclusive effect to settlements and consent decrees even though such

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> preclude any future litigation on the claim presented *but not on any of the issues presented.* Thus consent judgments ordinarily support claim preclusion but not issue preclusion.

Id. (emphasis added); *see also* United States v. Int'l Bldg. Co., 345 U.S. 502, 504-06 (1953) (consent judgments are not appropriate for collateral estoppel unless specific questions of fact and law were determined by court).

[112] ICCA, *supra* note 1, § 22.

[113] *See, e.g.*, Arizona v. California (*Arizona III*), 530 U.S. 392, 416 (2000) (states raising statutory preclusion argument against tribes).

[114] *See generally* Dep't of Ecology v. Yakima Reservation Irrigation Dist., 850 P.2d 1306 (Wash. 1993) (irrigation districts argued that Yakima Tribe was precluded from claiming ongoing treaty fishing rights by virtue of earlier ICC award).

[115] Transcript of Oral Argument at 16, *Arizona III*, 530 U.S. 392 (No. 8).

consent decrees would not normally support issue preclusion under traditional common law preclusion doctrine.[116]

Parties litigating against tribes have thus turned to both the common law and statute seeking preclusion doctrines to resist tribal claims, arguing that res judicata, collateral estoppel, or the Act itself bars subsequent litigation by tribes who presented claims to the ICC. The appropriate application and effect of these three preclusion doctrines in later litigation by tribes to enforce retained treaty rights is discussed in the next section.

V. ICC JUDGMENTS, PRECLUSION PRINCIPLES, AND OFF-RESERVATION FISHING RIGHTS

The following discussion considers the scope of preclusion that should be granted to ICC decisions, with particular emphasis on the question of whether prior ICC settlements should preclude a tribe's claim to recognize its off-reservation usual and accustomed fishing locations. In general, a prior ICC settlement, involving determinations of a tribe's aboriginal territory, should not preclude subsequent litigation which involves a tribe's usual and accustomed fishing locations. Preclusion principles bar relitigation of issues or claims that were already—or could have been—litigated in a previous action that ended in final judgment.[117] First, in the context of suits to recognize off-reservation fishing rights reserved by treaty, prior ICC settlements will not normally satisfy the traditional requirements of preclusion. Second, even if courts recognize a special doctrine of statutory preclusion in the context of the ICC, it should not affect the ability of a tribe to assert claims for the designation of usual and accustomed fishing locations.

A. Traditional Preclusion Principles Applied to ICC Findings and Settlements

In most instances, if courts apply a traditional claim or issue preclusion analysis, tribes should not be precluded from asserting off-reservation fishing rights reserved by treaty. Parties seeking to use claim preclusion defensively to estop a tribe from asserting off-reservation fishing rights locations will face two primary problems. First, claim preclusion normally requires mutuality of parties or privity between parties;[118] however, the jurisdiction of the ICC was limited to hearing claims against the United States.[119] Courts have diverged in

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[116] *Arizona III*, 530 U.S. at 392, 406-07; *Dep't of Ecology*, 850 P.2d at 1323-25 (both arguing preclusion based on settlement of ICC claims).

[117] *See supra* Section III.

[118] *See supra* note 108.

[119] ICCA, *supra* note 1, § 2.

how they have approached this limitation. Some courts have strictly construed this requirement, finding that future claims by a tribe against a state or individuals could not be precluded because there was no privity between the state or individuals and the United States.[120] However, the Supreme Court's 1985 *Dann* decision has been interpreted as holding that an ICC judgment awarding compensation for a takings claim precludes the tribe from asserting ownership of the property against the world, on the theory that an ICC award completely extinguished tribal title against all parties.[121] Courts have thus used this reasoning to preclude a tribe from re-asserting ownership of the land or the continuation of treaty or aboriginal rights for which they received compensation from an ICC judgment even as against states and individuals.[122]

Second, another problem with giving ICC awards broad preclusive effect arises from the ICC's limited jurisdiction. Claim preclusion requires that a party was able to assert its claim in the previous litigation, even if it chose not to do so.[123] Thus, the ICC's inability to provide equitable relief and, as a result, a tribe's inability to request a declaration of treaty rights, should serve as a limitation on a court's application of claim preclusion.[124] In fact, several courts which have considered the issue have declined to apply ICC claim preclusion to current litigation for just this reason.[125] In these cases courts have focused on

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[120] Cayuga Indian Nation of N.Y. v. Cuomo, 667 F. Supp. 938, 947 (N.D.N.Y. 1987) (noting that the ICC was created to resolve claims against the United States, and the plaintiffs could not have proceeded against non-federal defendants, at least not against those who did not derive title directly from the United States, in that forum); *see also* State *ex rel.* Martinez v. Ker-McGee Corp., 898 P.2d 1256, 1258-60 (N.M. Ct. App. 1995) (noting that state and other parties were not in privity with United States).

[121] United States v. Dann, 470 U.S. 39, 45 (1985). The Court in *Arizona III*, while ultimately rejecting the state's preclusion argument, did not seem to envision any problem with giving preclusive effect to an ICC decision to compensate tribes for land taking against any future claims even against individuals and states. *See Arizona III*, 530 U.S. at 414-17.

[122] Dep't of Ecology v. Yakima Reservation Irrigation Dist., 850 P.2d 1306, 1324-25 (Wash. 1993) (holding, based upon *Dann*, that Tribe could not argue retention of fishing rights in action against state and private parties since it had settled ICC claim with United States in which it had argued, among other things, that its fishing rights had been taken); *see also* W. Shoshone Nat'l Council v. Molini, 951 F.2d 200, 203 (9th Cir. 1991) (holding that the Tribe was precluded from asserting the continuation of aboriginal hunting and fishing rights against the State on land for which they had received compensation for takings by the United States).

[123] *See* RESTATEMENT (SECOND) OF JUDGMENTS § 26(1)(c) (1982) (noting exception to claim preclusion when the plaintiff was unable to seek certain remedy in the first action).

[124] 18 WRIGHT ET AL., *supra* note 104, § 4412 (suggesting that litigants should not be penalized for failing to seek a unified position in a first cause of action if it would not have been possible to combine the two claims into a single proceeding).

[125] *See, e.g.*, *Martinez*, 898 P.2d at 1258 (holding that a claim is not precluded if a tribe could not seek certain relief or rely on a certain theory in the original claim due to the ICC's limited jurisdiction. Because "[t]he ICC's jurisdiction was limited to monetary compensation for loss; it could not vindicate or establish Indian title by declaratory or injunctive relief"); *see also* Seneca Nation v. New York, 26 F. Supp. 2d 555, 566-69 (W.D.N.Y. 1998) (holding the

the inability of the ICC to recognize continuing rights or re-convey property taken without just compensation. Most of these courts have held that because the tribe was unable to seek equitable relief for the recognition or enforcement of treaty rights the tribe should not be barred from pursuing those claims now.[126]

For instance, the New Mexico Court of Appeals in *State ex rel. Martinez v. Kerr-McGee Corp.* found that a prior ICC judgment did not preclude the Laguna and Acoma Pueblos from asserting water rights against the State of New Mexico and private parties.[127] The Pueblos had previously filed a claim with the ICC seeking monetary compensation for the "permanent loss of aboriginal lands and appurtenant water rights," and also for loss of irrigation waters appurtenant to *retained* lands.[128] The ICC had found that the Pueblos had lost title to certain aboriginal lands and water appurtenant to those lands.[129] The ICC also held that the Pueblos had not proven that the irrigation waters appurtenant to the Pueblo's retained lands had been diminished.[130] The Pueblos and United States then settled the case.[131]

The later litigation arose when the New Mexico State Engineer commenced a general water rights adjudication.[132] The two Pueblos joined, asserting—among other claims—water rights for their retained lands.[133] The State Engineer filed a motion for summary judgment, arguing that the doctrine of claim preclusion barred the Pueblos from reasserting water rights because they had already received compensation for the lost water.[134]

Applying a traditional claim preclusion analysis, the court held that if a plaintiff was unable to assert a claim in the prior action due to limitations on subject matter jurisdiction, the parties could not assert claim preclusion as a defense in the later action.[135] Even though the ICC had found that the Pueblos

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ICC could not return land or property and therefore the ICC's determination of land ownership would not preclude future claims). *But see Dep't of Ecology*, 850 P.2d at 1324-25 (holding the Tribe's claim was precluded by a stipulated settlement agreement which compensated the tribe for lost fishing rights).

[126] *See Seneca Nation*, 26 F. Supp. 2d at 566; *see also Martinez*, 898 P.2d at 1259.

[127] *Martinez*, 898 P.2d at 1256 (holding that the claim was not precluded by claim or even a special statutory preclusion).

[128] *Id.* at 1258.

[129] *Id.*

[130] *Id.*

[131] *Id.*

[132] Such an adjudication, generally called a "general stream adjudication" when surface water is involved, determines and decrees all of the valid water rights to a particular water source. *See generally* WATERS AND WATER RIGHTS § 16.02 (LexisNexis 2008) (describing water rights adjudications).

[133] *Martinez*, 898 P.2d at 1262.

[134] *Id.* at 1258-59.

[135] *Id.* at 1260.

failed to prove interference with their retained water rights (and thus could not receive monetary damages for interference), that finding did not—and *could not*—affect the underlying title to the retained lands and water rights.[136] Because the Pueblos were unable to quiet title against the United States for retained land and water rights in the ICC case, the court would not preclude the Pueblos from asserting that claim in the state proceeding.[137]

Following this reasoning, courts should not preclude a tribe from asserting off-reservation treaty fishing rights unless the tribe accepted monetary compensation for the loss of *those specific treaty rights*.[138] Because the ICC was unable to provide equitable relief, a tribe was unable to assert continuing treaty rights or to enjoin interference with those rights.[139] Tribes were also unable to assert the continued existence of aboriginal rights. If a tribe did not receive compensation for land to which the aboriginal rights attached, or for the rights themselves, the tribe should not be precluded from asserting their existence now. If, on the other hand, a tribe did assert the *taking* of certain aboriginal or treaty rights before the ICC and accepted monetary compensation for those rights, then preclusion may be appropriate under the Supreme Court's holding in *Dann*.[140] On remand of the *Dann* case from the Supreme Court, the Ninth Circuit Court of Appeals stated (albeit overly broadly) that "payment of [a] claims award establishes conclusively that a taking occurred," even though the claim was not actually litigated and even though the Indian Claims Commission could not extinguish title or other Indian treaty rights.[141]

To avoid this very result, several tribes turned down monetary compensation offered by the ICC and instead chose to petition Congress for the return of their land. For example, the Taos Pueblo turned down an ICC settlement, opting instead to pursue the return of Blue Lake in Congress.[142] Indeed, the ICC

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[136] *Id.*

[137] *Id.* The court in *Martinez* also declined to apply issue preclusion and statutory preclusion to the Tribe's claims. *Id.* at 1260-63.

[138] Courts should ensure that the award was based on the loss of rights at issue in the present case.

[139] *Id.*

[140] United States v. Dann, 470 U.S. 39, 45 (1985).

[141] United States v. Dann, 873 F.2d 1189, 1198-99 (9th Cir. 1989). This statement accurately captures the essence of res judicata—making a claim and pursuing it to final judgment precludes relitigation of that claim and any related claim which could have been included in the first proceeding, even if it was not raised. RESTATEMENT (SECOND) OF JUDGMENTS §§ 24-25 (1982) (noting that plaintiff cannot pursue a new theory or different claim arising out of same transaction, broadly defined, in later case). However, whether this holding was the right conclusion in *Dann* has been persuasively questioned. *See* O'Connell, *supra* note 39.

[142] *See* GORDON-MCCUTCHAN, *supra* note 58, at 75 ("One of the major difficulties posed by the Taos case . . . was their refusal to accept money for the sacred watershed. Dollars, they emphatically maintained, could never compensate them for the loss of the sacred area. They

supported the return of the land to the Tribe; however, as the Taos Pueblo's brief acknowledged, "[We] are aware that under the Indian Claims Commission Act this Commission can only render money judgments in favor of petitioners. . . [i]t is the Pueblo's hope that on the basis of the Commission's interlocutory decision on the issue of land title, Congress will convey the land to the Pueblo."[143] Eventually, after several decades and numerous setbacks, Congress returned part of the Pueblo's lost land.[144] Many tribes, however, accepted monetary compensation as settlement for their claims.[145]

By limiting the ICC's jurisdiction, Congress created a Hobson's choice for tribes: seek only monetary compensation from the ICC within the prescribed time period, possibly foreclosing the opportunity to assert rights to land or other resources in the future, or forgo the ICC process and hope that equitable relief would become available at a later date from Congress, the executive branch, or the courts.[146] Although this choice seems particularly risky and unfair, the decision of the Court itself in *Dann* (and of lower courts following its reasoning) encourages parties to argue that pursuing takings claims before the ICC—and thereby being awarded monetary compensation for the loss of land, for aboriginal rights associated with those lands, or for other treaty rights—forecloses a tribe from relitigating ownership of those property rights in any forum, no matter what the theory of recovery.[147] Thus, any tribe that pursued an ICC claim may now find itself cut off from other relief, regardless of the ICC's limited remedial authority.

Parties may also assert issue preclusion in an attempt to limit a tribe's claim to establish off-reservation hunting and fishing rights reserved by treaty. Parties asserting issue preclusion must show that the issue was actually litigated in the prior suit, the issue was finally decided, and the issue was necessary to the previous judgment.[148] The ICC's calculation of monetary compensation for

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insisted on its reconveyance.").

[143] *See id.* at 80 (citation omitted). The Tribe wanted to use the ICC determination of its aboriginal territory to bolster its petition to Congress.

[144] *See generally* GORDON-MCCUTCHAN, *supra* note 58; PARKER, *supra* note 2, at 139-42.

[145] *See* PARKER, *supra* note 2, at 133.

[146] As noted, some tribes, such as the Taos Pueblo, used the ICC to determine aboriginal territory, refused monetary compensation, and petitioned Congress for the return of land. *See* GORDON-MCCUTCHAN, *supra* note 58, at 74-84; Temoak Band of W. Shoshone Indians v. United States, 593 F.2d 994, 999 (Ct. Cl. 1979) ("If the Indians desire to avert the extinguishment of their land claims by final payment, they should go to Congress. . . . If Congress wishes to alter or undo the normal course of Indian Claims Commission adjudication, it knows how to do it."). The Western Shoshone were not as fortunate as the Taos Pueblo, however, as their attempt to stop the ICC process and receive their land back was unsuccessful. *See* Schaaf & Fishel, *supra* note 39, at 180; O'Connell, *supra* note 39, at 766-79.

[147] *See generally* Thompson & Thompson, *supra* note 39, at 23 (declaring that "[t]oday, the doors of the courthouse are simply closed to claims that arose between 1776 and 1946").

[148] *See* Parklane Hosiery Co. v. Shore, 439 U.S. 322, 326 n.5 (1979).

lands ceded to the United States involved an in depth analysis of a tribe's "aboriginal title."[149] Thus, parties may argue that an ICC determination of a tribe's aboriginal territory should preclude or limit the ability of a tribe to claim off-reservation fishing rights outside of that territory.

When the off-reservation rights consist of the rights to fish in usual and accustomed fishing locations, ICC findings should not be given preclusive effect. Unlike an ICC determination of a tribe's aboriginal territory—requiring a tribe to show exclusive possession for a long period of time—the usual and accustomed fishing location determination is more flexible, encompassing any area the tribe used "from time to time," "however distant from the usual habitat of the tribe," and regardless of whether other tribes used the same location.[150] Furthermore, the ICC was unable to provide declaratory or injunctive relief—the precise forms of relief necessary to recognize or enforce rights *retained* by the tribes. Indeed, in *Seufert Bros. Co. v. United States*, the court explicitly rejected the argument that the court should confine the Yakima Tribe's usual and accustomed fishing locations to land which was within the Tribe's original territory.[151]

In *Seufert*, the plaintiff company appealed an injunction from a lower court which had prohibited the company from interfering with the Yakima Tribe's treaty right to take fish in its usual and accustomed fishing locations.[152] The question on appeal was whether the Yakima Tribe could claim usual and accustomed fishing rights in another Tribe's territory.[153] The court, utilizing the principle of treaty construction which dictates that treaties should be construed as the tribes would have understood them, held that the Tribe would *not* have understood the language "usual and accustomed" to mean only areas

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[149] *See* Nez Perce Tribe of Indians v. United States, 18 Ind. Cl. Comm. 119, 128 (1967), *available at* http://digital.library.okstate.edu/icc/v18/iccv18p119.pdf.

[150] COHEN ET AL., *supra* note 6, § 18.04[2][e][ii]; *see* Seufert Bros. Co. v. United States, 249 U.S. 194, 195, 199 (1919) (finding a usual and accustomed site outside of the Yakima's ceded territory and within the territory of another tribe); Midwater Trawlers Coop. v. Dep't of Commerce, 282 F.3d 710, 718 (9th Cir. 2002) (finding usual and accustomed fishing sites outside of the United States three mile territorial limit); United States v. Washington, 384 F. Supp. 312, 332 (W.D. Wash. 1974) (noting a usual and accustomed site can be found regardless of whether other Tribes fished in the same area); United States v. Brookfield Fisheries, Inc., 24 F. Supp. 712 (D. Or. 1938), *aff'd*, 520 F.2d 676 (9th Cir. 1975) (granting the Yakima nation, the Umatilla, Walla Walla and Cayuse Tribes the right to fish in same "usual and accustomed place").

[151] *Seufert*, 249 U.S. at 198-99. This case did not involve any issues of claim and issue preclusion; however, the case provides a good example of the criteria used to determine which locations were a tribe's usual and accustomed fishing locations.

[152] *Id.* at 194.

[153] *Id.* at 195.

which had been in their exclusive use or in their own exclusively-occupied territory.[154]

Courts might use an ICC determination of a tribe's aboriginal territory as evidence of a tribe's historic land use patterns, but it is important to limit such evidence to its proper scope. The court in *United States v. Washington* allowed ICC findings to be introduced as evidence of usual and accustomed fishing locations;[155] however, it was careful to clarify that although the findings were relevant to the question of where usual and accustomed fishing sites may be located, the findings did not provide conclusive evidence of those sites' locations.[156] The court noted:

> Because the court was provided with copies of findings of fact supporting decisions of the Indian Claims Commission, a caveat concerning that source of information is appropriate. The primary purpose of those proceedings was for the establishment of aboriginal territories in order to base claims for compensation pursuant to 25 U.S.C. § 70a. *That inquiry was not directed to determining fishing places but to prove land use and occupancy.*[157]

For comparison, courts may properly use issue preclusion to preclude a tribe from claiming the continuation of rights which are dependent on ownership of land, such as aboriginal hunting and fishing rights and reserved water rights, if the tribe has already accepted compensation for the taking of the same land. For instance, in *Western Shoshone National Council v. Molini*,[158] the Ninth Circuit considered the Western Shoshone Tribe's claim against the State of Nevada. The Tribe asserted that certain wildlife regulations and laws were adversely affecting their aboriginal hunting and fishing rights.[159]

The Tribe first argued that the ICC's determination of land title should only preclude future suits against the United States.[160] The Ninth Circuit, drawing on the Supreme Court's holding in *Dann*, rejected this argument and affirmed that compensation received by the Tribe for lost land precludes *any* future claim to ownership of the same land.[161] Next, the court rejected the Tribe's argument that extinguishing land title did not extinguish aboriginal fishing and hunting rights.[162] The court again cited Supreme Court precedent which established that "the conveyance of title includes hunting and fishing rights,

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[154] *Id.*; *see also* United States v. Winans, 198 U.S. 371, 381-82 (1905).

[155] 459 F. Supp. 1020, 1058-59 (W.D. Wash. 1978).

[156] *Id.* at 1059.

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

[158] 951 F.2d 200 (9th Cir. 1991).

[159] *Id.* at 201.

[160] *Id.* at 202.

[161] *Id.* (citing United States v. Dann, 873 F.2d 1189 (9th Cir. 1989), and United States v. Pend Oreille Pub. Util. Dist. No. 1, 926 F.2d 1502 (9th Cir. 1991)).

[162] *Id.* at 202-03.

absent an express reservation of those rights."[163] Thus, the court found that because compensation for a takings claim conclusively determined that land title was extinguished, the Tribe could no longer claim the continuation of rights appurtenant to that land, holding that the claim was precluded by compensation awarded to the Tribe by the ICC for "full title extinguishment."[164]

It is important to recognize the proper limits in applying issue preclusion to ICC decisions. For instance, ICC settlements should not ordinarily support the use of issue preclusion. The court in *State ex rel. Martinez v. Kerr-McGee Corp.*, discussed earlier, acknowledged this general rule; however, it noted that the ICC adjudications were often split into two phases: first, the liability phase and second, the valuation phase.[165] The court further noted that "[t]his bifurcated procedure was specifically contemplated by statute, and a direct appeal could be taken from the liability phase even though the case was not yet complete."[166] The court held that issue preclusion might be supported based on issues actually decided during the liability phase, even if the valuation phase eventually ended in a settlement. In that case, the court analyzed whether, during the liability phase, the ICC had determined that the water rights attached to the Taos Pueblo's retained lands were lost.[167] The court found that the ICC had not precisely determined that issue in the earlier case and thus preclusion was not appropriate.[168] In order to properly apply issue preclusion in the context of ICC settlements, courts must be as careful as the *Martinez* court was in expressly examining the findings made in the ICC liability phase, rather than simply applying preclusion principles to the ICC settlements themselves.

In addition to arguing for the application of common law preclusion doctrines to decisions, parties litigating against Indian tribes have also raised a statutory preclusion argument based on the Indian Claims Commission Act. The next section addresses this statutory preclusion doctrine.

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[163] *Id.* at 202 (citing Or. Dep't of Fish and Wildlife v. Klamath Indian Tribe, 473 U.S. 753 (1985)).

[164] *Id.* The Ninth Circuit's decision seems correct insofar as it finds that loss of land normally also means loss of any rights appurtenant to that land. However, this decision also assumes that the *Dann* Court correctly determined that land title was extinguished, which may be questionable, as previously discussed.

[165] 898 P.2d 1256, 1260-61 (N.M. Ct. App. 1995).

[166] *Id.* at 1261.

[167] *Id.* at 1262.

[168] *Id.* at 1260-63. The liability phase should not support a claim preclusion argument. *Federal Practice and Procedure* notes that "an order that establishes liability but leaves open questions of damages or other remedies" is not a final judgment for purposes of claim preclusion. 18 WRIGHT ET AL., *supra* note 104, § 4432.

B. Statutory Preclusion: Stretching the Preclusive Effect of ICC Findings and Settlements

When Congress created the Indian Claims Commission in 1946,[169] it certainly hoped that the Commission would finally resolve the outstanding tribal claims against the U.S. government.[170] The language contained in the establishing act reflected that desire, insofar as the statute used phrases like "final judgment," "full discharge," and "forever bar."[171] However, these terms cannot be read in isolation from their immediate context and, in fact, they must be interpreted in light of the entire statutory scheme.

The purpose of the ICC was to provide a forum for monetary claims only.[172] The Act provided the necessary waiver of sovereign immunity to allow these damage claims to proceed against the government, and a non-Article III forum for their resolution, just as the Federal Tort Claims Act and the Court of Claims provided such a waiver and forum for non-tribal claims.[173] But to argue that the 1946 statute incorporates even broader principles of preclusion than the common law is to stretch it beyond its proper limits. Yet that is just what some litigants have tried to do.

In water rights litigation between Arizona, California, and other states in the United States, which also involved several Indian tribes as intervenors, the state parties urged the Court to hold that Congress, in establishing the ICC, created a special regime of statutory preclusion.[174] The state parties argued that Congress expressly intended that ICC judgments finally end litigation with tribes and thus, the Court should give ICC settlements and decrees *greater* preclusive effect than settlements would be accorded under traditional preclusion doctrines.[175]

Arizona III concerned a dispute over whether the Quechan Tribe had retained ownership of 25,000 acres of land, and appurtenant water rights, along a disputed reservation boundary. The boundary land dispute had been litigated in the ICC, with the proceeding ultimately ending in a consent decree that

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[169] *See* ICCA, *supra* note 1.

[170] *See supra* note 28 and accompanying text.

[171] *See* ICCA, *supra* note 1.

[172] *See, e.g.*, Arizona v. California (*Arizona III*), 530 U.S. 392, 402 n.1 (2000) ("The Act conferred exclusive jurisdiction on the Commission to resolve Indian claims solely by the payment of compensation.").

[173] Federal Tort Claims Act, 28 U.S.C. §§ 1346, 1491, 2674 (2006).

[174] *Arizona III*, 530 U.S. 392.

[175] *Id.* at 397-99; *see also* Thompson & Thompson, *supra* note 39 (arguing that the ICC process conclusively and finally resolved *all* Indian claims arising prior to 1946 and that courts should dismiss suits in which tribes seek "new ways to file lawsuits over old claims to circumvent the closure intended by Congress in passing the ICCA").

awarded money to the Tribe.[176] The state parties asserted preclusion based on two different grounds, but only one argument is pertinent to this article: the parties argued that once the Tribe accepted monetary compensation from the ICC it could no longer claim continuing ownership of the disputed lands.[177] As a result, the states argued that the Tribe should be precluded in the later interstate litigation from supplementing the water rights claim based on a claim to continued ownership of the disputed land.[178] The Supreme Court rejected the states' argument that the ICC decision precluded the Tribe's water rights claim. The Court noted that "standard preclusion doctrine" provides that consent agreements do not support issue preclusion because in a settlement "none of the issues is actually litigated" as required for issue preclusion.[179] This result was further mandated since the Tribe had argued alternative grounds before the ICC: either the Tribe still owned the land and the government owed them damages for trespass, or the government had obtained title by fraud or other unconscionable means and therefore owed compensation for the land so taken.[180] The Court noted that "the settlement was ambiguous as between mutually exclusive theories of recovery" and thus, was "too opaque to serve as a foundation for issue preclusion."[181]

But the state parties further urged the Court to find that Congress intended the Indian Claims Commission Act to create "a special regime of 'statutory preclusion'" whereby the ICC would finally settle all claims by tribes against the United States.[182] In oral argument, the state parties maintained:

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[176] *Arizona III*, 530 U.S. at 405-06.

[177] *Id.* at 413. The state parties also argued that a claim to increase the amount of water based on ownership of the disputed boundary lands should be precluded because the United States failed to raise it in *Arizona I* or *Arizona II*. *Id.* at 406-12. The Court found that the states had not raised this particular preclusion argument on a timely basis, and had therefore waived it, as the litigation had been going on for many years. *Id.* at 406-11 (citing FED. R. CIV. P. 8(c) ("Those principles rank res judicata an affirmative defense ordinarily lost if not timely raised."). The Court further declined to raise this preclusion argument sua sponte. *Id.* at 411-13.

[178] *Id.* at 413-14.

[179] *Id.* at 414. A settlement or consent decree can, however, support claim preclusion, under proper circumstances. *Id.*

[180] *Id.* at 403-04.

[181] *Id.* at 417-18.

[182] *See id.* at 416. The language of the ICCA includes:

> (a) when the report of the Commission determining any claimant to be entitled to recover has been filed with Congress, such report shall have the effect of a final judgment of the Court of Claims . . . .
>
> . . . .
>
> . . . the payment of any claim, after its determination in accordance with this chapter, shall be a full discharge of the United States of all claims and demands touching any of the matters involved in the controversy.

ICCA, *supra* note 1, § 22.

> [W]e agree with the Government and the [T]ribes that under collateral estoppel you need a litigated, adjudicated issue before . . . there's any preclusion, but not under the Indian Claims Commission Act. The [ICCA] says that the Attorney General is authorized to settle cases and settlement judgments are treated the same as adjudicated judgments.[183]

The state parties argued that section 22 of the Act contained this implication and further argued that ICC judgments are preclusive not only between the Tribe and the United States, but also "against anybody."[184] However, the Court declined to resolve the case so broadly.[185] The Court found that the ICC consent judgment could not be used preclusively against the Quechan Tribe on the issue of ownership, noting that there were two alternative bases upon which the settlement could have been made: trespass or takings.[186] Because trespass and takings have opposite consequences for title, it would be impossible to give preclusive effect to either ground.[187]

While the Court deferred comprehensively addressing the existence or effect of a special ICCA statutory preclusion scheme—and how such a doctrine might apply to settlements that differ from the Quechan settlement—some lower courts seem to employ the concept of statutory preclusion even to settlements, and even in circumstances that would not otherwise satisfy traditional preclusion requirements.[188] It is clear Congress wanted to provide a forum to finally decide all Native American claims.[189] However, it is not clear whether Congress actually succeeded in achieving that goal, because of the ICC's limited jurisdiction and remedial authority.[190] Due to restraints on the type of

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[183] Oyez, Arizona v. California—Oral Argument, http://www.oyez.org/cases/1990-1999/1999/1999_8_orig/argument/ (last visited Apr. 5, 2009) [hereinafter Oral Arguments].

[184] *Id.* The state parties argued that the statute had been so interpreted by the Ninth Circuit in several cases, but the Court distinguished those cases because they did not involve tribal claims of continuing title as did the Quechan dispute, and the Court further declined to address the decisions' correctness.

[185] *Arizona III*, 530 U.S. at 416-17 ("We need not decide whether, in the distinctive context of the Indian Claims Commission Act, some consent judgments might bar a tribe from asserting title even in discrete litigation against third parties, for the 1983 settlement of Docket No. 320 plainly could not qualify as such a judgment.").

[186] *Id.* at 417.

[187] *Id.* at 417-18.

[188] *See* United States v. Pend Oreille Pub. Util. Dist. No. 1, 926 F.2d 1502, 1507-08 (9th Cir. 1991); *see also* Dep't of Ecology v. Yakima Reservation Irrigation Dist., 850 P.2d 1306, 1323-25 (Wash. 1993).

[189] Courts normally cite the ICCA which states, "[w]hen the report of the Commission determining any claimant to be entitled to recover has been filed with Congress, such report shall have the effect of a final judgment of the Court of Claims" to support the application of preclusion principles to stipulated settlements. ICCA, *supra* note 1, § 22(a)-(b).

[190] *Cf.* United States v. Washington, 873 F. Supp. 1422 (W.D. Wash. 1994) (denying the affirmative defense arguing that payments by the ICC extinguished all claims the plaintiff Tribes had to fishing rights under their treaty). The court noted in part that:

relief which could be granted, the ICC was unable to properly air all of the tribes' claims. Indeed, Congress was also sensitive to providing a forum to finally redress the wrongs perpetrated by the United States against the tribes. It is contrary to this goal to preclude a tribe from asserting a claim which could not have been brought before the Indian Claims Commission. Indeed, it is difficult to see how the general language of the Act could, in one fell swoop, trump specific treaty language. Thus, in cases where tribes are asserting continuing rights, such as rights to fish in usual and accustomed fishing locations, courts should not use statutory preclusion to prevent a tribe from now asserting its claim.

VI. CONCLUSION

Given the ICC's limited jurisdiction, the doctrines of claim, issue, and statutory preclusion should not be used to confine usual and accustomed fishing locations to a tribe's aboriginal territory. First, claim preclusion only operates to bar claims which were or could have been litigated in a previous case, and a claim will not be precluded if a party could not have relied on a particular theory of the case or pursued a certain remedy or form of relief. Because the ICC was limited to providing monetary compensation, tribes were unable to request the equitable relief necessary to recognize usual and accustomed fishing locations, and thus under traditional preclusion doctrines a claim should not be precluded. Second, issue preclusion should not normally be available when the prior litigation ended in settlement unless the same issue was actually litigated in the liability phase of an ICC case. In the liability phase, the ICC was usually concerned with the determination of a tribe's aboriginal territory. As discussed above, this determination requires exclusive occupancy, while usual and accustomed fishing locations only require a showing of use. Thus, even if a court applies issue preclusion to findings made during the liability phase, a tribe should not be precluded from asserting usual and accustomed fishing locations outside of a tribe's aboriginal territory.

Finally, contentions about statutory preclusion should not confuse the preclusion analysis used by courts in these cases. Courts should not use the congressional goal of finality in the ICCA as a blanket justification to apply preclusion principles too liberally. Doing so stretches ICC decisions beyond

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> It is true that the primary purpose of the ICCA was "to dispose of the Indian Claim problem with finality." However, the Indians have never had a claim against the United States for lost fishing rights, because the Indians expressly reserved their fishing rights in the Stevens Treaties . . . . The payments awarded by the Commission to the Tribes were in compensation for the cession of the residual portions of their aboriginal title under the Stevens Treaties.

Id. at 1447 (internal quotation marks and citations omitted).

the proper limits of the statute's terms and the commission's authority. Even if a court liberally applies preclusion principles to ICC settlements, it should not affect the ability of a tribe to assert usual and accustomed fishing locations. The ICC could not hear claims which sought to recognize treaty rights, and the findings made by the ICC do not normally implicate usual and accustomed fishing locations. Thus, although parties have successfully argued for the application of preclusion principles in cases involving land title and appurtenant treaty rights, if a tribe has not specifically litigated and received compensation for the loss of off-reservation fishing rights, a court should deny the use of ICC decisions to preclude these tribal claims. In order to avoid perpetuating injustice against Indian tribes, courts must be careful to keep ICC decisions in their proper place.

From the Numbers Who Died to Those Who Survived: Victim Participation in the Extraordinary Chambers in the Courts of Cambodia

I. OVERVIEW

Victims of mass crimes are some of the most well known yet anonymous people of the twentieth and twenty-first centuries. With the advent of satellites and cable news, it has become impossible for the world to long remain ignorant when war crimes, crimes against humanity, and genocide are perpetrated anywhere on the planet. The faces of victims are splashed, at least briefly, across television screens and newspapers. One would be hard-pressed to find someone who has not at least heard of the tragedy in Darfur, and most people at least know that *something* happened in Rwanda and Yugoslavia, even if fewer can recall the atrocities of Sierra Leone, Congo, or Cambodia.

But such knowledge has only rarely led to action. Too often, political considerations stymie international attempts at meaningful intervention, and victims usually fade into faceless statistics. In the modern era, the international community's response to atrocity has often been to hold tribunals after the fact to prosecute those most responsible for the crimes. Here, too, the faces and stories of victims are recalled, but usually in the context of witness testimony designed to serve the aims of the prosecution. These aims are not necessarily the same as those of the victims, for many of whom the telling and the reparation are often more important than the conviction. The resources provided to victims also pale in comparison to those of other parties to the proceedings. While thousands of hours and millions of dollars have been spent ensuring that those accused of mass crimes receive a fair trial, the victims of those crimes have historically received little support at international war crimes tribunals.

Neither the International Criminal Tribunal in the former Yugoslavia (ICTY) nor that in Rwanda (ICTR) allows victims to participate as parties in their own right.[1] Although the International Criminal Court (ICC), allows victims to participate in a few key phases of the trial,[2] it also requires victims to justify

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[1] M. Cherif Bassiouni, *International Recognition of Victims' Rights*, 6 HUM. RTS. L. REV. 203, 242 n.202 (2006).

[2] Rome Statute of the International Criminal Court, art. 68(3), July 17, 1998, 2187 U.N.T.S. 90 [hereinafter Rome Statute]:

> Where the personal interests of the victims are affected, the Court shall permit their views and concerns to be presented and considered at stages of the proceedings

their right to participate at each successive stage.[3] In recent years, this has led to a debate about the proper role of victims in international criminal proceedings, with advocates for expanding participation confronting those who say that allowing victims "out of the witness box" would fundamentally distort the judicial proceedings.

The most recently operational tribunal is the Extraordinary Chambers in the Courts of Cambodia (ECCC),[4] which provides a unique case study of the expanding role of victims. Established to try "senior leaders" of the Khmer Rouge and "those who were most responsible for the crimes and serious violations of Cambodian penal law,"[5] the ECCC is designed to allow victims a more robust, substantive role in the tribunal than any predecessor institution in modern international criminal law. As discussed herein, the ECCC is a "hybrid" tribunal, which draws upon Cambodia's civil law system to allow victims to join as civil parties. This system affords victims many opportunities to influence the course of the investigation and the trial.

Cataloging the ways in which the arrangement between the Cambodian government and the UN is not conducive to the efficient administration of justice is beyond the scope of this article, and has already been amply elaborated by other commentators.[6] Nonetheless, the ECCC offers many lessons for those who advocate an expanded role for victims in international

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determined to be appropriate by the Court and in a manner which is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial. Such views and concerns may be presented by the legal representatives of the victims where the Court considers it appropriate, in accordance with the Rules of Procedure and Evidence.

Id.

[3] Prosecutor v. Dyilo, Case No. ICC-01/04-01/06, Judgment on the Appeal of Mr. Thomas Lubanga Dyilo Against the Decision of Pre-Trial Chamber I, PP 12-13 (Feb. 13, 2007), *available at* http://www.iclklamberg.com/Caselaw/DRC/Dyilo/Appeals/ICC-01-04-01-06-824_English%20%20Judgment,%2013%20February%202007.pdf [hereinafter Prosecutor v. Dyilo (Appeal)].

[4] At the time of this writing, in August, 2008, the proposed war crimes tribunal in Lebanon had not yet begun its operations. For more on the formation of the Tribunal, see Special Tribune for Lebanon, http://www.un.org/apps/news/infocus/lebanon/tribunal/ (last visited July 14, 2009).

[5] LAW ON THE ESTABLISHMENT OF EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA FOR THE PROSECUTION OF CRIMES COMMITTED DURING THE PERIOD OF DEMOCRATIC KAMPUCHEA art. 1 (2003), *available at* http://www.eccc.gov.kh/english/cabinet/law/4/KR_Law_as_amended_ 27_Oct_2004_Eng.pdf.

[6] *See, e.g.*, Simon Chesterman, *An International Rule of Law?*, 56 AM. J. COMP. L. 331 (2008); David Cohen, *"Hybrid" Justice in East Timor, Sierra Leone and Cambodia: "Lessons Learned" and Prospects for the Future*, 43 STAN. J. INT'L L. 1 (2007); Padraic J. Glaspy, *Justice Delayed? Recent Developments at the Extraordinary Chambers in the Courts of Cambodia*, 21 HARV. HUM. RTS. J. 143 (2008); Tessa V. Capeloto, Comment, *Reconciliation in the Wake of Tragedy: Cambodia's Extraordinary Chambers Undermines the Cambodian Constitution*, 17 PAC. RIM L. POL'Y J. 103 (2008).

tribunals. The first is that the civil party system benefits both victims and the court itself, by directly engaging those most affected by the alleged crimes of the accused. This not only improves the court's access to evidence, but it helps to increase its legitimacy in the eyes of the local population by empowering victims to confront their accused tormentors and to describe publicly the harm they have suffered. Second, experiences at the ECCC show that if a tribunal is to seriously incorporate the rights of victims into its mandate, these rights must be vigorously represented from the court's inception.

This paper offers an overview of previous tribunals, based predominantly on common law systems, and details the ways in which the ECCC's civil law approach affords victims a more meaningful role in the trial of mass crimes. It also analyzes the challenges faced by victims' advocates and how the Victims Unit at the ECCC (Victims Unit or Unit) might serve as a model for allowing tribunals to become, not merely about the numbers who died, but also the people who survived. Though the international community cannot undo the crimes themselves, or the staying of its collective hand when intervention might have spared lives, it can seek to reform the method by which it prosecutes those most responsible, making tribunals significant for victims while still maintaining international standards. I begin with an overview of applicable international law.

II. INTERNATIONAL STANDARDS

A. UN Declarations

On November 29, 1985, the General Assembly of the United Nations adopted the *Declaration of Basic Principles for Justice for Victims of Crime and Abuse of Power.*[7] The Declaration affirmed the international community's commitment to the fact that all victims "are entitled to access to the mechanisms of justice and to prompt redress, as provided for by national legislation, for the harm that they have suffered."[8] The Declaration states that:

> The responsiveness of judicial and administrative processes to the needs of victims should be facilitated by:
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> (a) Informing victims of their role and the scope, timing and progress of the proceedings and of the disposition of their cases, especially where serious crimes are involved and where they have requested such information;

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[7] Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, G.A. Res. 40/34, U.N. Doc. A/CONF.121/22/Rev.1 (Nov. 3, 1985), *available at* http://www.unhchr.ch/html/menu3/b/h_comp49.htm.

[8] *Id.* para. 4.

> (b) Allowing the views and concerns of victims to be presented and considered at appropriate stages of the proceedings where their personal interests are affected, without prejudice to the accused and consistent with the relevant national criminal justice system;
>
> (c) Providing proper assistance to victims throughout the legal process;
>
> (d) Taking measures to minimize inconvenience to victims, protect their privacy, when necessary, and ensure their safety, as well as that of their families and witnesses on their behalf, from intimidation and retaliation;
>
> (e) Avoiding unnecessary delay in the disposition of cases and the execution of orders or decrees granting awards to victims.[9]

These same principles were reaffirmed on December 16, 2005 with the adoption of the *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*,[10] which imposes an obligation on states to provide victims with "effective and prompt access to justice."[11] While neither of these documents is a binding treaty, the principles they reflect represent evolving standards in international criminal law.

B. Past Practices: Victim Participation at the Ad Hoc Tribunals and the ICC

The primary purpose of international war crimes tribunals is to help "end[] impunity for crimes against the peace and security of mankind."[12] These tribunals often seek both to establish the truth about a particular historical event and to mete out appropriate punishment, which in turn can bring some sense of satisfaction to victims.[13] Achieving this requires that victims play a substantial role, as they are often the best sources of information in developing the historical record at trial, and have the greatest stake in seeing that the outcome

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[9] *Id.* para. 6.

[10] Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, G.A. Res. 60/147, U.N. Doc. A/RES/60/147 (2006), *available at* http://www2.ohchr.org/english/law/remedy.htm [hereinafter Basic Principles and Guidelines].

[11] *Id.* para. I(2)(b).

[12] Bert Swart, *Internationalized Courts and Substantive Criminal Law*, *in* INTERNATIONALIZED CRIMINAL COURTS 292 (Ceasare P. R. Romano et. al. eds., 2004).

[13] Ivan Simonovic, *Attitudes and Types of Reaction Toward Past War Crimes and Human Rights Abuses*, 29 YALE J. INT'L L. 343 (2004), *in* INTERNATIONAL CRIMINAL LAW AND ITS ENFORCEMENT: CASES & MATERIALS 4 (Beth Van Schaack & Ronal C. Slye eds., 2007).

is fair and just. Indeed, the trend in international law is towards recognizing the rights of victims to seek reparations and remedies for violations of human rights and humanitarian law,[14] though no war crimes tribunal has ever gone as far as the ECCC in allowing victim participation.

Neither the ICTY nor the ICTR, the two ad hoc war crimes tribunals established by the UN, allow victims to participate as anything more than witnesses for the prosecution.[15] Both of these tribunals relegate victims who seek reparations to the domestic courts, specifically refusing to allow them a more far-reaching role in the international criminal prosecution.[16] This limited role cannot fully establish the historical record, and often leaves victims feeling unsatisfied. The ICC, while offering significantly more to victims than previous tribunals, still falls far short of what was proposed for the Cambodian tribunal. The ICC consults victims during the investigation of crimes,[17] and it has created a special Victims Unit within the court, an Office of Public Counsel for Victims, and a Trust Fund for Victims.[18] However, the ICC requires victims to constantly re-articulate the ways in which the particular legal issue at hand impacts their personal interests, thus limiting their role and perpetuating an impression that, while these trials may be *about* victims, they are not truly *for* them.[19] For all three of these tribunals, the main vehicle for incentivizing victim participation as witnesses has been the use of procedures and protections such as *in camera* hearings and victims' protection units.[20] While this approach has met with some success, it may be insufficient to reach more reluctant witnesses who do not feel that international prosecutors truly represent their needs or concerns. The civil party system, on the other hand, provides an array of procedural advantages and protections that benefit both victims and the court itself.

1. "Farming Out" victims' claims: The ad hoc tribunals

Victims seeking personal justice at the ICTR and the ICTY are afforded very little opportunity to participate in the proceedings. Rule 106,[21] common to the

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[14] Bassiouni, *supra* note 1, at 203.

[15] *See id.* at 242-43.

[16] *See infra* Part IIB1 ("Farming Out"), and Rule 106, common to both tribunals.

[17] Bassiouni, *supra* note 1, at 245.

[18] *See id.*; *see also* ICC, Frequently Asked Questions, http://www.icc-cpi.int/Menus/ICC/Structure+of+the+Court/Victims/Office+of+Public+Counsel+for+Victims/Frequently+Asked+Questions.htm (last visited Apr. 7, 2009) (providing more information on the legal representation of Victims at the ICC).

[19] Prosecutor v. Dyilo (Appeal), *supra* note 3, P 13.

[20] *See, e.g.*, Rome Statute, *supra* note 2, art. 68.

[21] ICTR, RULES OF PROCEDURE AND EVIDENCE, Rule 106, *as amended* Mar. 14, 2008, *available at* http://www.ictr.org/ENGLISH/rules/080314/080314.pdf; ICTY, RULES OF

rules of procedure for both tribunals, allows a victim, or persons claiming through the victim, to bring an action for compensation in the *national* courts, but not the tribunal itself.[22] This right, of course, is contingent on the assumption that national legislation exists to give standing to the victim and provide a civil remedy.[23] The President of the ICTY ended any speculation that victims might be allowed to bring their own claims in the Hague when he proposed that the UN Security Council establish a separate "claims commission," which would provide "a method of compensation" for victims of crimes in the former Yugoslavia.[24] This effectively stifled debate on whether proceedings before the tribunal itself would be extended to hear the claims of and grant compensation to victims. In the ICTR, judges dealt with the issue by explicitly rejecting the suggestion that the tribunal's statute be amended to provide a means of redress to victims of Rwanda's genocide.[25]

Commentators have noted that the approach taken by the ICTY and the ICTR of leaving the issue of reparations to domestic courts has been ineffective in meeting victims' needs.[26] Both the former Yugoslavia and Rwanda were recent war zones, and their domestic court systems were in no condition to handle victims' claims.[27] Cambodia, which has only recently begun to emerge from decades of civil war, faces many of the same issues. However, it is hoped that the inclusion of victims as civil parties at the ECCC will provide victims with a forum for their claims while the aging leaders of the Khmer Rouge remain alive.

2. *The ICC: Getting victims closer to the inside*

Because of the weakness of the domestic courts in Rwanda and the former Yugoslavia, the two ad hoc tribunals did little more than pay lip service to victims' rights. The ICC, on the other hand, has taken a far more robust approach. This is especially evident towards the end of a trial, where victims are allowed to initiate hearings on the question of reparations.[28] At these hearings, victims can be represented by counsel, who are allowed to question

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PROCEDURE AND EVIDENCE, Rule 106, *as amended* Nov. 4, 2008, *available at* http://www.icty.org/x/file/Legal%20Library/Rules_procedure_evidence/IT032_Rev42_en.pdf.

[22] Bassiouni, *supra* note 1, at 242.

[23] *Id.*

[24] *Id.* at 243 n.204.

[25] *Id.*

[26] *See id.* at 242 ("[T]he structure of the tribunals pre-supposes individual access to national courts on the part of individual victims and leaves the ultimate decision on whether to provide compensation to a victim to national justice systems. In post-war Yugoslavia and Rwanda, domestic courts were ill-prepared to handle such cases.").

[27] *Id.* at 243.

[28] *See* Rome Statute, *supra* note 2, art. 75.

witnesses, experts and the convicted person.[29] The ICC's rules require the Registrar to inform victims of this right "insofar as practicable,"[30] and to take "all the necessary measures to give adequate publicity of the reparation proceedings."[31] While these rules greatly expand upon the rights available at the ICTY and the ICTR, the rights of victims are far more limited during the rest of the proceedings.

Article 68(3) of the Rome Statute of the International Criminal Court (Rome Statute), allows the views of victims to be considered where their "personal interests" are affected, and "at stages of the proceedings determined to be appropriate by the Court."[32] Such stages include not only reparations, but also the decision to authorize a prosecutorial investigation, which allows the victim to assist the court in deciding whether there is sufficient evidence to warrant a prosecution.[33]

However, a determination that a victim qualifies under Article 68(3) does not guarantee victims a meaningful right to participate in the trial itself.[34] Unlike the prosecution or defense, the ICC rules require victims' lawyers to apply for permission to question witnesses.[35] The chamber can then require that victims' questions be submitted in advance and shared with the prosecution and the defense.[36] The court may also choose to limit the manner and order in which victims may present these questions.[37] Most strikingly, the court also has the right, "if it considers it appropriate," to "put the question to the witness, expert or accused, on behalf of the victim's legal representative."[38] As a result, victims become even more distant from the proceedings. While it is one thing to accept that a victim's lawyer may have the same perspective and motivation in posing questions as the victim herself, it is quite another to ascribe such motivation to the court. In effect, the ICC rules provide a mechanism for

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[29] Bassiouni, *supra* note 1, at 244 n.214; *see also* INTERNATIONAL CRIMINAL COURT RULES OF PROCEDURE AND EVIDENCE, R. 143, Sept. 3-10, ICC-ASP/1/3, *available at* http://www.amicc.org/docs/Rules_of_Proc_and_Evid_07 0704-EN.pdf [hereinafter ICC RULES OF PROCEDURE AND EVIDENCE] (allowing hearings to be initiated by victims or their representative); *Id.* R. 93(4) (allowing victim's representative to question witnesses, experts, and the accused).

[30] ICC RULES OF PROCEDURE AND EVIDENCE, *supra* note 29, R. 96; *see also id.* R. 16(2)(a) ("[T]he Registrar shall be responsible for . . . : (a) informing them of their rights under the Statute and the Rules, and of the exercise, function, and availability of the Victims and Witnesses Unit.").

[31] *Id.* R. 16(2)(a).

[32] Rome Statute, *supra* note 2, art. 68(3).

[33] *See id.* art. 57(d).

[34] Prosecutor v. Dyilo (Appeal), *supra* note 3, PP 12-13.

[35] ICC RULES OF PROCEDURE AND EVIDENCE, *supra* note 29, R. 91(3)(a).

[36] *Id.* R. 91(3)(b).

[37] *Id.*

[38] *Id.*

filtering and sanitizing victims' participation in the interest of justice, rather than for facilitating justice in the interest of victims.

Victims' rights at the ICC are further limited with respect to proceedings in the appellate chambers. Victims wishing to participate in appeals must request permission from the court and articulate how the particular legal issue being appealed affects their interests.[39] As discussed below, this is precisely the approach urged by Nuon Chea's defense team in opposing victim participation at the ECCC. This approach can seriously curtail participation, since procedural issues may not be held to have a sufficient impact on a victim's personal interest. The result is an on again, off again model of participation, which may prevent victims from feeling a sense of continuity and connection to the proceedings.

The stage at which victims receive the most rights at the ICC comes after the guilt of accused has already been decided. Following the trial, Article 75 of the Rome Statute states that victims may, at the court's discretion, be heard on the matter of reparations.[40] While the court retains absolute discretion to "determine the scope and extent of any damage, loss and injury to, or in respect of, victims,"[41] the statute states that, before any order is made, the court "may invite and shall take account of representations from or on behalf of the convicted person, victims, other interested persons or interested States."[42] If permission is granted, victims' counsel may question the accused.[43] Because the hearing takes place following conviction, however, such questioning is strictly limited to issues that bear on reparations, not on culpability.[44]

Reparations hearings give victims a chance to present their case in front of the same judges who convicted the accused, in the same chambers, and as an ancillary part of the same proceedings as the criminal trial. This offers the sort of procedural fairness unlikely to be available in the domestic courts. It also gives the victim an opportunity to present his or her case before those most intimately familiar with the facts of the case, having spent months, if not years, listening to the evidence. On the other hand, because the rules severely limit

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[39] Prosecutor v. Dyilo (Appeal), *supra* note 3, PP 12-13. These criteria have been affirmed in subsequent decisions. *See* Prosecutor v. Dyilo, Case No. ICC-01/04-01/06 OA 12, Decision on the Participation of Victims in the Appeal, PP 7-8 (Aug. 6, 2008), *available at* http://www.icc-cpi.int/iccdocs/doc/doc541561.PDF [hereinafter Prosecutor v. Dyilo (Victim Participation)].

[40] Rome Statute, *supra* note 2, art. 75(3).

[41] *Id.* art. 75(1).

[42] *Id.* art. 75(3).

[43] ICC RULES OF PROCEDURE AND EVIDENCE, *supra* note 29, R. 91(4) (removing restrictions placed on victims' counsel at all other stages of the proceedings).

[44] *See id.*

victims' roles in securing a conviction, victims may never have an opportunity to exercise the expanded rights available to them in reparations proceedings.[45]

The ICC was initially criticized for using the terms "party" and "participant" interchangeably throughout the statute, creating uncertainty about what role victims are meant to play in the tribunal proceedings.[46] If he or she is deemed a "participant," a victim in the ICC would have only the procedural rights discussed above, which are specified in the statute.[47] If deemed a "party," he or she would gain a wide array of other procedural rights similar to those of the prosecution and defense.[48] As will be addressed throughout this article, these particular shortcomings and ambiguities have been largely avoided in the Cambodian tribunal, thanks to the framework of that country's civil law system.

Scholars have already noted that civil parties could play a decisive role in ensuring the fairness and impartiality of the proceedings at the ECCC, thus adding to the tribunal's perceived legitimacy, both among the Cambodian people and in the international community.[49] Some commentators caution, however, against allowing victims too great a role in areas that are within the traditional purview of the prosecution.[50] At the ICC, where the role of victims is much more limited, concerns have already been raised that further expansion of these procedural rights at the ICC would be "in contradiction with the role and prerogatives of the Office of the Prosecutor."[51] Noting that "the ICC Statute's provisions and the Rules of Procedure are very detailed as to the role of the Office of the Prosecutor," scholar M. Cherif Bassiouni, has argued that "it would be highly inconsistent with the goals and purposes of these provisions to allow the victim a parallel role or one that could be in conflict with the Office of the Prosecutor."[52]

Such interference with prosecutorial prerogative has been a mostly theoretical matter at the ICC, given the requirement that victims justify their right to participate at nearly every turn.[53] The ECCC seeks to avoid this conflict entirely, by according qualified victims the status of "parties," rather than "participants," and by drawing on a well-established tradition that has allowed such proceedings for centuries to no ill effect. In discussing the advantages that this system offers to international criminal proceedings, I begin

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[45] *See* Rome Statute, *supra* note 2, art. 75(2) (requiring conviction before commencement of reparations proceedings).

[46] Bassiouni, *supra* note 1, at 245.

[47] *Id.* at 245-46.

[48] *Id.*

[49] *See generally* David Boyle, *The Rights of Victims: Participation, Representation, Protection, Reparation*, 4 J. INT'L CRIM. JUST. 307 (2006).

[50] Bassiouni, *supra* note 1, at 246.

[51] *Id.*

[52] *Id.*

[53] *See generally* Prosecutor v. Dyilo (Appeal), *supra* note 3, PP 12-13.

with an overview of the ECCC and the applicable law, and then offer an analysis of how these civil law provisions have been put into effect at the Cambodian tribunal.

III. THE EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA: EXPANSION ON PAPER

A. The Domestic Judicial System

The Cambodian domestic legal system has long been regarded as ineffective and susceptible to political pressures.[54] Commentators have noted that the judiciary is "still dominated by judges appointed by the communist party and by rules and procedures befitting the communist regime."[55] Judicial review is still an "intriguing" term to Cambodian judges, who "often want to know what it means,"[56] and it is common practice for judges to confuse the standards applicable in civil versus criminal proceedings.[57] Most former colonies inherited from the colonial power a basic code of laws and a system of administration that was then modified and built upon as the newly independent nation grew and evolved.[58] The brutality and relentlessness with which Pol Pot and the Khmer Rouge destroyed the Cambodian judiciary, however, essentially wiped out the nation's legal establishment in only four years. The fledgling courts that existed when the country became independent were established by the Vietnamese, who ruled the country from 1979 until 1992.[59] These followed a socialist model of justice that was largely based on one-party autocratic rule.[60]

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[54] Basil Fernando & Terrance Wickremasinghe, *Justice in Name Only: No Genuine Courts*, *in* PROBLEMS FACING THE CAMBODIAN LEGAL SYSTEM 89, 91 (Basil Fernando ed., 1998) ("Judges exercise their discretion, not judicially, but arbitrarily, acting on prejudices, preset opinions, extraneous facts and circumstances not established through evidence heard in court. This is more evident in cases where a political element is present and where parties involved in the trial have political affiliations.").

[55] Basil Fernando, *The Statement and Recommendations of the Participants*, *in* PROBLEMS FACING THE CAMBODIAN LEGAL SYSTEM, *supra* note 54, at 1, 5.

[56] Basil Fernando, *The System of Trial Under the Vietnamese-Khmer Model (1981-1993)*, *in* PROBLEMS FACING THE CAMBODIAN LEGAL SYSTEM, *supra* note 54, at 59.

[57] Fernando, *supra* note 55, at 29.

[58] Basil Fernando, *Understanding Cambodia as a Post-Revolutionary Society*, *in* PROBLEMS FACING THE CAMBODIAN LEGAL SYSTEM, *supra* note 54, at 54.

[59] Fernando & Wickremasinghe, *supra* note 54, at 90 ("In the 1980s when Vietnamese experts introduced the current system of courts to Cambodia, they acted on the basis of their experience and training, which was naturally based on the socialist law. It is quite well known that Vietnamese experts were trained in Eastern Europe.").

[60] *Id.*

As a result of this history, the Cambodian legal system lacks most of the procedural safeguards required under international law.[61] The nation's only judges were trained under the Vietnamese system, which failed to include a mechanism for appeals,[62] and it is widely believed that Cambodia's courts are little more than an arm of the executive branch.[63] In fact, in a move that proves that UN diplomats are not without a sense of irony, the General Assembly passed a Resolution on December 18, 2002 expressing concern about "the functioning of the judiciary [in Cambodia] resulting from . . . corruption and interference by the executive with the independence of the judiciary."[64] This was the same day that it approved the Law on the Establishment of the Extraordinary Chambers.[65]

B. The Evolution of the Extraordinary Chambers

1. Early negotiations

Many legal scholars who studied the atrocities of the Khmer Rouge found prima facie evidence that those most responsible for the killings could be charged with war crimes, genocide, and other crimes against humanity.[66] The first efforts to try the Khmer Rouge on a large scale, with international assistance, began on April 11, 1994, with the adoption by the UN Commission on Human Rights of Resolution 1997/49.[67] The Resolution requested that the Secretary General "examine any request . . . for assistance in responding to past serious violations of Cambodian and international law as a means of bringing about national reconciliation, strengthening democracy and addressing the issue of individual accountability."[68] Initial proposals included creating a "Truth

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[61] *Id.*

[62] *Id.* at 92 ("Even before 1993 its power was limited to the reading of case records after trials. The only action it could take after reading a case record was to request a court to hear a case again. In reality the purpose of reading the judgement [sic] of the courts was to ensure that the courts function in a politically correct manner, rather than to ensure an appeal process for parties who may want to show that the original court has arrived at a wrong judgement [sic]. Even since 1993 the Supreme Court has not exercised an appellate function.").

[63] *Id.* at 91.

[64] G.A. Res. 57/225, ¶ II(2), U.N. Doc. A/RES/57/225 (Dec. 18, 2002); *see* Daphna Shraga, *The Second Generation UN-Based Tribunals: A Diversity of Mixed Jurisdictions*, *in* INTERNATIONALIZED CRIMINAL COURTS, *supra* note 12, at 15, 18.

[65] G.A. Res. 57/225, *supra* note 64.

[66] Shraga, *supra* note 64, at 18.

[67] *See* Yale University, Cambodian Genocide Program, Chronology, 1994-2004, http://www.yale.edu/cgp/chron_v3.html (last visited Mar. 5, 2009) [hereinafter Cambodian Genocide Program] (providing a detailed timeline of events leading to the creation of the ECCC).

[68] U.N. High Commissioner for Human Rights, Situation of Human Rights in Cambodia,

Commission" similar to those used in South Africa, since most Cambodians have expressed, not a desire for retributive justice, but rather for answers to the question of why the Khmer Rouge inflicted such suffering on its own people.[69]

The political reality of Cambodia, however, makes such a commission impossible. Many members of the sitting government were, at one time or another, associated with the Khmer Rouge, and commentators have noted that it appears that "there are elements of Cambodia's political leadership who believe there are some truths that may be better left unsa*id.*"[70] As such, negotiations between the UN and Cambodia proceeded on the assumption of creating a more traditional, retributive model of justice aimed at the most egregious offenders. Despite these problematic realities, the underlying desire of the country's citizens to be more actively involved in seeking justice remained strong.

In July of 1998, the UN assembled a group of experts to assess the feasibility of bringing Khmer Rouge leaders to justice.[71] The group published its recommendations on February 18, 1999.[72] Unlike the hybrid tribunal that has since emerged, they called for the creation of an ad hoc tribunal modeled almost entirely on the ICTY.[73] The Cambodian Government rejected this proposal, insisting on a court situated within the territory of Cambodia, based on Cambodian law, and with a large role for Cambodian nationals, especially as judges and co-prosecutors.[74] Four years of protracted negotiations between the UN and the Cambodian Royal Government resulted in an "internationalized" court based in Phnom Penh and grounded in Cambodia's civil law code.[75] The expanded role of victims at the ECCC is a direct result of this hybrid structure.[76]

2. *Founding documents*

One of the most contentious points of negotiation was the balance of Cambodian-to-international judges at each level of the Tribunal. In 2001, the Cambodian government passed the *Law on the Establishment of the Extraordinary Chambers*[77] (the Law), which summarily settled the dispute

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U.N. Hum. Rts. Comm'n Res. 1997/49, ¶ 12 (Apr. 11, 1997).

[69] Craig Etcheson, *The Politics of Genocide Justice in Cambodia*, *in* INTERNATIONALIZED CRIMINAL COURTS, *supra* note 12, at 181, 189.

[70] *Id.* at 190.

[71] Cambodian Genocide Program, *supra* note 67.

[72] Etcheson, *supra* note 69, at 199.

[73] *Id.*

[74] *Id.*

[75] *See generally id.*

[76] Boyle, *supra* note 49, at 308.

[77] LAW ON THE ESTABLISHMENT OF EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA FOR THE PROSECUTION OF CRIMES COMMITTED DURING THE PERIOD OF DEMOCRATIC KAMPUCHEA

about the ratio of judges.[78] Unlike in the previous tribunals established for Yugoslavia and Rwanda, where international judges always comprised a majority, the Law gave Cambodian judges a majority at every level of the tribunal.[79] This imbalance raised considerable concern at the UN, which formally withdrew from negotiations on February 8, 2002.[80] Bowing to political pressure, however, the UN resumed negotiations in the spring of 2003, and the Agreement establishing the ECCC (the Agreement) was adopted by the United Nations on May 22, 2003, and signed by the parties two weeks later on June 6, 2003.[81] The ECCC was granted jurisdiction over senior leaders of the Khmer Rouge and "those who were most responsible for the crimes and serious violations of Cambodian penal law, international humanitarian law and custom, and international conventions recognized by Cambodia, that were committed during the period from 17 April 1975," the day that the Khmer Rouge took Phnom Penh, "to 6 January 1979," the day that they were driven out by Vietnamese forces.[82] Both the Agreement and the Law mentioned involving victims at trial, but the extent and contours of that involvement did not become clear until the passage on the Internal Rules of the ECCC on June 12, 2007.[83]

Thanks to immense lobbying by victims' advocates and an increased understanding of the role of civil parties, each subsequent document made greater reference to the role of victims, establishing procedural guidelines for their active participation throughout the trial.[84] As the role of victims became clearer and more pronounced, the potential for somewhat contradictory results emerged. On the one hand, victim participation may help ensure that prosecutions will be thorough, despite any political pressures to conduct a more

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(2004), *available at* http://www.eccc.gov.kh/english/cabinet/law/4/KR_Law_as_amended_27_Oct_2004_Eng.pdf [hereinafter ECCC LAW].

[78] Ernestine E. Meijer, *The Extraordinary Chambers in the Courts of Cambodia for Prosecuting Crimes Committed by the Khmer Rouge: Jurisdiction, Organization, and Procedure of an Internationalized National Tribunal*, *in* INTERNATIONALIZED CRIMINAL COURTS, *supra* note 12, at 206-07.

[79] ECCC LAW, *supra* note 77, art. 9.

[80] Meijer, *supra* note 78, at 208.

[81] *Id.*

[82] *Id.* In what is surely not a coincidence, the temporal jurisdiction of the ECCC explicitly precludes the possibility of bringing any charges based upon the American bombing campaign conducted under President Nixon. ECCC LAW, *supra* note 77, art. 3 (limiting the jurisdiction to crimes committed from April 17, 1975 to January 6, 1979).

[83] ECCC INTERNAL RULES, *available at* http://www.eccc.gov.kh/english/cabinet/files/irs/ECCC_IRs_English_2007_06_12.pdf.

[84] The Agreement refers, in Article 23, to the ECCC's responsibility to offer protection to victims and witnesses. The ECCC Law does the same in Article 33, and also establishes procedures whereby the co-prosecutors can question victims (art. 23) and victims can appeal an unfavorable verdict at the trial level (art. 36). It is the Internal Rules, however, that truly flesh out the role of victims in the ECCC. *See, e.g.*, *id.* R. 12.

cursory investigation. On the other hand, this participation may present significant challenges to the ECCC's ability to prosecute the accused in a way that comports with international standards of fairness.

C. Victims as Parties: Cambodia's Expansion of Victims' Roles

1. An overview of civil law and victims' participation: Victims v. Civil Parties

As a hybrid court, the Extraordinary Chambers are the first international tribunal to be based entirely on the civil law system. In contrast to common law countries, where the prosecutor, as the representative of the state, both gathers evidence and tries the case in court, civil law creates a distinction between these functions. Responsibility for the former is given to an investigating judge—— a theoretically neutral figure whose only interest lies in uncovering as much evidence as possible, regardless of whether it is incriminating or exculpatory.[85] This is the basic model followed at the ECCC. Because of the court's hybrid nature, however, each of these positions is duplicated: there is a Cambodian Co-Prosecutor and an International Co-Prosecutor, as well as a Cambodian Co-Investigating Judge and an International Co-Investigating Judge.[86]

The Co-Prosecutors are responsible for considering the initial evidence against the accused, but may only go so far as to establish whether there is enough such evidence to *charge* the person.[87] Their investigation does not establish whether there is enough evidence to potentially support a conviction.[88] It is at this stage that complaints from victims are first used at the ECCC.[89] For example, general statements of what victims suffered from 1975-1979 may lead the Co-Prosecutors to look at villages or incidents that were not initially considered.[90] Since the Co-Prosecutors only look for general information at this stage, there is less of a requirement of specificity for victim statements than for civil party applicants. Civil party applications must contain enough detail to connect them personally to the investigation. The lower threshold during the investigatory stage creates an incentive for victims to come forward, rather than relying solely on the prosecution, which cannot possibly investigate all the

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[85] JOHN HENRY MERRYMAN & ROGELIO PÉREZ-PERDOMO, THE CIVIL LAW TRADITION: AN INTRODUCTION TO THE LEGAL SYSTEMS OF EUROPE AND LATIN AMERICA 130-31 (3d ed. 2007).

[86] *See* ECCC LAW, *supra* note 77, arts. 16, 23.

[87] ECCC INTERNAL RULES, *supra* note 83, R. 53 ("If the Co-Prosecutors have reason to believe that crimes within the jurisdiction of the ECCC have been committed, they shall open a judicial investigation by sending an Introductory Statement to the Co-Investigating Judges.").

[88] MERRYMAN & PÉREZ-PERDOMO, *supra* note 85, at 130-31.

[89] ECCC INTERNAL RULES, *supra* note 83, R. 12(2)(c).

[90] *Id.* R. 49(2).

crimes of the Khmer Rouge's top leadership.[91] Although some contain significant detail, acceptable complaints may amount essentially to a statement that "a massacre happened in my village; the Court should come look here."[92] When the Co-Prosecutors conclude that they have enough evidence to charge the accused person with a crime, they prepare an "Introductory Submission," similar to an indictment, outlining the crimes with which the accused person is charged.[93] The Introductory Submission makes note of the dates and locations of the alleged crimes, but does not provide a substantial evidentiary basis on which to determine the guilt or innocence of the charged person. At this point, the case is essentially "handed over" to the Co-Investigating Judges, and the Co-Prosecutors do not regain control until the case is ready to go to trial.[94]

It is the introductory submission that creates the crucial distinction between victims and civil parties. Anyone who suffered under the Khmer Rouge may submit complaints to the Co-Prosecutors, who use this information in conducting their investigation.[95] On the other hand, only those victims whose experiences relate directly to one of the crimes listed in the introductory submission may apply to be joined as civil parties.[96] These applications are made to the Office of the Co-Investigating Judges (OCIJ), not the Co-Prosecutors, and they afford the civil party a host of procedural rights if he or she is accepted.

Under the Internal Rules, a civil party is defined as "a victim whose application to become a Civil Party has been accepted by the Co-Investigating Judges or the Trial Chamber in accordance with these [Internal Rules]."[97] The only requirements for application are that a victim's injury must be "physical, material or psychological," and "the direct consequence of the offence, personal and have actually come into being."[98] The Rules do not establish criteria for proving the injury; they require only "sufficient information to allow verification" that the victim qualifies as a "Civil Party."[99] There is also no clarification of what is meant by "sufficient information," and there is a danger that this could prove to be a roadblock if international and Cambodian judges are unable to agree on whether an applicant's petition is "sufficient."

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[91] Boyle, *supra* note 49, at 310.

[92] ECCC, PRACTICE DIRECTION ON VICTIM PARTICIPATION, art. 2.3 (2007), *available at* http://www.eccc.gov.kh/english/cabinet/files/pd/PD_on_victim_participation_eng.pdf [hereinafter PRACTICE DIRECTION].

[93] ECCC INTERNAL RULES, *supra* note 83, R. 53.

[94] *Id.* R. 55(2) ("The Co-Investigating Judges shall only investigate the facts set out in an Introductory Submission or a Supplementary Submission.").

[95] *Id.* R. 49.

[96] *Id.* R. 23(2).

[97] *Id.* R. 69.

[98] *Id.* R. 23(2)(a); *see also id.* R. 23(2)(b).

[99] *Id.* R. 23(5).

Experiences at the ICC have shown the impracticability of requiring victims to provide extensive documentary evidence of their injuries, since the very crimes that they suffered may also have deprived them of the ability to provide such evidence. In the early years of the ICC, the court required that all victims provide photographic identification before they could apply to participate.[100] This requirement, while perfectly feasible in the abstract, proved nearly impossible to uphold, as many victims were living in refugee camps in Chad and Northern Uganda, hours from the nearest government office where they could obtain such identification.[101] Additionally, due to instability in the region, many of these offices kept only sporadic hours, which further exacerbated the difficulty of complying with the identification requirement.[102] The ICC was faced with a choice between adhering to a more rigid identification requirement and adapting its procedures to meet the needs of the victims of mass crimes who were within its jurisdiction. The same seems to be true in Cambodia. Although the country is relatively peaceful thirty years after the fall of the Khmer Rouge, the crimes of the regime and the passage of time mean that much of the evidence that could serve to link individual victims to the crimes in the Introductory Submission may have been lost or destroyed. This may explain why the court adopted a more flexible evidentiary standard in determining the admissibility of civil party applications.

Victims at the ECCC must also provide a description of the alleged crime and "any evidence of the injury suffered or tending to show the guilt of the alleged perpetrator."[103] The Rules explicitly state that a civil party need not be a resident or national of Cambodia,[104] allowing for the potential participation of the Cambodian diaspora community and those who suffered under Pol Pot's incursion into North Vietnam in late 1978. This low threshold may succeed in bringing forward victims and evidence that might otherwise have remained unknown.

During the investigation, all parties to the case, namely the Co-Prosecutors, defense, and civil parties, must formally submit their requests to gather evidence, question witnesses or retain experts to the Co-Investigating Judges, who then rule on whether to grant the request.[105] No party may undertake these functions independently, and evidence that was not gathered and approved by the investigating judges cannot be used at trial.[106] Once the investigation is

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[100] REDRESS, VICTIMS AND THE ICC: STILL ROOM FOR IMPROVEMENT 3 (2008), *available at* http://redress.org/reports/ASP%20Paper%20Draft%20Nov08.pdf.

[101] *Id.*

[102] *Id.*

[103] *Id.*

[104] ECCC INTERNAL RULES, *supra* note 83, R. 23(2).

[105] *Id.* R. 55(10).

[106] *See id.* R. 53, 55, 66, 70.

complete, the Co-Investigating Judges issue a Closing Order, after which the case is "handed back" to the Co-Prosecutors, who may use only the evidence gathered by the Co-Investigating Judges in making their case before the court.[107]

To help victims exercise their rights, Rule 12 of the Internal Rules created the Victims Unit, which is broadly charged with facilitating "the participation of Victims" in the tribunal.[108] While not explicitly stated, this seems to delegate to the Unit the ECCC's responsibility to "ensure that victims are kept informed and that their rights are respected throughout the proceedings."[109] The Unit is responsible for maintaining and making available to victims a list of foreign and domestic lawyers "who wish to represent" them,[110] taking applications from "Victims' Associations,"[111] and helping victims to lodge complaints with the Co-Prosecutors[112] or civil party applications with the OCIJ.[113]

Based on the sheer number of victims of the Khmer Rouge, some commentators have expressed concern that allowing the participation of civil parties could clog the procedural mechanisms of the ECCC and reduce its effectiveness.[114] Those who favor active victim participation point out, however, that "[i]t would appear illogical . . . to exclude the victims of the most serious mass crimes simply because there are too many of them."[115] To address this possibility, the Victims Unit is authorized to assist civil parties in organizing themselves into "Victims Associations."[116] These are similar to a class-action configuration, with groups of civil parties being represented by either individual lawyers or a foreign-based organization.[117] Such collective representation may help reduce some of the delay that could result from thousands of individual civil parties each asserting their respective rights under the Rules.

2. *General advantages for civil parties*

Civil parties are entitled to many more protections than they would be as victims. Victims, for example, may be interviewed by the Co-Investigating

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[107] *Id.* R. 66; *see also id.* R. 67.
[108] *Id.* R. 12(2)(g).
[109] *Id.* R. 21(1)(c).
[110] *Id.* R. 12(2)(a), (e).
[111] *Id.* R. 12(2)(b).
[112] *Id.* R. 12(2)(c).
[113] *Id.* R. 12(2)(d).
[114] Boyle, *supra* note 49, at 309.
[115] *Id.*
[116] ECCC INTERNAL RULES, *supra* note 83, R. 12(2)(c).
[117] *Id.* R. 23(8).

Judges,[118] but they do not enjoy a guaranteed right to counsel at such interviews.[119] The Rules only describe who may *not* be present at victim interviews, mandating that the interviews take place "in the absence of the Charged Person, any other party, or their lawyers."[120] The investigatory process is likely to be foreign and intimidating to victims, most of whom have had little exposure to the justice system. They may be reluctant to speak without a lawyer present, especially given the inquisitorial nature of Cambodian investigators under the Khmer Rouge and the Vietnamese regimes.[121] Those who file as civil parties, on the other hand, enjoy the right to counsel during an interview,[122] which may help put the individual at ease. This would help ensure the reliability of his or her testimony and benefit the investigation as a whole.

Anecdotal evidence from my own experience confirms the distrust that many Cambodians feel for the court investigators. As part of an outreach activity with the Khmer Institute for Democracy (KID) in December, 2007, my colleagues and I traveled to several towns in the southeastern part of the country, near the Vietnam border. Initially, the villagers expressed great skepticism about our mission. Before anyone would speak to us about their experiences under the Khmer Rouge, we first had to meet with village chiefs and other respected members of the community, who vouched for the KID representatives and assured villagers that we were part of an independent organization and not representatives of the court. It was only then that villagers would agree to speak with us.

An amicus curiae brief submitted by a coalition of Cambodian human rights NGOs also emphasized this skepticism of authority figures.[123] The brief cites a decision from the Pre-Trial Chamber (PTC) of the ECCC, which noted the "profound effect on the national psyche" of the Khmer Rouge Regime and pointed out that, as a result, "merely being questioned by authority figures would have been a threatening and coercive experience" for many Cambodians.[124] Providing a civil party with representation during interviews may go a long way towards assuaging victims' fears, increasing both participation and the OCIJ's access to evidence.[125]

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[118] *Id.* R. 55(5)(a).

[119] *Compare id.* R. 55(5)(a)(1), *with* R. 59.

[120] *Id.* R. 60(2).

[121] Basil Fernando, *Cambodia: The Courts and the Constitution—A Point of View*, *in* PROBLEMS FACING THE CAMBODIAN LEGAL SYSTEM, *supra* note 54, at 99.

[122] ECCC INTERNAL RULES, *supra* note 83, R. 59(2).

[123] Brief for Cambodian Human Rights Action Committee as Amicus Curiae Supporting Appellant at 4, Case Against Nuon Chea, No. 002/19-09-2007-ECCC/OCIJ (PTC06) (Dec. 13, 2007), *available at* http://www.eccc.gov.kh/english/cabinet/courtDoc/21/Amicus_chrac_on_appeal_by_Nuon_chea_C11_12_EN.pdf.

[124] *Id.*

[125] *See generally* PHUONG PHAM ET AL., SO WE WILL NEVER FORGET: A POPULATION-BASED

The Internal Rules provide that once a victim has joined as a civil party, he or she "can no longer be questioned as a simple witness in the same case and . . . may only be interviewed under the same conditions as a Charged Person or Accused."[126] As such, a civil party is entitled to five days' notice before an interview takes place, during which time his or her lawyer may consult the prosecution's case file.[127] No such provision is made for victims. Unlike victims, civil parties may not be questioned by the Judicial Police——the investigators who work for the OCIJ——but only by one of the investigating judges themselves.[128] These procedural protections aim to ensure that civil parties feel secure in presenting evidence to the Co-Investigating Judges without fear of coercion by either the court or other agents of the Cambodian government, some of whom have expressed frank opposition to the work of the tribunal.[129]

As under the civil law system, not only the civil parties themselves, but even their relatives enjoy procedural protections.[130] According to Rule 24(2), any relative of a civil party, including brother and sister in-laws and divorced spouses enjoy the privilege of being interviewed only by the Co-Investigating Judges and of testifying in court without having to take an oath.[131] While typical in a domestic regime, this is the first time such an exemption has ever been applied in an international tribunal, and it seems certain to have an impact on the legitimacy of the proceedings. By allowing the relatives of a civil party to testify without taking an oath, the tribunal risks casting a pall of doubt over the evidence of those who might be in the best position to know the truth. This is of particular concern, given the objections already raised by the defense that civil party participation is unfairly prejudicial to the charged person and violates equality of arms.[132]

SURVEY ON ATTITUDES ABOUT SOCIAL RECONSTRUCTION AND THE EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA 36 (2009), *available at* http://hrc.berkeley.edu/pdfs/So-We-Will-Never-Forget.pdf.

[126] ECCC INTERNAL RULES, *supra* note 83, R. 23(6)(A).

[127] *Id.* R. 59(1).

[128] *Id.* R. 62(3)(b).

[129] Etcheson, *supra* note 69, at 183, 184.

[130] ECCC INTERNAL RULES, *supra* note 83.

[131] *Id.* R. 24(2).

[132] Brief for Defendants, para. 27, Case Against Nuon Chea, No. 002/19-09-2007-ECCC/PTC (Feb. 22, 2008), *available at* http://www.eccc.gov.kh/english/cabinet/courtDoc/48/Submissions_by_Defence_lawyers_C11_45_EN.pdf.

3. Civil party rights during investigation

The Internal Rules state that a civil party's role is to "support[] the prosecution."[133] As discussed below, this has been challenged by lawyers for the defense as placing "an unjust burden on the accused to respond to a multiplicity of opponents."[134] Unless the Internal Rules are further defined and clarified by the PTC, however, this broad language poses a risk that civil parties may become or be perceived as the sort of "parallel role" that has been condemned by other tribunals.[135]

In practice, civil parties are afforded rights that go well beyond merely supporting the prosecution.[136] They enjoy a host of procedural rights during an investigation, and are entitled to appeal any decision to close the investigation without indicting the charged person.[137] In addition to being called as witnesses for the prosecution or the defense,[138] civil parties are also granted the right to present their own witnesses,[139] to examine and obtain copies of the case file,[140] and to question the accused directly.[141] Lawyers for a civil party are afforded the first opportunity to present closing statements at the conclusion of the trial, as well as to rebut the closing statement of the accused, although the accused always has the right to make the final statement.[142] As discussed below, these rights have been somewhat curtailed in recent months.[143] Nonetheless, civil parties still have considerable influence over the proceedings.

Once their applications are accepted by the Co-Investigating Judges, civil parties may appeal to the PTC if the OCIJ refuses to undertake a particular investigation.[144] A civil party may affirmatively request (1) that he or another witness be interviewed, (2) that a particular site be visited, (3) that the

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[133] ECCC INTERNAL RULES, *supra* note 83, R. 23(1)(A).

[134] Brief for Defendants, *supra* note 132, para. 29.

[135] Bassiouni, *supra* note 1, at 246.

[136] ECCC INTERNAL RULES, *supra* note 83, R. 23(1)(A).

[137] *Id.* R. 23(a); *Id.* R. 74(f).

[138] *Id.* R. 91.

[139] *Id.* R. 83.

[140] *Id.* R. 86.

[141] *Id.* R. 90.

[142] *Id.* R. 94.

[143] *See* Transcript of Oral Decision on the Civil Party's Request to Address the Court in Person, Case Against Nuon Chea, No. 002/19-09-2007-ECCC/OCIJ (PTCO3) (July 1, 2008) (Downing, J., dissenting), *available at* http://www.eccc.gov.kh/english/cabinet/courtDoc/89/Civil_Party_request_to_address_the_court_C22_I_54_EN.pdf ("After the co-rapporteurs have read their report, the Co-Prosecutors and the lawyers for the parties may present brief observations." (citing ECCC INTERNAL RULES, *supra* note 83, R. 77(10))).

[144] ECCC INTERNAL RULES, *supra* note 83, R. 24(4)(A).

prosecution collect certain evidence, and (4) that certain expert witnesses be retained.[145] If these requests are denied, the party may appeal.[146] In fact, every request to question witnesses, collect evidence, or order expertise that the civil party feels is necessary to his or her case is subject to appeal, even in situations where such evidence might not necessarily aid the goals of the prosecution.[147] While not ruling out the possibility of doing so, the Rules make no mention of consolidating such appeals, and the potential for delay when the Co-Investigating Judges refuse to comply with the wishes of a civil party seems considerable. This risk may help explain why other tribunals have chosen to restrain victim participation, despite the potential benefits.[148]

In cases where expert witnesses are used to assist in an investigation, a civil party has the right to request that additional experts be appointed when the first opinion proves unfavorable to his or her case.[149] A refusal to do so is also subject to appeal.[150] Thus, even if the OCIJ finds that there is not sufficient evidence to charge an accused person, a civil party who disagrees has the right to subject nearly every investigatory decision to appeal and judicial scrutiny. Civil parties can even request that the Co-Prosecutors summon witnesses who were not originally listed, and the Rules provide that the Co-Investigators must comply with the request.[151] While some may argue that this will slow down an already cumbersome process, victims' rights advocates view this as a great step forward, since such testimony could help to highlight issues that are of particular concern to victims, but which might not have been considered necessary as part of the Co-Prosecutors' case-in-chief.

One of the appeals provisions poses a real threat to judicial efficiency, however, and should be amended. As part of the negotiations between the UN and the Cambodian Royal Government, elaborate procedures were devised to deal with a situation where the Co-Investigating Judges cannot agree about an aspect of the investigation.[152] Throughout the lengthy settlement process provided for in these situations, the Rules specify that the "action or decision" that is "the subject of the disagreement *shall be executed* . . . ."[153] This is

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[145] *Id.* R. 59(5).

[146] *Id.*

[147] *Id.* R. 74(4).

[148] Contrast the limited opportunity for a Victim, under Art. 68(3) of the Rome Statute, to participate in the decision to investigate, but not in the investigation itself. *See generally supra* Part II(B)(2).

[149] ECCC INTERNAL RULES, *supra* note 83, R. 31(10).

[150] *Id.* R. 74(e); *see also id.* R. 31(10).

[151] *Id.* R. 79(5) (providing that the OCP "shall submit an additional list to the . . . Trial Chamber," which in turn "shall place such list on the case file and forward a copy of the list to the other parties").

[152] Meijer, *supra* note 78, at 220.

[153] ECCC INTERNAL RULES, *supra* note 83, R. 71(3) (emphasis added).

presumably designed to keep an investigation moving forward and prevent one of the Co-Investigating Judges from grinding the procedure to a halt for personal or political reasons. Thus, if the Co-Investigating Judges cannot agree on whether to take a particular action requested by one of the parties, the default rule is that it be taken and retroactively annulled if the PTC rules that it should not have been. For example, if the Co-Prosecutors want a witness interviewed and the Cambodian and international Co-Investigating Judges cannot agree whether to do so, the Rules mandate that the interview go forward, and that the information be disregarded if the PTC later rules that it should not have taken place. This balancing of interests promotes judicial efficiency while still allowing for oversight by the PTC.

If the subject of the dispute "would be open to appeal . . . by a Civil Party,"[154] however, "no action shall be taken with respect to the subject of the disagreement" for at least thirty days or until the Co-Investigating Judges either agree or the PTC issues a ruling.[155] Thus, a provision designed to prevent gridlock between the investigators may be rendered void if the same objection is raised by a civil party. Since both the prosecution and the defense are subject to the same rule, creating this exception for civil parties seems clearly to violate the principle of equality of arms.[156] The Rule should be amended to correct this disparity, especially since unnecessary delays caused by civil parties only fuel the arguments of those who wish to see victim participation curtailed. There is no reason to think that the interests of civil parties will not be as adequately protected by the same post-hoc review that is afforded to the prosecution and the defense, especially since civil parties have a right to be represented by counsel.

4. Civil parties during trial

In addition to having the right to call witnesses and present evidence, civil parties also benefit from the efforts of the Co-Prosecutors, since the Rules mandate that "[t]he Chambers shall not hand down judgment on a Civil Party action that is in contradiction with their judgment on public prosecution of the same case . . . ."[157] Thus, if the prosecution is successful in proving its charges, the civil party will also prevail. At the close of the trial, the chamber will rule on both the criminal matter and the civil claims. While it may not issue a

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[154] *Id.* R. 72(3)(a).

[155] *Id.* R. 71(3); *id.* R. 72(3).

[156] Civil Party's Repeated Attempts to Address Bench and Poor Management of Proceedings Force Worrying Precedent for Victim Participation Before the ECCC, http://ecccreparations.blogspot.com/2008/07/civil-partys-repeated-attempts-to.html (July 4, 2008, 12:05 EST) (describing oral arguments).

[157] ECCC INTERNAL RULES, *supra* note 83, R. 23(6).

decision that is inconsistent with its ruling in the criminal matter, "the Chamber may adjourn its decision on Civil Party claims to a new hearing"[158] if it considers this appropriate. The precise impact of such an adjournment is not described in the Rules, and it is unclear whether civil parties may appeal this decision without the consent of the Co-Prosecutors. Any judgment that concerns a civil party is subject to appeal,[159] but those concerning the guilt or innocence of the accused may only be had when the Co-Prosecutors also appeal.[160] This is one of the major modifications that the ECCC has made to traditional civil party proceedings, since concurrence of the prosecution is not a prerequisite to appeal under Cambodian domestic law or in other civil law regimes.[161] Such a provision may be necessary in the prosecution of mass crimes to prevent frivolous appeals by victims unwilling to accept anything less than a conviction. In light of the influence that civil parties have over the rest of the proceedings, however, it seems highly unlikely that one who has come this far in the process will be content to have his or her claim left unresolved when the criminal judgment is rendered.

The civil party system is not without risk. The Rules do not explicitly require victims to be represented by counsel, and both the domestic and international lawyers who are available to represent victims are inexperienced in international criminal proceedings. It is possible that victims' personal desire to see the accused convicted could lead to confusion and misunderstanding, courtroom outbursts, or attempts to introduce inadmissible evidence, all of which could undermine the perceived legitimacy of the trial. Advocates of victims' participation face an uphill battle in convincing future courts that civil parties will not disrupt the judicial proceedings. At the same time, however, these risks may bolster the argument that providing for legal representation in the operating budget of the court would limit these occurrences. Experience at the ECCC offers both an example of the great potential of the civil party system and a caution against embracing these principles without providing the necessary support to implement them properly.

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[158] *Id.* R. 100(1).

[159] *Id.* R. 103, 105(C); *see also id.* R. 100.

[160] *Id.* R. 105(C).

[161] JOHN HENRY MERRYMAN & DAVID S. CLARK, COMPARATIVE LAW: WESTERN EUROPEAN AND LATIN AMERICAN LEGAL SYSTEMS: CASES AND MATERIALS 698-99 (1978).

IV. THE VICTIMS UNIT OF THE EXTRAORDINARY CHAMBERS: EXPANSION IN PRACTICE

A. Early Stages

The Victims Unit at the ECCC was created by the passage of the Internal Rules on June 12, 2007.[162] Rule 12 states that "[t]he Office of Administration shall establish a Victims Unit," but it speaks in broad terms and offers little in terms of concrete guidance.[163] While the functions of the Unit are similar in practice to those of the Victims' Participation and Reparation Section at the ICC,[164] the express language of the Rule seems to imply that the Cambodian Victims Unit was intended to serve primarily as a clearinghouse for complaints and civil party applications, funneling these either to the Co-Prosecutors or the Co-Investigating Judges, as necessary. The rule directs the Unit to maintain lists of lawyers,[165] administer applications,[166] and provide victims with information about their rights.[167] However, a narrow interpretation of this rule would have represented only a slight change from the ad hoc tribunals in Yugoslavia and Rwanda, and such "paper rights" would be of little value to the average Cambodian.

This limited understanding of the Unit's mandate is not the only plausible interpretation of Rule 12, however, and a more robust role for the Unit has ultimately emerged. One example is the provision instructing the Unit to "assist Victims" in lodging complaints and filing civil party applications.[168] Interpreted broadly, effective assistance could entail everything from designing outreach programs to partnering with local civil society groups whose networks would help the court reach out to victims across the country. Most importantly, the rule also calls on the Unit to "[f]acilitate the participation of Victims and the common representation of Civil Parties . . . ."[169] In order to facilitate meaningful participation, the Unit would have to do far more than simply process applications. The rule leaves open the possibility that the Victims Unit could not only serve as the initial point of contact between victims and the court, but could also guide them through the proceedings, offering the legal

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[162] *See* ECCC INTERNAL RULES, *supra* note 83.

[163] *Id.* R. 12.

[164] Rome Statute, *supra* note 2, art. 43(6); *see* International Criminal Court, Participation of Victims in Proceedings, http://www.icc-cpi.int/Menus/ICC/Structure+of+the+Court/Victims/Participation/ (last visited July 16, 2009).

[165] ECCC INTERNAL RULES, *supra* note 83, R. 12(2)(A).

[166] *Id.* R. 12(2)(b)-(d).

[167] *Id.* R. 12(2)(f).

[168] *Id.* R. 12(2)(c)-(d).

[169] *Id.* R. 12(2)(g).

support and logistical assistance necessary for victims to exercise the rights guaranteed to them elsewhere in the Rules. This interpretation could have guided the Unit's work from its inception. Instead, a lack of resources and a reluctance to fully embrace victims' participation made much of this work unnecessarily challenging.

The ECCC officially began operations in February 2006.[170] Five defendants had already been arrested and the court began to hear pretrial motions before the first staff member of the Unit arrived in November 2007.[171] The court issued a *Practice Direction on Victim Participation* on October 5, 2007, which authorized the offices of the Co-Prosecutors and the Co-Investigating Judges to handle victim applications until the Victims Unit became operational, but had taken no further action.[172] By the time the deputy director of the Unit arrived, the court had already received more than five hundred complaints and civil party applications from victims wishing to participate in the trials.[173]

While funding at the ECCC has been a source of difficulty since the court's inception, it was particularly acute at the Victims Unit. Writing in March of 2008, only a few months before the Unit opened its doors, the International Federation for Human Rights issued a press release noting that the Unit did not have sufficient funding to fulfill its mandate, and calling on the UN and donor states to provide additional funds.[174]

B. Learning from Previous Experiences

The operations of the Victims Unit are, in many ways, a microcosm of a larger debate in international criminal law about the appropriate role and scope of victim participation. From its inception, the Unit pressed for the

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[170] Extraordinary Chambers in the Courts of Cambodia, Sean Visoth and Michelle Lee Lead the Joint Start up Team, http://www.eccc.gov.kh/english/news.view.aspx?doc_id=5 (last visited Apr. 8, 2009).

[171] *See* Extraordinary Chambers in the Courts of Cambodia, Scheduling Order, 02/14-08-2006-ECCC/PTC-067-C6 (Oct. 23, 2007), *available at* http://www.eccc.gov.kh/english/cabinet/02_14-08-2006-ECCC_ PTC-067-C6-English.pdf. The first hearing held at the ECCC was the appeal by Kaing Guek Eav, alias "Duch," against provisional detention. This appeal was heard by the PTC on November 20, 2007, before the Victims Unit even became operational. As a result, there was no participation by victims or civil parties at this hearing.

[172] *See* PRACTICE DIRECTION, *supra* note 92, art. 1.2.

[173] UN News Centre, UN-Backed Tribunal Processing Over 500 Khmer Rouge Victims' Complaints, http://www.un.org/apps/news/story.asp?NewsID=25544&Cr=cambodia&Cr1 (last visited June 29, 2009); *see also* James P. Bair et al., Strategic Plan of the Victims Unit, Presented to Intermediary Organizations (2008) (on file with author).

[174] Press Release, Federation Internationale des Ligues des droits de l'Homme, Cambodia, ECCC: More Resources Needed for the Victims Unit to Fulfill its Mandate Effectively (Mar. 19, 2008), http://www.iccnow.org/documents/FIDH_PR_Cambodia_19mar08_eng.pdf (last visited Apr. 8, 2009) [hereinafter FDIH Report].

incorporation of international human rights and humanitarian law into the proceedings while still trying to maintain the political support of those who felt more comfortable operating under a more traditional, prosecution-driven regime. As discussed above, although the *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of Humanitarian Law*[175] were approved by the UN General Assembly in December 2005, they were not binding in the same way that a treaty would have been.[176] Thus, the degree to which victims would be allowed independently to assert these rights was left to the discretion of the court. Victims Unit staff collaborated with civil society in recruiting international experts in the field of victims' rights to speak to court staff and judges in an effort to allay their concerns and emphasize the moral and legal imperative of allowing victims to participate fully at the tribunal.

During a trip to Cambodia in January of 2009, the director of REDRESS, a London-based organization dedicated to seeking reparation for torture survivors, spoke extensively about the legal principles underlying victims' rights and offered proposals for how these might be implemented at the ECCC.[177]

Noting some of the court's concerns about the public perception of its work, the director pointed out that lessons from the ICTY and the ICTR demonstrated that victims' perceptions of the proceedings were generally more positive when they were well-informed about what to expect from a criminal tribunal. The Victims Unit outreach activities would thus be crucial not only for informing victims about their rights, but also beneficial for the reputation of the tribunal as a whole.

For most victims, participating at the ECCC would mark their first interaction with a judicial body of any type, let alone an international criminal proceeding. The court would thus need to explain the proceedings in advance, in addition to ensuring that victims were protected from unnecessary exposure to the public or to the accused, which might pose a significant risk of re-traumatization.[178]

While these suggestions were grounded in well-established precedents from previous tribunals such as the ICTY and ICTR, the ECCC in early 2008 lacked even minimal capacity to educate the public or to provide security or support to victims and civil parties.[179] The court's documents established a commitment

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[175] Basic Principles and Guidelines, *supra* note 10.

[176] *See* Bassiouni, *supra* note 1, at 252 n.255.

[177] Carla Ferstman, Dir. of REDRESS, Address at ADHOC, Phnom Penh, Cambodia (Jan. 21, 2008) (on file with author).

[178] *Id.*

[179] *See* FDIH Report, *supra* note 174 (discussing the lack of funding for the Victims Unit).

to victims' participation, but neither the UN nor the Cambodian government had provided the resources that would have allowed the Unit to effectuate that commitment.

The most crucial portion of REDRESS' recommendations, and the main issue for the future of victim participation at the ECCC and beyond, was that of providing access to legal counsel. REDRESS' director stressed that a court cannot always rely on the prosecution adequately to represent the interests of victims, because those interests might be reasonably expected to diverge at some point during the trial. The director referred to the aggressive cross-examination of a rape victim at the ICTR that was made even more damaging by the fact that several of the judges were seen laughing during the questioning, further adding to the victim's humiliation.[180] The director argued that independent counsel, dedicated to advancing the interests of the victim, could have intervened to prevent this incident in the Rwandan tribunal, and she urged the court to support measures that would ensure such protection for victims at the ECCC.

C. Defining the Mandate of the Victims Unit

Because of the vague terms of Rule 12,[181] the Victims Unit was required to seek formal approval from the Plenary of Judges regarding the interpretation of its mandate. However, the first opportunity to do so did not arise until March 2008,[182] only days before the first civil parties were scheduled to appear at the hearing on Nuon Chea's appeal against provisional detention.[183] This unfortunate timing may have had an impact on the quality of the proceedings. As discussed below, the performance of the lawyers for the civil parties generally reflected poorly on advocates of victims' participation, despite the ultimately favorable ruling of the PTC.

Such a situation was entirely avoidable. Had the Unit been provided with appropriate time and support, more time might have been spent preparing the civil parties for their first appearances. While the timing was unfortunate and frustrating, it was nonetheless crucial that the Victims Unit's mandate be

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[180] UN Judges Laugh at Rape Victim, MONITOR, Dec. 3, 2001, *available at* http://www.globalpolicy.org/intljustice/tribunals/2001/0512rwa.htm.

[181] ECCC INTERNAL RULES, *supra* note 83, R. 12.

[182] *See* His Excellency Kong Srim, Remarks at the Opening of the Third Plenary Session of Judges of the Extraordinary Chambers in the Courts of Cambodia (Jan. 28, 2008), http://www.eccc.gov.kh/english/cabinet/speeches/7/OPENING_REMARKS_AT_THE_3rd_plenary_by_Kong_Srim_Eng.pdf.

[183] *See* Prosecutor v. Chea, No. 002/19-09-2007-ECCC/OCIJ (PTC01), Decision on Civil Party Participation in Provisional Detention Appeals, PP 5-6 (Mar. 20, 2008), *available at* http://www.dccam.org/Projects/Tribunal_Response_Team/Victim_Participation/PDF/Civil%20Parties%20Decision.pdf.

formalized. The interpretation that ECCC ultimately adopted represents an important step forward in advancing victims' rights, if not a model for institutional efficiency.

1. Preliminary suggestions

The Victims Unit interpreted Rule 12 as comprising five core functions: (1) facilitating the participation of victims in the proceedings;[184] (2) managing victims' complaints and civil party applications;[185] (3) maintaining a list of legal representatives and victims' associations;[186] (4) ensuring a high quality of legal representation to victims; [187] and (5) implementing good practices amongst all those who interact with victims.[188] Of these, the second and third functions were uncontroversial, since they comported with the more limited view of the Victims Unit as primarily a data-processing center.[189] While additional staff and equipment would be required to handle the processing of complaints and civil party applications, this did not represent any major change in the understanding of victims' roles within the proceedings.

The importance of inculcating good practices among all those who dealt with victims reflected the approach taken by the ICC.[190] While not required by any specific provision of the rules, the Victims Unit argued that ensuring the safety and minimizing the risk of re-traumatization to victims was an essential, yet distinct part of "facilitating participation."[191] The Unit proposed producing a handbook of good practices for anyone who might come into contact with victims, including staff of the court, civil society intermediaries, journalists, and legal representatives.[192] It would also conduct trainings on interacting with victims, assisted by civil society groups specializing in assisting victims of mass crimes.[193] Lastly, the Victims Unit proposed to work closely with the Witness

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[184] ECCC INTERNAL RULES, *supra* note 83, R. 12(2)(c).

[185] *Id.* R. 12(2)(c)-(d).

[186] *Id.* R. 12(2)(a)-(b).

[187] *Id.* R. 12(2)(f)-(g). This can also be said to be derived from the "penumbra" of the Rules in much the same way that substantive due process rights have been implied under the U.S. Constitution.

[188] *Id.*

[189] *Id.*

[190] *See* Press Release, Int'l Criminal Court, Joint Declaration on the Identification of Good Practices in the Administration of International Criminal Justice (Feb. 10, 2005), http://www.icccpi.int/menus/icc/structure%20of%20the%20court/registry/statements/joint%20declaration%20on%20the%20identification%20of%20good%20practices%20in%20the%20administration%20of%20international%20cri (last visited Apr. 8, 2009).

[191] ECCC INTERNAL RULES, *supra* note 83, R. 12(2)(c).

[192] Bair et al., *supra* note 173.

[193] *Id.*

and Expert Unit[194] to assess any threats to victims and civil parties and implement appropriate measures to protect their safety.

Ideally, much of the groundwork for these proposals would have already been laid before the first victim filed a complaint with the ECCC, and certainly before the first civil party appeared in open court. Nonetheless, the delay does not negate the necessity, and these relatively simple steps of educating court staff and intermediaries about the particularities of interacting with victims will continue to be a crucial component of the Unit's work. Once established, procedures and training materials can be made available to future tribunals, to avoid the feeling of "re-inventing the wheel" that accompanied much of the ECCC's work.

2. *Outreach activities*

The Victims Unit is also responsible for confronting and correcting public misperceptions about what the ECCC can and cannot do for victims. There is enormous pressure to ensure that victims' participation does not overwhelm the increasingly scarce judicial resources,[195] which has led the Victims Unit to focus on "managing expectations." This does not mean that robust victim participation is incompatible with fair and efficient judicial proceedings, but rather that budget concerns are of paramount importance, and that the nature and scope of victim's rights are still vague and unestablished.

The Victims Unit proposals for conducting outreach offer an effective counter to those who feared that the scope of its undertaking would overwhelm judicial resources, and offers an important lesson for future tribunals: use what is already there. By partnering with existing media outlets and civil society organizations, the Unit developed a program that ensured that victims could

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[194] ECCC INTERNAL RULES, *supra* note 83, R. 12(3). The responsibilities and contours of the Witness/Experts Support Unit are not explicitly mentioned or established in the Internal Rules, but is mentioned once regarding protective measures, wherein responsibility for the safety and coordination of witnesses and experts is assigned to a separate Witness/Experts Support Unit. *Id.*

[195] For example, in April of 2008, nearly a year before the first trial at the ECCC began, a team of three representatives from the Court was sent to the United Nations in New York seeking an additional $114 million from state donors to continue the work of the Court. The Tribunal has already spent its original budget of $56 million, less than half way through its original three-year mandate, which was originally scheduled to end in mid-2009. The sharp increase in funds has been highly controversial, particularly since 70% of the requested increase is to cover staff costs. *See* Extraordinary Chambers in the Courts of Cambodia, Australia Contributes $500,000 to ECCC, http://www.eccc.gov.kh/english/news.view.aspx?doc_id=109 (last visited Apr. 13, 2009); *see also* Andrew Buncombe, *Cambodian War Crimes Trial Begs for More Cash*, INDEPENDENT, Mar. 26, 2008, *available at* http://www.independent.co.uk/news/world/asia/cambodian-war-crimes-trial-begs-for-more-cash-800605.html.

receive clear, consistent messages without placing a great strain on the court's budget. The Victims Unit model also enables the court to tap into the experience and connections of these organizations, which are usually more trusted by the local population. As a result, the Unit's activities can provide a one-way flow of information about the court, and also receive input from victims to make the process more meaningful for them.

D. Media

The Victims Unit, in collaboration with civil society, has reached out extensively to media groups. These include an organization that trains young journalists, and the Women's Media Center (a Phnom Penh radio station that broadcasts weekly hour-long call-in shows about the work of the ECCC).[196] Both groups had hosted representatives from the court in the past, but it was the issue of victim participation that seemed to generate the most enthusiastic responses. A large majority of Cambodians were confused about their rights as victims, and Victims Unit representatives fielded dozens of questions about the court, ranging from how victims could participate and what the risks were in doing so, to the timing of the trials and what sorts of penalties the court would apply.[197]

One of the most contentious issues was that of the death penalty.[198] The death penalty is illegal under Cambodian domestic law, and thus was never considered during the negotiations of the ECCC.[199] The strongest penalty that the court can impose is life imprisonment.[200] Still, this remains a point of controversy for many Cambodians, who believe that the atrocity of the crimes committed by the Khmer Rouge warrant a departure from this law.

During a radio appearance at the Women's Media Center, Victims Unit staff received a call from a man who offered a novel solution this problem. He suggested that the people deliver a petition to the Cambodian Parliament calling for the reinstatement of the death penalty, that Parliament could then force the ECCC to apply this law and execute the prisoners, after which Parliament would then summarily repeal the death penalty once again. While the staff member assured him that this was impossible, the man's suggestion met with approval from several other callers and seemed to reflect a feeling amongst

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[196] Extraordinary Chambers in the Courts of Cambodia, Frequently Asked Questions, http://www.eccc.gov.kh/english/faq.view.aspx?doc_id=73 (last visited Apr. 8, 2009) (providing additional access to information regarding the Khmer Rouge Trials).

[197] *Id.*

[198] *Id.*

[199] *See generally* Etcheson, *supra* note 69.

[200] ECCC LAW, *supra* note 77, art. 38.

Cambodians that the penalties available at the tribunal do not adequately reflect the gravity of their suffering under the Khmer Rouge.[201]

By far the most frequently raised issue was one with which the court still has yet to grapple: reparations. For most Cambodians, many of whom live in extreme poverty, the idea of spending millions of dollars to prosecute a handful of octogenarians thirty years after the fall of the Khmer Rouge is unfathomable. Many assume that, if there is so much money available to be spent on the trials, each victim who participates at the court can expect at least some amount of personal compensation for his or her suffering. However, individual reparations are not contemplated by any of the court's documents. The tribunal may award only "collective and moral reparations" under the Internal Rules, such as an order to fund a non-profit activity for the benefit of victims.[202] There has been speculation that this might take the form of a school or a road in a village, or perhaps funds to rebuild a pagoda that was destroyed by the Khmer Rouge. The final determination is left entirely to the discretion of the court, however, and the Rules further specify that reparations can only be awarded to civil parties, and must be paid entirely from the assets of the convicted person.[203] Given the fact that all the defendants have declared indigence, the prospects of meaningful reparations at the ECCC remain quite dim.[204]

This has already led to a certain degree of disillusionment among Cambodians. During an outreach activity with the Khmer Institute for Democracy before I joined the Victims Unit, I met one woman who had collected complaints from people in her village to send to the ECCC. A few days afterwards, and before the complaints had been sent to Phnom Penh, a

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[201] Seth Mydans, *Khmer Rouge Victims Given Voice in Cambodia Trials*, INT'L HERALD TRIBUNE, June 16, 2008, *available at* http://www.iht.com/articles/2008/06/16/asia/cambo.php (quoting a victim who said: "Only killing them will make me feel calm. I want them to suffer the way I suffered. I say this from the heart"). This also raises another difficulty with prosecuting mass crimes, especially thirty years afterwards. The presumption of innocence for the accused is unheard of amongst the Cambodian population, and some would argue that this has affected the proceedings themselves. Many of the arguments advanced by the Co-Prosecutors for denying bail to Nuon Chea and Duch revolved around the fact that, if bail were granted, regardless of the legality of that decision, it would cause the Cambodian public to lose faith in the proceedings. As one caller to the Women's Media Center put it: "they have spent so much money and taken so much time for these trials that it is impossible that the Court will find anyone innocent. People will riot in the streets." James P. Bair, Notes from Author's Radio Appearance at the Women's Media Center (Jan. 25, 2008) (on file with author).

[202] ECCC INTERNAL RULES, *supra* note 83, R. 23(11).

[203] *Id.*

[204] See generally, Kevin Doyle, *The End of Cambodia's Family Affair*, TIME, Nov. 13, 2007, *available at* http://www.time.com/time/world /article/0.8599.1683285.00.html. At this point, all five of those arrested by the ECCC have been determined to lack the resources necessary to pay for their own defense. This includes Ieng Sary and his wife Ieng Thirith, both of whom lived in a mansion in the center of Phnom Penh until their arrest. *Id.*

man who had filed a complaint came to her home, wanting to know where his money was. When the woman explained that the court did not award reparations for simply filing a complaint, and that in fact it was unclear whether there would be reparations of any type, the man demanded that she return his complaint. He tore it up in the doorway of her home and walked away.

Although frustrating, these experiences are invaluable in determining how to best serve the needs of victims. As discussed above, many experts felt that the most effective way of addressing the crimes of the Khmer Rouge would have been through a "Truth and Reconciliation Commission" because of the overwhelming desire among victims to simply know why these crimes were committed, rather than to see the perpetrators punished. As the ECCC tries to accommodate these desires within a judicial structure, the Victims Unit will be in a position to document what victims across the country would like to see for reparations, and to advocate that the Trial Chamber take these concerns into consideration when determining the type of "collective and moral" reparations that will be awarded.[205]

1. Cooperation with civil society groups

Long before the Victims Unit became operational, Cambodian civil society organizations had already begun laying the groundwork for victims' participation at the trials.[206] These groups had traveled to most of the country's provinces to inform people about the work of the court. Some, like the Documentation Center of Cambodia, had been gathering evidence and statements from victims for more than two decades in anticipation of a tribunal.[207] Using methods and materials of their own design, civil society groups had reached out to an often-skeptical Cambodian population and encouraged victims of the Khmer Rouge regime to support the work of the tribunal.

Victims Unit staff met frequently with representatives of these groups to discuss the methods and strategies they had employed and to discern how the Unit could best draw on civil society networks while ensuring that victims

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[205] Extraordinary Chambers in the Courts of Cambodia, Victim Information Form, *available at* http://www.eccc.gov.kh/english/cabinet/files/victim_unit/vu_participation_form_eng.pdf. The form that victims fill out to either file a complaint or apply to become a Civil Party includes a box where victims can describe the types of reparations they hope to see the Court award. The form itself is confusing, and does not make it clear to applicants that only civil parties can be awarded reparations under the explicit terms of rule 23(11).

[206] *See generally*, The Khmer Institute of Democracy, Khmer Rouge Tribunal Project, http://www3.online.com.kh/users/kid/program_7.htm (last visited July 13, 2009).

[207] For more on the Documentation Center of Cambodia and their collaboration with the Yale Genocide Project, see Documentation Center of Cambodia, http://www.dccam.org/ (last visited July 18, 2009).

across Cambodia all received a clear, consistent message regarding their rights. Among the most difficult issues was explaining the precise difference between victims and civil parties. As discussed above, anyone who suffered under the Khmer Rouge Regime is entitled to file a complaint with the Office of the Co-Prosecutors to request an investigation.[208] Those with a judicially cognizable injury that is the direct result of one of the crimes contained in the prosecutor's introductory submission may apply to be joined as civil parties.[209] Although these distinctions are drawn directly from Cambodian law, there was a great deal of confusion surrounding this issue. This was due at least partially to the fact that many civil society organizations are directed or staffed by Westerners from common law countries, for whom the concept of civil party participation was completely foreign.[210]

Drawing on these discussions, the Unit proposed a two-pronged approach to informing victims about their rights. The first involved developing a sort of "outreach curriculum," whereby the Victims Unit would provide training and materials to civil society groups, which in turn would use their own networks to disseminate information about the court across Cambodia.[211] Such an arrangement involves delicate balancing on the part of civil society groups, for whom maintaining independence from the court is essential to maintaining credibility, but it was seen as the only feasible way to conduct widespread outreach, given the limited resources available. The Unit also recognized, however, that civil society networks did not reach everywhere, and interpreted their mandate to include filling in the remaining gaps by reaching out to Cambodians who would not otherwise know about their right to participate in the trials, particularly members of the large diaspora community.

Since the Victims Unit was not even conceived until the drafting of the Internal Rules in the summer of 2007, victims' interests may not have been adequately represented during the drafting process. At the time the Rules were drafted, there was not yet a single staff member assigned to the Victims Unit.[212] Ultimately, far too many of the details regarding victims' participation were left undefined, and many seem to have assumed that civil society groups, rather than the court itself, would undertake the lion's share of this work. While it is

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[208] ECCC INTERNAL RULES, *supra* note 83, R. 12(2)(c).

[209] *Id.* R. 23(3).

[210] James P. Bair, Notes from Meetings of NGO Leaders to Discuss Victim Participation at the ECCC, Phnom Penh, Cambodia (Dec. 2007) (on file with author). This issue is a problem for future civil law-based tribunals, since most experienced staff members at future courts are likely to be veterans of the ad hoc tribunals in Rwanda and Yugoslavia or the Special Court for Sierra Leone, all of which were based on common law models.

[211] *See* Bair et al., *supra* note 173.

[212] The internal rules were adopted on June 12, 2007. *See* ECCC INTERNAL RULES, *supra* note 83. The Deputy Director of the Victims Unit did not arrive in Cambodia until November 2007.

true that civil society has substantial capacity for outreach activities, these groups are not arms of the court and are in no way bound to assist in its outreach. In recognizing the right of civil party participation and creating the Victims Unit, one must assume that the ECCC also undertook to actively inform victims of their rights, rather than delegating that responsibility to organizations over which it had no authority. Thus, providing the minimal outreach capacity necessary for the court to reach only those areas in which civil society groups were not previously established is not only required by Unit's mandate, but is actually far less of a burden than the court might have otherwise had to shoulder without the support of civil society.

2. Legal representation

Although the Internal Rules provide victims the right to be represented "by a national lawyer, or a foreign lawyer in collaboration with a national lawyer,"[213] victims are not guaranteed representation in the same way as the charged person. A charged person who is unable to pay for his or her legal expenses[214] is entitled to both a national and an international lawyer from a list compiled by the defense support section, who are paid by the court.[215] Civil parties, in contrast, are only guaranteed the right to look at a list of lawyers maintained by the Victims Unit and are not afforded any financial assistance in paying an attorney.[216] A reliance only on the bare text of the Rule would create a startling inequality of arms between civil parties and the prosecution or defense, since few if any victims of the Khmer Rouge can be expected to afford to pay their own legal fees. The right to representation in the Rules will be no right at all if it is outside the reach of most Cambodians. Thus, the Victims Unit will need the capacity to provide some basic, minimal access to counsel for the group representation of civil parties. This involves three distinct issues: organizing victims according to their common experiences, providing modest financial support legal expenses, and offering training and support to the lawyers themselves.

3. Collective representation

Collective representation of victims is explicitly contemplated by the Rules,[217] which would help to offset any expense and delay associated with victim participation. The Rules call for the Unit to keep a list of victims

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[213] *Id.* R. 23(7).
[214] *See* PRACTICE DIRECTION, *supra* note 92.
[215] ECCC INTERNAL RULES, *supra* note 83, R. 22(1)(A).
[216] *Id.* R. 23(7)(a).
[217] *Id.* R. 12(2)(g).

associations which would be the primary vehicles for organizing group representation, for example, of victims from a particular region, or of a particular crime.[218] It has even been suggested that a separate group be formed for war orphans: those who lost both of their parents during the Khmer Rouge.[219] The court has issued a supplementary practice direction, which clarifies that "Victims' Association are not themselves Civil Parties. They simply represent their members who are Civil Parties."[220] An analogy can be made to class actions in the United States, with the important exception that a victims association, unlike the representative plaintiff in a class action, is not required to have a personal stake in the proceedings. A victims association would serve as the umbrella organization for large numbers of victims, all of whom would be represented by a common lawyer.[221] This should help to allay fears that allowing victims of the Khmer Rouge to file as civil parties would lead to a courtroom clogged with dozens of lawyers all making the same argument and grind the proceedings to a halt. It would also encourage participation by those victims who would qualify as civil parties, but who are reluctant to participate out of either fear or financial limitation, by significantly lowering their individual costs and mitigating their fears by providing strength in numbers.

Victims associations are an efficient compromise between the concerns of victims' rights and judicial efficiency. To date, however, it appears that few if any victims associations have registered with the court, since civil party representation remains relatively modest and is being handled by individual lawyers acting in teams.[222] Civil society groups, which are in the best position to facilitate mass representation of victims, have expressed reluctance to do so, noting that the application process is quite cumbersome.[223] This reluctance may be attributable to the particular arrangement reached between the UN and the Cambodian government on the issue. Both the Rules and the Practice Direction distinguish between those organizations that can be "construed as carrying on activities in Cambodia" and those that merely "represent foreign resident victims before the ECCC."[224] Organizations "carrying on activities in Cambodia," are required to complete an entirely separate application procedure

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[218] *Id.* R. 23(9).

[219] Seth Mydans, *In Khmer Rouge Trial, Victims Will Not Stand Idly by*, N.Y. TIMES, June 17, 2008, *available at* http://www.nytimes.com/2008/06/17/world/asia/17cambodia.html?pagewanted=print.

[220] PRACTICE DIRECTION, *supra* note 92, art. 5.2.

[221] *Id.* art. 5.9.

[222] Bair et al., *supra* note 173.

[223] *Id.*

[224] ECCC INTERNAL RULES, *supra* note 83, R. 23(9)(B); *see also* PRACTICE DIRECTION, *supra* note 92, art. 5.7.

with the Cambodian Ministry of the Interior,[225] which is in a position to assert considerable political pressure on those organizations, both during and after the proceedings at the ECCC. Since all of the local civil society groups are already "carrying on activities in Cambodia," they face the threat of political reprisals or at least revocation of "Association" status if their representation of victims happens to elicit information that is embarrassing to the government.[226] Despite these logistical challenges, the use of victims associations may be the most effective and efficient way to encourage participation and should be strongly considered in any future tribunals. To avoid repeating the ECCC's mistakes, however, work in this area must be coordinated far in advance of the actual proceedings. In Cambodia, meanwhile, the Victims Unit will have to conduct its work delicately in order to not offend the tribunal's hosts.

4. Providing financial support

The Victims Unit also requested funding to provide victims with basic legal representation similar to that provided by the defense section. Mirroring the court's hybrid structure, each team would be comprised of one international lawyer and one Cambodian lawyer, along with a case manager and a legal consultant.[227] These teams would then represent victims associations, thus providing representation to large numbers of victims without significant cost. Ideally, the Unit hoped to provide one legal team for each of the five cases before the court.[228] In the event that resources prove too scarce to provide this level of support, however, it is possible that the same teams may be able to provide representation across a number of cases. Because the tribunal has indicated that it will try the defendants *seriatim*, there will be little overlap between cases, which would allow the lawyers to move from the end of one case to the beginning of another without the need to hire additional staff. While this may prove more complicated during the appeals process, it suggests a workable model that would guarantee representation to victims at little extra cost to the court.

The five civil parties accepted by the court at the time of this writing are represented by three lawyers from the Cambodian Defenders' Project (CDP), a legal aid organization that was founded in 1994.[229] These lawyers are paid through a grant by the German Development Corporation (DED),[230] and

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[225] PRACTICE DIRECTION, *supra* note 92, art. 5.6.

[226] Bair et al., *supra* note 173.

[227] *Id.*

[228] *Id.*

[229] *See* Cambodian Defenders Project, CDP's Background, http://www.cdpcambodia.org/background.asp (last visited Mar. 5, 2009).

[230] *See* Civil Peace Service, National Reconciliation and Justice in Cambodia,

organized under the auspices of the Cambodian Human Rights Action Committee (CHRAC). While this support was both appreciated and necessary, considering the court's inability to provide representation in time for the February 2008 hearing, it raises some concern, given the tendency towards territorialism among civil society groups that must compete for finite grant resources. While this represents potentially thousands of victims reached by CHRAC's member organizations, it does not reach them all. This makes it even more crucial for the ECCC to provide basic legal assistance, lest the question of whether a particular civil party is afforded representation turn solely on the issue of which NGO got to his or her village first to collect the complaint.

E. Providing Training and Support for Victims' Lawyers

Victims' representation is primarily expected to be on a pro bono basis.[231] This may deter foreign lawyers from representing victims. As a result, it is likely that many lawyers representing victims will be Cambodians trained in the domestic system. This presents several challenges. Following the collapse of the Khmer Rouge in 1979, there were few lawyers left alive in Cambodia, and the profession has been struggling to rebuild itself over the past two decades.[232] Even though civil parties are a part of Cambodian domestic law, training conducted by the Victims Unit in late January 2008 for nearly thirty lawyers revealed that few understood the fundamental distinction between victims and civil parties, let alone the complex series of procedural rights afforded to civil parties at the ECCC.[233]

The Victims Unit has argued that the words "facilitating participation" in Rule 12 imply *effective* participation, which necessitates the assistance of counsel for civil parties as much as it would for the charged person.[234] The Unit proposed to conduct training for civil party lawyers, to be followed by on-the-job supervision for a period of six weeks so that lawyers could receive

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http://kambodscha.ded.de/cipp/ded/custom/pub/content,lang,2/oid,4543/ticket,56405715294830/~/Civil_Peace_Service.html (last visited Mar. 5, 2009).

[231] ECCC INTERNAL RULES, *supra* note 83, R. 22(1) (only "Suspects, Charged Persons, Accused, or any other persons entitled to a defense lawyer under these IRs" are guaranteed the assistance of counsel, even when this is beyond their financial means). Since civil party representation cannot be construed as "defense," and since Rule 12 does not provide civil parties with a guarantee of representation, this has been interpreted to mean that civil party lawyers must proceed pro bono or by procuring outside financial assistance.

[232] Fernando, *supra* note 121, at 102.

[233] James P. Bair, Notes of Training Session at the Cambodian Defenders' Project (Jan. 30, 2008) (on file with author).

[234] Bair et al., *supra* note 173.

guidance and feedback about specific elements of their cases.[235] This would not only be more cost-effective than hiring international lawyers, it would also help to strengthen the capacity of the domestic bar association, both in international criminal matters and in more traditional civil party representation. Again, however, funding for such an initiative is scarce. Aside from the general issue of the ECCC's management of its finances, this reiterates one of the fundamental lessons of the Cambodia tribunal's experience with victim participation: if it is to be meaningful, it must be planned and budgeted for from the earliest planning stages.

Under the circumstances, the lawyers for the civil parties performed well at their first appearance before the PTC. However, they were unprepared for the defense's attack on their right to appear, and won a favorable decision from the PTC due largely to an outpouring of support from amicus curiae submissions.[236] All of this highlights the need for the Victims Unit to provide substantive training for lawyers who wish to represent civil parties.[237]

V. CIVIL PARTY PARTICIPATION IN ACTION: THE APPEAL OF NUON CHEA

On February 4, 2008, the first Civil Parties in the history of international criminal law made their courtroom debut. They were afforded thirty minutes each during which to make submissions to the PTC regarding Nuon Chea's appeal against provisional detention. The Defense alleged that Nuon Chea's right to counsel had been violated during his initial interview with the OCIJ and that the OCIJ had failed to satisfy the conditions necessary to hold a charged person in provisional detention under the Internal Rules.[238] The Defense was

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[235] *Id.*

[236] *Id.*

[237] *See* Extraordinary Chambers in the Courts of Cambodia, Pre-trial Chamber Invites Submissions from Co-Defence Lawyers, Co-Prosecutors, Civil Parties, and Amicus Curiae Relating to the Issue of Civil Party Participation in Appeals Against Provisional Detention, http://www.eccc.gov.kh/english/news.view.aspx?doc_id=97 (last visited Apr. 8, 2009). Of the five amicus briefs received on the issue of Victims' participation, only one, that of Dr. Christoph Safferling, argued against allowing Civil Parties to participate. *Id.*

[238] ECCC INTERNAL RULES, *supra* note 83, R. 63(3). Provisional detention is only appropriate where:

> a) there is well founded reason to believe that the person may have committed the crime or crimes specified in the Introductory or Supplementary Submission; and b) The Co-Investigating Judges consider Provisional Detention to be a necessary measure to: i) prevent the Charged Person from exerting pressure on any witnesses or Victims, or prevent any collusion between the Charged Person and accomplices of crimes falling within the jurisdiction of the ECCC; ii) preserve evidence or prevent the destruction of any evidence; iii) ensure the presence of the Charged Person during the proceedings; iv) protect the security of the Charged Person; or v) preserve public order.

Id.

afforded an opportunity to speak first, followed by the Co-Prosecutors, and finally the Civil Parties. Rather than use their submission to address the alleged waiver of the right to counsel or the provisions for detention, however, the Defense began with an attack on the rights of the Civil Parties to appear at the hearing.

The National Co-Lawyer for the Defense, Mr. Son Aroun, claimed that under both the Internal Rules and the Cambodian Code of Criminal Procedure, civil parties were only allowed to participate at the trial on the merits, and not in pre-trial proceedings.[239] The Defense also contended that the procedure through which the Civil Parties and their lawyers had been admitted to appear before the PTC was inadequate.[240] Noting that the lawyers had not filed submissions prior to the hearing,[241] the Defense pointed out that none of the Civil Parties had articulated a personal interest in the proceedings.[242]

Mr. Son's international co-counsel, Victor Koppe, based his argument primarily on a comparison to victim participation at the ICC, arguing that civil parties at the ECCC should be required to prove their personal interests at every stage of the proceedings before being allowed to participate.[243] While conceding that the rules do give civil parties a right to participate in a "supporting role,"[244] Koppe argued that participation would be inappropriate unless the Civil Parties were able to show a "demonstrable interest" in the specific appeal against pre-trial detention.[245] He urged the court to adopt the standard set forth by the ICC in *Prosecutor v. Dyilo*, which held that victims at the ICC are not afforded an automatic right of participation, but must repeatedly seek the leave of the court to do so.[246]

These arguments threatened to derail the Victims Unit's efforts before the first Civil Party had ever opened her mouth in court. The Co-Prosecutors, speaking next, argued that the Internal Rules did not impose any limitation the allowable scope of civil party participation, but rather that Rule 23 allowed civil parties to "participate in criminal proceedings,"[247] which the Co-

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[239] Transcript of Oral Decision on the Civil Party's Request to Address the Court in Person, *supra* note 143, para. 5.

[240] *Id.* paras. 19-20.

[241] *Id.* para. 5.

[242] *Id.* para. 25.

[243] *Id.*

[244] Brief for Defendants, *supra* note 132, para. 22.

[245] *Id.* para. 24.

[246] *Id.* para. 14.

[247] Co-Prosecutors' Submission on Civil Party Participation in Provisional Detention Appeals, para. 7, http://74.125.95.132/search?q=cache:MSXEzTIHjTIJ:www.eccc.gov.kh/english/cabinet/courtDoc/175/C11_44_EN.pdf+CoProsecutors%E2%80%99+Submission+on+Civil+Party+Participation+in+Provisional+Detention+Appeals&cd=2&hl=en&ct=clnk&gl=us&client=firefox-a (last visited July 29, 2009).

Prosecutors asserted could only be understood to mean all stages of the proceedings. They also noted that increased victim participation was consistent with the "evolution of international criminal practice."[248] Importantly, the Co-Prosecutors also emphasized the difference between civil parties at the ECCC and victims at the International Criminal Court, who are accorded the status of "participants."[249]

Disappointingly, the legal arguments of the Civil Party lawyers essentially parroted those of the Co-Prosecutors. With the exception of Theary Seng, a Civil Party who spoke on her own behalf, little new information was presented by the lawyers, who seemed slightly taken aback by this challenge. Ultimately, it was the Prosecutor's arguments, echoed by a slew of amicus curiae briefs that carried the day.[250] The PTC found that the wording of Rule 23 granting civil parties the right to participate in "proceedings" made it clear that they had "active rights to participate from the investigative phase of the procedure," which included appeals against provisional detention.[251] More importantly, the PTC noted that "the inclusion of Civil Parties in proceedings is in recognition of the stated pursuit of national reconciliation" that underlies the tribunals fundamental purpose.[252] The PTC noted that civil party participation was not only consistent with the Rules of the ECCC, but was also in accordance with procedural practices at the ICC, with the *Transitional Rules of Criminal Procedure for East Timor*, and with the *Provisional Criminal Code of Kosovo*—three jurisdictions that represent some of the most forward-thinking applications of victims' rights in modern law.[253]

The decision should rightly be considered a watershed moment in the development of victims' rights in international criminal law. By affirming the

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[248] *Id.* para. 6.

[249] *Id.* para. 1.

[250] Of the five *amicus* briefs received on the issue of Victims' participation, only one, that of Dr. Christoph Safferling, argued against allowing Civil Parties to participate. Brief Opposing Co-Prosecutors as Amicus Curiae, Opposing Co-Prosecutors Submission on Civil Party Participation in Provisional Detention Appeals, *available at* http://www.eccc.gov.kh/french/cabinet/courtDoc/172/Amicus_Christoph_Safferling_C11_39_EN.pdf.

A rebuttal to Professor Safferling's argument can be found in the Cambodian Defender's Project Amicus Brief. Brief for Co-Prosecutors as Amici Curiae Supporting Co-Prosecutors Submission on Civil Party Participation in Provisional Detention Appeals, *available at* http://www.cambodiatribunal.org/CTM/Ieng%20Sary,%20PTC,%20Civil%20Party%20(joint%20civil%20parties),%20Joint%20Response%20to%20Submissions%20on%20the%20Participation%20of%20Civil%20Parties%20in%20Provisional%20Detention%20Appeals%20(6%20Mar.%202008).pdf?phpMyAdmin=8319ad34ce0db941ff04d8c788f6365e&phpMyAdmin=ou7lpwtyV9avP1XmRZP6FzDQzg3.

[251] Transcript of Oral Decision on the Civil Party's Request to Address the Court in Person, *supra* note 143, para. 36.

[252] *Id.* para. 38.

[253] *Id.* para. 40.

rights of victims to participate as parties, rather than participants, the PTC took a major step forward in making tribunals places that do not simply lay blame upon those most responsible mass crimes, but also promote healing and national reconciliation in ways that are meaningful for those most affected by them. But the decision is only one step in the process, and does not conclusively settle the issue. This approach to victims' participation, while innovative, suffers from the weaknesses of the framework in which it is being implemented. In addition to the procedural, logistical and financial obstacles unnecessarily placed in the way of the Victims Unit's work by the ECCC, the decision of the PTC offers far less support than might appear at first glance.

Nearly all of the chamber's arguments regarding the applicability of international standards and its comparison of the ECCC to both Cambodian law and that of other international courts is disturbingly conclusory, and offers little rationale for the decisions, making the decision's precedential value questionable at best. Its analysis amounts to merely three and a half pages of a twenty-page decision, and is characterized by vague assertions such as "considering this international practice, civil party participation . . . must in addition be regarded as generally complying with fair trial principles,"[254] without offering any analysis of such practice or comparison thereof to the ECCC. Nonetheless, the decision does affirm the right of civil parties to continue participating at both the pre-trial and trial stages, and there is hope that the quality of the legal analysis and decision writing will improve considerably when proceedings move beyond the pre-trial stage. Perhaps the most important lesson of the ECCC's treatment of victims' participation lies in the ability to separate an important, innovative concept from its flawed context and avoid throwing the baby out with the bathwater.

This potential for civil party participation to change the future of international criminal law is perhaps best exemplified by the pros and cons found in the submission of the only civil party to speak on her own behalf, Theary Seng. Ms. Seng's arguments, while they did not confine themselves explicitly to the issues at hand, had a profound effect on the charged person, Nuon Chea. Up until the introduction of the civil parties into the proceedings, Nuon Chea, also known as "Brother Number Two" for his key role in the Khmer Rouge regime, had said that he welcomed the opportunity to "show my people that I am a good man."[255] Theary Seng's emotional presentation made him visibly uncomfortable. Later, during the recitation by one of the lawyers of the harm he was alleged to have wrought upon the civil parties and their families, Nuon Chea suddenly asked for a recess, unwilling to sit through such

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[254] *Id.*

[255] Phil Rees, *Brother Number Two Enjoys Retirement*, BBC NEWS, Mar. 15, 2002, http://news.bbc.co.uk/2/hi/programmes/correspondent/1874949.stm (last visited Mar. 5, 2009).

a litany of complaints from victims.[256] The inclusion of civil parties has the potential to help dispel any lingering doubts that the prosecution will amount to a political show trial, by highlighting issues of importance to victims that might not otherwise have comported with the government's agenda. In addition, pubic interest in the trials has increased considerably. The Victims Unit recently processed its one thousandth complaint,[257] and the court has launched a massive public relations campaign to encourage new civil parties to file before commencement of the first trial.[258] The Victims Unit has opened an office in the center of Phnom Penh, where it will be able to better serve as a point of contact between victims and the court.[259] Civil parties have come forward from across Cambodia, including the first transgender victim, who filed as a civil party on September 3, 2008.[260]

VI. RECENT DEVELOPMENTS—A PROMISING MODEL IN AN IMPERFECT COURT

Unfortunately, the enthusiasm with which Ms. Seng embraced her role as a civil party confirmed the fears of some skeptics and has already resulted in a curtailment of civil party rights. In the decision of Nuon Chea's provisional detention appeal, issued the same day as the *Decision on Civil Party Participation*, the PTC noted that "the submissions made by the Civil Party Theary Seng amounted to a victim statement; this part of her submission has not been taken into account in deciding this appeal."[261] Thus, while her presentation generated considerable interest in the proceedings, it placed the already uncertain status of civil parties on even shakier legal ground. The court

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[256] *See* Theary C. Seng, Daughter of the Killing Fields, http://www.thearyseng.com (last visited Apr. 8, 2009) (video of Theary Song's ECCC submission).

[257] Australian Broadcasting Corporation: Radio Australia, Filed Complaints Bolster Cambodian Trials, http://www.abc.net.au/ra/news/stories/200804/s2211452.htm?tab=latest (last visited Apr. 8, 2009).

[258] *See* Jaclyn Belczyk, *Cambodia Genocide Court to Encourage Victims to Come Forward*, JURIST, Jan. 20, 2009, *available at* http://jurist.law.pitt.edu/paperchase/2009/01/cambodia-genocide-court-to-encourage.php.

[259] His Excellency Sean Visoth, Remarks at the Viewing of the New Information Centre in the Centre of Phnom Penh for the Extraordinary Chambers in the Courts of Cambodia (Apr. 21, 2008), http://www.eccc.gov.kh/english/cabinet/speeches/11/DOA_remarks_of_the_new_information_center.pdf.

[260] *See* Press Release, First Civil Party on Gender Based Violence (Sept. 2, 2008), http://www.eccc.gov.kh/english/cabinet/press/73/PressRelease_1st_civil_party_on_Gender_Based_Violence.pdf.

[261] Decision on Appeal Against Provisional Detention Order of Nuon Chea, para. 6, Case against Nuon Chea, No. 002/19-09-2007-ECCC/OCIJ (PTC01) (2008), *available at* http://www.eccc.gov.kh/english/cabinet/courtDoc/54/PTC_decision_on_nuon_chea_appeal_C11_54_EN.pdf.

went so far as to e-mail Ms. Seng's attorney before the next hearing, informing him that, under the PTC's understanding of the Internal Rules, only the lawyer, and not the civil party herself, would be allowed to speak at the next hearing.[262] Ignoring these directions, the civil party nonetheless offered a statement on her own behalf at an *in camera* hearing on the detention of Khieu Samphan.[263] The PTC responded on May 20, 2008 by issuing the *Directions on Civil Party Oral Submissions*,[264] which significantly narrowed the rights granted to civil parties only two months earlier.

In these directions, the PTC declared that: "Civil Parties who have elected to be represented by a lawyer shall make their brief observations . . . through their lawyer."[265] In support of this position, the court cited Internal Rule 23(7), which refers to the right of a civil party to be represented by a lawyer.[266] While the rule gives no indication that a civil party *must* be represented by counsel, the PTC bolstered its position by reference to Rules 77(4), and 77(10), both of which refer to the rights of "lawyers for the parties" to consult the case file and present arguments.[267]

Ms. Seng next appeared as a civil party at the detention appeal of Ieng Sary, where she again asked to speak on her own behalf, rather than through her lawyer.[268] The Judges reiterated that, under the PTC's interpretation of the rules, civil parties would only be permitted to speak through counsel.[269] The following day, Ms. Seng, who is also an U.S.-trained lawyer,[270] seized on what she considered a loophole in the PTC's reasoning, and fired her attorney in open court, after which she asserted that the grounds on which the PTC had denied her request to speak were inapplicable, since she no longer had legal representation.[271] The PTC again refused, strongly stating its position that

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[262] Decision on Application for Reconsideration of Civil Party's Right to Address Pre-Trial Chamber in Person, para. 7, Case Against Sary Ieng, No. 002/19-09-2007-ECCC/OCIJ (PTC03) (2008), *available at* http://www.eccc.gov.kh/english/cabinet/courtDoc/126/C22_I_68_EN.pdf [hereinafter Decision on Reconsideration].

[263] *Id.* para. 8.

[264] Directions on Civil Party Oral Submissions During the Hearing of the Appeal against Provisional Detention Order, Case Against Thirith Ieng, No. 002/19-09-2007-ECCC/OCIJ (PTC02) (May 20, 2008) *available at* http://www.eccc.gov.kh/english/cabinet/courtDoc/97/Directions_to_civil_parties_oral_submissions_C20_I_21_EN.pdf [hereinafter Directions on Oral Submissions].

[265] *Id.* para. 5.

[266] ECCC INTERNAL RULES, *supra* note 83, R. 23(7) ("[A]ny victim participating in proceedings before the ECCC as a Civil Party has the right to be represented by a national lawyer.").

[267] Directions on Oral Submissions, *supra*, note 264, para. 3.

[268] Decision on Reconsideration, *supra* note 262, para. 12.

[269] *Id.*

[270] *See* Seng, *supra* note 256.

[271] Decision on Reconsideration, *supra* note 262, para. 13.

"only lawyers for civil parties have the right" to speak at the pre-trial phase.[272] Judge Rowan Downing filed a dissenting opinion in which he suggested, without concluding, that forbidding unrepresented civil parties from speaking may conflict with Rule 23, which grants civil parties a general right of appearance, without reference to counsel.[273] Ms. Seng then filed an appeal with the PTC, requesting reconsideration of the PTC's decision, in which she relied heavily on Judge Downing's dissent.[274] She urged the PTC to consider the fact that "the direct voice of the Civil Party . . . resonates differently than that of her lawyer."[275] Employing the same textual approach to the Rules used by the PTC, Ms. Seng emphasized that the ECCC's "fundamental principles" guarantee that the court must "preserve a balance between the rights of the parties."[276] This broad wording presumably includes civil parties, as well as the Co-Prosecutors and the defense.

These arguments did not prevail, and the result is a lamentable step backwards for the ECCC. In an August 2008 decision, the PTC found summarily that "no new facts, arguments[,] or change of circumstances have been put forward,"[277] and that "the Civil Party . . . has not demonstrated that the decision has . . . caused her an unexpected result leading to an injustice."[278] In what is a disturbing trend at the ECCC, eight pages of a nine-page decision were devoted to reciting the facts, compared to a scant four paragraphs explaining the court's reasoning.[279] Thus, at the time of this writing, civil parties, whether represented by counsel or otherwise, may only address the court through the mouth of a lawyer, rather with their own voices.

VII. CONCLUSION

It is undeniable that Ms. Seng's participation as a civil party may have caused difficulties for the PTC, and that her courtroom outbursts occasionally strayed from the legal issues at hand. But one must always remember that most

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[272] Transcript of Oral Decision on the Civil Party's Request to Address the Court in Person, *supra* note 143, para. 3.

[273] Decision on Reconsideration, *supra* note 262, para. 13.

[274] Application of Reconsideration on Civil Party's Right to Address the Pre-Trial Chamber, Civil Party Theary Chan Seng, No. 002/19-09-2007-ECCC/OCIJ (PTC 03) (July 2, 2008), *available at* http://www.eccc.gov.kh/english/cabinet/courtDoc/101/App_CP_right_to_address_PTC_C22_I_53_EN.pdf.

[275] Application for Declarative Relief for Civil Party to Speak in Person, Not for Rehearing, para. 32, Civil Party Theary Chan Seng, No. 002/19-09-2007-ECCC/OCIJ (July 17, 2008), *available at* http://www.eccc.gov.kh/english/cabinet/courtDoc/176/C22 _I_62_EN.pdf.

[276] *Id.* (citing ECCC INTERNAL RULES, *supra* note 83, R. 21(1)(a)).

[277] Decision on Reconsideration, *supra* note 262, para. 26.

[278] *Id.* para. 27.

[279] *Id.*

victims are not lawyers. They did not ask to experience the unspeakable tragedies by which they have qualified to participate in these tribunals. Nor, thus far, have they ever been given a voice in deciding what the appropriate contours of such participation should be. The ECCC, despite all its flaws, has taken a remarkable step forward in making international tribunals more open, more inclusive, and more responsive to the needs of victims than any institution that has come before it. The PTC's conclusory decision should be read, not as an indictment of the civil party system, but as an admission that the ECCC might not be up to the task of achieving its highest aspirations. However, this does not mean that those aspirations should be discarded.

The challenges that have arisen in implementing civil party participation at the ECCC can be easily met without the need to scale back on victims' rights. For example, Rule 77(4), which requires all parties to file their pleadings prior to a hearing in the PTC,[280] should be scrupulously enforced. If civil parties deviate in their oral submissions from the substance of their written briefs, opposing counsel should be permitted to object on the grounds of relevance. The fact that the first civil parties were allowed to make oral submissions without submitting briefs has created some confusion around this issue, but this can be easily rectified in future proceedings.[281] By forcing civil parties to articulate their views in writing, the court can ensure that their submissions remain confined to the issues relevant at a particular hearing. This can be accomplished just as efficiently for unrepresented civil parties as for those who have the benefit of counsel. While Rule 74(4) makes reference to "the lawyers for the parties" having the right to make submissions,[282] Judge Downing's dissent rightly notes that it is inconsistent with civil parties' right of participation to adopt a narrow reading of that rule.[283] Since there is an internal inconsistency within the rules, the trial chamber should revisit the PTC's perfunctory analysis and issue a ruling that allows unrepresented civil parties to participate, provided that they submit written briefs and confine their submissions within the scope of the hearing. The unpredictability of victim participation calls for the court to enforce the boundaries within which civil parties may recognize their rights—it does not justify scaling back on those rights at the first sign of procedural difficulty.

If international tribunals are to provide any measure of meaningful justice, they must make the inclusion of victims in the proceedings a central priority. Civil party participation ensures greater access to evidence and enhances the

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[280] ECCC INTERNAL RULES, *supra* note 83, R. 77(4) (the parties "must file their pleadings with the Greffier of the Pre-Trial Chamber").

[281] *See* Transcript of Oral Decision on the Civil Party's Request to Address the Court in Person, *supra* note 143, para. 46.

[282] ECCC INTERNAL RULES, *supra* note 83, R. 77(4).

[283] Decision on Reconsideration, *supra* note 262, para. 13.

legitimacy of the court. It allows victims to feel that their suffering is as much the focus of the trial as it was the focus the crimes. This, in turn, helps to assuage suspicions that international tribunals serve only the interests of the politically powerful. These concerns are especially important in the case of Cambodia, where the crimes took place over three decades ago, and where allegations of political interference have dogged the court from its inception. While the Extraordinary Chambers are certainly flawed, the model of civil party participation for victims offers the most promising method to date for improving international criminal proceedings. Future tribunals, such as the one being planned for Lebanon, could benefit greatly by adopting the civil party model. As such, it should be embraced, supported, and expanded to meet the needs of international criminal justice in the twenty-first century.

James P. Bair[284]

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One-Sided Bargain? Assessing the Fairness of Hawai'i's Workers' Compensation Law

I. INTRODUCTION

Sam Shopper walks into his neighborhood grocery store to pick up a frozen pizza for dinner. While making his way down the frozen foods isle, he slips and falls on a puddle of water that was caused by a leaking refrigeration unit. As he lays on the floor in agonizing pain, a store employee says: "Wow, you're the third person to slip on that puddle today! I've been telling Mr. Johnson to fix that thing for a month." Despite his pain and suffering, Sam can take a small amount of solace from the fact that he can expect to be compensated for his injury.

Because the tort system is intended to make an injured party whole, Sam will not only be able to recover for his special damages, i.e., medical bills and lost wages, he will also have the opportunity to recover for his general damages such as pain and suffering. Additionally, given the strong evidence of liability and the grocery store's ability to pay a substantial judgment, Sam will probably be able to obtain counsel to take the case on a contingency fee basis. This will decrease the chance that Sam will be forced to settle for less than he is due because he is unable to afford an attorney to help him pursue his claim. A small tweak of this hypothetical, however, would severely limit Sam's recovery for his injuries.

If Sam had been employed by the store when he suffered his injury, his recovery would have been limited by workers' compensation law. Under Hawai'i law,[1] Sam's employer would be required to pay for Sam's medical expenses and compensate him for two-thirds of his lost wages.[2] Sam would receive no compensation for his pain and suffering, and would be precluded from bringing a civil suit against his employer, regardless of the negligence or recklessness of his employer's actions.[3] In return, Sam would be entitled to receive his compensation without the delay and expense associated with the tort system, and without regard to Sam's own culpability in the accident that caused

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[1] HAW. REV. STAT. §§ 386-1 to 386-155 (1993 & Supp. 2008).

[2] *Id.* § 386-21 ("[E]mployer shall furnish to the employee all medical care, services, and supplies as the nature of the injury requires."); *id.* § 386-31(b) ("[E]mployer shall pay the injured employee a weekly benefit equal to sixty-six and two-thirds per cent of the employee's average weekly wages . . . .").

[3] It is unclear whether Sam could bring a civil claim if he was injured as result of an intentional tort. *See* Amanda M. Jones, Note, *Hawai'i's Workers' Compensation Scheme: An Employer's License to Kill?*, 29 U. HAW. L. REV. 211 (2006) (discussing the possibility that workers' compensation is the exclusive remedy for an employee injured by an intentional tort).

his injury.[4] In essence, workers' compensation reflects a legislatively mandated bargain between employers and employees. Employees give up their right to recover common law damages against an employer in return for a guarantee of prompt compensation for a workplace injury, regardless of fault.[5]

This comment posits that, in practice, Hawai'i's workers' compensation scheme fails to ensure a fair bargain between workers and employers because employers can deny or delay meritorious claims without repercussion. Given the strong economic incentives for an employer to limit the number of workers' compensation claims that are filed by its employees, it would be naïve to think that every employee receives the benefits she is due. Under current law, the injured worker bears the costs associated with compelling payment of benefits, even when those benefits have been wrongfully denied. For many working class employees, these costs present an insurmountable burden to receiving the benefits they are rightfully due.

Hawai'i's workers will receive the full benefit of the workers' compensation bargain only if the workers' compensation laws are amended to provide for an award of attorneys' fees and costs to employees whenever benefits are wrongfully withheld. Amending Hawai'i's law to provide for an award of attorney's fees would restore the bargain that is the lynchpin of the workers' compensation system, would bring Hawai'i's law into accord with many other jurisdictions, and would ensure that Hawai'i's working class has the protection that is supposed to be guaranteed under the workers' compensation scheme.

Section II of this comment traces the development of the worker's compensation laws in the United States, paying particular attention to the purposes of the laws. Section III examines the current status of workers' compensation law, particularly in Hawai'i, and argues that the high cost of challenging denied benefits prevents many workers from receiving the benefits the law is intended to provide. Section IV looks to the protections provided by other jurisdictions and proposes an amendment to Hawai'i's law that will adequately protect the state's workers without unduly burdening Hawai'i's businesses.

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[4] *See* HAW. REV. STAT. § 386-3 (requiring employers to compensate injured employees for any work related injury without regard to the injured employee's negligence).

[5] Price V. Fishback & Shawn Everett Kantor, *The Adoption of Workers' Compensation in the United States, 1900-1930*, 41 J.L. & ECON. 305, 306 (1998).

II. WORKERS' COMPENSATION LAWS WERE A LIMITED RESPONSE TO THE TORT SYSTEM'S INABILITY TO ADEQUATELY COMPENSATE INJURED WORKERS

Workers' compensation laws are a response to the thousands of workers who were injured during the industrial revolution and left destitute by a tort system that was too expensive and time consuming to provide meaningful compensation.[6] It was only after the public became aware of the large numbers of injured workers who were forced to live in poverty that workers' compensation laws gained widespread support.[7] The laws that developed were intended to provide greater protection to the working class by mandating compensation for all industrial accidents, regardless of fault.[8] In return, compensation was limited to an amount that would allow the injured employee to carry on his life without being a burden on society.[9] The prompt payment of limited benefits remains the basis for modern workers' compensation laws.

A. The Industrial Revolution Exposed Workers to Increased Risk

The Industrial Revolution, characterized primarily by the replacement of manual labor with machinery, completely changed the American social structure by concentrating the working class in large cities and factories.[10] As American industry expanded during the second half of the nineteenth century,[11] there was a huge demand for unskilled labor.[12] This need was filled by excess farm laborers, whose services had been replaced by new farm machinery, and the millions of immigrants who came to the United States looking for opportunity.[13] As industry grew, American workers went from scattered farms and craft shops to large factories in urban centers[14] and found themselves

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[6] P. Blake Keating, *Historical Origins of Workmen's Compensation Laws in the United States: Implementing the European Social Insurance Idea*, 11 KAN. J.L. & PUB. POL'Y 279, 280 (2002).

[7] Fishback & Kantor, *supra* note 5, at 315-16 (arguing that increases in government mandated reporting of industrial accidents led to increased public knowledge of the number of injuries); *see also* Keating, *supra* note 6, at 294 (giving an example of industrial accidents being used to expose the harsh realities of slum life).

[8] Keating, *supra* note 6, at 297.

[9] 1 ARTHUR LARSON & LEX K. LARSON, LARSON'S WORKERS COMPENSATION LAW § 1.03[5] (2007).

[10] Keating, *supra* note 6, at 290.

[11] *Id.*

[12] *Id.*

[13] *Id.*

[14] *Id.* at 293.

working for impersonal companies that viewed labor as nothing more than a commodity to be used in the search for greater profits.[15]

At the same time, the large factories and mines of late nineteenth century American industry exposed workers to dangers that were unknown before the industrial revolution.[16] Workers who had toiled behind a plow a few decades earlier were spending endless hours working with machinery that punished the slightest misstep with debilitating injury.[17] Little was done to improve safety because business owners were concerned that safety measures would raise costs, and thus put their businesses at a competitive disadvantage.[18] Predictably, large numbers of workers were injured or killed while providing the labor necessary to build the United States into the world's leading industrial power.[19]

B. Laissez Faire Economics Discouraged Government Promulgation of Safety Regulations

While the modern observer might expect government to step in and protect the working class, the prevailing economic theory during the industrial revolution suggested workers were better off if left to fend for themselves.[20] The "social Darwinists" of the industrial age viewed the business world as an extension of the natural evolutionary process described by Darwin, and believed government could best serve the economy by allowing the "fittest" members of society to rise above the rest.[21] This belief led to the widespread acceptance of *laissez faire* economics,[22] with its belief that business should be free to operate without government regulation.[23] The vast amounts of wealth created by the explosion of industry in the United States was viewed as proof-

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[15] *Id.* at 284.

[16] *Id.* at 290.

[17] *Id.* at 292.

[18] *Id.* at 292.

[19] *Id.* at 290. Before workers' compensation laws were enacted the injury rate for trainmen was approximately ten percent a year. *Id.* at 296.

[20] *Id.* at 284-87.

[21] *Id.* at 285.

[22] *Laissez faire*, literally translated to "allow to do," is an economic philosophy which gained popularity in the early 19th century and reached its worldwide peak sometime around 1870. *See generally* Encyclopedia Britannica Online, Laizzez-faire, http://www.britannica.com/EBchecked/topic/328028/laissez-faire (last visited July 26, 2009). The basic tenet of *laissez faire* is that society's best interest will be served if the government allows individuals to pursue their own interests. *Id.* Accordingly, *laissez faire* theory counsels against government intrusion into business and personal relationships and sees government's role in business as limited to enforcing contracts. *Id.*

[23] Keating, *supra* note 6, at 284.

positive of the validity of *laissez faire*, and increased its influence with policymakers.[24]

Laissez faire philosophy became so pervasive during the latter half of the nineteenth century that businesses were free to compete with almost no government regulation.[25] This freewheeling business environment created a situation where businesses competed fiercely to eliminate competition.[26] In the absence of anti-trust law, businesses looked to consolidation as a way to take advantage of economies of scale and combined through mergers, acquisitions, and hostile takeovers, into large conglomerations.[27] The reduced costs of production, marketing, and finance that were enjoyed by larger companies soon led to the monopolization of several industries.[28] In his examination of the historical origins of workers' compensation law, P. Blake Keating argues that the concentration of jobs in fewer employers further contributed to the unsafe working conditions by limiting employment options.[29] Employers did not have to be responsive to employee demands for safer working conditions when the employees had no other options for work.[30]

The industrial revolution marked the high point for employer's bargaining power over their employees. With limited options for other employment, employees found themselves powerless when negotiating the terms of their employment.[31] Demands for better pay and improved working conditions were largely ignored by the employers, who feared increasing employment costs would give competitors an economic advantage and knew that their employees would not be able to find safer working conditions at a competitor.[32] At the same time, the widespread popularity of *laissez faire* economics deterred the government from mandating improved working conditions.[33]

Government policy at the time was based on a belief that society's best interests would be achieved if each individual were left alone to pursue his own self-interest.[34] Applied to the labor market, this meant that workers would seek employment that offered an acceptable balance of safety and pay, and that employees working in dangerous positions had decided that their pay offset the risk of injury.[35] According to *laissez faire* theory, an employee who valued a

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[24] *Id.*
[25] *Id.* at 283-84.
[26] *Id.*
[27] *Id.*
[28] *Id.* at 284.
[29] *Id.*
[30] *Id.*
[31] *Id.* at 290.
[32] *Id.* at 292.
[33] *Id.* at 290.
[34] *Id.* at 284.
[35] *Id.* at 291-92.

safer working environment more than the accompanying reduction in pay would simply keep looking for a job until finding the right mix of risk and reward. This logic, of course, assumed that workers had a choice between safe and unsafe working conditions.

The realities of the labor market prevented the theory of *laissez faire* from becoming a reality.[36] Large scale consolidation of industry had left relatively few employment options for workers.[37] Additionally, the lack of concern for employee working conditions was pervasive among the industries employing unskilled workers.[38] As a result, the working class was left to choose among careers with only marginally different safety records.[39] Safety conscious workers were unable to obtain employment that offered a satisfactory balance of risk and reward because all industries presented a high level of risk.

C. The Tort System Provided Only Limited Relief

Although *laissez faire* policies did not interfere with an injured employee's right to bring a tort suit against his employer for injuries received in an industrial accident, courts did not provide a welcoming venue.[40] The common law only required employers to exercise the care of a "reasonably prudent master," and required injured workers to prove by "competent evidence" that their employer failed to meet that standard.[41] Despite this potential avenue of proving negligence, and thus receiving compensation for an industrial injury, practical considerations often prevented meaningful recovery.[42]

Tort recovery was often denied because the injured employee could not meet the burden of proof, or because the employer was able to successfully argue an affirmative defense.[43] In many cases, the injured employee had to depend on the testimony of his coworkers to prove that the employer was negligent.[44] This prevented many injured workers from proving their cases because current employees were often afraid of losing their jobs if they testified against their

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[36] *Id.* at 292.

[37] *Id.* at 284.

[38] Fishback & Kantor, *supra* note 5, at 315 (comparing accident rates among industries).

[39] *Id.*

[40] *See* Keating, *supra* note 6, at 280.

[41] *Id.* (quoting 1 LARSON, *supra* note 9, § 4.30 [2-5]). An injured employee could receive compensation by showing that the employer did not ensure there were enough employees to allow work to be performed safely, inspect and repair equipment, give warnings about any unusual dangers, or promulgate and enforce safety rules that would have alerted the employee to the risk. *Id.*

[42] *Id.* at 280-81.

[43] *Id.* at 280.

[44] *Id.*

employer.[45] In cases in which an employee was able to overcome the evidentiary challenges, the common law provided several affirmative defenses for employers that created significant obstacles to recovery.[46] The employee would be denied recovery if the employer could prove that the injury was the fault of a negligent coworker, was from an inherent risk of the job, or if the injured employee was contributorily negligent in any way.[47]

Even if the injured employee was able to overcome the hurdles to obtaining a tort recovery against the employer, the costs and delay of going to court often made any recovery a pyrrhic victory.[48] Attorneys' fees ate away at the principal of any award, and the period of time between injury and payment was often too much for the injured worker and his family to bear.[49] For the many injured workers whose sole source of survival was the pay earned by selling their labor to others, a long delay in receiving compensation was the equivalent to no recovery at all.

D. Workers' Compensation Was First Proposed by the Early Labor Movement to Improve Recoveries for Injured Workers

The basic concept of workers' compensation came from the labor movement's attempt to improve working conditions.[50] The working class, who had felt powerless against their large corporate employers, discovered the power of banding together shortly after the end of the Civil War.[51] These early unions quickly made improving working conditions a major goal, and sought to negotiate better conditions for their members.[52] Consequentially, the first examples of the bargain that forms the basis of modern workers' compensation law, where workers agree to surrender their common law rights to sue in exchange for guaranteed compensation, came from the unions in the form of private contracts between employers and employees.[53] Although these agreements were ultimately struck down as contrary to public policy,[54] the seed of workers' compensation had been sown.

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[45] *Id.*

[46] *Id.* at 280-81.

[47] *Id.*

[48] *Id.* at 280.

[49] *Id.* at 299 (citing state investigations that revealed legal costs averaged between thirty and fifty percent of the recovery and suits often took years to resolve).

[50] *See id.* at 289.

[51] *See id.* at 283.

[52] *See id.*

[53] Fishback & Kantor, *supra* note 5, at 311.

[54] *See id.* Many courts struck down the early workers' compensation agreements out of concern for employees. The concern was that employers, who held most of the bargaining power, would force employees to sign away their rights as a condition of employment. "[A]n

The labor movement also alerted government to the conditions facing many workers, which caused government regulators to begin tracking workplace safety.[55] According to economists Fishback and Kantor, the publication of these government accident reports caused the public to take notice of the plight of many injured workers.[56] As public outrage grew, the failings of *laissez faire* were recognized and government realized the need to provide some protection for the working class.[57]

The State of New York passed the first comprehensive workers' compensation law in 1910,[58] and saw that law struck down as unconstitutional the very next year.[59] The statute made employers directly liable for injuries to employees, but did not contain a provision for mitigation of that liability by insurance.[60] The New York Court of Appeals saw the "plainly revolutionary"[61] law as an unconstitutional taking of the employer's property without compensation or due process of law and invalidated the law as applied.[62] The court did recognize, however, the state's power to eliminate the common law defenses to liability that had been a major obstacle in employees' attempts to recover from negligent employers.[63]

Faced with the prospect of having all workers' compensation laws struck down, New York and six other states amended their state constitutions to specifically allow workers' compensation laws.[64] Other states enacted voluntary systems, and statutorily eliminated the common law defenses to negligence in an attempt to coerce employers into participating.[65] Government did not face any serious opposition to its attempts to implement workers' compensation on a large scale, however, because all of the interested parties expected to benefit from the laws.[66]

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employer can not [sic] relieve itself from responsibility to an employee for an injury resulting from his own negligence by any contract entered into for that purpose before the happening of the injury." *Id.* (citing Stephen Fessenden, Present Status of Employers' Liability in the United States 1203 (U.S. Dep't Lab. Bull. No. 29, 1900)).

[55] *Id.* at 315-16.

[56] *Id.* at 316.

[57] *See* Keating, *supra* note 6, at 291-92.

[58] *Id.* at 300.

[59] *See* Ives v. S. Buffalo Ry. Co., 94 N.E. 431 (N.Y. 1911).

[60] Keating, *supra* note 6, at 300.

[61] *Ives*, 94 N.E. at 436.

[62] *Id.* at 440-41.

[63] *Id.* at 437-38.

[64] Keating, *supra* note 6, at 300.

[65] *Id.* at 298.

[66] *See generally*, Fishback & Kantor, *supra* note 5, at 305-08.

Mandatory workers' compensation laws were believed to be beneficial to both the working class and business interests.[67] Although workers paid for workers' compensation through lower wages and limited recovery, the price they paid was worth the increased access to compensation for injuries.[68] Employers viewed workers' compensation as a way to reduce the uncertainty that came from having to litigate injury claims, and also as a way to buy peace with the labor movement.[69] Another reason employers were receptive to workers' compensation, according to Fishback and Kantor, is that employers expected to pass the costs of insurance to workers through lower wages.[70]

With the support of labor and industry, workers' compensation became a national movement,[71] and states began to pass enabling legislation in the early twentieth century.[72] The U.S. Supreme Court recognized the validity of both voluntary and compulsory schemes in 1917,[73] and by 1920 all but six states had workers' compensation laws of some sort on their books.[74] As of 2009, workers' compensations statutes have been in place in all fifty states for more than fifty years.[75]

E. Workers' Compensation Benefits Intentionally Undercompensates Injured Workers

The introduction of workers' compensation laws reflected a newfound belief that industrial accidents were not the "fault" of anyone, and should therefore not be allocated to employer or employee alone.[76] Additionally, policymakers recognized that the central tenet of *laissez faire*, that the unrestricted pursuit of individual self-interest would automatically lead to optimal results, was not a practical reality.[77] Where *laissez faire* economics told government to stay out of business regulation, turn of the century America expected the government to actively promote the welfare of all members of society.[78] It was against this backdrop that the details of workers' compensation developed.

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[67] *Id.* at 305.

[68] *Id.*

[69] *Id.* at 309-10.

[70] *Id.* at 314.

[71] Keating, *supra* note 6, at 307.

[72] Fishback & Kantor, *supra* note 5, at 314-15.

[73] Keating, *supra* note 6, at 300 (citing N.Y. Central R.R. Co. v. White, 243 U.S. 188 (1917)).

[74] Fishback & Kantor, *supra* note 5, at 320.

[75] *Id.* It should be noted that Hawai'i's workers' compensation scheme dates to 1915. *See* 1915 Haw. Sess. Laws 323.

[76] Keating, *supra* note 6, at 297.

[77] *Id.* at 291.

[78] *Id.* at 297.

For workers' compensation laws to be accepted by the business community, the laws had to provide business owners with relief from expensive litigation and the threat of liability for large damage awards.[79] Despite the fact that employees had great difficulty bringing a successful suit, business owners faced the risk that a sympathetic jury would grant an injured worker a large award.[80] When the costs of defending suits by employees was considered, it made sense for businesses to accept liability for all employment injuries in exchange for a limit on the size of the award and freedom from litigation.[81]

Employees were also open to workers' compensation because employers' common law defenses to negligence under the tort system often made an injured worker's recovery impossible.[82] Even if an injured worker could overcome the employer's defenses, the long delay between injury and trial meant that many injured workers were forced to settle with the company out of a need to support their families.[83] Meaningful compensation was also denied to many who successfully brought suit because legal fees drained away thirty to fifty percent of the recovery.[84] To workers exposed to the harsh realities of using the courts to recover for industrial injuries, the guarantee of an immediate, though limited, award from workers' compensation was preferable to having the opportunity to pursue an uncertain, although possibly higher, tort award.[85]

With the interested parties agreeing on the need for change as well as the basic elements of the workers' compensation bargain, the only issue left for government to decide was the amount of compensation to provide injured workers.

The comprehensive nature of workers' compensation, where employees receive benefits even if they are injured by their own negligence, raised concerns that workers would feign injury to obtain benefits, or would not be as careful to avoid injuries as they had been under the tort system.[86] In response,

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[79] Fishback & Kantor, *supra* note 5, at 309.

[80] *Id.* at 316. Employers also had reason to fear large awards because state legislatures had begun statutorily removing some of the common law defenses to employer negligence in response to public outrage at the results of industrial accidents.

[81] *See id.* at 309-10, 316-18.

[82] Keating, *supra* note 6, at 280-81. Employers had three common law defenses to negligence. The fellow servant rule denied recovery if the injury was due to the "negligence of a fellow worker." *Id.* at 280. The assumption of risk doctrine denied recovery if it was determined that the injury was the result of a danger that was inherent in the job and the employee should have known of the danger. *Id.* Finally, contributory negligence denied recovery if the employee was even slightly at fault for his own injury. *Id.* at 280-81.

[83] *Id.* at 299-300.

[84] *Id.* at 299.

[85] Fishback & Kantor, *supra* note 5, at 305.

[86] *Cf.* Richard A. Epstein, *The Historical Origins and Economic Structure of Workers'*

the benefits paid under workers' compensation were intentionally designed to leave the injured employee worse off than if the injury had not occurred.[87] Under workers' compensation, injured employees were no longer entitled to compensation for pain and suffering, or even permanent disabilities that did not affect earning potential.[88] Instead, injured workers would be compensated solely for lost earning potential.[89]

III. HAWAI'I'S WORKERS' COMPENSATION FALLS SHORT OF PROVIDING ALL INJURED EMPLOYEES WITH THE BENEFITS THEY ARE DUE

Hawai'i's workers' compensation laws do not create a fair bargain between employers and workers because there is no provision to provide an injured worker with the resources needed to compel payment of a wrongfully denied claim. Although workers are still effectively precluded from bringing civil actions against their employers for work related accidents,[90] and the practice of intentionally undercompensating injured workers is still in place,[91] the lack of representation for injured workers allows employers to avoid paying some legitimate claims.[92]

Hawai'i's laws, like those of many other states, attempt to encourage payment of all meritorious claims by assessing penalties to employers[93] who

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Compensation Law, 16 GA. L. REV. 775, 800-01 (1982) (listing the benefits of low compensation as including the prevention of fraud and the encouragement of self protection).

[87] *Id.*

[88] Keltz v. Cereal & Fruit Products, Ltd., 34 Haw. 317, 319 (1937) (denying permanent disability compensation to a worker whose eyesight was damaged by a workplace accident, but was correctable with eyeglasses).

[89] *E.g.*, *id.*

[90] HAW. REV. STAT. § 386-5 (1993). Commonly known as the exclusivity provision, the statute establishes workers' compensation as the exclusive remedy for "a work injury suffered by the employee[, and] . . . exclude[s] all other liability of the employer to the employee . . . ." *Id.* The statute makes exceptions for "sexual harassment or sexual assault and infliction of emotional distress or invasion of privacy related thereto," but does not allow civil suits for any other reason. *Id.* While many state and federal courts have interpreted exceptions to exclusivity provisions for intentional torts, the Hawai'i Supreme Court has not yet ruled on this issue. *See* Jones, *supra* note 3, at 219-38.

[91] *See generally* 1 LARSON, *supra* note 9, §§ 1.01 to 1.1.03[5]; *supra*, Section II-E.

[92] *See infra* Section III.B.

[93] HAW. REV. STAT. § 386-9 (1993) ("No contract, rule, regulation or device whatsoever shall operate to relieve the employer in whole or in part from any liability created by this chapter."). As a practical matter, it is almost always the employer's workers' compensation insurance carrier that is handling the claim, making the payments, and potentially paying the penalties. This comment will refer to the penalties as if it were assessed against the employer because Hawai'i Revised Statute (HRS) section 386-9 ensures that liability for workers' compensation payments remains with the employer.

withhold payment of legitimate claims.[94] Hawai'i's laws fall short, however, because enforcement of these penalties is left to the injured employee, who must bring an action with the Labor and Industrial Relations Board.[95] In the hearing that follows, the injured worker will be required to prove the legitimacy of the contested benefits in a quasi-judicial proceeding.[96] To an injured worker, the prospect of proving his or her case in an adversarial setting may prove too confusing, or too intimidating, to be a legitimate option.[97] As a result, employers can deny legitimate claims with little fear that the employee will challenge the denial in front of the board.

A. The Compensation Provided to Injured Workers is Not Enough to Allow Workers to Obtain Representation

The limited benefits provided to injured workers do not allow workers to pursue wrongfully denied claims because the costs of pursuing the claim often outweigh the benefits. Although workers' compensation benefits are intended to compensate the injured worker for lost earning potential,[98] concerns that workers would attempt to defraud the system resulted in benefits being limited to "a sum which, added to his or her remaining earning ability, if any, will

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[94] *See* HAW. REV. STAT. § 386-92 (Supp. 2008) (allowing a penalty of twenty percent of any disability benefits that are not paid within ten days of being due); *id.* § 386-93 (allowing the assessment of the costs of the proceeding against a party that has filed a complaint without reasonable ground and requiring an employer to pay the costs and attorneys' fees of an injured worker if the employer loses an appeal of a decision of the director); *see also* 8 ARTHUR LARSON & LEX K. LARSON, LARSON'S WORKERS COMPENSATION LAW § 135.01 (2007) (comparing the penalty provisions of each state).

[95] HAW. REV. STAT. § 386-73.5. The statute vests the director of the Labor and Industrial Relations Board with "original jurisdiction over all controversies and disputes over employment and coverage under [the workers' compensation laws.]" *Id.* The Hawai'i administrative rules give an injured employee the right to file a claim with the administrator if benefits are denied. HAW. ADMIN. RULES § 12-10-73(c) (LexisNexis 2009).

[96] *See* HAW. ADMIN. RULES § 12-10-65 (permitting the use of any means of discovery available in the circuit courts); *id.* § 12-10-66 (establishing procedures for the issuance of subpoenas); *id.* § 12-10-74 (allowing "consolidation of claims and joinder of additional parties").

[97] Chief Justice Phil Hardberger, *Texas Workers' Compensation: A Ten Year Survey—Strengths, Weaknesses, and Recommendations*, 32 ST. MARY'S L.J. 1, 57-58 (2000). A study of the Texas workers' compensation system revealed that only 44% of injured workers without a high school education knew they could challenge an impairment rating, whereas 58% of injured workers with more than a high school education knew they could challenge their rating.

[98] *See, e.g.*, Keltz v. Cereal & Fruit Prods., Ltd., 34 Haw. 317, 319 (1937). Workers' compensation also entitles injured workers to "all medical care, services, and supplies . . . the nature of the injury requires," subject only to the limit that treatment not exceed what is necessary for medical recovery. HAW. REV. STAT. § 386-21.

presumably enable [the] claimant to exist without being a burden to others."[99] To avoid the expense of individual determinations of the appropriate levels of compensation, workers' compensation laws set wage loss benefits as a percentage of pre-accident wages.[100] Most states have limits on the amount of compensation that can be paid to discourage abuse of the system by injured workers who may attempt to delay their return to work in order to extend their benefits.[101]

The lost wage benefits provided by Hawai'i's workers' compensation law compare favorably with the benefits provided by other states. Across the country, workers' compensation statutes set lost wage benefits at somewhere between 50% and 100% of the injured employee's average pre-injury earnings.[102] More than wages are included in this calculation, everything that constitutes economic gain to the employee, including tips, bonuses, and other indirect benefits, are included.[103] Most states, however, limit either the amount of time that benefits will be paid, or establish a maximum benefit that caps payments at a particular level.[104]

In Hawai'i, an injured worker is entitled to 66.66% of his or her average wage as compensation for lost wages.[105] These benefits will continue as long as the employee is receiving medical treatment necessary to recover from the injury,[106] but are limited to one hundred percent of the state's average weekly wage.[107]

Hawai'i's method of computing lost wage benefits is a good compromise between efficiency and accuracy. The mechanical nature of the benefit calculations controls costs by essentially eliminating disputes over the level of compensation.[108] Additionally, by limiting benefits to 100% of the state's

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[99] 1 LARSON, *supra* note 9, § 1.03[5].

[100] *See generally* 5 ARTHUR LARSON & LEX K. LARSON, LARSON'S WORKERS COMPENSATION LAW § 93.01[1] (2007).

[101] *See generally id.* § 93.04.

[102] 10 ARTHUR LARSON & LEX K. LARSON, LARSON'S WORKERS COMPENSATION LAW B-10 to B-19, tbl. 6 (2007). New Jersey, and Oklahoma fix compensation at 70% of pre-injury wages; Washington and Texas set compensation on a sliding scale with a maximum award of 75% percent of pre-injury wage. Forty states, including Hawai'i, set compensation at 66 2/3% of pre-injury wage.

[103] 5 LARSON, *supra* note 100, § 93.01[2][a].

[104] *See id.* § 93.04.

[105] HAW. REV. STAT. § 386-31(a) (1993).

[106] *See id.* (requiring the unlimited payment of benefits for permanent disabilities, and the payment of temporary benefits until the employee is able to return to work).

[107] *Id.* The maximum weekly benefit in 2007 was $622.00. *See* 10 LARSON, *supra* note 102, at B-12 tbl. 6.

[108] *See* HAW. ADMIN. RULES § 12-10-23 (LexisNexis 2009). This section contains detailed procedures for the calculation of benefits. A partial listing of the scenarios included are instructions for calculating benefits for employees who work occasional overtime, do seasonal

average weekly wage, the law ensures that most injured workers will receive the full 66.66% of their wage as compensation.[109] Because workers' compensation payments are excluded from taxable income,[110] basing compensation on a percentage of the injured employee's pre-accident wages serves as an acceptable estimate of the employee's lost earning power. It should be remembered, however, that this level of compensation is based on the assumption that the employee will not have to expend any resources to obtain the benefits that are due.

B. Hawai'i's Laws do Not Adequately Protect the Injured Workers' Interests

Unlike the typical tort plaintiff, an injured worker cannot expect to recover for general damages associated with his or her injury.[111] This severely limits the worker's ability to pursue a wrongfully denied claim because there is no possibility of the worker recovering the cost of pursuing the claim. As a result, an injured worker who wishes to challenge a denial of benefits must pay the associated expenses out of his or her own pocket. This can act as an absolute bar to recovery if the injured worker is unable to navigate the claims system *pro se*, and does not have the resources to hire representation.[112] To compensate for the average worker's inability to effectively pursue a claim, every workers' compensation scheme contains some mechanism to ensure employers promptly distribute the benefits due to an injured worker.[113]

Most states use monetary penalties to punish employers who unreasonably delay benefits.[114] These penalties range from 10% to 100% of the unpaid amount,[115] and can be supplemented by civil penalties in some states.[116] Where the states differ, however, is in the specific conduct that triggers a penalty.[117] At one extreme are states that assess a penalty whenever a payment takes longer

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work, earn incentive pay, or have recently changed jobs. *Id.*

[109] As of 2007, only workers earning more than $932 per week, or 150% of the state's average weekly wage, would see their benefits affected by the compensation limit of $622.00 per week.

[110] 26 U.S.C.A. § 104(a) (1) (West, Westlaw through 2009 legislation).

[111] *See supra* Section II.D.

[112] *See generally* Hardberger, *supra* note 97, at 41-67 (assessing the effects of changes to the Texas workers' compensation law that drastically reduced attorney involvement).

[113] 8 LARSON, *supra* note 94, § 135.02[2].

[114] *Id.* § 135.01.

[115] *Id.*

[116] *Id.*; *see also* Hough v. Pac. Ins. Co., 83 Hawai'i 457, 927 P.2d 858 (1996) (allowing claims of bad faith, intentional and negligent infliction of emotional distress, unfair and deceptive acts or practices, breach of contract and fiduciary duty, conversion, and loss of consortium against a workers' compensation insurance carrier that refused benefits in bad faith).

[117] 8 LARSON, *supra* note 94, § 135.02[1].

than a statutory deadline, at the other extreme are the states that require a finding of unreasonable delay regardless of the amount of time it takes the employer to compensate the injured worker.[118]

Hawai'i law assesses a penalty of 20% of the unpaid benefits if permanent disability benefits are not paid within thirty-one days, or if temporary disability benefits are not paid within ten days.[119] This penalty will only be assessed if the employee files a claim with the Department of Labor and Industrial Relations, and is waived if the employer reasonably contests the employee's right to compensation.[120] An employer who wishes to contest the legitimacy of a claim may file a motion with the director of labor and industrial relations,[121] and may also request a hearing to resolve the issue.[122]

1. Employers have a legitimate interest in challenging borderline claims

To understand why employers have legitimate reasons to contest claims, it is important to keep in mind that, even though negligence is not an issue, workers' compensation is not a strict liability system. Hawai'i Revised Statutes (HRS) section 386-3 establishes that all "personal injury either by accident arising out of and in the course of employment or by disease proximately caused by or resulting from the nature of the employment" will be covered by the workers' compensation laws.[123] Consequentially, an employer is only liable for injuries that are sustained in the course of employment, and any diseases that are proximately caused by the nature of the employment.[124]

Disputes about the legitimacy of claims are most likely to develop in the context of an occupational disease. Occupational diseases, as opposed to work

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[118] *Id.*

[119] HAW. REV. STAT. § 386-92 (Supp. 2008).

> [A]ny compensation . . . not paid . . . within thirty-one days after it becomes due, as provided by the final decision or judgment, or if any temporary total disability benefits are not paid . . . within ten days, . . . and where the right to benefits are not controverted in the employer's initial report of industrial injury or where temporary total disability benefits are terminated in violation of section 386-31, there shall be added to the unpaid compensation an amount equal to twenty per cent thereof payable at the same time as, but in addition to, the compensation.

Id.

[120] *Id.* The employer can also prove that the delay should be excused because it was caused by circumstances outside the employer's control. *Id.*

[121] *Id.* § 386-73.5.

[122] *Id.* § 386-86.

[123] *Id.* § 386-3.

[124] *Id.* § 386-3(b). Employers are also excused from liability if the injury was caused by "the employee's wilful [sic] intention to injure oneself or another by actively engaging in any unprovoked non-work related physical altercation other than in self defense, or by the employee's intoxication." *Id.*

related injuries, develop gradually over a period of time.[125] There is no specific triggering event, and it is possible that the disease is the result of multiple factors. This makes occupational diseases especially susceptible to challenges from employers because the cause of the disease is not always clear.

Employee challenges to these types of claims serve a valid purpose in the workers' compensation scheme. Without these challenges, the workers' compensation system would bear the burden of compensating injuries that are not work related. This would raise the costs of the system, and consequentially the cost of doing business. At the same time, the interests of the worker with a valid claim must be protected.

2. The Hawai'i claims process provides an unfair advantage to employers

The possibility of a hearing before the director can act as severe obstacle to the payment of legitimate benefits or the enforcement of the penalty provisions. The quasi-judicial nature of the hearing process can confuse or intimidate an injured worker,[126] and the relatively modest compensation provided by workers' compensation[127] does not justify the expense of hiring an attorney to represent the worker's interests. Additionally, workers who are able to use the system may find that the low levels of compensation available make the process uneconomical.[128]

Hawai'i's workers' compensation law attempts to level the playing field by providing assistance to injured workers. The Department of Labor and Industrial Relations is statutorily required to maintain a workers' compensation benefits facilitator unit, whose purposes include assisting injured workers in filing claims.[129] Perhaps more importantly, the law provides for presumptions in favor of the employee:

> (1) That the claim is for a covered work injury;
>
> (2) That sufficient notice of such injury has been given;
>
> (3) That the injury was not caused by the intoxication of the injured employee; and

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[125] 82 AM. JUR. 2D *WORKERS' COMPENSATION* § 312 (Westlaw 2008).

[126] *See* HAW. REV. STAT. § 386-86(e) (allowing discovery for hearings before the department).

[127] *See supra* Section I.E.

[128] *See* HAW. ADMIN. RULES §§ 12-10-65, 12-10-66 (LexisNexis 2009) (allowing depositions and subpoenas, which would require the employee to pay for a court reporter and service).

[129] HAW. REV. STAT. § 386-71.6.

> (4) That the injury was not caused by the wilful [sic] intention of the injured employee to injure oneself or another.[130]

The law also attempts to accommodate the injured worker by requiring the hearings to be informal in nature,[131] thus reducing the potential that procedural hurdles will prevent the injured worker from making his or her case.

Even though the hearing is intended to be an informal affair, there is no denying it has the essence of a judicial proceeding.[132] The employee will be expected to subpoena evidence, question witnesses, and persuade the director of the validity of his or her position.[133] All of these tasks will be intimidating to someone unfamiliar with the legal system, and may serve as an insurmountable obstacle to a worker with only a limited formal education. Add to that the fact that the employer is likely to be represented by experienced counsel and the odds against effective enforcement of the penalty provisions become even greater.

3. The lack of a provision for the award of attorneys' fees prevents many workers from effectively contesting denials of valid claims

An injured worker is free to hire an attorney to represent his or her interests in a workers' compensation claim.[134] Many states have recognized the possibility that an injured worker will have limited financial resources, and have attempted to protect workers from high fees.[135] The traditional response has been to strictly supervise the fees charged by attorneys, often by placing limitations on the amount that can be charged.[136] Hawai'i has joined this group by requiring the approval of the director of Labor and Industrial Relations for any fees charged to represent an injured worker.[137] In considering fee requests,

> the director may consider factors such as: the attorney's skill and experience in Hawaii workers' compensation matters; time and effort required by the complexity of the case; novelty and difficulty of issues; fees awarded in similar cases; benefits obtained for the claimant; hourly rate customarily awarded attorneys possessing similar skill and experience; and fees awarded in compensation cases . . . .[138]

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[130] HAW. REV. STAT. § 386-85 (1993).

[131] *Id.* § 386-86(b).

[132] *See supra* note 96 (showing the various discovery methods available to participants in a hearing before the department of labor and industrial relations).

[133] HAW. REV. STAT. § 386-86.

[134] *Cf. id.* § 386-94 (requiring approval of all attorneys' fees).

[135] *See* 8 LARSON, *supra* note 94, §§ 133.01-.02.

[136] *Id.*

[137] HAW. REV. STAT. § 386-94.

[138] HAW. ADMIN. RULES § 12-10-69(b) (LexisNexis 2009).

In 2008, these factors resulted in fees ranging from $125 per hour to more than $150 per hour.[139]

To put the attorney's fees in perspective, it is important to remember that the maximum weekly benefit allowed by Hawai'i's workers' compensation law is $622 per week.[140] This results in a maximum penalty of approximately $125 for any unreasonable delay in the payment of temporary disability benefits.[141] With the department awarding attorneys' fees no lower than $125 per hour, the penalty awarded to an injured worker receiving the maximum temporary disability benefit will only pay for one hour of work by an attorney at the lowest end of the compensation scale.[142] A worker who is challenging the denial of permanent partial disability payments is in only a marginally better position.

Permanent partial disability payments are significantly higher than temporary benefits.[143] Permanent disability benefits range from fifteen weeks wages for the loss of a finger, to three hundred twelve weeks wages for the loss of an arm.[144] While these increased benefits may provide resources to pay attorneys' fees, the fees will be paid from funds that are intended to compensate the worker for a lifetime of lost wages.[145] Additionally, because permanent disability benefit determinations are based on medical reports,[146] an injured worker will need to hire medical experts, with the associated expenses, to contest a denial of these claims. Consequentially, an injured worker who prevails in a hearing regarding permanent partial disability benefits will see a large portion of her benefits go to attorneys' fees and costs.

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[139] Interview with Clyde Imada, Workers' Compensation Chief, Hawai'i Dept. of Labor and Indus. Relations, in Honolulu, Hawai'i (Mar. 27, 2009).

[140] *See supra* note 107.

[141] HAW. REV. STAT. § 386-92; *see also supra* note 117.

[142] HAW. ADMIN. RULES § 12-10-74(b). An injured worker could obtain an increased penalty award by consolidating multiple claims into one action. If the worker was receiving the maximum weekly benefit, and hired an attorney who was awarded the minimum fee, the worker would need to obtain penalty payments for one week per hour worked by the attorney ($125 per week penalty versus $120 per hour minimum attorney compensation).

[143] *See* HAW. REV. STAT. § 386-31.

[144] *Id.* § 386-32(a).

[145] *See supra* Section II.E (discussing the purpose of workers' compensation as replacing lost income).

[146] *Cf.* HAW. ADMIN. RULES § 12-10-21 ("Impairment rating guides issued by the American Medical Association, American Academy of Orthopedic Surgeons, and any other such guides which the director deems appropriate and proper may be used as a reference or guide in measuring a disability.").

IV. HAWAI'I'S WORKERS' COMPENSATION LAWS SHOULD BE AMENDED TO PROVIDE FOR AN AWARD OF ATTORNEYS' FEES TO A WORKER WHO SUCCESSFULLY CONTESTS A DENIAL OF BENEFITS

The basic rule of the American legal system that "[e]ach party pays its own lawyer, win or lose"[147] has been modified by statute when the legislature has determined that the interests of justice will be best served by shifting the burden of attorneys' fees.[148] Some of the instances in which the Hawai'i legislature has enacted provisions for attorneys' fees include actions in the nature of assumpsit,[149] certain civil cases,[150] and in claims against automobile personal injury protection (PIP) providers.[151] The legislature has not, however, provided for the award of attorneys' fees to an injured worker who successfully contests a denial of benefits.

A substantial majority of states have adopted provisions to workers' compensation laws that "add on" awards attorneys' fees to the regular compensation that an injured employee is due.[152] These statutes are intended to protect injured workers by ensuring workers will not be forced to abandon valid claims due to the high costs of obtaining representation.[153]

Hawai'i has joined this majority by providing for an award of add-on attorneys' fees in one specific situation. Hawai'i's provision for add-on attorneys' fees allows the award of attorneys' fees against an employer who loses an appeal of an adverse decision.[154] It is important to note that because this provision only applies when an employer loses an appeal, it only comes into effect if the employee has already been awarded benefits.[155] Hawai'i's add-on attorneys' fees provision does not provide any relief to the worker who is forced to prove the validity of her claim at an initial hearing in front of the board.

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[147] 8 LARSON, *supra* note 94, § 133.01.

[148] *E.g.*, TSA Int'l, Ltd. v. Shimizu Corp., 92 Hawai'i 243, 263-64, 990 P.2d 713, 733-34 (1999) (explaining the basis for awarding attorneys' fees in actions in the nature of assumpsit).

[149] HAW. REV. STAT. § 607-14 (Supp. 2008).

[150] *Id.* § 607-14.5.

[151] HAW. REV. STAT. § 431:10C-304(5) (2005).

[152] 8 LARSON, *supra* note 94, § 133.02[2][a].

[153] *Id.*

[154] HAW. REV. STAT. § 386-93 (1993 & Supp. 2008).

[155] *Id.* § 386-93. Hawai'i law also provides for the assessment of the cost of the proceeding against any party that is found to have brought, prosecuted, or defended a claim without reasonable ground.

A. Awarding Attorneys' Fees to Injured Workers Who Compel Payment of Wrongfully Denied Benefits is Consistent with Established Reasons for Awarding Attorneys' Fees

The American system of requiring each party to pay its own attorneys' fees has been the subject of much criticism because legal costs prohibit a winning plaintiff from recovering her true damages, and a winning defendant finds herself punished in the form of legal bills even though she is without legal fault.[156] While this system has been seen as a necessary evil, state legislatures have seen fit to alter this arrangement in certain situations.[157] Given the limited benefits provided by the workers' compensation system, many states have determined that some of the costs of representation should be shifted away from injured employees.[158]

Requiring an injured worker to pay the costs associated with compelling payment of benefits unreasonably burdens the worker. Because the workers' compensation system intentionally undercompensates injured workers,[159] any funds that are used to compel payment will have a significant effect on the injured employee's quality of life.[160] If the workers' compensation laws are truly limiting compensation to "a sum which, added to his or her remaining earning ability, if any, will presumably enable [the] claimant to exist without being a burden to others,"[161] an employee who is forced to expend resources to obtain benefits could easily become destitute. Allowing an award of add-on attorneys' fees could protect workers by ensuring the benefits due under workers' compensation would remain with the injured worker, and not be cannibalized in the process of securing payment.[162]

B. Add-on Attorneys' Fees Should Only be Awarded When an Injured Worker Prevails in a Claim Against an Employer

Hawai'i automobile insurance law provides a framework for the implementation of add-on attorneys' fees in workers' compensation law. HRS section 431:10C-304[163] provides for the mandatory award of attorneys' fees whenever an insured party successfully brings a suit to compel payment of

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156 8 LARSON, *supra* note 94, § 133.01.
157 *Id.*
158 *Id.*
159 *See supra* Section II.E.
160 *Id.*
161 1 LARSON, *supra* note 9, § 1.03[5].
162 8 LARSON, *supra* note 94, § 133.02[2][a].
163 HAW. REV. STAT. § 431:10C-304 (2005).

benefits due under an auto insurance policy. This statute was enacted in an attempt to:

> equalize the inequitable situation which occurs when no-fault insurance benefits are denied by the insurance company. In most instances, the insured is a person with a moderate income and without the means to afford an attorney. Allowing the insured to recover attorney's fees and costs will better assure that the claimant will be able to protect his rights.[164]

Injured workers are in a similar situation to the average automobile insurance claimant. An injured worker whose claim has been denied will likely be without the means to afford an attorney and will likewise be in an inequitable situation when forced to contest a denial of benefits. Allowing injured workers to recover the attorneys' fees necessary to compel payment of wrongfully denied claims will ensure that Hawai'i's workers will have the ability to protect their right to workers' compensation.

The automobile insurance laws go one step further, however, and allow a claimant to recover attorneys' fees and costs upon losing a claim for benefits. HRS section 431:10C-211(a) provides that "[a] person making a claim for . . . benefits may be allowed an award of a reasonable sum for attorney's fees, and reasonable costs of suit in an action brought by or against an insurer who denies all or part of a claim . . . ."[165] This award of fees is discretionary,[166] and would not be appropriate in the workers' compensation scheme because it would likely encourage costly, unnecessary litigation.[167]

The State of Texas provides an example of the danger in being too free with the awarding of attorneys' fees in workers' compensation cases. Prior to 1989, Texas law allowed attorneys to collect 25% of a worker's benefits as a fee for representation.[168] In his review of the effects of the 1989 reforms to Texas' workers' compensation laws, Texas Chief Justice Phil Hardberger[169] explains that attorneys' fees accounted for $450 million of the $2 billion in expenses incurred by the Texas workers' compensation system in 1988.[170] The easy fees to be earned in workers' compensation practice caused workers' compensation to become the training ground for new trial attorneys.[171] Texas workers'

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[164] S. Rep. No. 934 (Haw. 1985) (Stand. Comm. Rep.), *as reprinted in* 1985 S.J. 1312.

[165] HAW. REV. STAT. § 431:10C-211(a).

[166] Iaea v. TIG Ins. Co., 104 Hawai'i 375, 379-80, 90 P.3d 267, 271-72 (App. 2004).

[168] *See* Hardberger, *supra* note 97, at 42-43 (describing the heavy attorney involvement and litigation that resulted from an earlier workers' compensation scheme that awarded attorneys a fee of 25% of the employee's benefits).

[168] *Id.* at 41.

[169] Justice Hardberger is the Chief Justice of the Court of Appeals, Fourth District of Texas.

[170] Hardberger, *supra* note 97, at 42.

[171] *Id.*

compensation suffered from high costs and low benefits,[172] which sparked major reforms to the system in 1989.[173]

The reforms to Texas law focused on encouraging informal dispute resolution and reducing attorney involvement.[174] These reforms achieved their goals because between 1991 and 1994 almost 95% of all workers resolved their claims without dispute,[175] and there were almost no attorneys involved in the process.[176] Unfortunately, injured workers suffered from the changes.

There is evidence to suggest that injured workers were settling their claims for less than fair value because they could not find the representation they needed to dispute a claim.[177] Also, many of the workers who settled claims felt that they had been treated unfairly by the system.[178] According to Justice Hardberger, the 1989 reforms went too far, and created a workers' compensation system where employees were unable to pursue valid claims.[179] Even workers who chose to pursue valid claims were at a large disadvantage, according to Justice Hardberger, because the reforms did not limit the involvement of attorneys on behalf of employers.[180]

In his study, Justice Hardberger argues for a fundamental change to the Texas law that would allow injured workers to receive the benefits they are due.[181] Justice Hardberger proposes an amendment to the current law that would require insurance companies to pay injured workers' attorneys' fees whenever a worker prevails in a dispute regarding benefits.[182] Justice Hardberger predicts that such an amendment would discourage employers from denying legitimate claims, foster cooperation between employers and injured employees, and encourage injured workers to seek counsel in order to enforce their rights.[183] Hawai'i's workers would likely see the same benefits from a similar amendment to state workers' compensation laws.

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[172] *Id.* at 41.
[174] *Id.*
[174] *Id.*
[175] *Id.* at 46.
[176] *Id.* at 41.
[177] *Cf. id.* at 52 (arguing that the difficulty in obtaining representation resulted in 23% of the workers involved in disputes being unable to hire an attorney).
[178] *Id.* at 55.
[179] *Id.* at 52.
[180] *Id.* at 61-64.
[182] *Id.* at 67.
[182] *Id.*
[183] *Id.*

V. CONCLUSION

The workers' compensation system is based on a bargain struck between employers and employees almost one hundred years ago. Under the terms of this bargain, employees agree to accept limited compensation for workplace injuries in exchange for the promise of swift payment of the benefits that are due. Unfortunately, a lack of ready access to competent representation currently limits an employee's ability to receive the full benefit of the workers' compensation system.[184]

The inability of an injured worker to recover attorneys' fees means injured workers are forced to decide between diverting limited resources to legal representation, and being subject to manipulation by an employer who is familiar with the ins-and-outs of the workers' compensation system.[185]

Workers can be assured the benefits they are due by allowing the award of add-on attorneys' fees when an injured worker successfully brings an action to enforce his or her rights. Allowing an award of attorneys' fees to an injured worker who brings a successful claim against his or her employer will help restore employees' benefits of the workers' compensation bargain.[186] Employers would be discouraged from denying valid claims, and workers would be more likely to enforce their rights.[187] Additionally, employers, who pass the cost of obtaining counsel along to employees in the form of reduced wages,[188] would no longer have the advantage of dealing with unrepresented employees. In essence, expanding the award of add-on attorneys' fees would ensure that workers receive the benefit they deserve for foregoing their common law rights to damages.

Christian Chambers[189]

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[184] *See id.* at 52.

[185] *See id.* at 62-64 (describing the perceived abuses of the Texas workers' compensation scheme in the absence of attorneys' fees provisions).

[186] *See id.* at 67.

[187] *See id.*

[188] *Id.*

[189] J.D. Candidate 2009, William S. Richardson School of Law, University of Hawai'i at Mānoa. The author would like to thank Lindsay Furuya for her support during the drafting of this comment, and Associate Dean Hazel Beh for her advice and direction. The author is also grateful to the editors and members of the University of Hawai'i Law Review for their assistance in preparing this comment for publication. Specifically, Nicholas Monlux, Kalani Sloat, and Terrence Thornburgh were especially helpful with analysis of the external environment.

Property Rights: Substantive Due Process and the "Shocks the Conscience" Standard

I. INTRODUCTION

The Fourteenth Amendment prohibits government action that deprives any person of life, liberty, or property without due process of law. Furthermore, the substantive aspect of due process protects against certain arbitrary, wrongful government actions regardless of the fairness of the procedures used to implement them. The right to own property has been an essential right deserving of certain protections, for example, that the government may not take property without just compensation. However, the First Circuit's flawed decision in *Mongeau v. City of Marlborough* has added to the confusion already surrounding substantive due process claims. By adopting the "shocks the conscience" standard, the First Circuit Court of Appeals has essentially blocked property owners' ability to assert their claims of arbitrary state action. Combined with the difficulty of overcoming the ripeness barrier in a Fifth Amendment takings claim, this test has contributed to effectively precluding judicial review of unconstitutional takings of private property.

There are many problems with the "shocks the conscience" test. The standard is inconsistent with the purpose of substantive due process. Furthermore, it is difficult to apply as it is largely subjective, gives an unwarranted amount of deference to administrative decisions, and disregards the uniqueness of land use cases. The disagreement among the circuits regarding which standard to use further illustrates the inappropriateness of the "shocks the conscience" standard. To remedy the confusion, the Supreme Court needs to provide a meaningful standard of review—something more suitable and easily applicable to property cases.

This comment takes a comprehensive look at the treatment of substantive due process claims in the context of property rights, specifically land use. Part two will briefly discuss the history of property rights in the United States, including the conduct the Framers of the Constitution sought to prevent, the options for aggrieved landowners, and the confusion regarding substantive due process. Part three will illustrate the disparity among the circuits regarding the standard for judicial review of substantive due process claims. Finally, part four will seek to identify a standard the Supreme Court should adopt when dealing with substantive due process claims involving property rights.

II. THE HISTORY OF PROPERTY RIGHTS IN THE UNITED STATES

In the eyes of the judiciary, the concept of property is broad and can include, besides real and personal property, contract rights,[1] goodwill,[2] a right to renew a land-use permit,[3] a legal, nonconforming, vested right,[4] and even procedural rights.[5] This comment focuses on real property. The inclusive notion of property began with the framers of the Constitution, who viewed property as a natural right,[6] and continued into our modern jurisprudence. While the right to property is significant, the government retains the right to regulate it under the police power. However, there are limits to the extent the government may regulate. Discussed below is a brief background of property rights, the police power, and options for aggrieved property owners.

Since the founding of the United States, property has been viewed as an integral part of freedom and liberty.[7] Accordingly, the founding fathers believed there were natural, higher-law limitations on the power of government to take property from an individual.[8] Substantive due process was the judicial mechanism used to articulate the idea that private property may not be taken for private purposes.[9] This notion continues today as the

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[1] STEVEN J. EAGLE, REGULATORY TAKINGS § 1-8(n)(4) (3d ed. 2005) (citing United States v. Winstar Corp., 518 U.S. 839 (1996)).

[2] TAKINGS: LAND DEVELOPMENT CONDITIONS AND REGULATORY TAKINGS AFTER DOLAN AND LUCAS 290 (David L. Callies ed., 1996) (citing WAM Props., Inc. v. DeSoto County, 758 F. Supp. 1468 (M.D. Fla. 1991)).

[3] *Id.* (citing Reed v. Vill. of Shorewood, 704 F.2d 943 (7th Cir. 1983)).

[4] *Id.* (citing Greene v. Town of Blooming Grove, 879 F.2d 1061 (2d Cir. 1989)).

[5] *Id.* (citing Wedges/Ledges of Cal., Inc. v. City of Phoenix, 24 F.3d 56 (9th Cir. 1994); Parks v. Watson, 716 F.2d 646 (9th Cir. 1983)).

[6] EAGLE, *supra* note 1, § 1-8(k) (citing Randy Barnett, *Ninth Amendment, in* THE OXFORD COMPANION TO THE SUPREME COURT OF THE UNITED STATES 589, 590 (Kermit B. Hall ed., 1992)).

[7] DAVID L. CALLIES ET AL., CASES AND MATERIALS ON LAND USE 284 (4th ed. 2004) (citing Norman Karlin, *Back to the Future: From* Nollan *to* Lochner, 17 SW. U. L. REV. 627, 637-38 (1988)).

[8] Steven J. Eagle, *Property Tests, Due Process Tests and Regulatory Takings Jurisprudence*, 2007 B.Y.U. L. REV. 899, 902 (2007) (citing Terrett v. Taylor, 13 U.S. (9 Cranch) 43, 52 (1815)).

[9] *Id.* at 903 (citing Balt. & Ohio R.R. v. Van Ness, 2 F. Cas. 574, 576 (C.C.D.C. 1835) (No. 830) ("[T]he Fifth Amendment of the Constitution of the United States says, that private property shall not be taken for public use without just compensation. But the objection in this case is that private property has been taken for private use, with just compensation; which is not within the prohibition of the constitution; although it would be an arbitrary proceeding." (internal alterations omitted)).

legislature has the power to regulate for the well-being of citizens, but the scope of the police power limits the extent the legislature can regulate.

A. The Police Power and How the State or Municipality Gets Its Power

The police power to regulate is broad, including "everything essential to the public safety, health and morals."[10] The Supreme Court declared the substantive due process test for a valid use of the police power in *Lawton v. Steele*: "To justify the State in thus interposing its authority in behalf of the public, it must appear, first, that the interests of the public . . . require such interference; and second, that the means are reasonably necessary for the accomplishment of the purpose, and not unduly oppressive upon individuals."[11] Thus, if a regulation is not tied to a legitimate state interest—including health, safety, welfare, or morals—then the regulation is unconstitutional as an arbitrary and unreasonable limitation on private rights.[12] This leads to the importance of a comprehensive plan which is often the indicia of reasonableness.

In *Village of Euclid v. Ambler Realty Co.*, the Supreme Court upheld the zoning ordinance of Euclid, Ohio which divided the city into use-districts with the most restrictive uses the farthest away from the least restrictive uses.[13] The landowner challenged the ordinance as a deprivation of property without due process of law.[14] The property owner intended the land to be used for industrial development but the land was put in the most restrictive district which allowed for only single and two-family dwellings.[15] The Court held the ordinance must find its justification in the police power and analogized to the common law of nuisance to hold the public purpose furthered by the city was not arbitrary or unreasonable.[16] The comprehensive plan used by Euclid was considered, and given deference. Had there been no comprehensive plan, the Court would probably have taken a stricter approach.[17]

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[10] Lawton v. Steele, 152 U.S. 133, 136 (1894).

[11] *Id.* at 137.

[12] 1 EDWARD H. ZIEGLER JR. ET AL., RATHKOPF'S THE LAW OF ZONING AND PLANNING § 3:1 (2007).

[13] 272 U.S. 365 (1926).

[14] *Id.* at 384.

[15] *Id.*

[16] *Id.* at 387-88, 397.

[17] BRIAN W. BLAESSER ET AL., LAND USE AND THE CONSTITUTION: PRINCIPLES FOR PLANNING PRACTICE § 4.03 (1989).

B. The Options for Property Owners Whose Property Interests Are at Stake

An option for a landowner whose rights have been deprived is a Fifth Amendment takings claim, arguing that property was taken due to regulations going too far or that there was a physical invasion—seeking inverse condemnation or that the regulation be invalidated. However, a Fifth Amendment taking first requires the claim to be ripe.[18] Ripeness generally requires a final government decision[19] and exhausting existing state remedies (particularly compensation).[20] Furthermore, absent a permanent physical invasion,[21] a total regulatory taking has to deprive a landowner of all economically beneficial use.[22] Finally, the use must already be part of the owner's title.[23] For a partial regulatory taking, a court would use the *Penn Central Transportation Co. v. New York City*[24] analysis: Interference with distinct investment backed expectations; the character of the government action; and the economic effect on the landowner. In addition, nuisance use of property may be prohibited by government regulation,[25] and enforcement of a custom or public trust can be made without the requirement of compensation.[26] It is ultimately difficult to bring a takings case in federal court. This is why 42 U.S.C. § 1983 and the Fourteenth Amendment are so important.

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[18] Williamson County Reg'l Planning Comm'n v. Hamilton Bank of Johnson City, 473 U.S. 172, 186 (1985) (holding that a takings claim is not ripe until the government entity charged with implementing the regulation has reached a final decision regarding the application of the regulations to the property at issue).

[19] *Id.* at 186 (citing Hodel v. Va. Surface Mining & Reclamation Ass'n, Inc., 452 U.S. 264 (1981) (holding the claim was not ripe because the owner did not take advantage of administrative relief); Agins v. Tiburon, 447 U.S. 255, 260 (1980) (holding the claim was not ripe because the owner had not yet submitted a plan for development); Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 136-37 (1978) (finding there was no taking because the owners had not submitted any other plans for approval)).

[20] *Id.*

[21] Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982). The Supreme Court declared that a taking occurs when a regulation imposes a permanent physical occupation of private property. In *Loretto*, the Teleprompter installed a cable slightly less than one-half inch in diameter and approximately thirty feet in length along the length of the building along with two large silver boxes along the roof cable. *Id.* at 422.

[22] Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1019 (1992).

[23] *Id.* at 1029.

[24] *Penn Central Transp. Co.*, 438 U.S. 104.

[25] *Lucas*, 505 U.S. at 1022.

[26] Esplanade Props., LLC v. City of Seattle, 307 F.3d 978, 983-84 (9th Cir. 2002) (interpreting *Lucas* as stating background principles of Washington law, specifically the public trust doctrine, precluded compensation).

Another option for landowners is a § 1983 action. The substantive issues in a § 1983 action usually involve allegations the local government has taken property without just compensation under the Fifth Amendment, has denied the landowner procedural or substantive due process rights or equal protection pursuant to the Fourteenth Amendment, or has denied the litigant freedom of speech or religion under the First Amendment.[27] The touchstone of § 1983 action against a government body is whether "official policy" was responsible for deprivation of federal rights.[28] A municipality can be liable through the adoption of a zoning ordinance or through the acts of building inspectors, planning officials or the planning commission.[29] However, only municipal officials who have final policymaking authority may subject the municipality to liability,[30] which is a matter of state law.[31]

State, regional, and local legislators are absolutely immune from suit under § 1983 for their legislative acts.[32] Additionally, § 1983 actions are not freestanding; they must be asserted along with another constitutional or federal claim,[33] such as a Fourteenth Amendment substantive due process violation. A successful § 1983 action grants a property owner a panoply of remedies, including injunctive relief, declaratory relief, attorney's fees, and damages.[34]

An aggrieved land owner can bring a substantive due process claim contending the state either has no business regulating the conduct in question or has chosen irrational means of regulation.[35] When bringing a substantive due process claim, the majority of circuits ask: (1) is it a property interest under state law or is it constitutionally protectable notwithstanding state law; and (2) did the government act in such a way as to deny the property owner substantive due process.[36] An allegation of arbitrary and capricious government conduct need arise only from the one application.[37] The ripeness doctrine requires harm to the plaintiff not be "hypothetical."[38] Because arbitrary government conduct can occur regardless of whether a regulatory taking has occurred, the substantive due

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[27] CALLIES ET AL., *supra* note 7, at 409.

[28] Monell v. Dep't of Soc. Servs., 436 U.S. 658, 690 (1978).

[29] *See* Video Int'l Prod., Inc. v. Warner-Amex Cable Commc'ns, Inc., 858 F.2d 1075 (5th Cir. 1988).

[30] Pembaur v. City of Cincinnati, 475 U.S. 469 (1986).

[31] *Id.*

[32] *See* Kaahumanu v. County of Maui, 315 F.3d 1215 (9th Cir. 2003).

[33] CALLIES ET AL., *supra* note 7, at 409.

[34] *Id.*

[35] 2 DOUGLAS W. KMIEC, ZONING AND PLANNING DESKBOOK § 7:02 (2000).

[36] *Id.* § 7.02[4].

[37] *See* Marks v. City of Chesapeake, 883 F.2d 308 (4th Cir. 1989).

[38] *See* EAGLE, *supra* note 1, § 8-3.

process injuries a landowner suffers are concrete as they have already occurred.[39] Thus, getting over the ripeness barrier should not be as difficult for substantive due process claims, potentially making it a more desirable claim to bring in court.

Bringing a successful substantive due process claim is not without obstacles. Property interests do not arise from the Constitution but from some other source, such as state law.[40] Thus, in many instances, the claim may be defeated by redefining the constitutionally relevant property interests.[41] This can be a problem for potential plaintiffs seeking to bring a substantive due process claim.

Yet, the biggest concern in bringing a substantive due process claim is the amount of deference courts give to the government decision-maker.[42] With the increased application[43] of the "shocks the conscience" standard,[44] as examined below, the chances of winning on a substantive due process claim are slim. As discussed above, while there are other options for property owners,[45] these options are not without significant hurdles themselves.[46] If the regulation does not amount to a taking, property owners should not be precluded from bringing a substantive due process claim when the government acts outside its realm of authority. The Supreme Court should provide guidance to the lower courts by stating a standard for reviewing these claims.

III. THE APPLICATION OF SUBSTANTIVE DUE PROCESS CLAIMS IN THE VARIOUS CIRCUITS

The Fourteenth Amendment's straightforward demand that no property may be taken without due process of law has not led to straightforward results in property cases.[47] The Constitution does not define property, so federal courts look to state law in determining what the relevant property

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[39] *Id.* § 8-8(d) (citing Carpinteria Valley Farms, Ltd. v. County of Santa Barbara, 344 F.3d 822 (9th Cir. 2003)).

[40] *See* David H. Armistead, Note, *Substantive Due Process Limits on Public Officials' Power to Terminate State-Created Property Interests*, 29 GA. L. REV. 769, 792 (1995).

[41] *See* 2 KMIEC, *supra* note 35, § 7.02[4].

[42] *See*, Brian W. Blaesser, *Substantive Due Process Protection at the Outer Margins of Municipal Behavior*, 3 WASH. U. J.L. & POL'Y 583, 585 (2000).

[43] *See infra* notes 63, 70, 80, 82, 96, 120, 135, 150, 153, 155, 162, 188, 194, 200, 205, 216, 219, 222 and 227.

[44] *See infra* note 63.

[45] *See supra* notes 18 and 27.

[46] *See supra* notes 18-20, 22-26, 32 and 33.

[47] *See infra* notes 38-39; Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532 (1985); Nectow v. City of Cambridge, 277 U.S. 183 (1928).

interests are.[48] In order not to run afoul of the doctrine of separation of powers, the court will evaluate the characterization of the government entity and its acts, affording great deference to legislatively characterized acts.[49] The following is a brief account of how substantive due process claims have been received by the courts.

A. History of Substantive Due Process

Substantive due process is most often articulated as requiring laws to promote a legitimate public end in a rational manner, while not overly oppressive.[50] When bringing an arbitrary and capricious due process claim, a claimant asserts "the state either has no business regulating the conduct in question or has chosen an irrational means to regulate."[51] A claimant must also articulate what the property interest at stake is and whether that interest is protected.[52] The Supreme Court has noted state law created property rights protected by the Due Process Clause "can arise from express or implied contract, administrative regulation, statute or ordinance."[53]

The Court has largely only recognized due process claims for denials of state-created property rights in the contexts of employment[54] and land use regulation or licensing decisions.[55] In re-zoning, the landowner could claim the zoning in question, as applied, is arbitrary and capricious, having no substantial relationship to the general welfare.[56] The arbitrary and capricious standard is the minimum standard for validity and is extremely deferential.[57]

There is a difference between how federal and state courts will receive substantive due process claims. Federal courts are more deferential to the government and tend to uphold the zoning ordinance unless the court "breaks out giggling,"[58] while state courts look for a "real and substantial"

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[48] *See infra* note 51.

[49] *See infra* note 59.

[50] CALLIES ET AL., *supra* note 7, at 397 (citing Lawton v. Steele, 152 U.S. 133, 137 (1894); Nollan v. Cal. Coastal Comm'n, 483 U.S. 825, 845 (1987) (Brennan, J., dissenting)).

[51] *Id.* at 398; *see also* Gosnell v. City of Troy, 59 F.3d 654, 657 (7th Cir. 1995) ("Some things a government cannot do at all, no matter the justification.").

[52] *See generally* 2 KMIEC, *supra* note 35, § 7.02[4].

[53] Armistead, *supra* note 40, at 775.

[54] *Id.* at 776 (citing Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532 (1985)).

[55] *Id.* (citing Nectow v. City of Cambridge, 277 U.S. 183 (1928)).

[56] 3 EDWARD H. ZIEGLER ET AL., RATHKOPF'S THE LAW OF ZONING AND PLANNING § 40:7 (2008).

[57] *Id.*

[58] *Id.* (citing Gosnell v. City of Troy, 59 F.3d 654, 658 (7th Cir. 1995); *see also* Villas of Lake Jackson, Ltd. v. Leon County, 884 F. Supp. 1544 (N.D. Fla. 1995); Jacobs, Visconsi &

relationship in reviewing due process "arbitrary and capricious" as applied claims.[59] Courts will often establish how a government decision is characterized to determine the amount of deference that should be due.[60]

B. Legislative Versus Administrative Characterization

If an act affecting property is characterized as legislative in character, such as re-zoning, courts will apply a highly deferential standard because of the principle of separation of powers of the branches of government.[61] Many commentators, however, have stated an application that does not affect an entire community, but only a single landowner, is more appropriately characterized as administrative or quasi-judicial, subject to more exacting review standards.[62] Justices Thomas' and O'Connor's dissent in *Parking Ass'n of Georgia v. City of Atlanta*[63] reveals the uncertainty of why the existence of a taking should turn on the type of governmental entity responsible for the taking.[64] "A city council can take property just as well as a planning commission can . . . . The distinction between sweeping legislative takings and particularized administrative takings appears to be a distinction without a constitutional difference."[65] Despite this statement, there is still confusion over what the standard of review should be for substantive due process claims in the context of property rights.

C. "Shocks the Conscience" Test

Rochin v. California[66] was the first case in which the "shocks the conscience" standard was announced and applied to a substantive due process claim. Deputy Sheriffs had information Rochin was selling narcotics.[67] They entered the open door of Rochin's dwelling, then forced open the door to his bedroom and forcibly attempted to extract capsules he

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Jacobs, Co. v. City of Lawrence, 927 F.2d 1111 (10th Cir. 1991); Shelton v. City of Coll. Station, 780 F.2d 475 (5th Cir. 1986).

[59] *See* 3 ZIEGLER ET AL., *supra* note 56, § 40:7; *see also* 1 ZIEGLER ET AL., *supra* note 12, § 3:2.

[60] *See generally* 3 ZIEGLER ET AL., *supra* note 56, § 40:6.

[61] *Id.*

[62] *Id.*

[63] 515 U.S. 1116 (1995) (Thomas, J., dissenting).

[64] *Id.* at 1116-18.

[65] *Id.* at 1118.

[66] 342 U.S. 165 (1952).

[67] *Id.* at 166.

had swallowed.[68] The deputies successfully obtained the capsules after taking Rochin to the hospital and directed a physician to force emetic solution through a tube into Rochin's stomach against his will, which produced vomit containing the capsules.[69] Rochin was then convicted of possessing morphine.[70] The case was brought to the Supreme Court to seek clarity on the sort of limitations the Due Process Clause of the Fourteenth Amendment imposes on the conduct of state criminal proceedings.[71] The requirements of due process "inescapably imposes . . . an exercise of judgment upon the . . . proceedings (resulting in a conviction) in order to ascertain whether they offend those canons of decency and fairness which express the notions of justice . . . even toward those charged with the most heinous offenses."[72] The Court did not view the Due Process Clause as imposing a rigid standard of review, stating, in each case, due process requires an evaluation of the facts by a disinterested party mindful of reconciling the needs of continuity and of change in society.[73] Here, the Court was specifically looking at the conduct of state court criminal proceedings and found the proceedings that led to the conviction of Rochin conscience-shocking.[74]

The Court again applied the "shocks the conscience" standard in *County of Sacramento v. Lewis*.[75] In *Lewis*, the parents of a passenger killed in a high speed police chase brought a § 1983 action against the county, the sheriff's department, and deputy, alleging a deprivation of their son's substantive due process right to life.[76] The Court held, since there was no intent to harm the suspect physically, there was no liability under the Fourteenth Amendment.[77] The Court distinguished between substantive due process limits in the government's legislative capacity versus its executive capacity and the different criteria used to identify fatally arbitrary actions.[78] This case involved a challenge to executive action,[79] so the question would be whether the behavior of the government officer is so egregious, and/or outrageous that it would shock the contemporary

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[68] *Id.*

[69] *Id.*

[70] *Id.*

[71] *Id.* at 168.

[72] *Id.* at 169 (citing Malinsky v. New York, 324 U.S. 401, 416-17 (1945)) (internal quotation marks omitted).

[73] *Id.* at 172 (citing Hudson County Water Co. v. McCarter, 209 U.S. 349, 355 (1908)).

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

[75] 523 U.S. 833 (1998).

[76] *Id.* at 837.

[77] *Id.* at 855.

[78] *Id.* at 846-55.

[79] *Id.* at 840.

conscience.[80] The Court held the officer's actions did not shock the conscience; he was acting pursuant to his duty as an officer by making a split-second judgment call to stop a suspect.[81] This did not have the harmful purpose necessary to shock the conscience.

Both *Lewis* and *Rochin* involved police conduct and human rights. *Rochin* was an appeal from a criminal conviction[82] and *Lewis* was essentially a wrongful death suit[83]—a far cry from a zoning or permit dispute. Both were also cases in which split second decision making was necessary. The *Lewis* Court also noted that the "shocks the conscience" standard was used in cases of *executive* abuse of power.[84] Therefore, it is inappropriate to use the same standard applied in emotionally charged police chases, such as in *Lewis* and forced pumping of human stomachs, like in *Rochin*, in legislative or administrative property cases where more deliberation is possible. The First and Third Circuits have, however, erroneously equated and expanded the test adopted by the Court for shocking police conduct to property cases by adopting the "shocks the conscience" standard and applying it to substantive due process cases involving property rights.

In *Mongeau v. City of Marlborough*,[85] the First Circuit adopted the *Rochin* "shocks the conscience" test and applied it to a decision involving property rights.[86] In *Mongeau*, the developer brought a § 1983 action against the city and a city official after he was denied a building permit alleging there had been a substantive due process violation.[87] In 1991, the City had commenced eminent domain proceedings, including parcels owned by Mongeau.[88] In exchange for $450,000 and a promise Mongeau would be able to build on the remaining tract, Mongeau agreed to sell the parcels to the City.[89] Mongeau was denied building permits twice, however, and when he appealed the second denial to the Zoning Board of Appeals, the government official, Reid, who had previously denied him the building permits, sat on the Site Plan Review Committee.[90] The Committee and Mongeau engaged in lengthy negotiations during which time

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[80] *Id.* at 855.
[81] *Id.*
[82] Rochin v. California, 342 U.S. 165, 166-68 (1952).
[83] *Lewis*, 523 U.S. at 837-38.
[84] *Id.* at 847.
[85] 492 F.3d 14 (1st Cir. 2007).
[86] *Id.* at 18.
[87] *Id.* at 15.
[88] *Id.*
[89] *Id.*
[90] *Id.*

Mongeau's variance expired.[91] Thereafter, Mongeau's building permit was denied.[92] Mongeau filed suit against Reid in his official capacity alleging Reid's refusal to issue the building permit was because Mongeau never offered to make an unspecified "mitigation payment" to the City, and claimed that he was entitled to construct his building.[93]

The court held, for a defendant to be liable for a violation of substantive due process, he must be engaged in behavior that is "conscience-shocking," and that "substantive due process may not, in the ordinary course, be invoked to challenge discretionary permitting or licensing determinations of state or local decision makers, whether those decisions are right or wrong."[94] Thus, land use decisions, such as rejections of building permits, do not ordinarily implicate substantive due process, even if the state official has allegedly violated state law or administrative procedures.[95]

In *Mongeau*, the First Circuit interpreted *Lewis* to allow the "shocks the conscience" standard to apply in circumstances where deliberation was possible, stating its application would vary with the circumstances.[96] The court declared it had recently decided the "shocks the conscience" test applied to substantive due process claim in the land use context and it was bound by that decision.[97] The only exceptions would be in "those relatively rare instances in which authority . . . offers a sound reason for believing that the former panel, in light of fresh development, would change its collective mind," or the holding was undermined by a controlling authority, such as the Supreme Court.[98] This underscores the need for guidance from the Supreme Court on how to deal with substantive due process claims in the context of property rights.

The First Circuit was not the first to adopt "shocks the conscience" as its test. In 2003, the Third Circuit applied the standard in *United Artists Theatre Circuit, Inc. v. Township of Warrington*.[99] Unlike the First Circuit, the Third Circuit had a history of affording property owners a workable standard, that of "improper motive,"[100] to state a claim of a deprivation of substantive due process.

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[91] *Id.* at 16.

[92] *Id.*

[93] *Id.*

[94] *Id.* at 17.

[95] *Id.*

[96] *Id.* at 18 (citing County of Sacramento v. Lewis, 523 U.S. 833, 851 (1998)).

[97] *Id.*; *see also* SFW Arecibo, Ltd. v. Rodriguez, 415 F.3d 135, 141 (1st Cir. 2005).

[98] *Mongeau*, 492 F.3d at 18-19 (internal citations omitted).

[99] United Artists Theatre Circuit, Inc. v. Twp. of Warrington, Pa., 316 F.3d 392 (3d Cir. 2003).

[100] *See* Bello v. Walker, 840 F.2d 1124 (3d Cir. 1988).

Prior to *United Artists*, the Third Circuit's substantive due process test went through several changes. It evolved originally from showing an "improper motive" by municipal officials as sufficient to state a substantive due process claim,[101] to a suitable amount of deference to the legislature with an "arbitrary and irrational" standard.[102] Finally, it moved to the "shocks the conscience" test[103] and its inappropriate level of deference to state action with its holding in *United Artists*.[104]

In United Artists, the owner and operator of movie theaters brought a § 1983 action against township and township supervisors, alleging the township board of supervisors delayed approval of the owner's proposed theatre development so the township could obtain an impact fee offered by a competing developer in violation of due process.[105] The court interpreted Lewis' "shocks the conscience" standard to be applicable to land use cases, viewing the factual distinctions between Lewis and United Artists insignificant and finding "no reason why land use cases should be treated differently."[106] The court, concerned about becoming a zoning board of appeals, declared land-use decisions are a local concern, and stated that allegations a government official acted with "improper" motives should not transform the dispute into a substantive due process claim.[107]

Judge Cowen's dissent stated otherwise and remarked the "shocks the conscience" test was highly subjective and nebulous and opined the "improper motive" test should have been applied instead.[108] He believed the effect of the "shocks the conscience" test would allow for flagrant abuses of authority to go unchecked.[109] He did not find the facts in *Lewis* analogous to the facts in *United Artists*. Judge Cowen pointed out the court in *Lewis* was not presented with what test to use in the "unique arena of Fourteenth Amendment-protected property rights as they relate to local land use decisions,"[110] and the Supreme Court described the issue for review narrowly: "[T]o resolve a conflict among the Circuits over the standard of culpability on the part of a law enforcement officer for violating substantive

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[101] *See id.*

[102] *See* Sameric Corp. v. City of Philadelphia, 142 F.3d 582 (3d Cir. 1998) (holding that a government decision would violate substantive due process if it was not rationally related to a legitimate government purpose or motivated by bad faith).

[103] *United Artists*, 316 F.3d at 399-401.

[104] *Id.* at 392.

[105] *Id.* at 394.

[106] *Id.* at 401.

[107] *Id.* at 402.

[108] *Id.* at 402-03, 406-07 (Cowen, J., dissenting).

[109] *Id.* at 406-07.

[110] *Id.* at 405.

due process in a pursuit case."[111] He further noted the Supreme Court had never indicated the "improper motive" test was inappropriate in the land use context.[112] Judge Cowen distinguished the usefulness of the "shocks the conscience" standard in high speed police chases which stir emotions to the "mundane world of local land use decisions."[113] He also observed the Third Circuit had continued to use the "improper motive" test even after *Lewis* was decided,[114] and the application of the "shocks the conscience" standard was specifically rejected in the Third Circuit as being amorphous and imprecise.[115] If Judge Cowen is correct, the consequence of the court's decision in *United Artists* would lead to confusing and disparate results in the district courts.

While the First and Third Circuits have found a connection between substantive due process claims involving split-second decision making and those where more time for deliberation is possible, the rest of the circuits rely on different standards of review for substantive due process claims involving property rights.[116] Other circuits do not regard land use disputes as mainly political disputes of local concern, which would rarely state facts sufficient to state a substantive due process claim as the First and Third Circuits do.[117] The "shocks the conscience" standard is one of extreme deference to government agencies. If the agency is administrative and filled with political appointees instead of elected officials, the will of the decision maker could run afoul of what the community desires.

D. Disagreement among the Circuits

There is an astonishing lack of uniformity among the circuits as to what type of government action may constitute a denial of substantive due process. Most courts do not want to be zoning boards of appeal, and thus

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[111] *Id.* (quoting County of Sacramento v. Lewis, 523 U.S. 833, 839 (1998)) (internal quotation marks omitted).

[112] *Id.* at 407.

[113] *Id.*

[114] *Id.* at 406 (citing Doby v. DeCrescenzo, 171 F.3d 858 (3d Cir. 1999); Woodwind Estates, Ltd. v. Gretkowski, 205 F.3d 118 (3d Cir. 2000); Nicholas v. Pa. State Univ., 227 F.3d 133 (3d Cir. 2000); Khodara Envtl., Inc. v. Beckman, 237 F.3d 186 (3d Cir. 2001); Omnipoint Commc'ns Enters., L.P. v. Zoning Hearing Bd., 248 F.3d 101 (3d Cir. 2001); Herr v. Pequea Twp., 274 F.3d 109 (3d Cir. 2001)).

[115] *Id.* at 407 n.4 (citing Fagan v. City of Vineland, 22 F.3d 1296, 1308 (3d Cir. 1994) (en banc)).

[116] *See infra* notes 121, 149, 164, 182, 188, 200, 224.

[117] BRIAN W. BLAESSER & ALAN C. WEINSTEIN, FEDERAL LAND USE LAW & LITIGATION § 2:3 (2007).

apply a highly deferential standard of review.[118] Yet courts have to balance governmental deference with landowners' right to due process and freedom from arbitrary and irrational zoning decisions.[119] Some courts think of land use disputes as primarily state issues, leading courts to tighten their standards and perhaps evolve toward a complete bar on local land use claims in federal courts.[120] Listed below are some highlights of the circuits' various treatments of substantive due process.

1. No recognition of substantive due process claims involving property

The Eleventh Circuit does not recognize substantive due process claims arising from deprivations of property interests.[121] Since property rights are not created by the Constitution, they are not fundamental rights and thus are not protectable by the substantive component of the due process clause.[122] *Greenbriar Village, LLC. v. Mountain Brook City* involved a zoning dispute where the landowner sought to use his property for a commercial use while the land was zoned for residential uses only.[123] The landowner received a land disturbance permit after his requests for rezoning were denied.[124] The city then passed an ordinance in which land disturbance permits would expire two years after their issuance.[125] In effect, this caused Greenbriar's permit to expire automatically within thirty days of the passage of the ordinance.[126] The landowner alleged the revocation of his permit through passage of the ordinance was unconstitutional.[127] Even though Greenbriar was the only entity targeted and affected by the ordinance, the landowner's substantive due process claim was denied.[128] The court held zoning decisions will usually not implicate constitutional guarantees and that it was disinclined to sit as a zoning board of review.[129] Indeed, the court found substantive due process only protects "fundamental" rights, rights that are

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[118] *See* Blaesser, *supra* note 42, at 585-590.

[119] *Woodwind Estates Ltd.*, 205 F.3d at 122 (citing Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 263 (1977)).

[120] Parna A. Mehrbani, Comment, *Substantive Due Process Claims in the Land-Use Context: The Need for a Simple and Intelligent Standard of Review*, 35 ENVTL. L. 209, 229 (2005).

[121] *See* Greenbriar Vill., L.L.C. v. Mountain Brook, City, 345 F.3d 1258 (11th Cir. 2003).

[122] *Id.* at 1262.

[123] *Id.* at 1260.

[124] *Id.*

[125] *Id.* at 1261.

[126] *Id.*

[127] *Id.*

[128] *Id.* at 1261, 1263-64.

[129] *Id.* at 1262 (citing Spence v. Zimmerman, 873 F.2d 256, 262 (11th Cir. 1989)).

implicit in the concept of ordered liberty[130] and are created by the constitution,[131] which property rights are not.[132] The court relied on *Board of Regents v. Roth*[133] to hold property rights are created and defined by an independent source, such as state law.[134] Thus, the court held, "to the extent that *Greenbriar* predicates its substantive due process claim directly on the denial of its state-granted and-defined property right in the permit, no substantive due process claim is viable."[135] Even if the government acted arbitrarily and irrationally, the Eleventh Circuit did not expand the scope of substantive due process and held procedural due process was enough protection (since a claim of arbitrary and irrational conduct was better applied to procedural due process claims) to satisfy the due process clause of the Fourteenth Amendment.[136]

The Eleventh Circuit has historically interpreted deprivations of substantive due process claims involving property rights narrowly.[137] In *DeKalb Stone, Inc. v. County of DeKalb*,[138] the court held substantive due process only applies to legislative acts.[139] The property owners brought suit, alleging the county had arbitrarily and capriciously denied their substantive due process rights by depriving them of the legal nonconforming use of their property when the county ordered them to cease using the property as a rock quarry.[140] Prior to that, the owners had obtained a license for the quarry as a nonconforming use.[141] The county had informed the owners the quarry would need a development permit, after the county received complaints about the blasting from residents.[142] In negotiations for a development permit, the owners agreed to purchase a

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[130] *Id.* (citing McKinney v. Pate, 20 F.3d 1550, 1556 (11th Cir. 1994) (en banc)).

[131] *Id.* (citing DeKalb Stone, Inc. v. County of DeKalb, 106 F.3d 956, 959 n.6 (11th Cir. 1997) (per curiam)).

[132] *Id.* at 1261 ("The district court specifically found that Greenbriar's land disturbance Permit demonstrated to the City the need for revision of the current ordinances." (internal quotation marks omitted)).

[133] 408 U.S. 564 (1972).

[134] *Greenbriar*, 345 F.3d at 1262 (citing Vinyard v. Wilson, 311 F.3d 1340, 1356 (11th Cir. 2002)).

[135] *Id.* (citing *McKinney*, 20 F.3d at 1560; Morley's Auto Body, Inc. v. Hunter, 70 F.3d 1209, 1217 n.5 (11th Cir. 1995)).

[136] *McKinney*, 20 F.3d at 1559.

[137] *See* DeKalb Stone, Inc. v. County of DeKalb, 106 F.3d 956 (11th Cir. 1997), *cert. denied*, 522 U.S. 861 (1997).

[138] *Id.*

[139] *Id.* at 959 (citing Crymes v. DeKalb County, 923 F.2d 1482, 1485 (11th Cir. 1991)).

[140] *Id.* at 958.

[141] *Id.* at 957.

[142] *Id.*

seventy-acre "buffer zone."[143] Thereafter, the county ordered the quarry to cease all operations and proclaimed the purchase of the "buffer zone" an unlawful expansion of the non-conforming use, even though the owners never intended to use the buffer zone as a quarry.[144]

The court held the action of the county, by enforcing the existing zoning, was not a legislative act, but an executive-administrative act.[145] The court declared a plaintiff does not present a substantive due process claim when he alleges an executive deprivation of a state-created right.[146] Furthermore, the court held land use rights are state-created rights, not fundamental rights created by the Federal Constitution and are protected only by procedural due process, not by substantive due process.[147]

The problem with such a holding is it precludes judicial review of arbitrary government action—the heart of substantive due process. Perhaps this view comes from a misunderstanding of the purpose of the substantive part of the Due Process Clause. The Eleventh Circuit relies on procedural due process to provide protection and might prefer to hear arguments claiming arbitrary government conduct as part of an equal protection claim. In the case of exclusionary zoning, state courts have treated the issue as an equal protection problem under the state constitution or a matter of statutory interpretation, instead of treating it as a violation of substantive due process. [148] But what if the property owner was singled out for unfair treatment, even if there was no class-based discrimination? The Eleventh Circuit takes an extreme approach in interpreting the *Roth* "clear entitlement" test, and the Eleventh Circuit is not the only circuit to rely on *Roth* for its standard in reviewing substantive due process claims.

2. *The "clear entitlement" test*

The "clear entitlement" test is the standard of choice in the Second and Tenth Circuits.[149] The Second and Tenth Circuits rely on *Roth* to ask whether the plaintiff has a "clear entitlement" to the approval being sought from the land use regulating body.[150] This analysis also relies on the

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[143] *Id.* at 958.

[144] *Id.*

[145] *Id.* at 959.

[146] *Id.* at 960 (citing McKinney v. Pate, 20 F.3d 1550, 1556 (11th Cir. 1994)).

[147] *Id.* (citing Boatman v. Town of Oakland, 76 F.3d 341, 346 (11th Cir. 1996)).

[148] BLAESSER ET AL., *supra* note 17, § 3.03.

[149] *See, e.g.*, *infra* notes 153 and 164; Nichols v. Bd. of County Comm'rs, 506 F.3d 962 (10th Cir. 2007); DLC Mgmt. Corp. v. Town of Hyde Park, 163 F.3d 124 (2d Cir. 1998).

[150] *See infra* note 167.

amount of discretion the issuing authority has.[151] If there is significant discretion, then the property owner has a mere expectancy, but if there is little or no discretion, the owner has an entitlement.[152]

The Second Circuit takes a strict approach to defining constitutionally protected property interests. In *DLC Management Corp. v. Town of Hyde Park*[153] the court applied the clear entitlement test not only to property interests in what is sought, but also to property interests in what is owned, and found property owners had no property interest.[154] Here, the landowner had not yet acquired a vested right, meaning the property owner did not undertake substantial construction and make substantial expenditures, which, had he done so, would have given him a protectable property interest.[155]

RRI Realty Corp. v. Incorporated Village of South Hampton[156] makes clear how important it is for a property to be both zoned and used in order for the property interest to vest and thus be sufficient to support a substantive due process claim in the Second Circuit.[157] A claim of denial of substantive due process is supportable, if, under the entitlement test, a constitutionally-protected property interest exists, and an issuing agency lacked the authority to deny or approve a sought-after permit for a legitimate reason, or the discretion of the agency was so narrowly circumscribed that approval of a proper application was virtually assured.[158] But in *RRI Realty* the court found the licensing authorities had discretion in the issuance of the permits, thus there was no protected property interest.[159] The Second Circuit applies the entitlement test independently of the probability of permit approval, so it is difficult to establish a property interest as long as the decision maker has the discretion to deny.[160] The highly deferential entitlement test usually means that a court will not reach the step of analyzing a substantive due process claim, but the Second Circuit has found a government decision to be arbitrary where it was based upon improper motive, such as political animus.[161]

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[151] *See infra* note 168.
[152] *See infra* note 171.
[153] *DLC Mgmt. Corp.*, 163 F.3d 124.
[154] *Id.* at 131.
[155] *Id.* at 130.
[156] 870 F.2d 911 (2d Cir. 1989).
[157] *Id.* at 917.
[158] *Id.* at 918.
[159] *Id.* at 919-20.
[160] BLAESSER & WEINSTEIN, *supra* note 117, § 2:5.
[161] *Id.* § 2:9 (citing Brady v. Town of Colchester, 863 F.2d 205, 216 (2d Cir. 1988)).

The Tenth Circuit gives a large amount of deference to the governing body and is reluctant to interfere in zoning disputes, which are seen as local concerns.[162] In *Nichols v. Board of County Commissioners*, the landowner sought modification of his special use permit because the county had permitted a second property owner to do what the first landowner sought to do.[163] The court rejected the due process claim, holding the property owner did not have a constitutionally protected property interest in the modifications.[164] Again, the court used *Roth's* "clear entitlement" test to hold modification was not an interest protected by the Fourteenth Amendment.[165] The court stated "the entitlement analysis presents a question of law and focuses on 'whether there is discretion in the defendants to deny a zoning or other application filed by the plaintiffs.'"[166] The Tenth Circuit held that in order to have a property interest, discretion must be limited by procedures.[167] If those procedures are followed, a certain outcome will follow.[168] However, if the governing body has discretion and the outcome is not determined by particular procedures, then there is no property interest.[169]

The problem of the "clear entitlement test" was noted by Justice Stevens in *RRI Realty*: "the opportunity to apply for . . . [a zoning] amendment is an aspect of property ownership protected by the Due Process Clause of the Fourteenth Amendment."[170] "Indeed, the entitlement inquiry will not often aid the analysis in this context."[171] The *RRI Realty* opinion stated it is not clear why the *Roth* entitlement test is needed in land regulation cases involving applications to local regulators.[172] The landowner has an undisputed property interest in his land so the focus should instead be on the authority of the local regulator. When the regulator is granted

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[162] Nichols v. Bd. of County Comm'rs, 506 F.3d 962, 971 (10th Cir. 2007) (citing Norton v. Vill. of Corrales, 103 F.3d 928, 933 (10th Cir. 1996)).

[163] *Id.* at 965-66.

[164] *Id.* at 971.

[165] *Id.* at 969-71.

[166] *Id.* at 970 (quoting Hyde Park v. Santa Fe City Council, 226 F.3d 1207, 1210 (10th Cir. 2000)).

[167] *Id.* (citing Crown Point I, L.L.C. v. Intermountain Rural Elec. Ass'n, 319 F.3d 1211, 1217 (10th Cir. 2003)).

[168] *Crown Point I, LLC*, 319 F.3d at 1217 (citing *Hyde Park*, 226 F.3d at 1210).

[169] *Id.* (citing *Hyde Park*, 226 F.3d at 1210); *see also* Jacobs, Visconsi & Jacobs, Co. v. City of Lawrence, 927 F.2d 1111, 1116-17 (10th Cir. 1991) (holding that where state law required the zoning board to consider six enumerated factors, those factors were "insufficient to confer upon the applicant a legitimate claim of entitlement").

[170] City of Eastlake v. Forest City Enter., 426 U.S. 668, 683 (1976) (Stevens, J., dissenting).

[171] RRI Realty Corp. v. Inc. Vill. of Southhampton, 870 F.2d 911, 918 (2d Cir. 1989).

[172] *Id.* at 917.

discretion in whether to grant or deny applications, the fact the permit could be denied on non-arbitrary grounds would defeat the federal due process claim. Only after that inquiry is made would the court look to whether the regulator has acted so arbitrarily as to offend substantive due process. Even if a government decision maker is granted discretion, however, he should not be allowed to abuse that discretion. In circuits where the property owner needs to prove a property interest exists before being able to bring a substantive due process claim, the use of discretionary land use control systems create problems for a potential plaintiff.[173] Government decision makers can manipulate the degree of discretion used—for example, changing a "shall" to "may"—to defeat legitimate claims of entitlement to a desired use or permit approval.[174]

Another flaw in applying the "clear entitlement" test to substantive due process claims is that *Roth* was a case involving procedural, not substantive, due process. The analysis for procedural due process analyzes what the liberty or property interest at stake is and whether that interest is protected by either the Constitution or state-created rights.[175] For substantive due process, however, the analysis focuses on what the government is trying to do.[176]

There is some debate as to whether substantive due process claims are dependent upon property rights under state law as procedural due process claims are.[177] The weight of authority, however, indicates there needs to be an independent property right created by state law to bring a substantive due process claim.[178] There is some debate arguing otherwise. Substantive due process affords property owners a theory to challenge the root of governmental conduct, and "[r]ights of substantive due process are founded not upon state provisions but upon deeply rooted notions of fundamental personal interests derived from the Constitution."[179] It would be useful for the Supreme Court to identify a standard so this debate can be settled.

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[173] BLAESSER & WEINSTEIN, *supra* note 117, § 2:3.

[174] *Id.*

[175] *See* Bd. of Regents v. Roth, 408 U.S. 564, 577-78 (1972).

[176] Wolff v. McDonnell, 418 U.S. 539, 558 (1974) (holding that "[t]he touchstone of due process is protection of the individual against arbitrary action of government"); *see also* Daniels v. Williams, 474 U.S. 327, 331 (1986) (holding the substantive due process guarantee protects against government power arbitrarily and oppressively exercised in the context of the exercise of power without reasonable justification in the service of a legitimate governmental objective).

[177] *See generally* J. Michael McGuinness & Lisa A. McGuinness Parlagreco, *The Reemergence of Substantive Due Process as a Constitutional Tort: Theory, Proof, and Damages*, 24 NEW ENG. L. REV 1129, 1131 (1990).

[178] *See* Regents of the Univ. of Mich. v. Ewing, 474 U.S. 214, 224 n.9 (1985).

[179] Mangels v. Pena, 789 F.2d 836, 839 (10th Cir. 1986) (citing *Ewing*, 474 U.S. at 228

3. "Egregious" government misconduct

The D.C. Circuit follows the substantive due process analysis of the Second and Tenth Circuits by first determining whether the state protects the property interest, and how much discretion is involved in the process.[180] After determining there is a property interest, the D.C. Circuit is highly deferential to the government decision maker and constrains only "egregious government misconduct . . . preventing only 'grave unfairness.'"[181] There are two ways to prove unfairness: "Only [1] a substantial infringement of state law prompted by personal or group animus, or [2] a deliberate flouting of the law that trammels significant personal or property rights."[182]

The D.C. Circuit understands substantive due process to impose "slight burdens on the government to justify its actions."[183] It is difficult to bring a substantive due process claim in the D.C. Circuit, but one can be brought once a showing of unfairness is made.[184] This is a step in the direction of the Seventh and Eight Circuits with their "irrational" standard of review.[185]

4. The "irrational" test

The "irrational" standard of review is used by the Seventh and Eighth Circuits.[186] For a property decision to be actionable under a substantive due process claim, the decision must be more than merely wrong, it must be irrational.[187] This means the action by the government had no relationship to the police power, or the action was truly irrational.[188]

The Seventh Circuit holds, to prevail on a substantive due process claim, a petitioner "must allege and prove that the denial of their proposal is arbitrary and unreasonable bearing no substantial relationship to the public

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(Powell, J., concurring)). In *Ewing*, the Court found that the record "was devoid of any indication that the University's decision was based on bad faith, ill will or other impermissible ulterior motives . . . ." *Ewing*, 474 U.S. at 220 (internal citations omitted). *See also* Edwards v. Johnson County Health Dep't, 885 F.2d 1215, 1219 (4th Cir. 1989).

[180] George Wash. Univ. v. Dist. of Columbia, 318 F.3d 203, 206-09 (D.C. Cir. 2003).

[181] *Id.* at 209 (quoting Silverman v. Barry, 845 F.2d 1072, 1080 (D.C. Cir. 1988)).

[182] *Silverman*, 845 F.2d at 1080.

[183] *George Wash. Univ.*, 318 F.3d at 206.

[184] *See Silverman*, 845 F.2d at 1080.

[185] *See infra* notes 192 and 197.

[186] *Id.*

[187] Mehrbani, *supra* note 120, at 230-32 (citing Blaesser, *supra* note 42, at 585). The Due Process Clause can also raise procedural due process issues and equal protection issues.

[188] *Id.*

health, safety or welfare."[189] This is because the Seventh Circuit characterizes even the approval of a site plan for a single parcel as a legislative rather than a quasi-judicial decision.[190] The legislative characterization frees the government decision maker from having to make findings of fact; and as long as the decision has some relation to land use, the decision will be immune from substantive due process challenges, even if the decision was driven by protectionist or narrow-minded motives.[191] In *Estate of Himmelstein v. City of Fort Wayne, Indiana*, the court held the Common Council, by requiring the petitioners to appear before it, was not irrational or arbitrary as the Himmelsteins alleged. The Himmelsteins claimed they had to endure an arbitrary and capricious zoning process because other petitioners did not have to appear before the Council. In fact, the court found the Council's decision to have the petitioners appear before the governmental body deciding the rezoning in a contested zoning dispute "quite rational and thorough."[192] The court also stated government decisions motivated by local interests do not violate a plaintiff's right to substantive due process.[193]

The Eighth Circuit, on a similar note, held, in order to state a substantive due process claim, something more than an allegation a governmental decision is arbitrary, capricious, an abuse of discretion, or otherwise in violation of state law is needed.[194] In *Chesterfield Development Corp. v. City of Chesterfield*, the developer sued for damages under § 1983 because the City had enforced an invalid zoning plan and ordinance against it. In affirming the dismissal of the developer's suit, the Eighth Circuit held that substantive due process claims should be "limited to 'truly irrational' governmental actions."[195]

The Seventh and Eighth Circuits' take impose a strict standard of review in order to avoid becoming a zoning board of appeals. If a less stringent standard is adopted, the federal floodgates would open and property owners would inundate the system by claiming a violation of a state law as a

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[189] Estate of Himmelstein v. City of Fort Wayne, Ind., 898 F.2d 573, 579 (7th Cir. 1990) (citing Burrell v. City of Kankakee, 815 F.2d 1127, 1129 (7th Cir. 1987); Vill. of Belle Terre v. Boraas, 416 U.S. 1 (1974); Vill. of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926)).

[190] BLAESSER ET AL., *supra* note 17, § 2:7 (citing New Burnham Prairie Homes, Inc. v. Vill. of Burnham, 910 F.2d 1474, 1479 (7th Cir. 1990)).

[191] *Id.*

[192] *Himmelstein*, 898 F.2d at 578.

[193] *Id.* at 577 (citing Coniston Corp. v. Vill. of Hoffman Estates, 844 F.2d 461, 466-67 (7th Cir. 1988)).

[194] Chesterfield Dev. Corp. v. City of Chesterfield, 963 F.2d 1102 (8th Cir. 1992) (citing Lemke v. Cass County, Neb., 846 F.2d 469, 470-71 (8th Cir. 1987) (en banc) (per curiam)).

[195] *Id.* at 1104 (citing and adopting the concurring opinion in *Lemke*, 846 F.2d at 472) (Arnold, J., concurring)).

federal constitutional issue.[196] While imposing a strict standard, the Seventh Circuit has not adopted the challenging "shocks the conscience" standard, holding *Lewis* "made clear that its shocks-the-conscience analysis was not generally applicable to all substantive due process claims."[197]

5. The "rational basis" test

The "rational basis" test is used by the Fifth, Sixth, and Ninth Circuits when hearing a substantive due process claim.[198] Trying to overcome a "rational basis" inquiry is difficult. The rational basis standard is meant to give deference to the governing body by requiring there need only be a rational basis for the government's decision.[199]

The Fifth Circuit takes a narrow view of substantive due process, as it strongly disapproves of federal court review of local zoning matters and classifies all zoning actions as legislative, even ones pertaining to an individual piece of property.[200] In *Shelton v. City of College Station*, Shelton sought variances from the city's ordinance which required a certain number of parking stalls, and when each request was denied, he alleged the decisions were arbitrary and capricious and a denial of substantive due process.[201] The court held there was a conceivable rational basis for the decisions and stated that local zoning decisions were legislative in character.[202] The large amount of deference given to legislative decisions is due to the principle the courts should not interfere with the legislative process since doing so would breach a separation of powers.[203] The Fifth Circuit gives much deference to the government, requiring only a conceivable rational basis for a zoning decision.

Contrary to the Fifth Circuit, the Sixth Circuit characterizes even zoning enactments of a general nature as administrative, not legislative.[204] The

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[196] Mehrbani, *supra* note 120, at 231-32.

[197] Khan v. Gallitano, 180 F.3d 829, 836 (7th Cir. 1999) (citing County of Sacramento v. Lewis, 523 U.S. 833 (1998)).

[198] *See infra* notes 203, 209, and 213.

[199] *See* Shelton v. City of Coll. Station, 780 F.2d 475, 477 (5th Cir. 1986) (en banc), *cert. denied*, 477 U.S. 905 (1986).

[200] *Id.* at 479-80.

[201] *Id.* at 477-78.

[202] *Id.* at 478-79.

[203] *Id.* at 482.

[204] *See* Pearson v. City of Grand Blanc, 961 F.2d 1211, 1221 (6th Cir. 1992) ("It may be safely said that there is no bright line between the legislative and administrative functions." (quoting Jodeco, Inc. v. Hann, 674 F. Supp. 488, 495 (D.N.J. 1987)) (internal quotation marks omitted)). Administrative decisions require an arbitrary and capricious standard while legislative decisions use a rational basis standard of review. *Id.* at 1221-23.

Sixth Circuit takes the stance that while the standard places a heavy burden on the landowner to overcome the rational basis deference, it does not follow that the government will necessarily win.[205] In *Berger v. City of Mayfield Heights*,[206] the court announced "[w]hile the 'rational basis' standard is the least demanding test used by courts to uphold legislative action, it is not 'toothless.'"[207] Berger claimed there was no rational relationship between the terms of the ordinance and the legitimate governmental purpose.[208] The ordinance was held to be facially unconstitutional as it required owners of vacant lots with less than 100-foot street frontages to cut overgrowth to eight inches in height. The stated governmental purpose was to prevent damage caused by falling tree limbs, growth of poison ivy and trash problems, but the ordinance was based on frontage and not on lot size, as the court held it should have been. As a result, the court found no rational relationship between the terms of the ordinance and a legitimate governmental purpose.[209]

The Ninth Circuit reviews substantive due process claims under the scope of review for legislation even if the government action affects an individual property owner. The Ninth Circuit also requires a substantive due process claim to be ripe.[210] The court will uphold a decision that has any relationship to a proper zoning goal, such as prevention of traffic congestion[211] or rent control,[212] unless there is a showing of complete irrationality or political animus.[213] The deferential approach focuses on whether the enacting body could have rationally believed at the time of the enactment the law would promote its objective, not on the ultimate

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[205] *See* Berger v. City of Mayfield Heights, 154 F.3d 621, 625 (6th Cir. 1998).

[206] *Id.*

[207] *Id.* (citing Mathews v. Lucas, 427 U.S. 495, 510 (1976) (referring to *Jimenez v. Weinberger*, 417 U.S. 628 (1974), "which held certain provisions of the Social Security Act requiring illegitimate children to satisfy different conditions in order to obtain insurance benefits did not rationally relate to the legitimate goal of avoiding spurious claims")); *see also id.* (citing Romer v. Evans, 517 U.S. 620, 633 (1996) (holding an Amendment to Colorado's Constitution, which prohibited all legislative, executive, or judicial action designed to protect homosexual persons from discrimination, did not rationally relate to any legitimate governmental interest)).

[208] *Id.* at 624 (citing *Romer*, 517 U.S. at 631).

[209] *Id.* at 625.

[210] S. Pac. Transp. Co. v. City of Los Angeles, 922 F.2d 498, 507 (9th Cir. 1990) (citing Pennell v. City of San Jose, 485 U.S. 1, 11 (1988); Sinaloa Lake Owners Ass'n v. City of Simi Valley, 882 F.2d 1398, 1404 (9th Cir. 1989); Herrington v. County of Sonoma, 857 F.2d 567, 569 (9th Cir. 1988)).

[211] *Id.*

[212] Equity Lifestyle Props., Inc. v. County of San Luis Obispo, 548 F.3d 1184, 1194 (9th Cir. 2008).

[213] 2 KMIEC, *supra* note 35.

effectiveness of the law.[214] But the court will take a hard look if the decision was based upon inaccurate and stereotypic fears.[215] "In this situation, a court must look more carefully to determine whether the decision to deny a permit is related to [a] substantial state interest . . . . Unless it specifically serves such an interest, the permit denial is arbitrary and violates due process."[216]

6. The "arbitrary and capricious" standard of review

The Fourth Circuit is generally deferential to municipal decision making[217] unless there is a showing of abuse of discretion or capriciousness. In *Marks v. City of Chesapeake*, the property owner was denied a conditional use permit to operate a palmistry because of the opposition raised by area residents.[218] The issue was whether the applicant was singled out for adverse treatment due to "illegitimate political or, at least, personal motives."[219] A substantive due process claim will be recognized for purposeful discrimination against an individual even when there is no class-based discrimination.[220] Even though the court gave discretion to the city council, it found the council denied the permit to placate the objecting residents, and thereby acted arbitrarily and capriciously.[221] The court found the council had given effect to private biases which should have remained outside the reach of the law.[222]

The Fourth Circuit appears to inquire whether the property owner is entitled to receive what he is applying for. In *Gardner v. City of Baltimore*, the developer brought suit against the city, claiming the denial of his subdivision was due to the city being politically influenced by residents.[223] The court held the developer had no claim of entitlement to a public works agreement.[224] Thus, there was no property right protected under the Fourteenth Amendment, even if the decision by the city was "motivated solely by political considerations."[225] State and municipal law conferred

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[214] *Equity Lifestyle Props.*, 548 F.3d at 1194.

[215] J.W. v. City of Tacoma, 720 F.2d 1126, 1130-31 (9th Cir. 1983).

[216] *Id.*

[217] 2 KMIEC, *supra* note 35.

[218] 883 F.2d 308 (4th Cir. 1989).

[219] *Id.* at 311 (citing Scott v. Greenville County, 716 F.2d 1409, 1420 (4th Cir. 1983)) (internal quotation marks omitted).

[220] *Id.*

[221] *Id.* at 312.

[222] *Id.*

[223] 969 F.2d 63, 65 (4th Cir. 1992).

[224] *Id.* at 72.

[225] *Id.* at 71.

significant discretion to the city.[226] Consequently, because the agreement could have been denied on non-arbitrary grounds, the due process claim was defeated.[227]

Gardner and *Marks* appear to be at odds. In *Gardner*, the court actually used the amount of discretion the city had to defeat the claim, while the court in *Marks* did not use the amount of discretion maintained by the city to find the city had acted arbitrarily.[228] It would be more appropriate to focus on how the government was acting, as the court did in *Marks*, rather than to focus on the amount of discretion a city may have, since a government official granted discretionary decision-making power could abuse that discretion and act arbitrarily.

Through its decision in *Marks*, the Fourth Circuit displays the appropriate amount of deference that should be given to government decision makers. An individual's property rights are weighed against the need for regulation, and the Fourth Circuit correctly finds there are limits to government regulation. Decisions by government regulators that are not based on the police power but on improper motives should not be endorsed. The Fourth Circuit understands the government cannot arbitrarily deprive a person of life, liberty or property.

The Fourth Circuit takes a hard look at what the real motives of the government are and will not tolerate bias or discrimination. While the government decision maker may be granted a significant amount of deference in his decision, he cannot abuse that discretion. The Supreme Court should use this circuit's test as a foundation in announcing a feasible standard of review that achieves what the substantive portion of the Due Process Clause is meant to accomplish.

IV. A PROPOSED STANDARD OF REVIEW

In *Lingle v. Chevron*, the Supreme Court declared the "substantially advances" test is part of the substantive due process analysis, not part of the takings analysis.[229] Thus, the Court affirmed a property owner could bring a claim for government takings of property and government deprivations of property without due process of law, and each claim is separate, to be resolved using different legal standards.[230] *Nectow* and *Euclid* both call for a "substantial relation,"[231] suggesting a higher level of scrutiny than the

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[226] *Id.* at 69.

[227] *Id.* at 69-70.

[228] *See, e.g., id.* 69-71; Marks v. City of Chesapeake, 883 F.2d 308, 312-13 (1989).

[229] Lingle v. Chevron, 544 U.S. 528 (2005).

[230] Eagle, *supra* note 8, at 900.

[231] Nectow v. City of Cambridge, 277 U.S. 183, 187-88 (1928); Vill. of Euclid v. Ambler

highly deferential "rational basis" standard of review used in the Fifth, Sixth and Ninth Circuits as discussed *supra*.[232] The phrase "substantial relation" implies an intermediate level of scrutiny requiring legislation "to bear a substantial relation to an important government goal."[233] In *Nectow*, the Court reviewed the findings of fact made by the master and examined the character of the land and the asserted benefit to the public to determine whether the zoning decision would actually—not hypothetically—promote a legitimate goal.[234] The Court found the location had little value for the limited uses permitted by the zoning ordinance.[235] This analysis indicates a higher level of scrutiny is more appropriate.[236]

The Court held takings claims are subject to a higher level of scrutiny than substantive due process claims. In *Nollan v. California Coastal Commission*[237] and *Dolan v. City of Tigard*,[238] the Court required an "essential nexus"[239] and "rough proportionality"[240] between the public benefit and the burden on the landowner. In *Penn Central Transportation Co. v. City of New York*,[241] the Court held "a use restriction . . . may constitute a 'taking' if not reasonably necessary to the effectuation of a substantial public purpose."[242] Since takings claims require higher scrutiny, it should follow substantive due process claims would also require a higher level of scrutiny as both are constitutional protections.

In *Erlich v. City of Culver City*,[243] the Supreme Court of California cited Justice Scalia's opinion in *Nollan* to require an intermediate standard of scrutiny in cases "exhibiting circumstances which increase the risk that the local permitting authority will seek to avoid the obligation to pay just compensation."[244] The court held the discretionary context of land use

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Realty Co., 272 U.S. 365, 395 (1926).

[232] *See, e.g., supra* notes 203, 209, 213 and accompanying text.

[233] Stewart M. Wiener, *Substantive Due Process in the Twilight Zone: Protecting Property Interests From Arbitrary Land Use Decisions*, 69 TEMP. L. REV. 1467, 1495 (1996); *see also id.* at 1495 n.229 ("[S]uggesting midlevel scrutiny for substantive review of land use regulation to promote fair accommodation of competing viewpoints." (citing DENNIS J. COYLE, PROPERTY RIGHTS AND THE CONSTITUTION: SHAPING SOCIETY THROUGH LAND USE REGULATION 258-60 (1993))).

[234] *Nectow*, 277 U.S. at 186-87.

[235] *Id.* at 187.

[236] Wiener, *supra* note 233, at 1495.

[237] 483 U.S. 825 (1987).

[238] 512 U.S. 374 (1994).

[239] *Nollan*, 483 U.S. at 837.

[240] *Dolan*, 512 U.S. at 375.

[241] 438 U.S. 104 (1978).

[242] *Id.* at 127.

[243] 911 P.2d 429, 439 (Cal. 1996).

[244] *Id.*

conditions in individual cases presents an inherent and heightened risk the local government will "manipulate the police power to impose conditions *unrelated* to legitimate land use regulatory ends, thereby avoiding what would otherwise be an obligation to pay just compensation."[245] The court has further held that for cases such as this, the Nollan-Dolan standard of scrutiny would assure "a constitutionally sufficient link between ends and means."[246] The more discretion a government entity has, the more room there is for abuse; this requires a higher level of scrutiny.

Some courts have applied a searching rational basis or higher level of scrutiny when an ordinance is challenged as applied by a quasi-judicial/administrative body rather than on its face as a legislative enactment.[247] This less deferential, searching standard of review for quasi-judicial/administrative decision results from courts being concerned with unelected and unaccountable judges thwarting the will of the people.[248] As discussed *supra*, there should be no difference whether an act is characterized as legislative, administrative, or quasi-judicial. The dissent in *Parking Ass'n of Georgia, Inc. v. City of Atlanta*, points out "[t]he distinction between sweeping legislative takings and particularized administrative takings appears to be a distinction without a constitutional difference."[249]

Regardless of the characterization of the government act, Justice Scalia failed to see the usefulness of "conscience shocking" as a legal test.[250] Justices Scalia and Thomas' concurrence in *Lewis* asserts the guideposts of the Due Process Clause are the Nation's history, legal traditions, and practices that restrain the exposition of the Due Process Clause.[251] This sentiment is shared by Justices Kennedy and O'Connor who view the "conscious shocking" standard as "laden with subjective assessments."[252] Justice Scalia points out the "shocks the conscience" test was rejected and decried in *Washington v. Glucksberg* as being one of those "arbitrary impositions" or "purposeless restraints" at odds with the Due Process Clause, but it is now being imposed, despite its highly subjective methodology.[253] He stated, rather than ask whether the conduct shocks the conscience, the first step in the analysis in a substantive due process claim

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[245] *Id.* at 439.
[246] *Id.*
[247] Wiener, *supra* note 233, at 1497.
[248] *See id.*
[249] Parking Ass'n of Ga., Inc. v. City of Atlanta, 515 U.S. 1116, 1117 (1995).
[250] Herrera v. Collins, 506 U.S. 390, 428 (1993).
[251] County of Sacramento v. Lewis, 523 U.S. 833, 860 (1998).
[252] *Id.* at 857.
[253] *Id.* at 860-61.

should be whether the Nation has traditionally protected the right by looking to textual or historical support.[254] Justice Scalia also points out, "[h]istorically, this guarantee of due process has been applied to *deliberate* decisions of government officials to deprive a person of life, liberty, or property."[255] This observation makes bringing a § 1983 suit claiming deprivation of substantive due process more attractive as one would need a deliberate government action in both. Another flaw pointed out in the standard is a court could use it as a self-defining test.[256]

An appropriate test to use in substantive due process claims involving property rights would be the standard articulated by the Fourth Circuit in *Marks v. City of Chesapeake*.[257] Where there is fairly alleged a basis for finding either abuse of discretion or caprice, a Fourteenth Amendment claim is properly stated.[258] As stated by Judge Easterbrook in *National Paint & Coatings Ass'n v. City of Chicago*,[259] the doctrine of substantive due process "is not a rival to the established rational basis analysis of economic regulation[.] It is instead derived from the many constitutional rules that protect personal liberty from unjustified intrusions."[260] The issue should be whether a property owner was singled out for inequitable treatment, even if there is no class-based or invidious discrimination.[261] Combined with the holding in *Lingle* that "substantially advances" is part of the due process analysis, the reviewing court should take a hard look at what the government's actual purpose is (rather than its articulated purpose) and whether the government action substantially advances a legitimate government interest.

Property owners should not be precluded from asserting a substantive due process claim because of a strict standard of review. As discussed *supra*, the ripeness barriers of a Fifth Amendment takings claim prevent potential plaintiffs from presenting their claims in court.[262] Conversely, when an "arbitrary and capricious" due process claim is made, only one development application must be made.[263] Instead of having to apply for a

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[254] *Id.* at 862.

[255] *Id.* at 863 (citing Daniels v. Williams, 474 U.S. 327, 331 (1986)) (internal quotation marks omitted).

[256] *See id.* at 858.

[257] 883 F.2d 308 (4th Cir. 1989).

[258] *Id.* at 311.

[259] 45 F.3d 1124, 1129 (7th Cir. 1995).

[260] EAGLE, *supra* note 1, § 1-8(a)(4) (citing *Nat'l Paint & Coatings Ass'n*, 45 F.3d 1124, 1129).

[261] *See* Scott v. Greenville County, 716 F.2d 1409, 1420 (4th Cir. 1983).

[262] *See, e.g.*, *supra* note 18; Williamson County Reg'l Planning Comm'n v. Hamilton Bank of Johnson City, 473 U.S. 172, 186 (1985).

[263] *See* EAGLE, *supra* note 1.

variance, there is no requirement for a second application to be submitted for a substantive due process claim to be ripe.[264] This is because a property owner has been denied substantive due process "the moment a governmental decision affecting his property has been made in an arbitrary and capricious manner."[265] Landowners should be allowed to challenge government action that is arbitrary or capricious. If a government regulation bears no relation to the police power, a landowner should be able to bring a substantive due process claim, especially if the ripeness barrier of a Fifth Amendment taking claim prevents him from doing so.

A land owner needs to be able to protect his property rights with a mechanism that successfully challenges arbitrary and capricious government regulation, having no substantial relation to the public health, safety, moral, or general welfare. An oppressive and arbitrary government action has no place in our democratic society. Thus, a successful substantive due process claim would result in the invalidation of the zoning restriction.[266] Also, if a substantive due process claim is combined with a § 1983 action, the remedies could include attorneys fees and damages.[267] This makes a substantive due process claim an attractive choice for property owners who cannot claim a Fifth Amendment taking has occurred.

While it is clear reviewing courts do not want to sit as zoning boards of appeal, the courts' interests need to be weighed against the property owner's right to be free from arbitrary government action. The Supreme Court declared this right includes arbitrary or irrational government conduct in land use actions, such as zoning,[268] and regulation that has "no substantial relation to public health, safety, morals, or the general welfare."[269] The "shocks the conscience" test does not adequately address these concerns. Furthermore, a majority of the circuits have not adopted the standard, and four Supreme Court justices have found the standard problematic. The Fourth Circuit's "arbitrary and capricious" standard, as evidenced in *Marks*, is the most fitting choice for judicial review of substantive due process claims involving property rights. It demonstrates a clear understanding of the Nation's history of substantive Due Process and

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[264] TAKINGS: LAND DEVELOPMENT CONDITIONS AND REGULATORY TAKINGS AFTER DOLAN AND LUCAS, *supra* note 2, at 295 (citing Herrington v. County of Sonoma, 834 F.2d 1488 (9th Cir. 1987)).

[265] *Id.* (citing Restigouche Inc. v. Town of Jupiter, 845 F. Supp. 1540, 1546 (S.D. Fla. 1993)).

[266] 1 ZIEGLER ET AL., *supra* note 12, § 3:12.

[267] *See* CALLIES ET AL., *supra* note 7, at 409.

[268] Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252 (1977).

[269] Vill. of Euclid v. Ambler Realty Co., 272 U.S. 365, 395 (1926); *see also* Nectow v. City of Cambridge, 277 U.S. 183, 187-88 (1928).

adequately protects property rights from arbitrary or irrational government conduct.

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Drunk, Driving, and Untouchable: The Implications of *State v. Heapy* on Reasonable Suspicion in Hawai'i

I. INTRODUCTION

Imagine driving home after having a few too many cocktails at your favorite watering hole. You pass one flashing sign indicating a sobriety checkpoint[1] ahead. Another sign looms and now you're within 100 yards of the checkpoint. At fifty feet, you slow down, signal, and turn down an unused dirt road. To your amusement, the road goes straight through fallow farmland culminating in a dead end. The question is, "can a police officer, observing your actions, pull you over to investigate"? In Hawai'i, the answer is a resounding "no." You're home free to go about your merry drunken way.

In *State v. Heapy*,[2] the Hawai'i Supreme Court suppressed evidence and statements resulting from a vehicular stop because the stop violated article I, section 7 of the Hawai'i Constitution.[3] The court concluded the stop was not supported by "a reasonable and articulable suspicion that Defendant was engaged in criminal conduct."[4] In other words, a police officer must ignore years of experience, as well as the time, place, and manner in which a vehicle avoids a sobriety checkpoint, and look the other way when a vehicle approaching a sobriety checkpoint affects a right turn, left turn, or u-turn.[5]

In reaching its decision, the majority purported to follow the more "extensive" right to privacy afforded by the Hawai'i Constitution.[6] The Hawai'i Constitution *does* afford individuals specific rights to privacy, while the right to privacy in the federal constitution is inferred.[7] However, in *Heapy*,

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[1] The defining case concerning the constitutionality of sobriety checkpoints was *Mich. Dep't of State Police v. Sitz*, 496 U.S. 444 (1990). In *Sitz*, "licensed drivers" sought injunctive relief against sobriety checkpoints in Michigan. *Id.* at 448. The Supreme Court held sobriety checkpoints are consistent with the Fourth Amendment. *Id.* at 455.

[2] 113 Hawai'i 283, 151 P.3d 764 (2007).

[3] HAW. CONST. art. I, § 7 ("The right of the people to be secure in their persons . . . against unreasonable . . . seizures and invasions of privacy shall not be violated . . . .").

[4] *Heapy*, 113 Hawai'i at 285, 151 P.3d at 766.

[5] See *infra* Section IV for further discussion.

[6] *Heapy*, 113 Hawai'i at 298, 151 P.3d at 779; *see also* State v. Tanaka, 67 Haw. 658, 661, 701 P.2d 1274, 1276 (1985) ("In our view, article I, § 7 of the Hawai'i Constitution recognizes an expectation of privacy beyond the parallel provisions in the Federal Bill of Rights.").

[7] Delaware v. Prouse, 440 U.S. 648 (1979). In *Prouse*, the Court concluded, "[t]he essential purpose of the proscriptions in the Fourth Amendment is to impose a standard of 'reasonableness' upon the exercise of discretion by government officials, including law enforcement agents, in order 'to safeguard the privacy and security of individuals against

the court failed to draw a logical connection between the enhanced right to privacy and a heightened standard for reasonable suspicion in Hawai'i.[8] The court should have found reasonable suspicion based on the totality of circumstances. Avoiding a sobriety checkpoint in and of itself may not give rise to reasonable suspicion, but the totality of the circumstances surrounding the avoidance gave rise to reasonable suspicion in this particular instance.

Accordingly, this Note argues that *Heapy* draws a bright line where a case-by-case analysis would be more rational. Avoidance of a sobriety checkpoint may give rise to reasonable suspicion of criminal activity in the mind of a reasonable police officer. In ruling avoidance can *never* give rise to reasonable suspicion, the Hawai'i Supreme Court has essentially created a situation where the totality of circumstances is ignored and the overall deterrent value of sobriety checkpoints is questionable. Part II of this note explores the rise of reasonable suspicion as an exception to the warrant requirement. Part III outlines the facts of the case and the plurality, concurrence, and dissent. Part IV provides an analysis of the opinion and explores the totality of circumstances which should have been thoroughly considered in this case. Part V concludes and briefly summarizes the effect *Heapy* will have on reasonable suspicion and sobriety checkpoints in Hawai'i.

II. BACKGROUND

A. The Concept of Reasonable Suspicion as Applied to Automobile Stops

1. Automobile stops constitute a "seizure" within the meaning of the Fourth Amendment and article I, section 7 of the Hawai'i Constitution

The Fourth Amendment to the Constitution protects against "unreasonable searches and seizures,"[9] and article I, section 7 of the Hawai'i Constitution protects against "unreasonable seizures and invasions of privacy."[10] The United States Supreme Court has concluded a "seizure" occurs within the meaning of the Fourth Amendment when an official stops an automobile and

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arbitrary invasions.'" *Id.* at 653-54 (quoting Marshall v. Barlow's, Inc., 436 U.S. 307, 312 (1978)).

[8] *See infra* Section IV.A.

[9] U.S. CONST. amend. IV.

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Id.

[10] *See* HAW. CONST. art. I, § 7.

detains its occupants, even if the stop is brief and the purpose of the stop is limited.[11]

The Hawai'i Supreme Court has similarly concluded an investigatory vehicle stop constitutes a seizure within the constitutional definition of "seizure."[12] Accordingly, any warrantless automobile stop could be regarded as an unconstitutional seizure. In other words, "[a] warrantless seizure *is presumed invalid* [and, thus, unreasonable,] 'unless and until the prosecution proves that the . . . seizure falls within a well-recognized and narrowly defined exception to the warrant requirement.'"[13]

2. *Reasonable suspicion is a legitimate exception to the warrant requirement and valid justification for an automobile stop*

One such exception to the warrant requirement is reasonable suspicion, which the Supreme Court has noted is a "somewhat abstract" concept.[14] Reasonable suspicion is "not readily, or even usefully, reduced to a neat set of legal rules"[15] but rather, is a "fluid concept" that takes its "substantive content from the particular context" in which it is being assessed.[16] This "abstract" and "fluid" concept is the minimum threshold a police officer must meet in order to initiate an investigatory stop. In *Terry v. Ohio*,[17] the Court articulated the boundaries of reasonable suspicion when it concluded an officer may stop and frisk a suspect without a warrant or even probable cause.[18] The

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[11] *Prouse*, 440 U.S. at 653; *see also* United States v. Cortez, 449 U.S. 411, 417 (1981) ("The Fourth Amendment applies to seizures of the person, including brief investigatory stops such as the stop of the vehicle here."); United States v. Brignoni-Ponce, 422 U.S. 873, 878 (1975) (in holding a roving vehicle patrol stop unconstitutional, the Court noted, "[t]he Fourth Amendment applies to all seizures of the person, including seizures that involve only a brief detention short of traditional arrest").

[12] State v. Bolosan, 78 Hawai'i 86, 92, 890 P.2d 673, 679 (1995) (citing Kernan v. Tanaka, 75 Haw. 1, 37, 856 P.2d 1207, 1225 (1993)); *see also* State v. Powell, 61 Haw. 316, 320, 603 P.2d 143, 147 (1979) ("It is beyond challenge that stopping an automobile and detaining its occupants constitute a 'seizure' within the meaning of the Fourth Amendment . . . and Article I, Section 7 of the Hawaii Constitution . . . .").

[13] State v. Heapy, 113 Hawai'i 283, 290, 151 P.3d 764, 771 (2007) (quoting State v. Eleneki, 106 Hawai'i 177, 180, 102 P.3d 1075, 1078 (2004)).

[14] United States v. Arvizu, 534 U.S. 266, 274 (2002).

[15] Ornelas v. United States, 517 U.S. 690, 695-96 (1996) (citing Illinois v. Gates, 462 U.S. 213, 232 (1983)). In *Ornelas*, the Court approved de novo review for reasonable suspicion and probable cause situations, to, among other reasons, "unify precedent." *Id.* at 697.

[16] *Id.* at 696. The Court also refers to probable cause as a "fluid concept." *Id.*

[17] 392 U.S. 1 (1968).

[18] *Id.* at 30-32. In *Terry*, a police officer watched two men repeatedly walk back and forth in front of a storefront and look inside the store window, which led the officer to conclude the men were casing the store for a robbery. *Id.* at 5-7. In his concurrence, Justice Harlan noted,

"reasonableness" of the stop derives from the balance of the government interests involved against the nature of the intrusion on individual rights.[19] The police officer must be able to point to "specific and articulable facts" that create a suspicion of criminal activity.[20] The reviewing court then looks at this assessment from an objective standard and asks whether a "man of reasonable caution" would believe the stop was appropriate.[21]

In 1979, the Supreme Court applied this standard to investigatory stops of automobiles. In *Delaware v. Prouse*,[22] a police officer found marijuana on the car floor after pulling a vehicle over for a random license and registration check.[23] In finding this stop unreasonable, the Court concluded, absent probable cause, there must be "at least articulable and reasonable suspicion that a motorist is unlicensed or that an automobile is not registered, or that either the vehicle or an occupant is otherwise subject to seizure for violation of law."[24] In other words, for a police officer to initiate an investigatory stop, there must be some "objective manifestation that the person stopped is, or is about to be, engaged in criminal activity."[25]

3. Reasonable suspicion requires a balancing of individual rights and state interests

In evaluating the reasonableness of a particular law enforcement procedure, the *Prouse* court balanced the "intrusion on the individual's Fourth Amendment interests against [the law enforcement entity's] promotion of legitimate governmental interests."[26] Random spot checks simply were not enough of a "sufficiently productive mechanism" to warrant the infringement of the driver's Fourth Amendment rights.[27] However, the Court was loathe to only require the high threshold probable cause entails because the state has an interest in reasonable stops as "a means of promoting public safety upon its

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"while the [Fourth Amendment] right does not depend upon possession by the officer of a valid warrant, nor upon the existence of probable cause, such activities must be reasonable under the circumstances as the officer credibly relates them in court." *Id.* at 31 (Harlan, J., concurring).

[19] *Id.* at 20-21 (majority opinion).

[20] *Id.* at 21.

[21] *Id.* at 21-22.

[22] 440 U.S. 648 (1979).

[23] *Id.* at 650.

[24] *Id.* at 663.

[25] United States v. Cortez, 449 U.S. 411, 417 (1981); *see also* United States v. Arvizu, 534 U.S. 266, 273 (2002) ("[T]he Fourth Amendment is satisfied if the officer's action is supported by reasonable suspicion to believe that criminal activity 'may be afoot.'" (quoting United States v. Sokolow, 490 U.S. 1, 7 (1989))).

[26] *Prouse*, 440 U.S. at 654.

[27] *Id.* at 659.

roads."[28] Reasonable suspicion, then, remains a middle ground between probable cause and random investigatory stops.[29] The Hawai'i Supreme Court has noted the lesser standard of reasonable suspicion is acceptable "when the nature and extent of the detention are minimally intrusive of the individual's Fourth Amendment interests."[30] The *Terry* balance is maintained between government interest and individual rights because the individual intrusion in an investigatory stop is "not unreasonable,"[31] and even "slight."[32]

Despite the more "extensive" right to privacy afforded by the Hawai'i Constitution,[33] the Hawai'i Supreme Court has adopted the reasonable suspicion standard for automobile investigatory stops. The court has maintained that "the police officer must be able to point to specific and articulable facts which, taken together with rational inferences from these facts, reasonably warrant that intrusion."[34] Reasonable suspicion in Hawai'i is similar to reasonable suspicion in the federal courts, but the "principles of *Prouse* as they apply to vehicle stops on public ways rest on independent state constitutional grounds afforded by article I, section 7,"[35] rather than on federal constitutional grounds. Reliance on Hawai'i's constitution has created the one apparent difference in reasonable suspicion between Hawai'i state courts and U.S. federal courts. In Hawai'i, the "ultimate test" is whether, "measured by an objective standard, a [person] of reasonable suspicion would be warranted in believing criminal activity was afoot and that the action taken was

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[28] *Id.* at 658; *see also* United States v. Brignoni-Ponce, 422 U.S. 873, 883 (1975) ("[A] requirement of reasonable suspicion for stops allows the Government adequate means of guarding the public interest and also protects residents of the border areas from indiscriminate official interference.").

[29] *See* Margaret Raymond, *Down on the Corner, Out in the Street: Considering the Character of the Neighborhood in Evaluating Reasonable Suspicion*, 60 OHIO ST. L.J. 99, 102 (1999) ("Reasonable suspicion . . . is less than probable cause . . . [but] [i]t requires, however, more than a mere 'inchoate and unparticularized suspicion or hunch.'" (quoting Terry v. Ohio, 392 U.S. 1, 27 (1968))).

[30] State v. Spillner, 116 Hawai'i 351, 359, 173 P.3d 498, 506 (2007) (citing United States v. Sandoval, 29 F.3d 537, 542 (10th Cir. 1994)).

[31] *Id.* at 364, 173 P.3d at 511. In *Spillner*, the driver had been pulled over twice before and cited for driving without a license twice. *Id.* at 356, 173 P.3d at 503. The court held an investigatory stop by a police officer based *only* on these prior offenses amounted to reasonable suspicion. *Id.* at 364, 173 P.3d at 511; *see also Brignoni-Ponce*, 422 U.S. at 879-80 (concluding when an officer stops an automobile, the "intrusion is modest").

[32] State v. Kaleohano, 99 Hawai'i 370, 380, 56 P.3d 138, 149 (2002).

[33] *See* HAW. CONST. art. I, § 7.

[34] State v. Prendergast, 103 Hawai'i 451, 454, 83 P.3d 714, 717 (2004) (quoting *Terry*, 392 U.S. at 21) (internal quotation marks omitted). In applying the approach from *Terry*, the Hawai'i Supreme Court has effectively adopted the United States Supreme Court reasonable suspicion standard.

[35] State v. Heapy, 113 Hawai'i 283, 291, 151 P.3d 764, 772 (2007).

appropriate."[36] In contrast, federal courts tend to ask whether a reasonable officer would have had reasonable suspicion of criminal activity.[37]

4. Reasonable suspicion requires an examination of the totality of circumstances to determine whether an investigatory stop is valid

When a court reviews a reasonable suspicion determination made by a police officer, it looks to the "totality of the circumstances of each case to see whether the detaining officer has a particularized and objective basis for suspecting legal wrongdoing."[38] In *United States v. Arvizu*,[39] a border patrol officer made an investigatory stop that resulted in the discovery of 128.85 pounds of marijuana.[40] The Ninth Circuit Court of Appeals suppressed the evidence and determined the stop did not reach the reasonable suspicion threshold.[41] In considering the totality of the circumstances of the stop and the various factors the arresting officer considered, the Supreme Court overruled the Ninth Circuit and noted that "each of these factors alone is susceptible of innocent explanation, and some factors are more probative than others. Taken together, we believe they sufficed to form a particularized and objective basis for . . . stopping the vehicle."[42] In contemplating the totality of the circumstances, the Court deferred to the officer's "assessment of the situation in light of his specialized training and familiarity with the customs of the area's inhabitants."[43] The Hawai'i Supreme Court also examines the totality of the circumstances in reasonable suspicion situations.[44]

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[36] *Spillner*, 116 Hawai'i at 357, 173 P.3d at 504 (quoting State v. Barnes, 58 Haw. 333, 338, 568 P.2d 1207, 1211 (1977)) (internal quotation marks omitted).

[37] *See* United States v. Cortez, 449 U.S. 411, 421 (1981) ("Rather, the question is whether, based upon the whole picture, they, as experienced Border Patrol officers, could reasonably surmise that the particular vehicle they stopped was engaged in criminal activity.").

[38] United States v. Arvizu, 534 U.S. 266, 273 (2002); *see also Cortez*, 449 U.S. at 417 (in determining whether a police officer can stop a person, "the totality of the circumstances—the whole picture—must be taken into account").

[39] *Arvizu*, 534 U.S. 266.

[40] *Id.* at 272.

[41] *Id.* at 268.

[42] *Id.* at 277-78. Some of the factors the officer (and Court) considered include: the area; the type of vehicle (minivan); the demeanor of the driver; the position and actions of the passengers; a turn made by the vehicle at a specific point (to avoid a checkpoint); and the address where the vehicle was registered. *Id.* at 268-71.

[43] *Id.* at 276.

[44] *See* State v. Prendergast, 103 Hawai'i 451, 454, 83 P.3d 714, 717 (2004). In *Prendergast*, the court considered the totality of circumstances, including the imminence of the harm and the reliability of the tip, when an officer pulled a vehicle over based on an anonymous tip. *Id.* at 461, 83 P.3d at 725. The court found in light of the totality of circumstances that the officer had reasonable suspicion of criminal activity. *Id.*

A reviewing court looks at the content and reliability of information that would be relevant to the officer in determining the totality of the circumstances.[45] In looking at the specific and articulable facts and rational inferences made by the police officer, the court must ask, objectively, whether "a [person] of reasonable caution would be warranted in believing that criminal activity was afoot."[46]

B. Constitutionality of Sobriety Checkpoints

Because reasonable suspicion is the minimum threshold an officer must meet to justify pulling over a vehicle, the concept of sobriety checkpoints is an anomaly within the constitutional framework. Within the confines of a sobriety checkpoint, police can pull over *every* vehicle, regardless of reasonable suspicion, probable cause, or random curiosity.[47] The Supreme Court reconciled this dilemma in *Mich. Dep't of State Police v. Sitz*[48] when licensed Michigan drivers challenged the constitutionality of the very first Michigan sobriety checkpoint.[49] The Court applied the reasonableness balancing test and weighed the state's interest in eliminating drunk driving against the intrusion on the motorist.[50] In holding the checkpoint program consistent with the Fourth Amendment, the Court found the balance weighed in favor of sobriety checkpoints because they reasonably advanced the state interest of combating drunk driving.[51] This creates an exception to the rule requiring reasonable suspicion for an investigatory stop.

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[45] *See* Alabama v. White, 496 U.S. 325, 330 (1990).

[46] State v. Kaleohano, 99 Hawai'i 370, 378, 83 P.3d 138, 146 (2002); *see also* State v. Eleneki, 106 Hawai'i 177, 180, 102 P.3d 1075, 1078 (2004); State v. Barnes, 58 Haw. 333, 338, 568 P.2d 1207, 1211 (1977).

[47] *See* Mich. Dep't of State Police v. Sitz, 496 U.S. 444, 453 (1990) (noting the checkpoint in question stopped every vehicle). Which vehicles are stopped varies depending on the particular statute, but it generally requires a "specified numerical sequence or pattern." HAW. REV. STAT. § 291E-20 (Supp. 2005).

[48] *Sitz*, 496 U.S. 444.

[49] *Id.* at 448.

[50] *Id.* at 451.

[51] *Id.* at 455. The Court noted, "the measure of the intrusion on motorists stopped briefly at sobriety checkpoints is slight." *Id.* at 451. The Court also reconciled this decision with that of *Prouse* by explaining that checkpoint searches are less intrusive than random patrol stops because at checkpoints, the "motorist can see that other vehicles are being stopped, he can see visible signs of the officers' authority, and he is much less likely to be frightened or annoyed by the intrusion." *Id.* at 453 (quoting United States v. Ortiz, 422 U.S. 891, 895 (1975)) (internal quotation marks omitted). Finally, though statistics indicated only around 1% of motorists stopped at sobriety checkpoints were actually arrested for drunken driving, the Court found the method effective enough to warrant the intrusion on motorists. *Id.* at 455.

In Hawai'i, the legislature has authorized the "police departments of the respective counties" to establish sobriety checkpoints.[52] Additionally, the legislature has provided minimum standards for roadblock procedures a police department must meet.[53] In discussing the scope of this legislation, the House Judiciary Committee reported, "[c]ognizant of fundamental Fourth Amendment protection against unreasonable searches and seizures, legislation authorizing the establishment of intoxication control roadblocks must provide minimum standards which limit officer discretion and the level of intrusion on individual rights."[54] Pursuant to this discussion, the relevant statute is extremely detailed in defining the aspects of sobriety checkpoints to minimize any "intrusion on individual rights," yet the statute is notably silent as to officer procedure when an individual avoids a checkpoint.[55]

III. *STATE V. HEAPY*

A. Facts

Despite the ambiguity in the state sobriety checkpoint statutes, the Hawai'i Supreme Court determined an arrest arising from avoidance of a checkpoint is not legitimate, even when the facts tilt towards reasonable suspicion.

"Officer Correa was stationed as the 'chase car' at an intoxication checkpoint being conducted by the Maui Police Department . . . to stop vehicles traveling southbound on Mokulele Highway."[56] Officer Correa had been stationed as the "chase car" around twenty times, and had assisted in around fifty intoxication checkpoints altogether.[57] Prior to this instance, Officer Correa had stopped around forty vehicles attempting to avoid the checkpoint, and in each of these forty stops, the driver was either intoxicated, without insurance, without a driver's license, or had an outstanding warrant.[58]

Officer Correa observed Heapy driving his vehicle past the "two four-foot by four-foot, fluorescent orange, diamond shaped, signs with the words 'INTOXICATION CHECKPOINT,'" located (respectively) at 500 feet and

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[52] HAW. REV. STAT. § 291E-19. The statute is entitled: "Authorization to establish intoxicant control roadblock programs." *Id.*

[53] *Id.* § 291E-20. Among other provisions, this statute requires proper illumination at checkpoints, vehicles be stopped in a specific numeral pattern, checkpoints be at a fixed location for a maximum of three hours, and uniformed officers be stationed at the checkpoints with proper identification. *Id.*

[54] H.R. REP. NO. 418-84, Reg. Sess., at 1033 (Haw. 1984) (Standing Comm.).

[55] *See* HAW. REV. STAT § 291E-20.

[56] State v. Heapy, 113 Hawai'i 283, 288, 151 P.3d 764, 769 (2007).

[57] *Id.*

[58] *Id.*

250 feet from the checkpoint.[59] Heapy took a legal right turn onto Mehameha Loop after passing the two signs but before reaching the flag officer at the checkpoint.[60]

Mehameha Loop is a quarter of a mile long strip of road that travels through sugar cane fields to terminate in a dead end with a bright yellow metal gate across the road.[61] The only structure on Mehameha Loop is an animal shelter, which was closed on the day of the incident.[62] Officer Correa turned down Mehameha Loop after observing Heapy turn down the loop and followed Heapy as he passed the animal shelter and continued at a constant speed and course towards the yellow gate.[63] Officer Correa then affected a stop of the vehicle based on his own reasonable suspicion that Heapy was avoiding the checkpoint and found Heapy operating an automobile under the influence of alcohol.[64]

B. District Court Opinion

In the District Court of the Second Circuit, Heapy moved to suppress the evidence of intoxication based on lack of reasonable suspicion on the part of Officer Correa.[65] The district court denied the motion to suppress evidence and found Officer Correa's stop met reasonable suspicion requirements within the Fourth Amendment and article I, section 7 of the Hawai'i State Constitution.[66]

C. The Plurality Opinion

In a four-to-one opinion, the Hawai'i Supreme Court reversed the district court and held Officer Correa's stop of Heapy violated article I, section 7 of the Hawai'i Constitution.[67] The decision hinged on the fact that Officer Correa only had a suspicion Heapy was avoiding the sobriety checkpoint, not that he was violating the law.[68]

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[59] *Id.* at 288-89, 151 P.3d at 769-70.

[60] *Id.* at 289, 151 P.3d at 770.

[61] *Id.*

[62] *Id.*

[63] *Id.*

[64] *Id.* Driving under the influence of alcohol violates Hawai'i Revised Statutes section 291E-61. The statute provides, "[a] person commits the offense of operating a vehicle under the influence of an intoxicant if the person operates or assumes actual physical control of a vehicle." HAW. REV. STAT. § 291E-61 (Supp. 2005).

[65] *Heapy*, 113 Hawai'i at 290, 151 P.3d at 771.

[66] *Id.*

[67] *Id.* at 305, 151 P.3d at 786.

[68] *Id.* at 292, 151 P.3d at 773 ("Officer Correa had no basis to have a reasonable suspicion that criminal activity was afoot.").

In the first section of the opinion, Justice Acoba (writing for the plurality) set forth much of the same reasonable suspicion analysis discussed *supra*. Justice Acoba noted, "Hawai'i has adopted the *Terry* reasonable suspicion test on independent state constitutional grounds and applied it to traffic situations."[69] Applying the Hawai'i Constitution, the court reasoned: "[I]t would be violative of the extensive right to privacy guaranteed by the Hawai'i Constitution for this court to permit seizures to occur on the basis of a suspicion that a motorist was avoiding a police confrontation by making a lawful turn."[70] This invasion of the enhanced right to privacy is contingent on whether the search itself is "suspicionless"[71] and therefore unreasonable, so this invasion of privacy relies on the basis the court finds the search itself unreasonable. In other words, the search only violates the right to privacy if the court finds the search unreasonable.

Justice Acoba recognized "[t]he totality of the circumstances . . . must indicate that *criminal activity is afoot*" for the stop to be reasonable.[72] In considering the totality of circumstances, the court regarded the following as significant: 1) Heapy made a legal right turn; 2) the turn was not made erratically; and 3) Heapy's headlights were on.[73]

The plurality also addressed the dissent's proposed multi-factor test to help determine whether there was reasonable suspicion.[74] Justice Acoba found these factors irrelevant in determining reasonable suspicion,[75] and Officer Correa's extensive experience was "immaterial" because "an objective basis for the stop was absent."[76] Given the circumstances the court actually considered,

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[69] *Id.* at 291, 151 P.3d at 772. Justice Acoba cited *State v. Kim*, 68 Haw. 286, 290 711 P.2d 1291, 1294 (1985), for the proposition that "under article I, section 7 of the Hawai'i Constitution, a police officer must have at least a reasonable basis of specific articulable facts to believe a crime has been committed to order a driver out of a car after a traffic stop." *Heapy*, 113 Hawai'i at 299, 151 P.3d at 780.

[70] *Heapy*, 113 Hawai'i at 299, 151 P.3d at 780.

[71] *Id.*

[72] *Id.* at 292, 151 P.3d at 773.

[73] *Id.*

[74] *Id.* at 296-97, 151 P.3d at 777-78. The factors Chief Justice Moon discussed in the dissent included: the motorist's distance from the roadblock when the turn was made, whether the motorist was able to see the roadblock before the turn was made, the manner in which the evasive action was made, the arresting officer's experience, and any other circumstances that would indicate the driver was avoiding the checkpoint to avoid arrest. *Id.* at 296-97, 308, 151 P.3d at 777-78, 789.

[75] *Id.* at 296-97, 151 P.3d at 777-78. The court noted, "the factors identified by the dissent fail to provide any objective guidance as to the reasonable suspicion standard in the context of this case." *Id.* at 296, 151 P.3d at 777.

[76] *Id.* at 295-96, 151 P.3d at 776-77.

the court determined there was no reasonable suspicion,[77] and the fact Heapy was found intoxicated after the stop did not "retroactively justify the stop."[78]

The court also noted the majority of other jurisdictions have found legally avoiding a sobriety checkpoint does not give rise to reasonable suspicion.[79] Justice Acoba bolstered these cases with other precedent supporting the proposition that flight or avoiding confrontation does not alone create reasonable suspicion.[80] Subsequent to this support, the court rationalized that there are many reasons for making a turn to avoid a sobriety checkpoint that are not illegal.[81]

The plurality concluded the Hawai'i statutes governing sobriety checkpoints[82] do not authorize law enforcement officers to pursue drivers avoiding the checkpoints, and such an action is "beyond the express scope of the statutory procedures and therefore more intrusive than the standards and guidelines described in [the statutes]."[83] The court also cited to the NHTSA Guide[84] in support of its ultimate conclusion that avoidance of a checkpoint does not give rise to reasonable suspicion.[85] The concurrence declined to discuss these particular issues, but expanded briefly upon Justice Acoba's totality of circumstances analysis.

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[77] *Id.* at 296, 151 P.3d at 777.

[78] *Id.* at 293, 151 P.3d at 774; *see also* State v. Wallace, 80 Hawai'i 382, 393, 910 P.2d 695, 706 (1996) ("Assuming an unreasonable search or seizure, any evidence derived therefrom is inadmissible in a criminal prosecution and . . . a conviction obtained thereby must be reversed.").

[79] *Heapy*, 113 Hawai'i at 293-94, 151 P.3d at 774-75. The court cited to various cases to demonstrate this "majority." *See* Howard v. Voshell, 621 A.2d 804 (Del. Super. Ct. 1992); Little v. State, 479 A.2d 903 (Md. 1983); State v. McCleery, 560 N.W.2d 789 (Neb. 1997); People v. Bigger, 771 N.Y.S.2d 826 (N.Y. Just. Ct. 2004); Commonwealth v. Scavello, 734 A.2d 386 (Pa. 1999).

[80] *Heapy*, 113 Hawai'i at 294, 151 P.3d at 775; *see also* People v. Thomas, 660 P.2d 1272 (Colo. 1983) (en banc), *overruled by* People v. Archuleta, 980 P.2d 509 (Colo. 1999); State v. Hathaway, 411 So. 2d 1074 (La. 1982); People v. Shabaz, 378 N.W.2d 451 (Mich. 1985).

[81] *Heapy*, 113 Hawai'i at 295, 151 P.3d at 776 (citing Bass v. Commonwealth, 525 S.E.2d 921, 925 (Va. 2000)) ("The reasons for which a driver may reverse direction other than to evade a traffic checkpoint are legion in number and are a matter of common knowledge and experience.").

[82] HAW. REV. STAT. § 291E-19 (Supp. 2005); *see also id.* § 291E-20.

[83] *Heapy*, 113 Hawai'i at 301, 151 P.3d at 782. The court initiated this discussion even though Heapy failed to raise the statutory issue on appeal. *Id.* at 303, 151 P.3d at 784.

[84] *Id.* at 302-03, 151 P.3d at 783-84 (the National Highway Traffic Safety Administration "Guide" states that "The act of avoiding a sobriety checkpoint does not constitute grounds for a stop.").

[85] *Id.*

D. The Concurring Opinion

In a brief concurrence, Justice Levinson (joined by Justice Nakayama) found, given the totality of the circumstances, Officer Correa could only have suspected Heapy was deliberately avoiding the sobriety checkpoint.[86] In considering the totality of circumstances, the concurrence deviated from the majority and regarded the following as significant: 1) the time of day; 2) the proximity of Heapy to the checkpoint; 3) the characteristics of Mehameha Loop; and 4) Officer Correa's prior experience.[87] Justice Levinson concluded, however, that the foregoing circumstances were insufficient to give rise to reasonable suspicion, based on "the search-and-seizure jurisprudence of this state, grounded in the Hawai'i Constitution."[88] Thus, Justice Levinson provided the factors that should be considered in a reasonable suspicion analysis, but declined to address their relevance in any particular detail.

E. The Dissenting Opinion

In a lengthy dissent, Chief Justice Moon addressed the factors pertaining to the totality of circumstances, and opined Officer Correa had reasonable suspicion of criminal activity in making the investigatory stop.[89] The dissent contested the plurality's notion purporting the majority of jurisdictions do not find reasonable suspicion stemming from avoidance of sobriety checkpoints.[90] Chief Justice Moon also admonished the plurality for creating a bright-line rule where police officers cannot consider the totality of the circumstances in checkpoint avoidance situations and where the state's overall ability to protect the safety of motorists is greatly diminished.[91]

As discussed previously, Chief Justice Moon set forth five factors previously utilized by other courts to help determine whether an officer has "specific and articulable facts to justify an investigatory stop" when the driver avoids a roadblock.[92] In other words, the Chief Justice specified the factors

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[86] *Id.* at 305, 151 P.3d at 786 (Levinson, J., concurring).

[87] *Id.*

[88] *Id.*

[89] *Id.* at 306, 151 P.3d at 787 (Moon, C.J., dissenting) ("[A]ll of these facts known to Officer Correa, considered in conjunction with the reasonable inferences arising from the totality of the circumstances . . . would warrant a man of reasonable caution in believing that Heapy avoided the . . . checkpoint due to some type of involvement in criminal activity.").

[90] *Id.* at 307, 151 P.3d at 788. Conversely, Chief Justice Moon noted, "the case law is 'split on whether avoiding a roadblock or checkpoint alone creates sufficient reason for a traffic stop.'" *Id.* (quoting Oughton v. Dir. of Revenue, 916 S.W.2d 462, 464 n.2 (Mo. Ct. App. 1996)).

[91] *Id.* at 306, 151 P.3d at 787.

[92] *Id.* at 308, 151 P.3d at 789.

encapsulated by a totality of circumstances analysis. These factors include: 1) "the motorist's distance from the roadblock when the turn or U-turn was made;"[93] 2) "whether the motorist was able to see the roadblock before he or she took evasive action;"[94] 3) "the manner in which the motorist operated [the] vehicle in making the evasive action;"[95] 4) "the arresting officer's experience;"[96] and 5) "any other circumstances that would indicate the motorist was intentionally avoiding the roadblock to evade arrest or detection."[97]

In applying the facts of the case to these factors, Chief Justice Moon found: 1) "Heapy was less than 250 feet from the checkpoint[;]"[98] 2) Heapy passed two four-foot-by-four-foot fluorescent orange signs providing notice of the checkpoint, and the lighting tower at the checkpoint as well as the flag officer were "fully visible from the intersection of Mokulele Highway and Mehameha Loop[;]"[99] 3) "Officer Correa did not observe a 'suspicious driving pattern[;]'"[100] 4) Officer Correa possessed sufficient experience to provide him with "specific and articulable facts and inferences . . . that [Heapy] was committing a crime[;]"[101] and 5) the nature of Mehameha Loop reasonably indicated Heapy was intentionally avoiding arrest or detection through avoidance of the checkpoint.[102] Given these factors and the totality of circumstances, Officer Correa could "form a reasonable suspicion that [Heapy]

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[93] *Id.* ("[T]he closer a motorist is to a roadblock when he or she turns, the more objectively reasonable it may be to infer the turn was made out of consciousness of guilt." (quoting State v. Lester, 148 F. Supp. 2d 597, 603 (D. Md. 2001)) (internal quotation marks omitted)); *see also* Snyder v. State, 538 N.E.2d 961 (Ind. Ct. App. 1989); Steinbeck v. Commonwealth, 862 S.W.2d 912 (Ky. Ct. App. 1993).

[94] *Heapy*, 113 Hawai'i at 309, 151 P.3d at 790 ("[W]hether a notice was posted is relevant to the assessment of a driver's scienter or guilt." (quoting *Lester*, 148 F. Supp. 2d at 603) (internal quotation marks omitted)).

[95] *Id.* at 309, 151 P.3d at 790 ("[U]nsafe, erratic driving is thought to militate towards a finding of reasonable suspicion." (quoting *Lester*, 148 F. Supp. 2d at 604) (internal quotation marks omitted)); *see also* State v. Foreman, 527 S.E.2d 921, 922 (N.C. 2000) (reasonable suspicion was raised when a police officer observed a motorist's "quick left turn" and subsequent "abrupt" turn prior to a checkpoint).

[96] *Heapy*, 113 Hawai'i at 309-10, 151 P.3d at 790-91 (stopping officers from pursuing motorists who avoid checkpoints is unnecessary, if the officer, "by virtue of experience and training, has reasonable and articulable facts upon which his suspicion is based—not mere hunches or speculation" (quoting *Snyder*, 538 N.E.2d at 965-66) (internal quotation marks omitted)); *see also* Stroud v. Commonwealth, 370 S.E.2d 721, 722-23 (Va. Ct. App. 1988).

[97] *Heapy*, 113 Hawai'i at 310, 151 P.3d at 791. Two of these "circumstances" may include the time of day and the area in which the stop was made. *Id.* at 310-11, 151 P.3d at 791-92.

[98] *Id.* at 311, 151 P.3d at 792 (emphasis omitted).

[99] *Id.*

[100] *Id.*

[101] *Id.* at 312, 151 P.3d at 793.

[102] *Id.* at 313, 151 P.3d at 794.

might have been engaging in criminal activity."[103] Chief Justice Moon also applied the *Terry* balancing test and determined the "state's interest in combating intoxicated motorists" and "protecting the safety of the public" outweighed the "minimal intrusion" on Heapy in this case.[104]

The dissent also addressed the plurality notion that Officer Correa's investigatory stop went "beyond the express scope of the statutory procedures [governing sobriety checkpoints]."[105] Chief Justice Moon disposed of this argument by noting Heapy never challenged the propriety of the checkpoint statutes, and the prosecution and Heapy's counsel "*agreed* that Heapy was *only contesting the reasonable suspicion aspect of the [investigatory] stop.*"[106] Therefore, this argument by the plurality was moot because Heapy himself never advanced such a theory.[107]

Additionally, Chief Justice Moon reproved the plurality's use of the NHTSA "Guide," which indicates that avoidance of a checkpoint should not be grounds for an investigatory stop. Heapy's counsel unsuccessfully attempted to enter the Guide into evidence, and the district court found that the Guide was "not relevant."[108] As such, Chief Justice Moon declined to consider the Guide as a legitimate source on appeal.[109]

The dissent also concluded that the "effectiveness of intoxication checkpoints would be reduced if motorists are permitted to avoid them."[110] "Common sense draws one to the conclusion that permitting motorists to choose whether they desire to cooperate with a checkpoint will reduce its

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[103] *Id.* at 314, 151 P.3d at 795 (quoting Steinbeck v. Commonwealth, 862 S.W.2d 912, 914 (Ky. Ct. App. 1993)) (internal quotation marks omitted).

[104] *Id.* at 315, 151 P.3d at 796 (Moon, C.J., dissenting).

[105] *Id.* at 301, 151 P.3d at 782 (plurality opinion).

[106] *Id.* at 312, 151 P.3d at 794 (Moon, C.J., dissenting) (quoting hearing on the motion to suppress) (internal quotation marks omitted).

[107] *Id.* Additionally, there is no specific provision in the Hawai'i statutes providing that no action is to be taken against a driver avoiding a checkpoint. This differs from parallel Maryland regulations in *Little v. State*, 479 A.2d 903 (Md. 1984), where there *is* a specific provision governing motorists avoiding sobriety checkpoints. *Id.* at 905-06. The plurality cited *Little*, but Hawai'i law does not contain a similar provision pertaining to avoidance of checkpoints. *See generally* HAW. REV. STAT. § 291E-20 (Supp. 2005).

[108] *Heapy*, 113 Hawai'i at 313, 151 P.3d at 794.

[109] *Id.* at 313-14, 151 P.3d at 794-95. The plurality cited *State v. McCleery*, 560 N.W.2d 789 (Neb. 1997), in support of its ultimate conclusion. *Heapy*, 113 Hawai'i at 294, 151 P.3d at 775 (plurality opinion). The court in *McCleery* concluded, "[u]nder certain circumstances, the avoidance of a checkpoint might create a reasonable suspicion that would justify a *Terry* stop." *McCleery*, 560 N.W.2d at 793. However, the court could not find reasonable suspicion because Nebraska conducts its checkpoints in total compliance with the NHTSA Guide. *Id.* Arguably, the *McCleery* court would have found reasonable suspicion in *Heapy*, because Hawai'i does not conduct its checkpoints in compliance with the Guide.

[110] *Heapy*, 113 Hawai'i at 314, 151 P.3d at 795 (Moon, C.J., dissenting).

effectiveness, detract from its deterrent effect, and, on occasion, create safety hazards."[111] This creates a situation where the police are prohibited from stopping the very drivers the police want off of the road. Chief Justice Moon's conclusions give credence to the concept of reasonable suspicion by pursuing a true analysis of the totality of the circumstances. The plurality did not attach the significance necessary to the factors required of a police officer to establish reasonable suspicion.

IV. ANALYSIS

The majority decision invalidating the investigatory stop in *Heapy* effectively draws a bright-line where "police officers may *never* stop vehicles that are believed to be intentionally avoiding a checkpoint because of some involvement in criminal activity."[112] This has a tangible effect on reasonable suspicion and sobriety checkpoints in Hawai'i. First, the *Heapy* decision leaves the totality of circumstances analysis in doubt when assessing the reasonable suspicion of an arresting officer.[113] Second, the *Heapy* decision leaves the deterrent value of Hawai'i sobriety checkpoints in questionable territory and inhibits the state interest of preventing drunk driving on highways.[114] Hawai'i may have an enhanced privacy right through the state constitution, but this right does not warrant total disregard of the totality of circumstances analysis. Additionally, the circumstances in *Heapy* warranted a finding of reasonable suspicion outweighing the brief intrusion on the driver in this particular case.[115]

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[111] *Id.* (quoting State v. Hester, 584 A.2d 256, 259 (N.J. Super. Ct. App. Div. 1990)) (internal quotation marks omitted); *see also* State v. Foreman, 527 S.E.2d 921, 924-25 (N.C. 2000) ("Certainly, the purpose of any checkpoint . . . would be defeated if drivers had the option to legally avoid, ignore, or circumvent the checkpoint by either electing to drive through without stopping or by turning away upon entering the checkpoint's perimeters.").

[112] *Heapy*, 113 Hawai'i at 306, 151 P.3d at 787.

[113] *See* State v. Kaleohano, 99 Hawai'i 370, 380, 56 P.3d 138, 148 (2002) ("Neither the Fourth Amendment nor the Hawai'i Constitution require a policeman who lacks the precise level of information necessary for probable cause to arrest to simply shrug his shoulders and allow a crime to occur or a criminal to escape.").

[114] *Heapy*, 113 Hawai'i at 306, 151 P.3d at 787 ("The plurality's conclusion . . . effectively abrogates our state's compelling interests in protecting the safety of the public and combating intoxicated motorists.").

[115] *Id.* at 315, 151 P.3d at 796.

A. The Value of Reasonable Suspicion Weighed Against the Right to Privacy in Hawai'i

The *Heapy* plurality emphasized the "extensive right to privacy guaranteed by the Hawai'i Constitution."[116] However, the court also indicated throughout the decision that the court relies on the reasonable suspicion standard first outlined in *Terry*.[117] Thus, even though the reasonable suspicion standard is grounded in the Hawai'i Constitution, the standard is essentially the same as the standard the United States Supreme Court applies. In *State v. Dixon*,[118] the Hawai'i Supreme Court acknowledged the greater privacy rights afforded by the Hawai'i Constitution.[119] However, the court also decided that sometimes the result does not differ between the Fourth Amendment and article I, section 7 when a purpose of the police activity (in *Dixon*, it was the knock and announce rule) is to protect individual privacy.[120] In other words, the Hawai'i and federal standards were the same for the knock and announce rule, because one of the purposes of the rule was to protect individual privacy. Likewise, a purpose for requiring reasonable suspicion when making an investigatory stop is to limit the intrusion upon individual privacy.[121] Thus, as in *Dixon*, an inquiry into reasonable suspicion under the Fourth Amendment *or* article I, section 7 is the same. Hawai'i courts use similar reasonable suspicion standards as federal courts, so the Hawai'i Constitution would be violated only upon finding that a law enforcement officer has no reasonable suspicion for a stop.[122] Arguably, the court should have come to the same conclusion as in *Dixon* and found reasonable suspicion despite the enhanced right to privacy in

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[116] *Id.* at 299, 151 P.3d at 780 (plurality opinion) (citing State v. Lopez, 78 Hawai'i 433, 446, 896 P.2d 889, 902 (1995)).

[117] *Id.* at 286, 151 P.3d at 767 ("[I]n justifying the particular intrusion, the police officer must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion." (quoting Terry v. Ohio, 392 U.S. 1, 21 (1968)) (internal quotation marks omitted)).

[118] 83 Hawai'i 13, 924 P.2d 181 (1996). In *Dixon*, the issue was whether the more extensive privacy rights under article I, section 7 of the Hawai'i Constitution protected the defendant from the knock and announce rule, even if the Fourth Amendment did not offer protection from the rule. *Id.* at 23, 924 P.2d at 191.

[119] *Id.*

[120] *Id.*

[121] *See* United States v. Cortez, 449 U.S. 411, 421 (1981); *see also* Delaware v. Prouse, 440 U.S. 648, 653-54 (1979) ("The essential purpose of the proscriptions in the Fourth Amendment is to impose a standard of reasonableness . . . in order to safeguard the privacy and security of individuals against arbitrary invasions . . . ." (quoting Marshall v. Barlow's, Inc., 436 U.S. 307, 312 (1978)) (internal quotation marks omitted)).

[122] *See Heapy*, 113 Hawai'i at 291, 151 P.3d at 772 ("[A] stop without 'at least articulable and reasonable suspicion' violate[s] the constitutional prohibition against unreasonable seizures . . . ." (quoting *Prouse*, 440 U.S. at 663)).

Hawai'i because one of the purposes of the concept of reasonable suspicion is to protect privacy.

Additionally, given reasonable suspicion is a balance between enforcing highway safety laws against the degree of intrusion on the motorist's privacy rights,[123] the Hawai'i Supreme Court has concluded that the state has a legitimate interest in promoting the safe use of its highways.[124] The court has also concluded that investigatory stops of automobiles provide only a "slight intrusion" on the privacy rights of the individual,[125] even with the specific protection provided by the Hawai'i Constitution.

In *Heapy*, there was no indication the imposition on Heapy's privacy was anything other than slight, or any different from the other automobile stop cases where the court found legitimate reasonable suspicion.[126] The privacy argument purported by the majority is inconsistent with precedent, because the court has consistently found investigatory automobile stops to be a minimal intrusion on individual privacy.[127] This is especially apparent in weighing the intrusion in *Heapy* against the state interest and the totality of circumstances indicating reasonable suspicion.

B. Totality of Circumstances

The *Heapy* plurality minimized any totality of circumstances analysis of the facts surrounding the investigatory stop.[128] Justice Acoba also dismissed the dissent's proposed factors in determining the totality of circumstances.[129]

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[123] *See Prouse*, 440 U.S. at 654-55; State v. Spillner, 116 Hawai'i 351, 364, 173 P.3d 498, 511 (2007); State v. Kaleohano, 99 Hawai'i 370, 379, 56 P.3d 138, 147 (2002).

[124] *See* State v. Powell, 61 Haw. 316, 320, 603 P.2d 143, 147 (1979). In *Powell*, the court concluded the State has compelling interests in protecting highway safety, but this interest is "not so compelling as to justify subjecting every vehicle to seizure at the unrestrained discretion of law-enforcement officials." *Id.*

[125] *Kaleohano*, 99 Hawai'i at 380, 56 P.3d at 148. In *Kaleohano*, the court found the "strong public interest in minimizing the dangers presented by impaired drivers" outweighed the "slight intrusion on [the motorist's] privacy." *Id.*

[126] *See Heapy*, 113 Hawai'i at 315, 151 P.3d at 796 (Moon, C.J., dissenting) ("I believe that our state's interest in combating intoxicated motorists . . . outweighs the minimal intrusion that an investigatory stop may impose upon a motorist under the circumstances of the present case.").

[127] *See Spillner*, 116 Hawai'i 351, 364, 173 P.3d 511 (concluding the limited nature of the intrusion on the motorist was outweighed by the state interest in keeping uninsured and unlicensed drivers off the road); *Kaleohano*, 99 Hawai'i at 380, 56 P.3d at 148 (noting the investigatory stop was a "slight intrusion on [the motorist's] privacy").

[128] *Heapy*, 113 Hawai'i at 292, 151 P.3d at 773. As mentioned *supra*, Justice Acoba declined to find any reasonable suspicion arising from Heapy's legal right turn, the fact that the turn was not made erratically, and the fact that Heapy's lights were on. *Id.*

[129] *Id.* at 296-97, 151 P.3d at 777-78.

Significantly, Justice Levinson differed from Justice Acoba in the concurrence and expanded the totality of circumstances analysis.[130] Yet, Justice Levinson failed to give a detailed explanation of how his factors failed to measure up to reasonable suspicion on the part of Officer Correa.[131] Rather than articulate *how* reasonable suspicion could not have formed, Justice Levinson only concluded it had not formed.[132] Chief Justice Moon's criteria and analysis for the totality of the circumstances were convincing, and the majority did not give enough credence to the points made by the Justice Moon. The majority should have considered and given the following factors an articulate analysis in determining whether Officer Correa had reasonable suspicion.

1. Officer experience

Prior to arresting Heapy, Officer Correa had affected *forty* stops on cars avoiding the checkpoint, and *forty* times the driver was violating the law in one way or another.[133] Additionally, Officer Correa had been employed with the Maui Police Department for twelve years and had formerly been a member of the DUI task force for four years.[134] The plurality discounted this experience, calling it "immaterial . . . [b]ecause an objective basis for the stop was absent."[135]

However, in *State v. Spillner*,[136] the court found reasonable suspicion when an officer pulled over a specific car because the driver had previously been cited for driving without a license or insurance.[137] Thus, reasonable suspicion was aroused in part because a specific driver's former illegal activity gave rise to a suspicion of current, ongoing activity.[138] The officer in *Spillner* arrested the motorist not based on random curiosity or the driver's criminal history, but

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[130] *Id.* at 305, 151 P.3d at 786 (Levinson, J., concurring).

[131] *Id.* (concluding the "time of day, the proximity of [Heapy's] vehicle to the [checkpoint], the characteristics of Mehameha Loop, and Officer Correa's prior experience" were "insufficient as a matter of law to give rise to reasonable suspicion").

[132] *Id.* ("I believe that Officer Correa could reasonably have suspected no more than that Heapy was intentionally attempting to avoid the checkpoint . . . .").

[133] *Id.* at 288, 151 P.3d at 769 (plurality opinion).

[134] *Id.*

[135] *Id.* at 295-96, 151 P.3d at 776-77.

[136] 116 Hawai'i 351, 173 P.3d 498 (2007).

[137] *Id.* at 364, 173 P.3d at 511.

[138] *Id.* at 362, 173 P.3d at 509. In *Spillner*, the court noted, "although . . . a person's prior history of drug arrests is insufficient to establish probable cause, awareness of past arrests may, when combined with other specific articulable facts indicating the probability of current criminal activity, factor into a determination that reasonable suspicion, sufficient to warrant a temporary investigate (sic) stop, exists." *Id.* at 360, 173 P.3d at 507 (quoting State v. Kaleohano, 99 Hawai'i 370, 380, 56 P.3d 138, 148 (2002)) (internal quotation marks omitted).

because of the "specific and articulable belief" based on the totality of circumstances, including the officer's experience and knowledge of the prior arrests.[139] Likewise, Officer Correa did not stop Heapy solely because of his experience with prior criminal activity in the specific area. Rather, Officer Correa made the stop based on this knowledge combined with other relevant factors.

Unquestionably, the officer in *Spillner* had experience with the particular suspect in regards to past criminal activity, while Officer Correa had experience with the particular area in regards to past criminal activity, but both of these forms of familiarity are relevant in determining present criminal activity. A law enforcement officer should not have to ignore "recent relevant criminal conduct,"[140] especially when the officer has prior knowledge of unlawful conduct in a specific area. Notably, the court decided *Spillner* after *Heapy*, which begs for reconciliation between two opinions with such a differing degree of logic concerning officer experience.

The logic in the *Spillner* decision finds support in the Supreme Court's decision in *United States v. Arvizu*,[141] when the Court took into account the border patrol officer's experience and gave "due weight to the factual inferences drawn by the law enforcement officer"[142] based on his "specialized training and familiarity with the customs of the area's inhabitants."[143] A police officer's training and experience generally may allow her to raise inferences from behavior a layperson would ignore.[144] Moreover, Officer Correa's success rate at the particular area should be a factor when considering totality of circumstances, because knowledge accumulated out of forty successful stops is relevant to a finding of reasonable suspicion. In other words, Officer Correa was familiar with the way in which motorists in the vicinity of Mehameha Loop avoided the sobriety checkpoint because of involvement in criminal activity. Given this experience, Officer Correa could reasonably raise an inference that Heapy was avoiding the checkpoint because of criminal activity.

The plurality tersely dismissed Officer Correa's extensive experience because the "stop must be based on objective criteria."[145] Yet, without taking experience into account, a court cannot readily determine the capacity of an

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[139] *Id.* at 364, 173 P.3d at 511.

[140] *Id.* (quoting *Kaleohano*, 99 Hawai'i at 380, 56 P.3d at 148) (internal quotation marks omitted).

[141] 534 U.S. 266 (2002).

[142] *Id.* at 277.

[143] *Id.* at 276.

[144] *See* United States v. Cortez, 449 U.S. 411, 419 (1981) ("[W]hen used by trained law enforcement officers, objective facts, meaningless to the untrained, can be combined with permissible deductions from such facts to form a legitimate basis for suspicion of a particular person and for action on that suspicion.").

[145] State v. Heapy, 113 Hawai'i 283, 297, 151 P.3d 764, 778 (2007).

officer to draw "specific reasonable inferences" from the situation.[146] The *Terry* court specifically allowed an officer to make inferences from the facts "*in light of his experience*."[147] Based on his experience with the area and sobriety checkpoint stops, Officer Correa inferred from Heapy's avoidance of the checkpoint that Heapy was engaged in some sort of criminal activity.[148] Objectively, a person with Officer Correa's experience, standing in his shoes, could reasonably come to the same conclusion. By discounting experience so abruptly, the plurality minimized an essential element of the reasonable suspicion analysis. Experience should not be *the* factor, but it should be *a* factor in determining reasonable suspicion.

2. Proximity to the checkpoint when the driver makes the turn

Heapy made his turn within 250 feet of the checkpoint.[149] In his dissent, Chief Justice Moon noted, "the closer a motorist is to a roadblock when he or she turns, the more objectively reasonable it may be to infer the turn was made out of consciousness of guilt."[150] From an objective standpoint, the closer a driver comes to a checkpoint when she turns, the more reasonable it is to suspect the avoidance is an element of criminal conduct. Awareness and notice of the checkpoint is more reasonably inferred as the vehicle draws closer to the checkpoint.[151] Conversely, a vehicle that turns 1000 yards away from the

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[146] Terry v. Ohio, 392 U.S. 2, 27 (1968).

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

[148] *Heapy*, 113 Hawai'i at 314, 151 P.3d at 795. Notably, Officer Correa was specifically designated as the "chase car" for this specific checkpoint. The plurality cited *People v. Bigger*, 771 N.Y.S.2d 826 (N.Y. Just. Ct. 2004), in support of its ultimate conclusion. However, in *Bigger*, the deciding factor for the court hinged upon the fact that the arresting officer was not part of the sobriety checkpoint. *Id.* at 831. The court also intimated that an officer who *was* part of a sobriety checkpoint detail, as Officer Correa was, would have discretion to pursue vehicles turning away from the checkpoint. *Id.*

[149] *Heapy*, 113 Hawai'i at 289, 151 P.3d at 770. It is unclear from the case as to how far Heapy was from the actual checkpoint when he turned, but he had passed the second checkpoint sign, which was located 250 feet from the checkpoint. *Id.* at 288, 151 P.3d at 769.

[150] *Id.* at 308, 151 P.3d at 789 (Moon, C.J., dissenting) (quoting State v. Lester, 148 F. Supp. 2d 597, 603 (D. Md. 2001)) (internal quotation marks omitted).

[151] *Id.* The plurality cited *Howard v. Voshell*, 621 A.2d 804 (Del. Super. Ct. 1992), in support of its finding that avoiding sobriety checkpoints cannot give rise to reasonable suspicion. *Heapy*, 113 Hawai'i at 293-94, 151 P.3d at 774-75 (plurality opinion). However, the *Howard* court found turning before a roadblock *could* supplement an officer's reasonable suspicion analysis, but a turn made 1000 feet before a roadblock was "beyond the purview of the roadblock." *Howard*, 621 A.2d at 807. Consequently, *Howard* actually supports the argument that proximity to the roadblock when the turn is made is a legitimate factor in the reasonable suspicion analysis.

checkpoint engenders a lesser degree of suspicion.[152] Again, the proximity to the checkpoint should be *a* factor when analyzing an officer's reasonable suspicion, not *the* factor.

3. Nature of the area

In determining whether an officer has reasonable suspicion to effectuate a stop, a reviewing court should also take into account the area in which the arrest took place.[153] The *Heapy* plurality ignored this aspect of the analysis, even though the Supreme Court has repeatedly given weight to the area in which a crime occurs.[154] Mehameha Loop is a dead-end road in the middle of sugar cane fields. Officer Correa only stopped Heapy after he passed the one structure on Mehameha Loop and was effectively traveling towards the gate at the end of the road.[155] Officer Correa testified, "There's nothing down there, so there's no real reason to be on that road."[156]

To a police officer with Officer Correa's experience and knowledge of the area, the fact Heapy turned down Mehameha Loop should immediately give rise to a suspicion of some kind. In the mind of Officer Correa or a reasonable person, it would indicate avoidance of the sobriety checkpoint. The nature of the area, combined with Officer Correa's arrest experience in the particular area provides a sound basis for reasonable suspicion of criminal activity. If Mehameha Loop were a residential neighborhood with multiple houses and apartment complexes, this would weigh heavily towards finding of an unreasonable stop, because there would be a legitimate reason for turning before the checkpoint. As the facts stand, the nature of the area weighs in favor of reasonable suspicion of criminal activity. For these reasons, the area should be another factor in considering the totality of the circumstances.

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[152] *See Howard*, 621 A.2d at 807.

[153] *See* Adams v. Williams, 407 U.S. 143, 147-48 (1972) (noting activity in a "high crime area" can contribute to a determination of reasonable suspicion); *see also* Raymond, *supra* note 29, at 144 ("Police cannot stop a person based solely on the character of the neighborhood where he or she is found . . . [b]ut the neighborhood in which the individual is found shapes both the police response to him or her and the court's ultimate view of the legality of the stop.").

[154] *See* United States v. Arvizu, 534 U.S. 266, 271 (2002) (concluding the arresting officer could legitimately find reasonable suspicion when a minivan was traveling in an area where the officer had never seen anyone picnicking or sightseeing); Illinois v. Wardlow, 528 U.S. 119, 124 (2000) (determining "officers are not required to ignore the relevant characteristics of a location in determining whether the circumstances are sufficiently suspicious to warrant further investigation").

[155] *Heapy*, 113 Hawai'i at 289, 151 P.3d at 770.

[156] *Id.* at 312, 151 P.3d at 793.

4. The issue of flight

The *Heapy* plurality noted the "majority of jurisdictions which have addressed the issue of flight have held that the mere act of avoiding confrontation does not create an articulable suspicion."[157] Flight should not be the *only* consideration a law enforcement officer takes into account when making an investigatory stop. However, as the Supreme Court concluded in *Illinois v. Wardlow*,[158] "[h]eadlong flight—wherever it occurs—is the consummate act of evasion: It is not necessarily indicative of wrongdoing, but it is certainly suggestive of such."[159] In *Wardlow*, the Court found the respondent's presence in a high-drug area combined with his "unprovoked flight" gave rise to reasonable suspicion.[160] Heapy's "flight" from the sobriety checkpoint should similarly be considered in conjunction with the other factors described *supra*; not alone, but part of the totality of circumstances. Heapy's flight away from the sobriety checkpoint, combined with the nature of the area and Officer Correa's extensive experience could reasonably give rise to reasonable suspicion of criminal activity.

C. The Heapy *Ruling Limits the Effectiveness of Sobriety Checkpoints in Hawai'i*

The Supreme Court has upheld the constitutionality of sobriety checkpoints because they are an effective means of combating drunk driving and preserving public safety.[161] In disallowing police officers to stop motorists who avoid checkpoints, the *Heapy* plurality has reduced this effectiveness to a great extent. It is plausible the vast majority of individuals who avoid sobriety checkpoints are those under the influence of alcohol or drugs or those who lack a driver's license or the necessary insurance to drive.[162] Officer Correa's experience at the Maui checkpoint confirms this conjecture.[163] Allowing this avoidance bestows an escape route to those drivers the police have a legitimate interest in investigating. Subsequently, law-abiding citizens who continue

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[157] *Id.* at 294, 151 P.3d at 775 (citing State v. Talbot, 792 P.2d 489, 493-94 (Utah Ct. App. 1990), *disapproved on other grounds by* State v. Lopez, 873 P.2d 1127 (Utah 1994)).

[158] *Wardlow*, 528 U.S. 119.

[159] *Id.* at 124.

[160] *Id.* at 124-26.

[161] Mich. Dep't of State Police v. Sitz, 496 U.S. 444, 455 (1990).

[162] *See* Shan Patel, *Per Se Reasonable Suspicion: Police Authority to Stop Those Who Flee from Road Checkpoints*, 56 DUKE L.J. 1621, 1643 (2007) ("Intuitively, the individuals who are most likely to avoid a checkpoint are the ones with something to hide.").

[163] *See* State v. Heapy, 113 Hawai'i 283, 288, 151 P.3d 764, 769 (2007) (out of forty motorists Officer Correa stopped for avoiding the checkpoint, all forty were engaging in some sort of illegal activity).

through the checkpoint are the ones burdened with the intrusion—however minimal—into their lives. After *Heapy*, the legitimate and constitutionally sound deterrent value of sobriety checkpoints in Hawai'i is severely impaired, if not made altogether insignificant.

V. CONCLUSION

The *Heapy* court should have taken the above factors into account because an officer's reasonable suspicion is determined by analyzing the totality of the circumstances.[164] Heapy's flight from the police presence at the checkpoint, combined with his proximity to the checkpoint, Officer Correa's experience, and the nature of Mehameha Loop are "specific and articulable facts"[165] which give rise to a reasonable suspicion of criminal activity. Officer Correa stopped Heapy because he avoided the checkpoint, but this avoidance occurred because of Heapy's involvement in criminal activity.[166] This was not a random *Prouse* stop, nor was it an abuse of discretion on the part of Officer Correa. Objectively, a person of reasonable caution standing in Officer Correa's shoes could have reasonably determined, given the facts and inferences of the situation, that criminal activity was afoot.

When a court discounts or ignores factors that contribute to reasonable suspicion, reasonable suspicion itself is weakened in terms of what a police officer can use to justify a stop.[167] Reasonable suspicion is constitutionally sound in part because of the minimal intrusion on the individual that results from an investigatory stop. Investigatory stops are allowable because this minimal intrusion is a reasonable balance with the legitimate state interest of ensuring that licensed, insured, and sober drivers are on our highways. As the Hawai'i Supreme Court recently noted, "a determination that reasonable suspicion exists . . . need not rule out the possibility of innocent conduct."[168] Heapy *may* have had an innocent reason for turning down Mehameha Loop, but that innocent reason did *not* preclude Officer Correa from initiating a stop based on reasonable suspicion.

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[164] *See* Samson v. California, 547 U.S. 843, 848 (2006) ("[W]e 'examine the totality of the circumstances' to determine whether a search is reasonable within the meaning of the Fourth Amendment." (quoting United States v. Knights, 534 U.S. 112, 118 (2001))).

[165] *Heapy*, 113 Hawai'i at 286, 151 P.3d at 767.

[166] *Id.*

[167] *See* State v. Kaleohano, 99 Hawai'i 370, 380, 56 P.3d 138, 148 (2002) ("Neither the Fourth Amendment nor the Hawai'i Constitution require a policeman who lacks the precise level of information necessary for probable cause to arrest to simply shrug his shoulders and allow a crime to occur or a criminal to escape.").

[168] State v. Spillner, 116 Hawai'i 351, 361, 173 P.3d 498, 508 (2007) (quoting United States v. Arvizu, 534 U.S. 266, 277 (2002)) (internal quotation marks omitted).

As Chief Justice Moon noted in his dissenting opinion, the *Heapy* plurality drew a bright line determining reasonable suspicion may never arise from an avoidance of a sobriety checkpoint.[169] In doing so, the "fluid concept" of reasonable suspicion has been reduced to a clear-cut rule of right and wrong.[170] Police experience and the totality of circumstances are irrelevant, and a black-and-white concept has emerged where, formerly, courts have resisted such a rigid definition. For these reasons, the majority erred in *Heapy*. The court should have given the totality of the circumstances greater weight and continued ruling on a case-by-case basis. As the law stands now, avoidance of a sobriety checkpoint cannot give rise to suspicion of criminal activity. So when in Hawai'i, drive drunk and happy, and make sure to turn around when you see that sobriety checkpoint ahead.

Jacob Matson[171]

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[169] *Heapy*, 113 Hawai'i at 306, 151 P.3d at 787 (Moon, C.J., dissenting).

[170] Ornelas v. United States, 517 U.S. 690, 696 (1996).

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State v. Spillner: An Investigatory Traffic Stop Based on Unreasonable Suspicion

I. INTRODUCTION

"No right is held more sacred, or is more carefully guarded, by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law."[1]

Is it reasonable for an officer to stop a vehicle when the officer *thinks* the driver is attempting to avoid a roadblock on the basis that the driver made a legal turn such that he would not have to continue to a sobriety checkpoint? Or when the officer *hopes* a vehicle contains an individual wanted for questioning on the basis that the individual was previously seen entering the vehicle? The Hawai'i Supreme Court has concluded that it is not.[2]

The United States and Hawai'i Constitutions do not allow assumptions to justify intrusions on the privacy rights of individuals.[3] An investigatory stop requires facts, which taken together with rational inferences, inform reasonable suspicion of current criminal activity.[4]

Although certain behaviors or circumstances may indicate the possibility of illegal behavior, it is not enough that the conduct is of the type that may be continuing[5] or that an individual may have a propensity to commit an illegal act.[6] Furthermore, a hunch which turns out to be true does not retroactively constitute reasonable suspicion.[7] There must be "specific and articulable facts"

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[1] Terry v. Ohio, 392 U.S. 1, 9 (1968) (quoting Union Pac. Ry. Co. v. Botsford, 141 U.S. 250, 251 (1891)) (internal quotation marks omitted).

[2] *See* State v. Heapy, 113 Hawai'i 283, 151 P.3d 764 (2007) (finding an officer did not have reasonable suspicion where the sole basis for the stop was the belief that the driver was avoiding a sobriety checkpoint); State v. Eleneki, 106 Hawai'i 177, 102 P.3d 1075 (2004) (finding an officer did not have reasonable suspicion where the sole basis for the stop was the hope that a certain individual was in the same vehicle the officer observed him enter the previous evening).

[3] *See, e.g.*, *Terry*, 392 U.S. at 21; *Heapy*, 113 Hawai'i at 291-92, 151 P.3d at 772-73.

[4] *Terry*, 392 U.S. at 21.

[5] *See* State v. Austria, 55 Haw. 565, 570, 524 P.2d 290, 294 (1974) (citing Commonwealth v. Eazer, 312 A.2d 398, 400 (Pa. 1973)).

[6] *See* State v. Joao, 55 Haw. 601, 605, 525 P.2d 580, 583-84 (1974); State v. Kaleohano, 99 Hawai'i 370, 377, 56 P.3d 138, 145 (2002).

[7] *See Heapy*, 113 Hawai'i at 293, 151 P.3d at 774.

demonstrating the likelihood that criminal activity is taking place at the time of the stop.[8]

In *State v. Spillner*,[9] however, the Hawai'i Supreme Court approved a standard that departed from this jurisprudence. In *Spillner*, the majority incorrectly allowed assumptions and past history of misconduct to supply reasonable suspicion.

Part II of this case note examines the historical treatment of the Fourth Amendment by the United States Supreme Court, the Hawai'i Supreme Court's interpretations of the Fourth Amendment, and the additional protections afforded by article I, section 7 of the Hawai'i Constitution. Part III highlights the facts and procedural history of *Spillner* and the majority and dissenting opinions. Finally, Part IV analyzes the majority opinion and argues the case was incorrectly decided. This note concludes *State v. Spillner* approves unconstitutional searches and seizures based only on beliefs and assumptions rather than specific and articulable facts, resulting in a decision which may have a significant impact on the constitutional rights of Hawai'i's people.

II. BACKGROUND

A. United States Supreme Court Cases

The Fourth Amendment to the United States Constitution protects the right of individuals to be secure against "unreasonable searches and seizures."[10] In order to enforce this right, courts exclude evidence obtained by searches and seizures in violation of the Fourth Amendment.[11]

By excluding the "fruits" of unreasonable governmental invasions of the constitutional rights of citizens, the "exclusionary rule" serves to both

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[8] *Terry*, 392 U.S. at 21.

[9] 116 Hawai'i 351, 173 P.3d 498 (2007).

[10] U.S. CONST. amend. IV.

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Id.

[11] Mapp v. Ohio, 367 U.S. 643, 648, 654-55 (1961). After affirming its decision in *Weeks v. United States*, 232 U.S. 383 (1914), which held evidence obtained by searches and seizures in violation of the Constitution was inadmissible in federal prosecutions, the Court further held the evidence was also inadmissible in state courts. *Mapp*, 367 U.S. at 648. *See generally* Toby M. Tonaki et al., State v. Quino: *The Hawaii Supreme Court Pulls Out All the "Stops,"* 15 U. HAW. L. REV. 289, 297 (1993).

discourage improper police conduct and reinforce judicial integrity and control.[12]

1. Terry v. Ohio: *The reasonable suspicion standard*

In the seminal case, *Terry v. Ohio*,[13] the United States Supreme Court announced a standard requiring reasonable suspicion to seize an individual for investigatory purposes.[14] In order to justify a brief stop, police officers "must be able to point to specific and articulable facts which, taken together with reasonable inferences from those facts,"[15] would lead the officer "reasonably to conclude in light of his experience that criminal activity may be afoot."[16]

This analysis is fact-intensive.[17] Courts evaluate the reasonableness of a search or seizure in light of the particular circumstances, under an objective standard, where the facts available at the time of the seizure would warrant a person of reasonable caution to believe the action taken was appropriate.[18] Any facts and inferences must be both specific and reasonable; "inchoate and unparticularized suspicions" or "hunches" are not sufficient.[19]

In applying these principles, the court also balances the "nature and extent of the governmental interests involved"[20] against the "nature and quality of the intrusion on individual rights" to determine whether the stop was reasonable.[21]

2. Delaware v. Prouse: *The expansion of reasonable suspicion to investigatory stops of vehicles*

In *Delaware v. Prouse*,[22] the Supreme Court applied the reasonable suspicion standard in the context of investigatory traffic stops.[23] While

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[12] *Terry*, 392 U.S. at 12 ("[W]ithout it the constitutional guarantee against unreasonable searches and seizures would be a mere 'form of words.'" (quoting *Mapp*, 367 U.S. at 655)).

[13] *Terry*, 392 U.S. 1.

[14] *Id.*; *see also* Robert Berkley Harper, *Has the Replacement of 'Probable Cause' with 'Reasonable Suspicion' Resulted in the Creation of the Best of All Possible Worlds?*, 22 AKRON L. REV. 13, 23 (1988) ("Prior to 1968, the requirement of probable cause was the minimum court approved standard which police officers could use to seize a person.").

[15] *Terry*, 392 U.S. at 21.

[16] *Id.* at 30.

[17] *Id.* The express holding in *Terry* was narrow. The Court held that under the reasonable suspicion standard, an officer was justified in stopping an individual engaged in unusual conduct, who may be armed and dangerous, when there was nothing to dispel a fear of harm to the officer or others and there was reasonable belief criminal activity may be afoot. *Id.*

[18] *Id.* at 21-22.

[19] *Id.* at 27; *see also id.* at 22 ("Anything less would invite intrusions upon constitutionally guaranteed rights based on nothing more substantial than inarticulate hunches . . . .").

[20] *Id.* at 22.

[21] *Id.* at 24.

recognizing a state's legitimate interest in ensuring safety on public roadways,[24] the Court also acknowledged individuals are entitled to a "reasonable expectation of privacy," which is not lost "simply because the automobile and its use are subject to government regulation."[25]

The Court held, in order to justifiably stop a vehicle and detain the driver for the sole purpose of verifying the validity of the driver's license and registration of the vehicle, the Fourth Amendment requires "at least articulable and reasonable suspicion that a motorist is unlicensed or that an automobile is not registered, or that either the vehicle or an occupant is otherwise subject to seizure for violation of law."[26]

3. United States v. Cortez *and* United States v. Arvizu: *Reasonable suspicion based on the totality of the circumstances*

Courts examine the totality of the circumstances when deciding whether an investigatory stop is reasonable.[27] A stop must be predicated on a particularized and objectively reasonable suspicion of criminal activity: (1) "based upon all of the circumstances" and (2) specific to the individual.[28] However, reasonable suspicion needs only a probability of criminal activity at the time of the stop.[29] It does not require probable cause, a preponderance of the evidence,[30] or the elimination of all possibilities of innocent conduct.[31]

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[22] 440 U.S. 648 (1979) (involving a completely random and discretionary stop of a driver for the sole purpose of verifying the driver's license and registration).

[23] *Id.* at 653 ("[S]topping an automobile and detaining its occupants constitute[s] a 'seizure' within the meaning of [the Fourth Amendment], even though the purpose of the stop is limited and the resulting detention quite brief."); *see also* United States v. Arvizu, 534 U.S. 266, 273 (2002) (affirming Fourth Amendment "protections extend to brief investigatory stops of persons or vehicles that fall short of traditional arrest").

[24] *Prouse*, 440 U.S. at 658 ("States have a vital interest in ensuring that only those qualified to do so are permitted to operate motor vehicles, that these vehicles are fit for safe operation, and hence that licensing, registration, and vehicle inspection requirements are being observed."). However, the *Prouse* Court noted, "[t]he foremost method of enforcing traffic and vehicle safety regulations . . . is acting upon observed violations." *Id.* at 659.

[25] *Id.* at 662.

[26] *Id.* at 663 ("[P]ersons in automobiles on public roadways may not for that reason alone have their travel and privacy interfered with at the unbridled discretion of police officers.").

[27] *Arvizu*, 534 U.S. at 273; United States v. Cortez, 449 U.S. 411, 417-18 (1981).

[28] *Cortez*, 449 U.S. at 418.

[29] *Id.* ("The process does not deal with hard certainties, but probabilities.").

[30] *Arvizu*, 534 U.S. at 274 ("[T]he likelihood of criminal activity need not rise to the level required for probable cause, and it falls considerably short of satisfying a preponderance of the evidence standard.").

[31] *Id.* at 277 ("A determination that reasonable suspicion exists, however, need not rule out the possibility of innocent conduct.").

Under this approach, courts may consider the specialized training and experience of the police officer.[32]

Because the "concept of reasonable suspicion is somewhat abstract,"[33] the Court has continually acknowledged the need for careful fact-sensitive, case-by-case analysis and has repeatedly declined to create a rigid set of standards to follow.[34]

B. Hawai'i Supreme Court Cases

Article I, section 7 of the Hawai'i Constitution is nearly identical to the Fourth Amendment, except the Hawai'i Constitution expressly protects against unreasonable invasions of privacy.[35] This, the Hawai'i Supreme Court has interpreted,[36] "provides Hawaii's citizens greater protection against unreasonable searches and seizures than the United States Constitution."[37]

Like the Fourth Amendment, under the Hawai'i Constitution, evidence obtained by an illegal seizure must be suppressed as "fruit of the poisonous tree."[38] However, "[u]nlike the exclusionary rule on the federal level,

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[32] *Cortez*, 449 U.S. at 418 (including the consideration of "objective observations, information from police reports, . . . [and] the modes or patterns of operation of certain kinds of lawbreakers," which may allow the officer to "draw[] inferences and make[] deductions . . . that might well elude an untrained person"); *accord Arvizu*, 534 U.S. at 273.

[33] *Arvizu*, 534 U.S. at 274.

[34] *See id.* (noting the Court "deliberately avoided reducing [reasonable suspicion] to 'a neat set of legal rules'" (quoting Ornelas v. United States, 517 U.S. 690, 695-96 (1996))); *see also* United States v. Sokolow, 490 U.S. 1, 7-8 (1989) (finding the lower court's "effort to refine and elaborate the requirements of 'reasonable suspicion' . . . create[d] unnecessary difficulty in dealing with one of the relatively simple concepts embodied in the Fourth Amendment").

[35] HAW. CONST. art. I, § 7.

> The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches, seizures and invasions of privacy shall not be violated; and no warrants shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized or the communications sought to be intercepted.

Id.

[36] *See* State v. Kam, 69 Haw. 483, 491, 748 P.2d 372, 377 (1988) ("As the ultimate judicial tribunal with final, unreviewable authority to interpret and enforce the Hawai'i Constitution, we are free to give broader protection than that given by the federal constitution.").

[37] State v. Kaleohano, 99 Hawai'i 370, 375, 56 P.3d 138, 143 (2002); *see also* State v. Heapy, 113 Hawai'i 283, 298, 151 P.3d 764, 779 (2007) (Hawai'i's Constitution "guarantees persons in Hawai'i a more extensive right to privacy" (quoting State v. Navas, 81 Hawai'i 113, 123, 913 P.2d 39, 49 (1996)) (internal quotation marks omitted)).

[38] State v. Prendergast, 103 Hawai'i 451, 454, 83 P.3d 714, 717 (2004) (quoting State v. Fukusaku, 85 Hawai'i 462, 475, 946 P.2d 32, 45 (1997)) (internal quotation marks omitted).

Hawai'i's exclusionary rule serves not only to deter illegal police conduct, but to protect the privacy rights of [the] people."[39]

The Hawai'i Supreme Court has analyzed searches and seizures separately under article I, section 7 and in conjunction with the Fourth Amendment.[40] However, even when the court has found separate and independent state grounds, it has been guided by United States Supreme Court decisions.[41]

In *State v. Barnes*,[42] the court adopted the rule for investigatory stops set forth in *Terry*.[43] Shortly after, in *State v. Bonds*,[44] the court extended *Barnes* and *Terry* to investigatory stops of automobiles.[45]

The Hawai'i Supreme Court concluded that Hawai'i has a legitimate interest in street and highway safety, which authorizes police to stop vehicles "in cases of *observed* traffic or equipment violations."[46] However, when Fourth Amendment rights are at issue, "the State's interest is not so compelling as to justify subjecting every vehicle to seizure at the unrestrained discretion of law-enforcement officials."[47] Public interest and safety must be balanced against "the individual's right to personal security free from arbitrary interference by law officers."[48]

Only a few months before *State v. Spillner*, the court in *State v. Heapy*[49] reaffirmed "the precepts established in *Terry* and its progeny which [the court]

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[39] *Heapy*, 113 Hawai'i at 299, 151 P.3d at 780.

[40] Tonaki et al., *supra* note 11, at 296.

[41] *See* State v. Eleneki, 106 Hawai'i 177, 178 n.1, 102 P.3d 1075, 1076 n.1 (2004) ("In applying Article I, Section 7, we may consider federal case law."); *see also Heapy*, 113 Hawai'i at 291, 151 P.3d at 772 (acknowledging Hawai'i adopted the reasonable suspicion test of *Terry* on "independent state constitutional grounds and applied it to traffic situations," such that the principles of *Prouse* also rest on independent state constitutional grounds). Both *Eleneki* and *Heapy* relied on independent state grounds. *See Eleneki*, 106 Hawai'i at 178, 102 P.3d at 1076; *Heapy*, 113 Hawai'i at 291 n.7, 151 P.3d at 772 n.7.

[42] 58 Haw. 333, 568 P.2d 1207 (1977).

[43] *Id.* at 338, 568 P.2d at 1211 ("To justify an investigative stop, short of an arrest based on probable cause, 'the police officer must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion.'" (quoting Terry v. Ohio, 392 U.S. 1, 21 (1968))). The court further stated, "[t]he ultimate test in these situations must be whether from these facts, measured by an objective standard, a [person] of reasonable caution would be warranted in believing that criminal activity was afoot and that the action taken was appropriate." *Id.*

[44] 59 Haw. 130, 577 P.2d 781 (1978).

[45] *Id.* at 133-34, 577 P.2d at 784 ("We now confirm that the standard which we announced in *Barnes* limits the discretionary actions of police officers in investigating possible violations of laws regulating the operation of motor vehicles."). *Bonds* was decided shortly before *Prouse*.

[46] State v. Powell, 61 Haw. 316, 320, 603 P.2d 143, 147 (1979).

[47] *Id.*

[48] *Bonds*, 59 Haw. at 134, 577 P.2d at 784 (quoting United States v. Brignoni-Ponce, 422 U.S. 873, 878 (1975)) (internal quotation marks omitted).

[49] 113 Hawai'i 283, 151 P.3d 764 (2007).

adopted, and the longstanding constitutional protections in [Hawai'i] that have stood as a bulwark against unreasonable seizures."[50]

III. *STATE V. SPILLNER*

A. Facts

On February 15, 2005, Officer Arthur Takamiya stopped Michael Spillner in his vehicle because his front windshield displayed illegal window tinting.[51] During the stop, Officer Takamiya determined Spillner did not have a valid driver's license or insurance for the vehicle, and Officer Takamiya cited Spillner for the illegally tinted windshield and driving without a license and insurance.[52]

Approximately one week later, Officer Takamiya again stopped Spillner's vehicle, with the same illegal window tinting, while Spillner's girlfriend was driving.[53] Officer Takamiya found the vehicle was still uninsured, and Spillner's girlfriend was cited.[54]

On March 1, 2005, Officer Takamiya stopped Spillner driving his vehicle for a second time.[55] The illegal windshield tint had been removed.[56] However, Officer Takamiya confirmed Spillner had not obtained a valid license or insurance, and Spillner was cited for both violations.[57]

B. Procedural History

On August 15, 2005, Spillner filed a motion to suppress the evidence obtained during the March 1, 2005 stop, alleging the stop and seizure was not supported by reasonable suspicion and the resulting charges "constitute[d] fruits of [an] unlawful stop and seizure."[58]

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[50] *Id.* at 287, 151 P.3d at 768.

[51] State v. Spillner, 116 Hawai'i 351, 353-54, 173 P.3d 498, 500-01 (2007).

[52] *Id.*

[53] *Id.* at 353, 173 P.3d at 500.

[54] *Id.* at 353-55, 173 P.3d at 500-02. It is unclear from the opinion whether Spillner's girlfriend was cited for the illegal tint, for driving without insurance, or both.

[55] *Id.* at 353, 173 P.3d at 500.

[56] *Id.* at 354, 173 P.3d at 501.

[57] *Id.* at 353, 173 P.3d at 500. During trial, the court received into evidence a record from the City and County of Honolulu's Division of Motor Vehicle, Licensing and Permits, demonstrating that on March 1, 2005, Spillner did not have a valid license. *Id.* at 355, 173 P.3d at 502.

[58] *Id.* at 353-54, 173 P.3d at 500-01.

On November 30, 2005, the district court conducted a consolidated bench trial and hearing on Spillner's motion to suppress.[59] During direct examination, Officer Takamiya testified, on March 1, 2005, he saw Spillner's vehicle and recognized it because, "one to two weeks prior," he had issued Spillner multiple citations while driving the same vehicle.[60] Officer Takamiya further testified, based on the citations he gave Spillner previously and upon seeing the vehicle and Spillner's face through the untinted windshield, Officer Takamiya was "thinking" Spillner was driving without a license or insurance.[61]

On cross-examination, Officer Takamiya admitted he did not observe any outward signs of traffic violations made by Spillner and affirmed he "pulled [Spillner] over . . . on the *assumption* that [Spillner] had no driver's license and was not insured."[62]

The district court denied Spillner's motion to suppress and found him guilty of driving while unlicensed[63] and driving without motor vehicle insurance.[64]

C. Majority Opinion

The majority opinion, written by Justice Levinson, affirmed the Intermediate Court of Appeals' decision.[65] The majority began by laying a foundation of reasonable suspicion jurisprudence of both the United States and Hawai'i Supreme Courts, noting the standards set forth in *Terry*, *Barnes*, *Cortez*, and *Arvizu*.[66] The majority then focused on the reasonable suspicion standard for investigatory traffic stops, as put forth in *Delaware v. Prouse*.[67]

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[59] *Id.* at 354, 173 P.3d at 501.

[60] *Id.*

[61] *Id.*

[62] *Id.* at 355, 173 P.3d at 502 (emphasis added).

[63] HAW. REV. STAT. § 286-102 (1993 & Supp. 2002).

[64] HAW. REV. STAT. § 431:10C-104 (Supp. 1997); *Spillner*, 116 Hawai'i at 353, 173 P.3d at 500. The decision was memorialized in a judgment dated January 4, 2006. *Id.* Spillner appealed the denial of his motion to suppress evidence and his two convictions. *Id.* On April 13, 2007, the Intermediate Court of Appeals (ICA) of Hawai'i issued a Summary Disposition Order (SDO), affirming the district court judgments. State v. Spillner, No. 27722, 2007 Haw. App. LEXIS 259 (Haw. Ct. App. Apr. 13, 2007). On July 20, 2007, Spillner filed an application with the Hawai'i Supreme Court for a writ of certiorari to review the ICA's SDO. *Spillner*, 116 Hawai'i at 353, 173 P.3d at 500. The court granted certiorari on August 21, 2007. State v. Spillner, No. 27722, 2007 Haw. LEXIS 236 (Haw. Aug. 21, 2007). On October 31, 2007, the court heard oral arguments. *Spillner*, 116 Hawai'i at 356-57, 173 P.3d at 503-04.

[65] *Spillner*, 116 Hawai'i at 353, 173 P.3d at 500. Chief Justice Moon, Justice Nakayama, and Justice Duffy joined the opinion; Justice Acoba dissented separately.

[66] *Id.* at 357-58, 173 P.3d at 504-05.

[67] *Id.* at 359, 173 P.3d at 506 ("[O]fficers [need] to articulate a specific rationale supporting reasonable suspicion that a particular driver was . . . driving without a license." (citing Delaware v. Prouse, 440 U.S. 648, 660-61 (1979))).

The majority rejected Spillner's argument that the objective approach prohibited consideration of any prior contacts in forming reasonable suspicion.[68] Instead, the majority held knowledge of a driver's insufficient credentials in the weeks preceding could justify an investigatory stop.[69]

1. Driving without a license is ongoing in nature and justifies an assumption that the previously observed behavior is continuing

After acknowledging that a particular individual's criminal background cannot provide the sole basis of an investigatory stop,[70] the majority discussed the difference between "past law violations that have come to an end" and "ongoing law violations engaged in by the individual in question."[71] It determined that sole reliance on past criminal activity was a violation of an individual's reasonable expectation of privacy; whereas, reliance on ongoing activity, if properly informed by the facts, was justifiable.[72]

The majority asserted "articulated facts that indicate that an offense is ongoing in nature support[s] reasonable suspicion that criminal activity continues to be afoot and . . . help[s] justify a brief investigatory stop to confirm or dispel those suspicions."[73] It cited several cases that characterized driving without a valid license as an ongoing or continuing offense in comparison to other offenses such as speeding, parking violations, jaywalking, and mugging.[74]

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[68] *Id.* at 358, 173 P.3d at 505.

[69] *Id.* at 364, 173 P.3d at 511.

[70] *Id.* at 359, 173 P.3d at 506. The majority cites multiple cases supporting the proposition that prior criminal involvement alone is not sufficient to supply reasonable suspicion. *See, e.g., id.* (citing State v. Santillanes, 848 F.2d 1103, 1107-08 (10th Cir. 1988); United States v. Laughrin, 438 F.3d 1245, 1247 (10th Cir. 2006); State v. Kaleohano, 99 Hawai'i 370, 377, 56 P.3d 138, 145 (2002)). The majority stated the court had not "fully articulated its view of the proper role that a defendant's criminal record plays in formulating reasonable suspicion." *Id.* at 358, 173 P.3d at 505. However, it noted prior reputation alone was found insufficient to support probable cause and, even when combined with other factors, was of little importance. *Id.* (citing *Kaleohano*, 99 Hawai'i at 377, 56 P.3d at 145).

[71] *Id.* at 360, 173 P.3d at 507.

[72] *Id.*

[73] *Id.* The majority cited *Deboy v. Commonwealth*, 214 S.W.3d 926 (Ky. Ct. App. 2007), where that court distinguished using "a driver's criminal record alone" from the "ongoing nature of the offense of driving with a suspended license" and concluded the officer's personal knowledge of the driver's license suspension several months prior supplied reasonable suspicion. *Spillner*, 116 Hawai'i at 360, 173 P.3d at 507.

[74] *Spillner*, 116 Hawai'i at 361-62, 173 P.3d at 508-09. In support of the proposition that driving without a license is an ongoing offense, the majority cited *United States v. Cortez-Galaviz*, 495 F.3d 1203, 1209 (10th Cir. 2007) ("[T]he legal infraction at issue typically wears on for days or weeks or months (like, say, driving without a license . . .), rather than concludes

The majority found an officer could justifiably form reasonable suspicion when an individual has "fixedly refused to cease" or "failed to amend" prior criminal behavior if it is ongoing in nature and the officer personally observed the behavior in the past, even though the officer has not observed any present violations of the law.[75]

2. Because driving without a license is ongoing, knowledge of prior criminal activity can be relied upon in forming reasonable suspicion for up to twenty-two weeks

Where a crime is determined to be ongoing in nature, the majority concluded the timeliness of the information regarding the prior encounter—used to form reasonable suspicion—is of less importance.[76] In support of its position, the majority cited several cases in other jurisdictions finding the freshness of the officer's information, combined with the inability of an individual to obtain a valid license during a revocation or suspension period, supported a reasonable suspicion.[77] It also took notice of other cases holding the officer's information was too stale and the stops unreasonable because the "length of the license suspension or the ease in obtaining the proper credentials" dissolved "the logical link between the former illegal activity and any suspicion of current, ongoing criminal activity."[78]

As a result, in determining the "freshness" or "staleness" of information, the majority deemed *United States v. Sandridge*[79] (i.e., twenty-two days) and *United States v. Laughrin*[80] (i.e., twenty-two weeks) "instructive 'bookends'"

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quickly (like, say, jaywalking or mugging) . . . ." (emphasis omitted)), and *United States v. Sandridge*, 385 F.3d 1032, 1036 (6th Cir. 2004) ("Driving without a valid license is a continuing offense—in contrast, say, to a speeding or parking violation.").

[75] *Spillner*, 116 Hawai'i at 361, 173 P.3d at 508.

[76] *Id.* at 361-62, 173 P.3d at 508-09.

[77] *Id.* at 362, 173 P.3d at 509. Most of the cases used throughout the opinion involved license suspensions and revocations, not the lack of a valid license. *See id.* at 360-62, 173 P.3d at 507-09. The majority cited the following cases involving driving with a suspended or revoked license and finding reasonable suspicion: Stewart v. State, 469 S.E.2d 424 (Ga. App. 1996); *Deboy*, 214 S.W.3d 926; State v. Duesterhoeft, 311 N.W.2d 866 (Minn. 1981); State v. Decoteau, 681 N.W.2d 803, 806 (N.D. 2004); and State v. Gibson, 665 P.2d 1302 (Utah 1983).

[78] *See Spillner*, 116 Hawai'i at 362-63, 173 P.3d at 509-10. The majority cited the following cases involving driving with a suspended or revoked license and finding the information too stale to support reasonable suspicion: United States v. Pierre, 484 F.3d 75 (1st Cir. 2007); Moody v. State, 842 So. 2d 754 (Fla. 2003); State v. Wade, 673 So. 2d 906 (Fla. Dist. Ct. App. 1996); Boyd v. State, 758 So. 2d 1032 (Miss. Ct. App. 2000); and Commonwealth v. Stevenson, 832 A.2d 1123 (Pa. Super. Ct. 2003).

[79] *Sandridge*, 385 F.3d 1032.

[80] 438 F.3d 1245 (10th Cir. 2006).

for the acceptable passage of time in which reasonable suspicion may be found in cases involving the ongoing offense of driving without a license.[81]

3. The stop of Spillner was supported by reasonable suspicion

Based on this analysis, the majority concluded Officer Takamiya's knowledge that Spillner was unlicensed at the time of the initial stop and had not remedied his insurance in the week following the first citations was "sufficiently fresh to give rise to reasonable suspicion."[82]

4. The state's interests outweighed Spillner's interests

In addition, the majority considered the state's interest in highway safety against the nature and degree of the intrusion.[83] Although the majority did not discuss the infringement of Spillner's rights, it concluded the stop was reasonable because it was for a reason likely to advance the state's important interest in highway safety.[84]

D. Justice Acoba's Dissent

Justice Acoba began by clarifying that his dissent rested on "separate, adequate, and independent [state] grounds" under the Hawai'i Constitution, article I, section 7.[85] He emphasized that because the Hawai'i Supreme Court has the ultimate authority to interpret and provide broader protection under the Hawai'i Constitution, United States Supreme Court decisions were persuasive, not controlling, authority.[86]

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[81] *Spillner*, 116 Hawai'i at 363, 173 P.3d at 510.

[82] *Id.* The majority stated:

> We believe that *Sandridge*, *Laughrin*, and other foreign cases support the district court's and the ICA's implicit conclusion that (1) Officer Takamiya's one-week-old knowledge that Spillner's truck did not carry valid insurance—and that he had not acted to remedy the insurance violation in the preceding week-long interval—and (2) his two-week-old knowledge that Spillner was unlicensed were together sufficiently fresh to give rise to reasonable suspicion to execute the March 1, 2005 traffic stop.

Id.

[83] *Id.* at 364, 173 P.3d at 511.

[84] *Id.* The majority distinguished the stop from *Prouse*, where the Supreme Court found no justification for a stop that was completely random and would not advance the state's interests any more than stopping another driver. *Id.* (citing Delaware v. Prouse, 440 U.S. 648, 663 (1979)).

[85] *Id.* at 365 n.1, 173 P.3d at 512 n.1 (Acoba, J., dissenting) (quoting Michigan v. Long, 463 U.S. 1032, 1041 (1983)) (alteration in original) (internal quotation marks omitted).

[86] *Id.* at 365, 173 P.3d at 512.

After acknowledging assumptions cannot form the basis of reasonable suspicion, Justice Acoba concluded Officer Takamiya's stop of Spillner was based only on the prior citations of Spillner and his girlfriend, which were insufficient to justify the stop.[87] Justice Acoba additionally found fault in the majority's analysis of the case and refuted each of the majority's arguments.[88]

The dissent argued many of the cases cited by the majority involved driving with a suspended or revoked license and thus were distinguishable from Spillner's case.[89] Unlike a license suspension or revocation, after a citation for driving without a license, an individual could obtain a valid license and the condition could be quickly remedied.[90] Justice Acoba found this distinction crucial in determining whether the offenses could be considered ongoing and whether the information was reliable to support a subsequent stop.[91] Because the cases used by the majority were not analogous to the instant case, he concluded they were not authority for its arguments.[92]

In regards to the timeliness of information, Justice Acoba found the majority's "bookends" approach at odds with the requirement of the court to evaluate the totality of the circumstances in each case.[93] He contended the approach improperly focused on the facts surrounding the previous stop and whether they had become stale, rather than the facts of the attendant stop.[94]

Justice Acoba characterized the majority's final argument regarding traffic safety as "a makeweight effort to buttress its ultimate holding."[95] He argued the majority's disregard of the reasonable suspicion standard itself "impermissibly tilt[ed] the balance" of interests in favor of the state.[96]

Justice Acoba concluded the seizure of Spillner was unconstitutional, and the motion to suppress should have been granted.[97]

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[87] *Id.* at 369-71, 173 P.3d at 516-18.

[88] *Id.* at 371, 173 P.3d at 518. Justice Acoba identified the majority's arguments as: (1) knowledge of an individual's past violations may authorize a stop if the suspected violation is ongoing, (2) timeliness of information regarding past violations is of less importance if the violation is ongoing, and the violation in Spillner's case was timely, and (3) the stop was likely to advance a state interest. *Id.*

[89] *Id.* at 371 n.7, 173 P.3d at 518 n.7.

[90] *Id.* at 371, 173 P.3d at 518.

[91] *Id.* at 371-73, 375, 173 P.3d at 518-20, 522.

[92] *Id.* at 371, 375, 173 P.3d at 518, 522.

[93] *Id.* at 374, 173 P.3d at 521.

[94] *Id.* at 375, 173 P.3d at 522.

[95] *Id.* at 375-76, 173 P.3d at 522-23.

[96] *Id.*

[97] *Id.* at 376, 173 P.3d at 523.

IV. ANALYSIS

State v. Spillner was based on faulty reasoning and incorrectly decided. Its holding allows investigatory traffic stops based on assumptions and past criminal behavior and approves unreasonable infringement on the constitutional rights of individuals.

Officer Takamiya did not point to specific and articulable facts from which a reasonable person could conclude Spillner was engaged in criminal activity at the time of his March 1, 2005 stop. Officer Takamiya did not have reasonable suspicion to stop Spillner, and as a result, Spillner's motion to suppress should have been granted.

The majority opinion is flawed in several respects: (1) the majority improperly allowed assumptions, based on Spillner's prior criminal behavior, to justify the investigatory stop; (2) the majority used inapposite authority to guide its decision; (3) the majority failed to consider the totality of the circumstances; and (4) the majority failed to balance the interests of the state against the intrusion of the individual.

Justice Acoba addressed many of these issues in his dissent, but because of the potential impact this decision could have on the privacy rights of all people in Hawai'i, the majority opinion deserves additional critical analysis.

A. The Majority Improperly Allowed Assumptions, Based on Spillner's Prior Violations, to Justify the Investigatory Stop

Officer Takamiya admittedly pulled over Spillner's vehicle on the *assumption* Spillner was driving without a valid license or insurance.[98] The majority concluded the "facts indicate[d] that Officer Takamiya reacted to a specific and articulable *belief*" that Spillner continued to lack a valid license or insurance.[99]

However, in justifying a brief investigatory traffic stop, it is "incumbent upon the officer to relate credibly to the trial court specific and articulable facts from which that tribunal could determine whether a [person] of reasonable

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[98] *Id.* at 355, 173 P.3d at 502 (majority opinion).

[99] *Id.* at 364, 173 P.3d at 511 (emphasis added).

> [T]he facts indicate[d] that Officer Takamiya reacted to a specific and articulable *belief*, held particularly as to Spillner, that Spillner's recent behavior of driving without a license and insurance was ongoing, meaning he had not desisted by either refraining from driving or investing the time and paperwork to obtain the necessary renewals.

Id. (emphasis added). The prosecution asserted a slightly different argument in its brief to the ICA, arguing Officer Takamiya's observation of Spillner driving his vehicle a few weeks after their initial encounter was a specific and articulable fact giving rise to the officer's reasonable suspicion. *Id.* at 356, 173 P.3d at 503.

caution would have been justified in relying solely upon it."[100] The police officer must point to specific and articulable *facts*, not specific and articulable assumptions or beliefs.[101]

As Justice Acoba reasoned in his dissent, "[a] police officer is not excused from complying with the standards applicable to an investigatory stop merely because he may have wanted to verify or check that a driver had obtained a license and insurance."[102] Because Officer Takamiya's assumptions could not supply the necessary reasonable suspicion, Justice Acoba concluded the only possible basis for the stop was the prior encounters with Spillner and his girlfriend.[103]

However, it is well-recognized that an individual's prior criminal history alone is insufficient to supply reasonable suspicion.[104] Both the majority and Justice Acoba discussed this proposition in their respective opinions,[105] with Justice Acoba citing Supreme Court jurisprudence to buttress his argument that "[i]f the law were otherwise, any person with any sort of criminal record . . . could be subjected to [an] investigative stop by a law enforcement officer at any time without the need for any other justification at all."[106]

Although the Hawai'i Supreme Court had not directly addressed this issue in the context of reasonable suspicion, in *State v. Kaleohano*[107] it held prior reputation for criminal activity was alone insufficient to establish probable cause.[108] Justice Acoba argued the consideration of prior misconduct as the sole factor in forming reasonable suspicion was likewise unacceptable.[109]

Instead of following the reasoning in *Kaleohano*, the majority deliberately circumvented this well-established precedent. It found the ongoing nature of the offenses of driving without a valid license and insurance allowed Officer Takamiya to assume the conduct was continuing at the time of Spillner's

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[100] State v. Joao, 55 Haw. 601, 605, 525 P.2d 580, 583 (1974).

[101] *See* Terry v. Ohio, 392 U.S. 1, 21 (1968).

[102] *Spillner*, 116 Hawai'i at 369, 173 P.3d at 517 (Acoba, J., dissenting).

[103] *Id.*

[104] *See, e.g.*, United States v. Sandoval, 29 F.3d 537, 542-43 (10th Cir. 1994) ("[K]nowledge of a person's prior criminal involvement . . . is alone insufficient to give rise to the requisite reasonable suspicion . . . . [A]nd we have found no case elsewhere that even suggests the contrary . . . .").

[105] *See* authorities cited *supra* note 70; *Spillner*, 116 Hawai'i at 370, 173 P.3d at 517 (citing United States v. Jerez, 108 F.3d 684, 693 (7th Cir. 1997); Robinson v. State, 388 So. 2d 286, 290 (Fla. Dist. Ct. App. 1980); Collier v. Commonwealth, 713 S.W.2d 827, 828 (Ky. Ct. App. 1986)).

[106] *Spillner*, 116 Hawai'i at 370, 173 P.3d at 517 (internal quotation marks omitted).

[107] 99 Hawai'i 370, 56 P.3d 138 (2002).

[108] *Id.* at 377, 56 P.3d at 145. Even when considered with additional factors, prior reputation was "entitled to only minimal weight." *Id.*

[109] *Spillner*, 116 Hawai'i at 370, 173 P.3d at 517.

subsequent stop.[110] However, this conclusion is not only incorrect, but it presents the same danger of "unbridled discretion" posed by the direct consideration of past criminal activity in forming reasonable suspicion.[111]

Justice Acoba described the assumption of continuing activity as "equivalent to establishing a presumption that individuals once found to have committed a violation are likely to repeatedly commit such violations in the future [which was] clearly at odds with 'the strictures against proving guilt . . . by a predisposition based on past criminal acts.'"[112]

In support of the characterization of driving without a valid license as ongoing criminal activity, the majority cited dicta from cases in other jurisdictions describing driving without a valid license as ongoing in contrast to other offenses, such as mugging, jaywalking, and speeding.[113]

However, the argument that driving without a valid license is ongoing is only convincing in contrast to these offenses. When a speeding car slows below the speed limit or when a jaywalker is across the street, the action visibly concludes and there can be no question as to whether the illegal activity is ongoing.[114] Conversely, in the situation of an individual who was previously cited for driving without a valid license or insurance, there is no apparent endpoint.[115] It is possible that subsequent observations of similar conduct could later reveal the previously observed activity was continuing.[116] In this sense, driving without a license may seem ongoing in comparison.

Nevertheless, driving without a license is not, per se, ongoing criminal activity.[117] The condition of being unlicensed may or may not be continuing at subsequent instances of driving.[118] Therefore, an officer is not justified in

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[110] *Id.* at 360, 173 P.3d at 508 (majority opinion).

[111] *See* Delaware v. Prouse, 440 U.S. 648, 661 (1979) ("To insist neither upon an appropriate factual basis for suspicion directed at a particular automobile nor upon some other substantial and objective standard or rule to govern the exercise of discretion 'would invite intrusions upon constitutionally guaranteed rights based on nothing more than inarticulate hunches.'" (quoting Terry v. Ohio, 392 U.S. 1, 22 (1968))).

[112] *Spillner*, 116 Hawai'i at 373, 173 P.3d at 520 (Acoba, J., dissenting) (citing *Kaleohano*, 99 Hawai'i at 380, 56 P.3d at 148).

[113] *See supra* note 74 and accompanying text.

[114] *See, e.g.*, HAW. REV. STAT. § 291C-102 (2007) ("Noncompliance with speed limit prohibited"); *id.* § 291C-73 ("Crossing at other than crosswalks").

[115] *See, e.g.*, HAW. REV. STAT. § 286-102 (2007 & Supp. 2008) ("Licensing").

[116] *See supra* note 57. Records presented at trial indicated Spillner did not have a valid license on March 1, 2005. *Spillner*, 116 Hawai'i at 355, 173 P.3d at 502 (majority opinion). However, as Justice Acoba explained, subsequent discovery of illegal activity does not retroactively validate the stop. *Id.* at 369, 173 P.3d at 515 (Acoba, J., dissenting).

[117] *See supra* note 74 and accompanying text. The cases cited by the majority do not directly state driving without a license is an ongoing offense.

[118] *See Spillner*, 116 Hawai'i at 361, 173 P.3d at 508 (majority opinion) ("[I]f the second encounter occurs after the licensing authority has reopened, it would then be conceivable for the

automatically assuming the misconduct is ongoing. The Hawai'i Supreme Court previously noted "[a] police officer's unsubstantiated impression that a particular crime is of the sort which usually is continuing is not sufficient."[119]

In addition, whether the stop is viewed as directly based on past violations or as permissible assumptions resulting from those past violations, the stop is still founded solely on the previous criminal behavior. This practice violates "a basic precept that law-enforcement officers not disturb a free person's liberty solely because of a criminal record. Under the Fourth Amendment our society does not allow police officers to 'round up the usual suspects.'"[120]

Officer Takamiya failed to point to any specific and articulable facts that criminal activity was afoot at the time of the stop.[121] Spillner was stopped by Officer Takamiya because of assumptions based solely on Spillner's prior criminal history, which is not sufficient to support reasonable suspicion.[122]

B. The Majority Used Inapposite Authority to Guide Its Decision

In his dissenting opinion, Justice Acoba discussed the fact that many of the majority's arguments were supported by cases involving driving with a suspended or revoked license.[123] The majority's use of these cases, however, neglected a critical difference between the offenses which renders the factual scenarios inapposite.[124]

Hawai'i law prohibits an individual with a suspended or revoked license from obtaining the required credentials until the suspension or revocation period expires.[125] In contrast, there is no such prohibition for an individual

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defendant to have renewed his or her license in the interim . . . ." (emphasis omitted)).

[119] State v. Austria, 55 Haw. 565, 570, 524 P.2d 290, 294 (1974) (quoting Commonwealth v. Eazer, 312 A.2d 398, 400 (Pa. 1973)) (internal quotation marks omitted).

[120] United States v. Laughrin, 438 F.3d 1245, 1247 (10th Cir. 2006).

[121] *See Spillner*, 116 Hawai'i at 354-55, 173 P.3d at 501-02.

[122] *See id.*

[123] *Id.* at 371-73, 375, 173 P.3d at 518-20, 522 (Acoba, J., dissenting); *see also supra* notes 77 and 79. Justice Acoba acknowledged the majority used one case that did not involve a license suspension or revocation, State v. Carrs, 568 So. 2d 120 (Fla. Dist. Ct. App. 1990), but he distinguished it from Spillner's case. *Spillner*, 116 Hawai'i at 371 n.7, 173 P.3d at 518 n.7. Unlike *Spillner*, in *Carrs*, the officer personally knew the defendant and, based on his familiarity with the defendant, the court concluded the officer's suspicions were reasonable. *Id.* (citing *Carrs*, 568 So. 2d at 121).

[124] *See Spillner*, 116 Hawai'i at 362, 173 P.3d at 509 (majority opinion). The majority noted, in some of the cases cited, the defendants were "precluded—or all but precluded—. . . from obtaining the required credentials," but the majority did not acknowledge this as a distinguishing factor compared to the instant case. *Id.*

[125] *See* HAW. REV. STAT. § 286-104 (2007 & Supp. 2008) (prohibiting the issuance of a license during a license or suspension period); *id.* § 286-132 (prohibiting an individual from operating a vehicle while the individual's license remains suspended or revoked).

who chooses not to obtain a valid license.[126] Where no impediment exists for obtaining a license, it is possible to immediately acquire one and rectify the situation.[127]

Justice Acoba explained that even in situations involving suspensions, an officer would need to know the length of the suspension to form reasonable suspicion that the driver continued to have a suspended license and was in current violation of the law.[128] An officer's knowledge of both the individual's license suspension or revocation and its duration may justify a stop based on a subsequent observation of the individual driving within the known prohibition period.[129]

However, if an officer only knows that during a previous stop the driver did not have a valid license, an automatic assumption that the individual has not obtained a license is unwarranted because the condition could have been remedied with relative ease.[130]

The inferences that can be made under a suspension or revocation do not apply to the lack of a valid license. As Justice Acoba argued, the ability to correct the deficiency is an essential difference which further undermines the majority's argument that driving without a license is ongoing.[131]

C. The Majority Failed to Consider the Totality of the Circumstances

The majority's choice of cases for support also demonstrated its failure to consider the totality of the circumstances. The majority stated, "[A] court must assess the nature of the information, the nature and characteristics of the suspected criminal activity, and the likely endurance of the information."[132] By likening the conduct to offenses that were not analogous, the majority did not accurately assess these elements or engage in the required fact-specific analysis.

Because the condition of driving without a valid license could be easily remedied, it would have been equally probable Spillner had obtained the

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[126] *See id.* § 286-102 (explaining the examination and licensing requirements before operating a vehicle).

[127] *See id.*; *see also Spillner*, 116 Hawai'i at 371, 173 P.3d at 518 (Acoba, J., dissenting).

[128] *Spillner*, 116 Hawai'i at 372, 173 P.3d at 519.

[129] *See, e.g.*, State v. Duesterhoeft, 311 N.W.2d 866, 868 (Minn. 1981) (finding reasonable suspicion where the officer had personal knowledge the defendant's license was suspended one month prior to the stop and the minimum length of any suspension was thirty days); *see also* United States v. Laughrin, 438 F.3d 1245, 1248 (10th Cir. 2006) (noting that if the officer testified to the length of the license suspension, the court might have been able to find the officer had reasonable suspicion).

[130] *See* HAW. REV. STAT. § 286-102.

[131] *Spillner*, 116 Hawai'i at 371, 173 P.3d at 518.

[132] *Id.* at 362, 173 P.3d at 509 (majority opinion) (quoting United States v. Pierre, 484 F.3d 75, 83 (1st Cir. 2007)) (internal quotation marks omitted).

required credentials as the possibility he had not.[133] The correctable nature of the offense and questionable endurance of the information were completely neglected by the majority's analysis.[134]

Additionally, the majority placed undue weight on certain facts while disregarding others. It emphasized the stop of Spillner's girlfriend as a display of Spillner's "cavalier attitude . . . toward the law," in failing to remedy his vehicle's lack of insurance after the initial citation.[135] The majority determined, because Spillner had not ceased his behavior previously, Officer Takamiya was justified in assuming he had not corrected the behavior by the March 1, 2005 stop.[136]

However, all that could be established by the stop was that Spillner's girlfriend was not able to produce proof of insurance, not necessarily that Spillner had not acquired the insurance.[137] It could be inferred Spillner did not obtain the insurance in the interim,[138] but since Spillner was not present at the stop, it was an error to describe this as a "fact known personally by Officer Takamiya."[139] Officer Takamiya admittedly had no first-hand knowledge from Spillner as to whether or not he had obtained insurance on the vehicle at the time of the stop of Spillner's girlfriend.[140]

On the other hand, the majority does not acknowledge Spillner had removed the illegal window tint that was on the vehicle during the first two stops by the March 1, 2005 stop.[141] The illegal tint alone would have supplied the

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[133] *Id.* at 368, 173 P.3d at 515 (Acoba, J., dissenting) (noting Officer Takamiya's admission that "for all [he knew]" Spillner could have been insured and licensed on March 1, 2005); *see also id.* at 361, 173 P.3d at 508 (majority opinion) ("[I]f the second encounter occurs after the licensing authority has reopened, it would then be conceivable for the defendant to have renewed his or her license in the interim . . . ." (emphasis omitted)).

[134] *See supra* Part IV(A)-(B).

[135] *Spillner*, 116 Hawai'i at 364, 173 P.3d at 511.

[136] *Id.*

[137] *Id.* at 355, 173 P.3d at 502. Officer Takamiya only testified to the following: "As far as the insurance, I stopped his girlfriend driving that same truck one week prior [to the March 1, 2005 stop] without insurance with the same tinted front windshield." *Id.*

[138] *See* State v. Arakaki, 7 Haw. App. 48, 54-55, 744 P.2d 783, 787 (1987) (holding there to be a permissible inference that the inability to produce an insurance card indicates lack of insurance), *overruled on other grounds by* State v. Dow, 72 Haw. 56, 806 P.2d 402 (1991).

[139] *Spillner*, 116 Hawai'i at 364, 173 P.3d at 511.

[140] *See id.* at 355, 173 P.3d at 502. During cross-examination, Officer Takamiya was asked, "You don't have any first-hand knowledge whether or not [Spillner] obtained insurance . . . in those two weeks, isn't that true?" *Id.* Officer Takamiya responded, "That's true." *Id.*

[141] *Id.* at 354, 356, 173 P.3d at 501, 503. The majority does not discuss this fact in its analysis, but only mentions it in the recitation of Officer Takamiya's testimony and in a reference to an argument in Spillner's brief. *See id.*

reasonable suspicion necessary to stop the vehicle the previous times because of the outward display of a violation of the law.[142]

By Spillner's second stop, the illegal tint was removed.[143] If this fact were considered, as Spillner asserted in his brief, it could reasonably have led to the conclusion all other criminal activity had also been discontinued.[144] The majority should have considered this fact as part of the totality of the circumstances, which would have decreased the probability that criminal activity was occurring and weakened the state's argument Spillner fixedly refused to cease his prior behavior.[145]

In addition, Justice Acoba found issue with the disproportionate attention the majority placed on the length of time between the two encounters and the facts justifying the previous stop.[146] He argued the majority improperly elevated these elements above whether the circumstances of the stop at issue would lead the officer to reasonably believe criminal activity was currently afoot.[147] Because Spillner's conduct was otherwise "objectively suspicionless," Justice Acoba warned this was the type of "unbridled discretion" the Constitution seeks to protect against.[148]

D. The Majority Failed to Balance the Interests of the State Against the Privacy Interests of the Individual

While the majority acknowledged the state's interests in highway safety must be weighed against "the nature and degree of the intrusion" on privacy,[149] it ultimately failed to balance these interests.

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[142] *See* HAW. REV. STAT. § 291-21.5 (2007) (regulating motor vehicle tinting); *see also* Weaver v. Shadoan, 340 F.3d 398, 407-08 (6th Cir. 2003) (finding reasonable suspicion based on violations of Tennessee's vehicle registration and window tinting laws).

[143] *Spillner*, 116 Hawai'i at 354, 173 P.3d at 501.

[144] *See id.* at 356, 173 P.3d at 503 ("Spillner maintained, it would have been 'more reasonable' for Officer Takamiya to assume from Spillner's having removed the illegal tinting by the time of the instant stop that he had obtained insurance and a license in the interim as well.").

[145] *See id.* at 372 n.8, 173 P.3d at 519 n.8 (Acoba, J., dissenting) (acknowledging the removal of the tint was arguably a fact suggesting Spillner had ceased his driving without a license).

[146] *Id.* at 375, 173 P.3d at 522.

[147] *Id.*

[148] *Id.*

[149] *Id.* at 363-64, 173 P.3d at 510-11 (majority opinion). There are two factors to examine when considering individual privacy interests: (1) "the degree of intrusiveness," and (2) the reasonable expectations of privacy. *See* John P. Cronan et al., Recent Development, *Developments in Policy Article: Fourth Amendment Trends and the Supreme Court's October 1999 Term*, 19 YALE L. & POL'Y REV. 197, 213 (2000).

The majority disregarded individual privacy interests, finding as long as an important state interest was actually advanced, the intrusion was not unreasonable.[150] It concluded Officer Takamiya's stop of Spillner likely advanced the state's interest in highway safety, and therefore, was reasonable.[151]

This standard asserted by the majority suggests the balancing of interests would always be presumptively in favor of the state as long as it can show an important state interest was advanced. However, the United States Supreme Court directly rejected this notion in *Delaware v. Prouse*,[152] finding if "individual[s] were subject to unfettered governmental intrusion every time he entered an automobile, the security guaranteed by the Fourth Amendment would be seriously circumscribed."[153]

The Hawai'i Supreme Court had not previously stated furtherance of a valid state interest is alone sufficient to outweigh privacy interests.[154] In *State v. Heapy*,[155] the court recognized, despite a valid state interest, the means of enforcement must consider and seek to minimize the level of intrusion on an individual's reasonable expectation of privacy in order to pass constitutional muster.[156] Article I, section 7 of the Hawai'i Constitution "requires that governmental intrusion into the personal privacy of citizens of this state be no greater in intensity than absolutely necessary."[157] The standard used by the majority ignores these privacy interests.

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[150] *Spillner*, 116 Hawai'i at 364, 173 P.3d at 511 ("Where a brief investigatory stop, based on particularized information regarding a specific driver, advances the important state interest in highway safety, courts have determined that such stops are not unreasonable intrusions into the private sphere protected by the [F]ourth [A]mendment." (citing State v. Carrs, 568 So. 2d 120, 121 (Fla. Dist. Ct. App. 1990))).

[151] *Id.*

[152] 440 U.S. 648 (1979).

[153] *Id.* at 662-63; *see also* State v. Bonds, 59 Haw. 130, 137, 577 P.2d 781, 786 (1978) (holding completely random traffic stops invalid, even though examination of license and registration documents "may be the only effective way to discover violations").

[154] *See, e.g.*, State v. Kaleohano, 99 Hawai'i 370, 379, 56 P.3d 138, 147 (2002) ("Determining whether a seizure pursuant to a temporary investigative stop is constitutional also involves a 'weighing of the gravity of the public concerns served by the seizure, the degree to which the seizure advances the public interest, and the severity of the interference with individual liberty.'" (quoting Brown v. Texas, 443 U.S. 47, 50-51 (1979))).

[155] 113 Hawai'i 283, 151 P.3d 764 (2007).

[156] *See id.* at 301, 151 P.3d at 782.

[157] State v. Endo, 83 Hawai'i 87, 93, 924 P.2d 581, 587 (App. 1996) (quoting State v. Lopez, 78 Hawai'i 433, 445-46, 896 P.2d 889, 901-02 (1995)) (emphasis omitted) (internal quotation marks omitted).

V. CONCLUSION

Although "individual cases may, on their own, seem insignificant outside of their narrow holdings, in context, they may signal broad changes in the way courts value privacy, law enforcement, and their interactions."[158] The decision in *State v. Spillner* could have far-reaching effects on the people of Hawai'i.

Whether the Fourth Amendment is viewed as securing the privacy rights of individuals or as a limitation on governmental power,[159] the provision begins with "[t]he right of the people to be secure in their persons, houses, papers, and effects."[160] Furthermore, the Hawai'i Constitution, article I, section 7, expressly guarantees individuals an "extensive right to privacy."[161] When the Constitution has already placed significant value on a right, "[a] citizen should not have to justify the value of that security and privacy to offset a countervailing governmental interest."[162]

Once the government intrudes, the privacy interest suffers.[163] The Fourth Amendment and article I, section 7 cannot prevent intrusive government conduct from occurring against any particular individual and it cannot reverse an invasion of privacy once it happens.[164] One must rely on judicial enforcement of the exclusionary rule to remedy the infringement after an unreasonable intrusion has already occurred.[165] The power is with the courts to protect and preserve these rights in hindsight.[166]

By classifying driving without a license as ongoing in nature, the majority no longer requires prior criminal history be combined with additional facts to warrant a suspicion of criminal activity.[167] Rather, the burden is shifted to the individual to demonstrate some other facts tending to show the individual has ceased or amended the previous criminal activity.[168] This practice does away with the protections afforded by the Fourth Amendment and article I, section 7.

Officer Takamiya failed to meet his burden of pointing to specific and articulable facts demonstrating Spillner was engaged in criminal behavior on

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[158] Cronan et al., *supra* note 149, at 197.

[159] James A. Adams, Lecture, *The Supreme Court's Improbable Justifications for Restrictions of Citizen's Fourth Amendment Privacy Expectations in Automobiles*, 47 DRAKE L. REV. 833, 834 (1999).

[160] U.S. CONST. amend. IV.

[161] *Heapy*, 113 Hawai'i at 299, 151 P.3d at 780.

[162] Adams, *supra* note 159, at 835.

[163] Marshall v. Barlow's, Inc., 436 U.S. 307, 312-13 (1978).

[164] Adams, *supra* note 159, at 836.

[165] *See* Mapp v. Ohio, 367 U.S. 643, 655 (1961); State v. Prendergast, 103 Hawai'i 451, 454, 83 P.3d 714, 717 (2004).

[166] Harper, *supra* note 14, at 43.

[167] *See* State v. Kaleohano, 99 Hawai'i 370, 380, 56 P.3d 138, 148 (2002).

[168] State v. Spillner, 116 Hawai'i 351, 361, 173 P.3d 498, 508 (2007).

March 1, 2005. The stop was not based on reasonable suspicion, but rather the improper consideration of unwarranted assumptions and Spillner's past behavior. It constituted an unreasonable seizure in violation of the Fourth Amendment of the United States Constitution and article I, section 7 of the Hawai'i Constitution. Thus, Spillner's motion to suppress should have been granted.

Although an investigatory traffic stop may be brief, the intrusion on the individual's reasonable expectation of privacy is significant. The state has an important interest in highway safety, however, when balanced against the "sacred" rights afforded by the Fourth Amendment and article I, section 7, the people of Hawai'i must not be subjected to intrusions of their security and privacy based solely on assumptions and past conduct.

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The State Marriage Cases: Implications for Hawai'i's Marriage Equality Debate in the Post-*Lawrence* and *Romer* Era

"You are a human being. You have rights inherent in that reality. You have dignity and worth that exist prior to law."[1]

I. INTRODUCTION

In four paragraphs, or slightly fewer than one thousand words, the Hawai'i Supreme Court effectively ended Hawai'i's marriage equality debate in 1999.[2] But now is a new civil rights era,[3] and nationwide, citizens, courts, and legislatures are debating the civil rights issue of our time: marriage equality for gays and lesbians.[4]

While some would say the debate is over in Hawai'i, this article urges a re-examination of the issue in light of four recent state supreme court decisions,[5] recognizing marriage equality for gay persons, and two United States Supreme

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[1] Suresh Nautiyal, *Hills Echo Human Rights*, 6 COMBAT L. 4, 2007 (quoting Lyn Beth Neylon) (internal quotation marks omitted), *available at* http://www.combatlaw.org/information.php?issue_id=35&article_id=984.

[2] Baehr v. Miike, No. 20371, 1999 LEXIS 391 (Haw. Dec. 9, 1999).

[3] *See, e.g.*, Matthew B. Stannard, *Obama Will End 'Don't Ask' Rule, Spokesman Says*, SAN FRANCISCO CHRONICLE, Jan. 14, 2009, at A1, *available at* 2009 WLNR 708031 (noting that Barack Obama, the United States' first African-American President, has pledged to end the U.S. military policy prohibiting openly homosexual soldiers from serving, known as the "Don't Ask, Don't Tell" policy); *Tennessee GOP: As President, Obama to Repeal Defense of Marriage Act*, US FED. NEWS, Feb. 29, 2008, *available at* 2008 WLNR 8879023 (reporting that President Obama has also said that he supports repealing the federal Defense of Marriage Act).

[4] *See, e.g.*, H.B. 444, 25th Leg., 2009 Reg. Sess. (Haw. 2009). In the 2009 Legislative session, the Hawai'i House of Representatives proposed HB 444, proposing civil unions for same-sex couples. The bill confers "the same rights, benefits, protections, and responsibilities of spouses in a marriage to partners in a civil union." *Id.* The bill passed the house but failed to pass out of the senate when a few senators proposed an amendment on the last day of the legislative session. Richard Borreca & Mary Adamski, *Amendment Stalls Civil-Unions Bill*, HONOLULU STAR BULLETIN, May 8, 2009, *available at* http://www.starbulletin.com/news/20090508_amendment_stalls_civil_unions_bill.html?page=1&c=y. In April 2009, the Vermont Legislature became the first state to allow gay marriage via legislative enactment, overriding the governor's veto. *See* S.B. 115, 2009 Leg., 2009-2010 Leg. Sess. (Vt. 2009) (enacted). As of the date of this Note's publication, at least two other state legislatures are considering bills that would allow same-sex marriages. *See* H.B. 436, 2009 Leg., 161st Sess. (N.H. 2009); S.P. 384, 2009 Leg., 124th Sess. (Me. 2009).

[5] *In re* Marriage Cases, 183 P.3d 384 (Cal. 2008); Kerrigan v. Comm'r of Pub. Health, 957 A.2d 408 (Conn. 2008); Varnum v. Brien, No. 07-1499, 2009 WL 874044 (Iowa Apr. 3, 2009); Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941 (Mass. 2003).

Court cases, holding that animosity or moral disapproval of homosexuality are not legitimate governmental interests.[6]

The four state marriage equality cases provide promising new arguments for state constitutional claims under the Hawai'i Constitution's Equal Protection, privacy, and Establishment Clauses. A federal constitutional question could also be raised based on the two Supreme Court decisions, *Romer v. Evans*,[7] and *Lawrence v. Texas*.[8] These six cases combine to seriously undermine the validity of the continued denial of marriage equality to gay persons in Hawai'i.

Hawai'i's same-sex marriage ban has been in effect since the 1998 ratification of a constitutional amendment that specifically targeted gay persons by denying them the opportunity to marry the partner of their choice.[9] The amendment does not preclude gay persons from marrying; rather it precludes them from marrying a person of the same sex, much like the discriminatory statute at issue in *Loving v. Virginia*.[10]

Hawai'i's marriage amendment granted the legislature the power to define marriage as a union between a man and a woman.[11] The then-existing statute embodied the discriminatory, heterosexist definition,[12] and therefore there is currently no marriage equality in Hawai'i.

However, nothing in the 1998 marriage amendment precludes the Hawai'i State Legislature from reversing course, agreeing with Massachusetts, Vermont, Iowa, and Connecticut, and finding that denying marriage equality to gay and lesbian couples violates their privacy, due process, and equal protection rights.

This article suggests that it is time to re-visit the same-sex marriage question in Hawai'i because the 1998 amendment was passed without consideration of the important legal and social issues recently considered in the California, Massachusetts, Iowa, and Connecticut decisions.[13] Additionally, the Hawai'i

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[6] *See* Romer v. Evans, 517 U.S. 620 (1996); Lawrence v. Texas, 539 U.S. 558 (2003).

[7] *Romer*, 517 U.S. 620. *See infra* Part III for a discussion of how *Romer* impacts gay marriage in Hawai'i.

[8] *Lawrence*, 539 U.S. 558. See *infra* Part III for a discussion of how *Lawrence* impacts gay marriage in Hawai'i.

[9] HAW. CONST. art. I, § 23 (declaring "[t]he legislature shall have the power to reserve marriage to opposite-sex couples").

[10] 388 U.S. 1 (1967) (holding that a Virginia statute prohibiting interracial marriage violated the Equal Protection Clause of the Fourteenth Amendment).

[11] HAW. CONST. art. I, § 23.

[12] HAW. REV. STAT. § 572-1 (2006) (declaring that a valid marriage contract "shall be only between a man and a woman").

[13] *See, e.g.*, Kerrigan v. Comm'r of Pub. Health, 957 A.2d 407, 418 (Conn. 2008) (considering historical oppression against gay persons as part of the suspect classification determination); Varnum v. Brien, No. 07-1499, 2009 WL 874044, at *28 (Iowa Apr. 3, 2009) (considering establishment clause principles and legitimacy of religious opposition to gay marriage as a state interest).

amendment was ratified prior to the Supreme Court's landmark decision in *Lawrence v. Texas*,[14] which decriminalized consensual homosexual sex and warned against laws that demean gay persons' lives.[15]

Section II discusses the historical background of Hawai'i's marriage amendment. Section III discusses a renewed marriage equality debate in the post-*Romer* and *Lawrence* era. Section IV discusses the four state marriage equality cases in detail, highlighting the commonalities, legal theories, and relevance for a renewed challenge to the same-sex marriage ban in Hawai'i. Section V concludes that the state marriage cases seriously threaten the legitimacy of Hawai'i's continued denial of gay person's civil rights in marriage.

II. HISTORICAL BACKGROUND OF HAWAI'I'S MARRIAGE AMENDMENT

In 1993, the Hawai'i Supreme Court in *Baehr v. Lewin*,[16] held that denying marriage licenses to same-sex couples violated the Equal Protection Clause of Hawai'i's Constitution[17] because the practice discriminated on the basis of sex.[18] Sex is a suspect classification in Hawai'i,[19] and therefore, the court remanded the case to determine if the State could meet its burden under the strict scrutiny standard.[20] Although the court remanded for application of equal protection doctrine, the plaintiffs' privacy claim failed outright because the court declined to hold that Hawai'i's citizens have a fundamental right to same-sex marriage under the Hawai'i Constitution's[21] privacy provision.[22]

The *Baehr* decision generated a contentious policy debate about how marriage should be defined in Hawai'i.[23] The case also sparked national policy debate because of concerns that the federal Constitution's Full Faith and Credit

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[14] 539 U.S. 558 (2003).

[15] *Id.* at 575.

[16] Baehr v. Lewin, 74 Haw. 530, 852 P.2d 44 (1993), *superseded by statute*, HAW CONST. art. I, § 23, *as recognized in* Milberger v. KBHL, 486 F. Supp. 2d 1156, 1164 n.9 (D. Haw. 2007).

[17] HAW. CONST. art. I, § 5.

[18] *Baehr*, 74 Haw. at 561, 852 P.2d at 59.

[19] *See* Holdman v. Olim, 59 Haw. 346, 581 P.2d 1164 (1978).

[20] *See Baehr*, 74 Haw. at 582, 852 P.2d at 68. In Equal Protection jurisprudence, the strict scrutiny standard requires that practices and policies be "narrowly tailored measures that further compelling governmental interests." Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 227 (2000).

[21] *See* HAW. CONST. art. I, § 6.

[22] *Baehr*, 74 Haw. at 550, 852 P.2d at 55.

[23] *See generally* David Orgon Coolidge, *The Hawai'i Marriage Amendment: Its Origins, Meaning and Fate*, 22 U. HAW. L. REV. 19 (2000).

clause[24] would require other states to recognize same-sex marriages performed in Hawai'i. Those opposed to granting same-sex marriage quickly mobilized to promote a constitutional amendment prohibiting same sex marriage.[25]

The proponents of the amendment tended to be religious leaders, primarily belonging to the Catholic and Mormon faiths, who worked through activist organizations.[26] The Church of Jesus Christ of Latter-day Saints (Mormon Church) spent an estimated $600,000 to encourage ratification of the amendment.[27] Religious groups were involved in the debate early, and given great deference by the legislature.[28]

After the *Baehr* decision, the legislature created a "Commission on Homosexuality and the Law" to study the ways in which Hawai'i statutes impact gay persons.[29] The commission was comprised of eleven seats, four of which were reserved for religious leaders in the Catholic and Mormon faiths.[30] A federal district court decision later invalidated these appointments as a violation of the Establishment Clause of the First Amendment.[31]

Yet even after the religious representatives were removed from the commission, some religious leaders continued the rancorous debate, calling homosexuality a "moral infection" that "pollutes the flesh."[32] Gay parents who sought protection for their families and children were cast as "promoters of a moral aberration" whose goal was to destroy the traditional family.[33]

By 1998 the marriage equality debate was over. By a two-to-one margin, Hawai'i voted to amend the state constitution to effectively define marriage as a union between a man and a woman.[34] In light of this amendment, the Hawai'i

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[24] U.S. CONST. art. IV, § 1 ("Full faith and credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State.").

[25] *See* Coolidge, *supra* note 23, at 28 (noting that "debate over the possible passage of a Marriage Amendment began almost immediately" after the court issued the plurality opinion in *Baehr*).

[26] *See id.* at 34 (documenting the heavy involvement of the Mormon and Catholic Churches in the marriage amendment debate).

[27] *Id.* at 101.

[28] *Id.* at 31 n.44 (noting that of the eleven seats on the legislature-appointed committee to study homosexuality and the law, four seats were mandated to be filled by Mormon and Catholic leaders, and two seats were to be filled by the Quaker-established American Friends Service Committee).

[29] *See* HAW. REV. STAT. § 572-1 (2006).

[30] *See* Coolidge, *supra* note 23, at 31 n.44.

[31] *See* McGivern v. Waihee, Civ. No. 94-00843 (D. Haw. 1995) (finding a violation of the Establishment Clause and removing religious representatives from the commission).

[32] The American Society for the Defense of Tradition, Family, and Property, *Appeal to Hawai'i's Voters*, HONOLULU ADVERTISER, Nov. 1, 1998, at E-13.

[33] *Id.*

[34] HAW. CONST. art. I, § 23 (declaring "[t]he legislature shall have the power to reserve marriage to opposite-sex couples").

Supreme Court issued a summary disposition order in the then-pending, *Baehr v. Miike*,[35] holding that the recent marriage amendment took the statute[36] "out of the ambit of the Equal Protection Clause of the Hawai'i Constitution, at least insofar as the statute, both on its face and as applied, purported to limit access to the marital status to opposite-sex couples."[37]

The *Baehr* summary disposition order did not satisfactorily address any equal protection or due process issues with the amendment, or employ any other statutory interpretation methods available to the court.[38] The court held that the petitioners' "narrow" claims were now moot and refused to address any due process or privacy claims.[39]

However, the court offered hope for a new challenge. In a footnote, the court acknowledged that Hawai'i's constitutional convention of 1978 intended for the article prohibiting sex discrimination to also prohibit discrimination on the basis of sexual orientation.[40] It is unclear whether this case has any precedential value because the summary disposition order is an unpublished opinion.[41]

To date, no new challenge to Hawai'i's same-sex marriage ban has been brought, but a judicial solution is not required. Legislative action would suffice because the marriage amendment reserves the power to define marriage to the legislature.[42]

Marriage in Hawai'i is *currently* defined as a union between a man and a woman.[43] However, nothing in the 1998 marriage amendment precludes the legislature from enacting a more inclusive statute, one that reflects the evolving trend of recognizing the inherent legitimacy of same-sex couples' relationships and their right to define those relationships as any opposite sex couple would.[44]

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[35] Baehr v. Miike, No. 20371, 1999 LEXIS 391 (Haw. Dec. 9, 1999). This case was an appeal from the remand of the original marriage equality case *Baehr v. Lewin*, 74 Haw. 530, 852 P.2d 44 (1993).

[36] HAW. REV. STAT. § 572-1 (2006) ("In order to make valid the marriage contract, which shall be only between a man and a woman . . . .").

[37] *Baehr*, 1999 LEXIS 391, at *6.

[38] *See, e.g.*, Mark Strasser, *State Marriage Amendments and Overreaching: On Plain Meaning, Good Public Policy, and Constitutional Limitations*, 25 LAW & INEQ. 59 (2007) (arguing for a narrow interpretation of marriage amendments when they conflict with other constitutional rights such as privacy, due process and equal protection).

[39] *Baehr*, 1999 LEXIS 391, at *6.

[40] *Id.* (citing Stand. Comm. Rep. No. 69, *in* 1 PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF HAWAII OF 1978, at 675 (1980)).

[41] *Baehr*, 1999 LEXIS 391.

[42] HAW. CONST. art. I, § 23.

[43] HAW. REV. STAT. § 572-1 (2006).

[44] *See, e.g.*, Human Rights Campaign, http://www.hrc.org (last visited Apr. 14, 2009); Relationship Recognition in the U.S., http://www.hrc.org/documents/Relationship_Recognition_Laws_Map.pdf (last visited Apr. 10, 2009) (showing presently at least twelve

The legislature now has the opportunity to correct this mistake by updating Hawai'i's marriage statute to a more inclusive definition that respects gay persons' privacy, due process, and equal protection rights. A legislative response is not the only solution, however. The next section addresses how a federal constitutional claim may prevail in light of Supreme Court precedent supporting the notion of ending discrimination against gay persons.

III. THE *ROMER* AND *LAWRENCE* ERA

Two Supreme Court decisions, *Lawrence v. Texas*[45] and *Romer v. Evans*,[46] ushered in a new era for gay persons' struggle for equality. These two decisions legitimize equal protection claims calling for equal treatment of gay persons. In these cases, the Court invalidated legislation motivated out of animus toward and moral disapproval of gay persons.

A. Lawrence v. Texas: *Moral Disapproval of Gay Persons is Not a Legitimate State Interest*

Lawrence is critically important to the debate because it shows the evolution in the Supreme Court's jurisprudence as well as the increasing societal acceptance of gay persons.[47] In *Lawrence*, the Court struck down a Texas statute that punished homosexual, but not heterosexual, sodomy under the Due Process Clause of the Fourteenth Amendment.[48]

In the 6-3 decision, the Court held that the homosexual sodomy laws violate gay persons' liberty interests because "[l]iberty presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct,"[49] and more importantly, that "[t]he State cannot demean [gay persons'] existence or control their destiny by making their private sexual conduct a crime."[50]

Lawrence is essential to the marriage equality debate because prior to the decision, the criminalization of gay persons' intimate sexual conduct was a

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states officially recognize same-sex relationships by allowing gay marriage, domestic partnerships, and civil unions).

[45] 539 U.S. 558 (2003).

[46] 517 U.S. 620 (1996).

[47] Hawai'i's marriage debate ended in 1998, five years before the *Lawrence* decision. *See* HAW. CONST. art. I, § 23 ("The legislature shall have the power to reserve marriage to opposite-sex couples."). The measure was approved by voters in November 1998.

[48] U.S. CONST. amend. XIV ("[N]or shall any State deprive any person of life, liberty, or property, without due process of law.").

[49] *Lawrence*, 539 U.S. at 562.

[50] *Id.* at 587.

barrier to equal protection claims,[51] and was used to justify legalized discrimination against gay persons in many spheres of life.[52] While all four state marriage cases rely heavily upon *Lawrence*, Hawai'i has never questioned whether continued reprobation of same-sex marriage is legally sound in the wake of *Lawrence*.

In *Lawrence*, the Court applied rational basis review and concluded that "moral disapproval" of homosexuals is not a legitimate state interest.[53] This conclusion is critically important in shifting perceptions about gay marriage. Indeed, even Justice Scalia's dissent, which analogized consensual homosexual sex to bestiality and incest,[54] acknowledged that the ruling in *Lawrence* "leaves on pretty shaky grounds state laws limiting marriage to opposite-sex couples."[55]

Justice Scalia went on to write that under the majority's reasoning, the state's interest in "preserving the traditional institution of marriage" could be re-cast as a "kinder way of describing the state's *moral disapproval* of same-sex couples."[56] Justice Scalia's prediction came to fruition as all four state marriage decisions relied upon *Lawrence* in holding that excluding gay persons from civil marriage is unconstitutional.[57]

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[51] *See Romer*, 517 U.S. at 641 (Scalia, J., dissenting) (relying on pre-*Lawrence* precedent, Bowers. v. Hardwick, 478 U.S. 186 (1986), and reasoning "[i]f it is constitutionally permissible for a State to make homosexual conduct criminal, surely it is constitutionally permissible for a State to enact other laws merely *disfavoring* homosexual conduct").

[52] *See Lawrence*, 539 U.S. at 582 (noting that Texas admitted its sodomy law "legally sanctions discrimination against homosexuals in a variety of ways unrelated to the criminal law, including in the areas of employment, family issues, and housing" (quoting State v. Morales, 826 S.W.2d 201, 203 (Tex. App. 1992), *rev'd*, 869 S.W.2d 941 (Tex. 1994)) (internal quotation marks and brackets omitted)); Lofton v. Sec'y of the Dep't of Children & Family Servs., 358 F.3d 804 (11th Cir. 2004) (upholding a Florida statute prohibiting gay parents from adopting).

[53] *Lawrence*, 539 U.S. at 582.

[54] *Id.* at 599 (Scalia, J., dissenting).

[55] *Id.* at 601.

[56] *Id.*

[57] *See, e.g.*, Kerrigan v. Comm'r of Pub. Health, 957 A.2d 407, 467 (Conn. 2008) (holding that "[t]o a very substantial degree, *Lawrence* undermines the validity of federal circuit court cases that have held that gay persons are not entitled to heightened judicial protection"); *In re* Marriage Cases, 183 P.3d 384, 451 (Cal. 2008) (citing *Lawrence* and noting that "prevailing societal views and official policies" can often "mask an unfairness and inequality that frequently is not recognized or appreciated by those not directly harmed by those practices or traditions"); Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941, 948 (Mass. 2003) (broadening the notion of marriage equality and reiterating the proposition that "[o]ur obligation is to define the liberty of all, not to mandate our own moral code" (quoting *Lawrence*, 539 U.S. at 570)) (internal quotation marks omitted).

B. Romer v. Evans: *Animus Toward Gay Persons is Not a Legitimate State Interest*

Romer, considered alongside *Lawrence*, is a critical ingredient in a renewed marriage equality debate in Hawai'i. Hawai'i's Supreme Court decided its same-sex marriage[58] case on state constitutional claims, and a sex discrimination theory, but a renewed challenged would likely invoke *Romer's* proscription against laws based on animus.[59]

In *Romer*, the Supreme Court struck down a Colorado constitutional amendment that eviscerated all protections for gay persons against discriminatory practices.[60] The Court found that the amendment "inflicts on [gay persons] immediate, continuing, and real injuries."[61] The Court reasoned that the purported state interest of "conserving resources to fight discrimination against other groups" and protecting "the liberties of landlords or employers who have personal or religious objections to homosexuality"[62] were not legitimate state interests.

The Court held that the amendment violated the Equal Protection Clause and concluded that "laws of the kind now before us raise the inevitable inference that the disadvantage imposed is born of animosity toward the class of persons affected."[63] Such a prohibition against animus-based laws applies here in Hawai'i as well.

In Hawai'i, opposition toward gay marriage and civil unions appears primarily to come from religious groups.[64] For example, one of two main rallies against the 2009 civil union bill was organized by religious leaders and named "God's 'Ohana Day."[65] If religious sentiment is the primary reason for

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[58] Baehr v. Lewin, 74 Haw. 530, 852 P.2d 44 (1993).

[59] Romer v. Evans, 517 U.S. 620, 634 (1996).

[60] *Id.* at 624.

[61] *Id.* at 635.

[62] *Id.*

[63] *Id.* at 634 ("If the constitutional conception of 'equal protection of the laws' means anything, it must at the very least mean that a bare . . . desire to harm a politically unpopular group cannot constitute a legitimate governmental interest." (quoting U.S. Dep't of Agric. v. Moreno, 413 U.S. 528, 534 (1973)) (internal quotation marks omitted)).

[64] *See* Coolidge, *supra* note 23, at 31 n.44 (documenting religious institutions' involvement in passing the 1998 marriage amendment); Derrick DePledge, *Colorado-Based Ministry Gave $20K for Ad Against Hawaii Same-Sex Union Legislation*, HONOLULU ADVERTISER, Apr. 5, 2009, *available at* http://www.honoluluadvertiser.com/article/20090405/NEWS02/904050363 (reporting that Focus on the Family, a conservative Christian group, gave $20,000 to defeat Hawai'i's 2009 proposed civil union bill and noting that the donation was part of a $50,000 fundraising campaign directed at Hawai'i).

[65] Michael Tsai, *Group Opposed to Civil Unions Rallies 1,000 People at Capitol*, HONOLULU ADVERTISER, Mar. 16, 2009, *available at* http://www.honoluluadvertiser.com/article/20090316/NEWS01/903160321/1001 (the rally was organized by the Prayer Center of

the failure of the court and legislature to guarantee gay persons' civil rights, then activists will have a new tool in their arsenal because *Romer* and the Iowa case, *Varnum v. Brien,* counsel that accommodating homophobic religious sentiment is not a legitimate state interest.[66]

The Hawai'i Supreme Court has never entertained a direct challenge to the 1998 constitutional amendment, and *Romer* may have implications for such a challenge because the Hawai'i amendment could be characterized as motivated out of animus toward gay persons. For example, The Foundation for a Christian Civilization purchased a full-page advertisement in the Honolulu Advertiser two days before the election, urging Hawai'i voters to "Defend God's Law and the American Family."[67] The advertisement went on to quote various religious leaders suggesting that gay persons should be punished for their conduct,[68] that homosexuality "cri[es] out to Heaven for vengeance," and calling the country's increasing egalitarianism and tolerance for differences a "descent to depravity."[69]

Regardless of whether a new challenge based on *Romer* and *Lawrence* would be successful, four recent state supreme court cases have created a new jurisprudence of equality, and have contributed immensely to the dialogue about civil rights for gay persons.

IV. THE STATE MARRIAGE CASES

This section discusses four state supreme court decisions in Connecticut, California, Massachusetts, and Iowa[70] and their implications for renewing the marriage equality debate in Hawai'i. One commonality among these four cases is that all four courts recognized the previous litigative advances gay persons had made on other civil rights fronts, such as adoption and employment.[71] Furthermore, these advances required the inexorable conclusion that current state social policies did not support the continued ban on same-sex marriage, because it was paradoxical to protect gay persons in some state policies and relegate them to second class citizens in others.[72]

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the Pacific, the same group that organized a February 2009 rally which drew 5,000 people).

[66] *See Romer*, 517 U.S. at 634; Varnum v. Brien, No. 07-1499, 2009 WL 874044, at *27 (Iowa Apr. 3, 2009).

[67] The American Society for the Defense of Tradition, Family, and Property, *supra* note 32.

[68] *Id.*

[69] *Id.*

[70] Kerrigan v. Comm'r of Pub. Health, 957 A.2d 407 (Conn. 2008); *In re* Marriage Cases, 183 P.3d 384 (Cal. 2008); Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941 (Mass. 2003).

[71] *See, e.g., Goodridge*, 798 N.E.2d at 967.

[72] *See, e.g., id.;* MASS. GEN. LAWS ch. 151B (LEXIS through 2008 legislation) (employment, housing, credit, services); MASS. GEN. LAWS ch. 265, § 39 (LEXIS through 2008 legislation) (hate crimes); MASS. GEN. LAWS ch. 272, § 98 (LEXIS through 2008 legislation)

In addition, three of the decisions documented the historical changes in marriage, including the shift away from the procreative purpose of marriage.[73] All four cases relied upon *Romer*'s condemnation of animus[74] and *Lawrence*'s more expansive definition of liberty,[75] though each case was decided on state constitutional grounds. Perhaps most importantly, all four cases documented the history of invidious discrimination gay persons have faced.[76]

The Connecticut decision was especially thorough, documenting the history of discrimination. The Connecticut opinion drew heavily on the California and Massachusetts cases, and because it aptly encapsulates the discourse, that case will be discussed in depth. Similarities and differences among the four cases will also be highlighted.

A. *Connecticut:* Kerrigan v. Commissioner of Public Health

Connecticut is the second-most recent state to embrace a more inclusive civil marriage policy by judicial opinion.[77] The Connecticut Supreme Court held that excluding gay persons from civil marriage is a violation of Connecticut's equal protection clause[78] and concluded that:

> [I]n light of the history of pernicious discrimination faced by gay men and lesbians, and because the institution of marriage carries with it a status and significance that the newly created classification of civil unions does not embody, the segregation of heterosexual and homosexual couples into separate institutions constitutes a cognizable harm.[79]

The Connecticut Supreme Court considered three primary issues related to same sex marriage: (1) whether the separate institutions for homosexual and heterosexual couples discriminates on the basis of sexual orientation, (2) whether sexual orientation is a suspect or quasi suspect class for purposes of

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(public accommodation); MASS. GEN. LAWS ch. 76, § 5 (LEXIS through 2008 legislation) (public education); *see also* Commonwealth v. Balthazar, 318 N.E.2d 478 (Mass. 1974) (decriminalizing private, consensual adult sexual conduct); Doe v. Doe, 452 N.E.2d 293 (Mass. App. Ct. 1983) (custody to homosexual parent not per se prohibited).

[73] *See, e.g.*, *Kerrigan*, 957 A.2d at 478 (noting that prohibiting same-sex marriage on the basis of the state's interest in promoting heterosexual procreation "do[es] not even pass rational basis").

[74] Romer v. Evans, 517 U.S. 620, 635 (1996).

[75] Lawrence v. Texas, 539 U.S. 558, 599 (2003).

[76] *See, e.g.*, *Kerrigan*, 957 A.2d at 418 (noting that gay persons as a group have historically been "the object of scorn, intolerance, ridicule or worse"); *In re* Marriage Cases, 183 P.3d 384, 401-02 (Cal. 2008) (noting the "widespread disparagement that gay individuals historically have faced").

[77] *Kerrigan*, 957 A.2d 407.

[78] CONN. CONST. art. I, § 20.

[79] *Kerrigan*, 957 A.2d at 412.

equal protection under the Connecticut Constitution, and (3) whether the state has provided "sufficient justification for excluding same sex couples from the institution of marriage."[80]

1. Excluding same-sex couples from marriage discriminates on the basis of sexual orientation

With regard to the first issue, whether the law excluding same-sex couples from civil marriage discriminated on the basis of sexual orientation, the State defended the same-sex marriage ban, contending that the law was facially neutral because "anyone who wishes to marry may do so with a person of the opposite sex."[81]

However, the Connecticut Supreme Court, like the Hawai'i Supreme Court, rejected this reasoning, finding instead that the law was facially invalid, and that the statute relegating same-sex couples to civil union status was "intended to assuage those citizens and legislators who believed that sexual conduct involving persons of the same sex is immoral, wrong, or otherwise *not* to be condoned."[82]

While the plaintiffs' action was pending in the trial court, the Connecticut Legislature passed the statute that created absolute equality between marriage and civil unions.[83] The statute left no doubt about the legislature's intent to render marriage and civil unions identical except in name only.[84]

Because the plaintiffs' suit was pending at the time, the logical inference was that the statute had been adopted to avoid an equal protection challenge to the gay marriage ban. Furthermore, the legislative history of the civil union statute revealed its true discriminatory intent, and therefore, the court held that the statute was "manifestly not neutral and must be read to express this state's preference for heterosexual conduct."[85]

The civil union statute read in totality:

> Parties to a civil union shall have all the same benefits, protections and responsibilities under law, whether derived from the general statutes, administrative regulations or court rules, policy, common law or any other source

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[80] *Id.*

[81] *Id.* at 414.

[82] *Id.* at 426 (quoting remarks of Representatives Tulisano and William L. Wollenberg addressing proviso that state does not condone homosexual lifestyle and acknowledging that it was political compromise aimed at distinguishing homosexual behavior from sexual orientation) (internal quotation marks omitted) (emphasis added).

[83] CONN. GEN. STAT. § 46b-38nn (LEXIS through 2008 legislation).

[84] *Id.* ("Parties to a civil union shall have all the same benefits, protections and responsibilities under law . . . as are granted to spouses in a marriage.").

[85] *Id.*

> of civil law, as are granted to spouses in a marriage, which is defined as the union of one man and one woman.[86]

However, the State's strategy to create a separate but equal designation for gay couples failed. The court concluded that the civil union statute also discriminated on the basis of sexual orientation, and that marriage and civil unions were not equal, despite the fact that parties to a civil union have the same rights, obligations, and benefits as married spouses.[87]

The court held that marriage and civil unions are not equal, although they confer the same legal rights, because marriage is "an institution of transcendent historical, cultural and social significance, whereas [a civil union] most surely is not."[88]

The court explained that this type of discrimination which may be characterized as "symbolic or intangible" is "every bit as restrictive as naked exclusions."[89] Applying Connecticut precedent on intangible discrimination, the court found that the relegation of same-sex couples to civil union status is "no less real than more tangible forms of discrimination, at least when as in the present case, the statute singles out a group that historically has been the object of scorn, intolerance, ridicule or worse."[90]

The State further maintained that the court should not engage in an equal protection analysis because same-sex couples and opposite sex couples are not similarly situated.[91] The State argued that "the conduct that [same-sex couples] seek to engage in—marrying someone of the same sex—is fundamentally different from the conduct in which opposite sex couples seek to engage."[92] However, the court decisively rejected this argument finding:

> It is true, of course, that plaintiffs differ from persons who choose to marry a person of the opposite sex insofar as each of the plaintiffs seek to marry a person of the same sex. Otherwise, however, the plaintiffs can meet the same statutory eligibility requirements applicable to persons who seek to marry, including restrictions related to public safety, such as age . . . and consanguinity.[93]

After determining that the statute intentionally discriminated against gay persons, and that same-sex couples are similarly situated to opposite-sex

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[86] *Id.*

[87] *Kerrigan*, 957 A.2d at 418 ("Accordingly, we reject the trial court's conclusion that marriage and civil unions are separate but equal legal entities.").

[88] *Id.*

[89] *Id.* (quoting Evening Sentinel v. Nat'l Org. for Women, 357 A.2d 498, 504 (Conn. 1975)) (internal quotation marks omitted).

[90] *Id.* at 418.

[91] *Id.* at 424.

[92] *Id.*

[93] *Id.* (citing CONN. GEN. STAT. § 46b-21.30 (LEXIS through 2008 Legislation)).

couples, the court then proceeded with an equal protection analysis under the Connecticut Constitution.[94]

2. Sexual orientation is a quasi-suspect classification warranting heightened equal protection scrutiny

Plaintiffs brought no federal constitutional claims, so the Connecticut Constitution governed. In order to determine the level of scrutiny to apply, the court had to address a novel legal issue in the state's jurisprudence: whether sexual orientation is a suspect or quasi-suspect classification.[95]

If sexual orientation were not at least a quasi-suspect classification, then the minimal level of equal protection scrutiny, rational basis, would apply.[96] This level of scrutiny would likely have been fatal to petitioners' claims because "in areas of social and economic policy that neither proceed along suspect lines, nor infringe fundamental constitutional rights, the equal protection clause is satisfied as long as there is a plausible policy reason for the classification."[97]

Petitioners argued for heightened scrutiny by asserting that sexual orientation is at least a quasi-suspect classification.[98] The court noted the fact that no Connecticut cases had ever designated a group a quasi-suspect class, although the possibility had been mentioned.[99] As such, the court had yet to determine the criteria for such a classification.

The Connecticut Supreme Court relied upon U.S. Supreme Court precedent for determining what criteria should be applied for determining quasi-suspect status because of the lack of Connecticut precedent.[100] Federal equal protection jurisprudence affords heightened judicial scrutiny to policies affecting "discrete and insular minorities"[101] and politically powerless groups whose distinguishing characteristic is immutable, congenital, and not linked to legitimate decision-making criteria.[102]

Anticipating a debate about the immutability of homosexuality, the court summarized Supreme Court jurisprudence and found that:

> [T]he United States Supreme Court has placed far greater weight—indeed, it invariably has placed dispositive weight—on the first two factors, that is, whether

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[94] *Id.* at 421-62.

[95] *Id.* at 432.

[96] *Id.* at 422.

[97] *Id.* (quoting U.S. R.R. Ret. Bd. v. Fritz, 449 U.S. 166, 174 (1980)) (internal quotation marks and brackets omitted).

[98] *Id.* at 415.

[99] *Id.* at 425-26.

[100] *Id.* at 426.

[101] United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938).

[102] City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432 (1985).

> the group has been the subject of long-standing and invidious discrimination and whether the group's distinguishing characteristic bears no relation to the ability of the group members to perform or function in society.[103]

The court circumvented the question whether sexual orientation is immutable by first noting that the Supreme Court considers the immutability of a characteristic, and a group's political powerlessness as "subsidiary" factors that are relevant to the analysis of how isolated and stigmatized a group is.[104]

The court further noted that while some courts have found that sexual orientation is not immutable, other courts "as well as many, if not most, scholarly commentators have reached a contrary conclusion."[105] The court ultimately held that immutability was not dispositive for determining quasi-suspect status because "immutability and minority status or political powerlessness are subsidiary to the first two primary factors" of (1) a history of invidious discrimination, and (2) a lack of relationship between the characteristic and rational decision-making criteria.[106] More importantly, the court stated "courts should ask whether the characteristic at issue is one *governments* have any business requiring a person to change."[107]

Applying the traditional four suspect classification factors, the court found that sexual orientation was a quasi-suspect classification because gay people have been "subjected to and stigmatized by a long history of purposeful and invidious discrimination" and being gay "bears no logical relationship" to the ability to "perform in society, either in familial relations or otherwise as productive citizens."[108]

As if to reinforce the decision to afford quasi-suspect status to sexual orientation, the court undertook a comprehensive discussion of the history of homosexual oppression in the United States.[109] The discussion included

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[103] *Kerrigan*, 957 A.2d at 427.

[104] *Id.* at 429 n.22 (citing *City of Cleburne*, 473 U.S. 432 (Marshall, J., concurring in the judgment and dissenting in part)); *see also* Baehr v. Lewin, 74 Haw. 530, 548 n.14, 852 P.2d 44, 54 n.14 (1993) (circumventing the immutability issue by finding that Hawai'i's same-sex marriage ban discriminated on the basis of gender). In *Baehr*, Judge Burns' concurring opinion argued that whether sexual orientation is "biologically-fated" is a relevant question, and if the answer were yes, then the Hawai'i Constitution would not be able to permit encouraging heterosexuality. *Id.* at 586-87, 852 P.2d at 70-71 (Burns, J., concurring).

[105] *Kerrigan*, 957 A.2d at 436-37.

[106] *Id.* at 427.

[107] *Id.* at 438 (quoting Andersen v. King County, 138 P.3d 963, 1032 n.5 (Wash. 2006) (Bridge, J., concurring in the dissent)) (internal quotation marks omitted).

[108] *Id.* at 432.

[109] *Id.* at 432 n.25 (noting among other things, that "[a]t the height of the McCarthy witch-hunt, the Department of State fired more homosexuals than communists") (internal brackets omitted). This open acknowledgement of the injustice of past discrimination of gay persons is particularly ground-breaking. In most cases up to this point, homosexual conduct was

analogies between the history of persecution suffered by African Americans and women; a review of policies excluding gay persons from the military, important professions, and government jobs; and an acknowledgement that gay persons were once labeled mentally ill, and their intimate, consensual conduct criminalized.[110]

Additionally the court cited the "large number of hate crimes" perpetrated against gay persons as evidence of a history of invidious discrimination.[111]

The Connecticut Supreme Court's analysis of the relationship between sexual orientation and legitimate state decision making is equally thorough. Significantly, the court noted that "defendants also concede that sexual orientation bears no relation to a person's ability to participate in or contribute to society, a fact that many courts have acknowledged."[112]

The court also stated the fact that Connecticut's child rearing policies acknowledge no relationship between the ability to raise children and sexual orientation was "highly significant."[113] Furthermore, Connecticut's commitment to allowing gay persons to "participate fully in every important economic and social institution and activity that the government regulates"[114]

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minimized or forgiven due to mitigating circumstances. *See, e.g.*, Morrison v. State Bd. of Educ., 461 P.2d 375, 378 (Cal. 1969) (reinstating a gay teacher after dismissal for homosexual conduct because the homosexual affair was only one "week-long" and he had been under "severe emotional stress" at the time of the homosexual conduct).

[110] *Kerrigan*, 957 A.2d at 433 n.27. Hawai'i's *Baehr v. Lewin* opinion was devoid of this kind of critical judicial decision-making in the historical context of widespread discrimination against gay persons.

[111] *Id.* at 446 n.38 (citing HENRY J. KAISER FAMILY FOUNDATION, INSIDE-OUT: REPORT ON THE EXPERIENCES OF LESBIANS, GAYS AND BISEXUALS IN AMERICA AND THE PUBLIC'S VIEW ON ISSUES AND POLICIES RELATED TO SEXUAL ORIENTATION 3-4 (2001)). The court reiterated findings from the Kaiser Family report noting that seventy-four percent of gay and bisexual persons have been verbally abused because of their orientation, and thirty-two percent had been physically assaulted. *See id.*

[112] *Id.* at 434 (citing Watkins v. U.S. Army, 875 F.2d 699, 725 (9th Cir.1989)) (Norris, J., concurring). As noted by the *Watkins* court, "[s]exual orientation plainly has no relevance to a person's 'ability to perform or contribute to society.'" *Watkins*, 875 U.S. at 725 (citation omitted), *cert. denied*, 498 U.S. 957 (1990)); *see also* Conaway v. Deane, 932 A.2d 571 (Md. 2007) (explaining that gay persons have been subject to unique disabilities unrelated to their ability to contribute to society); Hernandez v. Robles, 855 N.E.2d 1, 28 (N.Y. 2006) (Kaye, C. J., dissenting) ("Obviously, sexual orientation is irrelevant to one's ability to perform or contribute."); Equal. Found. of Greater Cincinnati, Inc. v. City of Cincinnati, 860 F. Supp. 417, 437 (S.D. Ohio 1994) ("[S]exual orientation . . . bears no relation whatsoever to an individual's ability to perform, or to participate in, or contribute to, society . . . ."), *rev'd*, 54 F.3d 261 (6th Cir. 1995), *vacated*, 518 U.S. 1001 (1996).

[113] *Kerrigan*, 957 A.2d at 435 (citing CONN. GEN. STAT. § 45a-727 (LEXIS through 2008 legislation)) (allowing same-sex adoption); CONN. GEN. STAT. § 45a-727a(3) (sexual preference of parents is not relevant to best interest of child determination).

[114] *Kerrigan*, 957 A.2d at 435 (citing CONN. GEN. STAT. § 46a-81a-n (LEXIS through 2008

demonstrated "an acknowledgment by the state that homosexual orientation is no more relevant to a person's ability to perform and contribute to society than is heterosexual orientation."[115]

Connecticut's equal protection jurisprudence requires the application of *Geisler*[116] factors when determining whether a particular group should be considered a suspect class. Among other things, *Geisler* factors include "contemporary economic and sociological considerations, including relevant public policies."[117] In this section, the *Kerrigan* court carefully investigated the sociological factors related to marriage equality and in the process sufficiently addressed many of the concerns of same-sex marriage opponents.[118]

In the *Geisler* analysis, the court first held that allowing same-sex couples to marry would not "deprive opposite sex couples of any rights" and "limiting marriage to opposite sex couples is not necessary to preserve the rights that those couples now enjoy."[119]

Next, relying on *Loving*[120] and borrowing language from *Goodridge*,[121] the court held that extending marriage equality to gay persons would not "diminish the validity or dignity of opposite sex marriage" anymore than the decision to allow interracial marriages did in *Loving*.[122] On the contrary, the fact that same-sex couples were willing "to embrace marriage's solemn obligations of

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legislation)) (banning sexual orientation discrimination in employment, trade and professional association membership, public accommodations, housing, credit practices, state hiring practices, state licensing practices, administration of state educational and vocational programs, and state-administered benefits programs).

[115] *Id.* (citing Nyquist v. Mauclet 432 U.S. 1, 9 n.11 (1977)) (rejecting immutability requirement for a class of resident aliens); *see also id.* at 427-28 (noting that the United States Supreme Court "has granted suspect class status to a group whose distinguishing characteristic is not immutable").

[116] State v. Geisler, 610 A.2d 1225 (Conn. 1992), *abrogated by* State v. Brocuglio, 826 A.2d 145 (Conn. 2003).

[117] *Kerrigan*, 957 A.2d at 421 (citing *Geisler*, 610 A.2d at 1232) (requiring consideration of six factors in order to "constru[e] the contours of our state constitution . . . [and] reach . . . [a] principled result").

[118] Although not mandated by Hawai'i constitutional jurisprudence, analysis of factors akin to these should have been conducted by the Hawai'i Supreme Court. Had the court conducted a similar inquiry, the court could have possibly found that current state policies about gay persons would be incongruous with continued denial of marriage equality.

[119] *Kerrigan*, 957 A.2d at 473.

[120] Loving v. Virginia, 388 U.S. 1 (1967).

[121] Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941, 965 (Mass. 2003). The Connecticut Courts' consideration of sister state and Supreme Court precedent is mandated under *Geisler*. *See Geisler*, 610 A.2d at 1232.

[122] 388 U.S. 1 (1967).

exclusivity, mutual support, and commitment to one another is a testament to the enduring place of marriage in our laws and in the human spirit."[123]

Quoting from California's *In re Marriage Cases*,[124] the court found that disallowing same-sex marriage "works a real and appreciable harm" on same sex couples, and their children, in part because "providing only a novel, alternative institution for same-sex couples" would most likely be viewed as "an official statement that the family relationship of same-sex couples is not of comparable stature or equal dignity to the family relationship of opposite-sex couples."[125]

The court concluded its analysis of sociological factors by considering the position of religious opponents to same-sex marriage. The court distinguished between civil and religious marriage and stated that "[b]ecause . . . marriage is a state sanctioned and state regulated institution, religious objections to same sex marriage cannot play a role in our determination of whether constitutional principles of equal protection mandate same sex marriage."[126]

While the court considered the arguments presented by the religious opposition, it ultimately concluded that religious organizations' "autonomy" and "freedom" would not be jeopardized or threatened because those organizations would not be required to perform same-sex marriages or condone them.[127]

3. There is no exceedingly persuasive justification for discrimination on the basis of sexual orientation

In both federal and Connecticut equal protection jurisprudence, an exceedingly persuasive justification is required for discriminating on the basis of a quasi-suspect classification.[128] Furthermore, the classification must be substantially related to important governmental objectives which were not created post-hoc for litigation purposes.[129]

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[123] *Kerrigan*, 957 A.2d at 474 (quoting *Goodridge*, 798 N.E.2d at 965) (internal quotation marks and brackets omitted).

[124] 183 P.3d 384 (Cal. 2008).

[125] *Kerrigan*, 957 A.2d at 474 (quoting *In re Marriage Cases*, 183 P.3d at 452) (internal quotation marks and brackets omitted).

[126] *Id.* at 475.

[127] *Id.*

[128] *See, e.g.*, United States v. Virginia, 518 U.S. 515, 531 (1996) (requiring exceedingly persuasive justification for discriminating on the basis of gender, a quasi-suspect classification); *see also Kerrigan*, 957 A.2d at 477 n.79 (citing *Virginia*, 518 U.S. at 532-33, for the proposition that discrimination against quasi-suspect classes require exceedingly persuasive justification).

[129] *Virginia*, 518 U.S. at 533.

The State offered two justifications for continuing the same-sex marriage ban: "(1) to promote uniformity and consistency with the laws of other jurisdictions; and (2) to preserve the traditional definition of marriage as a union between a man and a woman."[130]

First, the court rejected the uniformity and consistency argument as possibly meeting a rational basis level of review, but held that this argument failed heightened scrutiny.[131] The State could not meet its burden on this part of the test by merely reciting the assertion that uniformity and consistency of the laws is an important governmental objective, in the absence of precedent or other reasoning.[132]

Second, the court considered the argument that tradition in and of itself is a reason to continue to ban same-sex marriage. The State's main contention was that the legislature has a compelling interest in retaining the traditional definition of marriage as an opposite-sex union because "that is the definition of marriage that has always existed in Connecticut."[133] The court rejected this reasoning by noting that however deeply held the personal beliefs of many of the state's legislators and constituents were about this traditional definition of marriage, those beliefs "do not constitute the exceedingly persuasive justification required to sustain a statute that discriminates on the basis of a quasi-suspect classification."[134]

More to the point, the court reasoned "to say that the discrimination is traditional is to say only that the discrimination has existed for a long time."[135] And, most importantly, "a history or tradition of discrimination—no matter how entrenched—does not make the discrimination constitutional."[136]

Having found that the same-sex marriage ban discriminated on the basis of sexual orientation, that sexual orientation is a quasi-suspect class, and that the state failed to meet its burden of an exceedingly persuasive justification under the Equal Protection Clause, the court abolished the same-sex marriage ban in Connecticut.[137]

Lest Hawai'i's legacy be one of intransigency in an era of expanding civil rights, Hawai'i should heed the *Kerrigan* court's historical retrospective:

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[130] *Kerrigan*, 957 A.2d at 476.

[131] *Id.* at 477.

[132] *Id.* at 478.

[133] *Id.*

[134] *Id.*

[135] *Id.* (citing Romer v. Evans, 517 U.S. 620, 635 (1996)) (holding that the Equal Protection Clause forbids "a classification of persons undertaken for its own sake").

[136] *Id.* (quoting Hernandez v. Robles, 855 N.E.2d 1, 34 (N.Y. 2006) (Kaye, C.J., dissenting)) (internal quotation marks omitted).

[137] *Id.* at 482.

> It is instructive to recall in this regard that the traditional well-established legal rules and practices of our not-so-distant past (1) barred interracial marriage, (2) upheld the routine exclusion of women from many occupations and official duties, and (3) considered the relegation of racial minorities to separate and assertedly equivalent public facilities and institutions as constitutionally equal treatment.[138]

Approximately five months before the Connecticut case, the California Supreme Court arrived at the same conclusion and struck down that state's same-sex marriage ban.

B. California: In re Marriage Cases

In May 2008, California also adopted a more inclusive definition of civil marriage that ended that state's same-sex marriage ban. Under then-existing California law, same-sex unions were designated domestic partnerships and opposite-sex unions were designated marriages.[139]

As with Connecticut's "civil unions," California's "domestic partnerships" differed from marriage only in name.[140] Thus the issue before the courts was identical: whether the difference in nomenclature offended equal protection.[141] The court held that separate was not equal, and that gay persons should be allowed to marry.[142]

The backlash against this decision was swift and furious. In November 2008, California voters subsequently passed an initiative measure, Proposition 8, which overturned *In re Marriage Cases*, and amended the California Constitution so that "[o]nly marriage between a man and a woman is valid or recognized in California."[143]

Funding for Proposition 8 was record-breaking, with opponents of same-sex marriage raising nearly forty million dollars.[144] Proposition 8 also had unintended consequences: it mobilized people in three hundred American cities, and some foreign countries to demonstrate in support of gay civil

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[138] *Id.* at 482 (quoting *In re* Marriage Cases, 183 P.3d 384, 451 (Cal. 2008)) (internal brackets omitted).

[139] *In re Marriage Cases*, 183 P.3d at 384.

[140] *Id.* at 417-18 ("[I]n sum, the current California statutory provisions generally afford same-sex couples the opportunity to enter into a domestic partnership and thereby obtain virtually all of the benefits and responsibilities afforded by California law to married opposite-sex couples.").

[141] *Id.* at 399.

[142] *Id.* at 384.

[143] CAL. CONST. art. I, § 7.5.

[144] Jesse McKinley & Kirk Johnson, *Mormons Tipped Scale in Ban on Gay Marriage*, N.Y. TIMES, Nov. 15, 2008, at A1, *available at* 2008 WLNR 21813466 (noting that Mormons contributed approximately half of the $40 million dollars donated to pass Proposition 8).

rights.[145] Regardless of the outcome of the legal challenge to Proposition 8,[146] the debate over same-sex marriage in California has reinvigorated a new generation of gay rights activists.[147]

Despite its nullification by Proposition 8, the California marriage equality case has much to offer the debate here in Hawai'i because in addition to finding that a same-sex marriage ban violated equal protection principles, the court also held that the ban violated gay couples' due process right to marry.[148]

1. Same-sex marriage ban fails strict scrutiny under California's Constitution

California equal protection cases utilize only two tiers of scrutiny: "rational basis" or "strict scrutiny" for "suspect classifications."[149] The Supreme Court of California, like the Supreme Court of Connecticut, held that sexual orientation deserved heightened scrutiny for the same reasons: a history of invidious discrimination against gay persons, and a lack of relationship between

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[145] Jay Lindsay, *Gay Advocates Protest Marriage Ban Across Nation*, USA TODAY, Nov. 16, 2008, at A1, *available at* http://www.usatoday.com/news/nation/2008-11-15-668737864_x.htm (reporting on the magnitude of the nationwide Proposition 8 protests and estimating the total number of participants to be around one million). Some Proposition 8 protestors used less-than-democratic means to express their disappointment in Proposition 8's passage. *See, e.g.*, Jesse McKinley, *Marriage Ban Donors Feel Exposed by List*, N.Y. TIMES, Jan. 19, 2009, at A12, *available at* 2009 WLNR 1036184 (documenting boycotts of businesses, death threats directed at Proposition 8 supporters, and two cases of white powder being sent to Mormon and Catholic-owned buildings).

[146] *See* John Schwartz & Jesse McKinley, *Court Weighs Voters' Will Against Gay Rights*, N.Y. TIMES, Mar. 6, 2009, at A12, *available at* 2009 WLNR 4322897 (reporting that the California Supreme Court heard oral arguments about the validity of Proposition 8 on March 5, 2009, and that a decision is expected within 90 days of the hearing).

[147] *See, e.g.*, Jesse McKinley, *Marriage Ban Inspires New Wave of Gay Rights Activists*, N.Y. TIMES, Dec. 10, 2008, at A23, *available at* 2008 WLNR 23672721 (noting that Proposition 8's passage has helped motivate a new generation of activists and leaders in the gay community).

[148] *In re* Marriage Cases, 183 P.3d 384, 420 (Cal. 2008). Hawai'i and California's due process clauses are virtually identical. *Compare* HAW. CONST. art. 1, § 5, *with* CAL. CONST. art. 1, § 7. Nevertheless, the Hawai'i court characterized the issue as whether one has a right to a same-sex marriage and concluded that same-sex marriage is neither "so rooted in the traditions and collective conscience of our people" nor "implicit in the concept of ordered liberty" so as to require due process protection. Baehr v. Lewin, 74 Haw. 530, 556-57, 852 P.2d 44, 57 (1993). But this is an unacceptable narrowing of a right. How many years behind in racial equality would the United States be if the *Loving* court had accepted a similarly narrow definition of the fundamental right to marry? *See generally* Loving v. Virginia, 388 U.S. 558 (1967).

[149] *In re Marriage Cases*, 183 P.3d at 436.

sexual orientation and legitimate state decision-making regarding the group's ability to perform or contribute to society.[150]

The California opinion is more expansive than Connecticut's in that the California Supreme Court found another reason to apply strict scrutiny. In particular, the court accepted petitioners' claim that the same-sex marriage ban "impinges upon a same-sex couple's fundamental, constitutionally protected privacy interest, creating unequal and detrimental consequences for same-sex couples and their children."[151] The privacy analysis should be especially salient to the debate in Hawai'i because Hawai'i has some of the most stringent privacy protections of any state in the union.[152]

After finding that sexual orientation is a suspect classification, the California Supreme Court applied the highest level of equal protection review, strict scrutiny, which placed a "heavy burden of justification" on the state and required that the asserted state interest be a "*constitutionally compelling* one" that could justify the discrimination "prescribed by the statute . . . ."[153]

The California opinion devoted significant space to addressing the argument that traditional opposite-sex marriage serves a compelling interest in promoting procreation.[154] This argument was rejected based on the fact that physical capacity to have children has never been an eligibility requirement for marriage.[155]

The California opinion's main difference from Hawai'i's *Baehr* case was that the California Supreme Court recognized that gay persons had fundamental privacy and due process rights in choosing their spouse without state intrusion.[156] Ultimately, the California Supreme Court's state interest analysis was analogous to the Massachusetts' decision, discussed immediately below.

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[150] *Id.* at 442.

[151] *Id.* at 445-46 (relying on Hill v. Nat'l Collegiate Athletic Ass'n, 865 P.2d 633, 653 (Cal. 1994)) (holding the California Constitution's privacy clause includes "the freedom to pursue consensual family relationships").

[152] *See, e.g.*, State v. Tanaka, 67 Haw. 678, 701 P.2d 1274 (1985) (invalidating warrantless search of defendant's trash that was in a closed, opaque bag). But Hawai'i citizens may have more privacy rights in their trash than in their intimate relationships. *See Baehr*, 74 Haw. at 556-57, 852 P.2d at 57 (holding gay persons do not have a privacy or due process right to same-sex marriage).

[153] *In re Marriage Cases*, 183 P.3d at 446 (citing Darces v. Woods, 679 P.2d 458 (1984)).

[154] *See id.* at 430-34.

[155] *Id.* at 431.

[156] *See id.* at 420; *see also supra* note 148 and accompanying text.

C. *Massachusetts:* Goodridge v. Department of Public Health

As the first marriage equality case in the country, *Goodridge v. Department of Public Health*[157] is a civil rights case in a class with *Brown v. Board of Education*[158] and *Loving v. Virginia*.[159] *Goodridge*, even more so than the California, Connecticut, and Iowa decisions, can be seen as a beacon of liberty because in that case the Massachusetts Supreme Court struck down the same-sex marriage ban under rational basis review, the lowest level of constitutional scrutiny, and the most deferential to legislatures.[160]

Unlike the California, Iowa, and Connecticut supreme courts, the *Goodridge* court did not even reach the issues of whether sexual orientation is a suspect class or whether heightened scrutiny should apply.[161]

1. Same-sex marriage ban fails rational basis review under Massachusetts' Constitution

In order for the same-sex marriage ban to pass rational basis review, the State was required to show that the statute "bear[s] a real and substantial relation to the public health, safety, morals, or some other phase of the general welfare."[162] The court rejected all three proffered rationales for the marriage ban: "(1) providing a favorable setting for procreation; (2) ensuring the optimal setting for child rearing, which the department defines as a two-parent family with one parent of each sex; and (3) preserving scarce State and private financial resources."[163]

The court dispatched with the first rationale by noting that the State's interest in regulating marriage was not based on the concept that the "primary purpose of marriage is procreation."[164] "Our laws of civil marriage do not privilege procreative heterosexual intercourse between people above every other form of adult intimacy and every other means of creating a family."[165] Dismissing the

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[157] 798 N.E.2d 941 (Mass. 2003).

[158] 347 U.S. 483 (1954) (holding that racial segregation in public schools violates the Equal Protection Clause and that separate schools are inherently unequal).

[159] 388 U.S. 1 (1967) (holding that statute banning interracial marriage violates the Equal Protection Clause).

[160] *Goodridge*, 798 N.E.2d at 961 ("[W]e conclude that the marriage ban does not meet the rational basis test for either due process or equal protection.").

[161] *Id.* ("[B]ecause the statute does not survive rational basis review, we do not consider the plaintiffs' arguments that this case merits strict judicial scrutiny.").

[162] *Id.* at 960 (quoting Coffee-Rich, Inc. v. Comm'r of Pub. Health, 204 N.E.2d 281, 287 (1965)) (internal quotation marks omitted).

[163] *Id.* at 961 (internal quotation marks and brackets omitted).

[164] *Id.* (internal quotation marks and brackets omitted).

[165] *Id.* (noting that "[f]ertility is not a condition of marriage, nor is it grounds for divorce.

second rationale, that the State preferred opposite-sex couples as parents, the court noted that adoption and insurance coverage are available for same-sex parents in Massachusetts,[166] and that the "best interest of the child standard" in family law matters "does not turn on the parent's sexual orientation or marital status."[167]

With its third rationale, conserving economic resources, the State argued that "same-sex couples are more financially independent than married couples, and thus less needy of public marital benefits, such as employer-financed health plans that include spouses in their coverage."[168] However, this argument was rejected because Massachusetts does not "condition receipt of public and private financial benefits to married individuals on a demonstration of financial dependence on each other."[169] The court further noted that some married couples are financially interdependent, yet still entitled to these benefits.[170]

This argument for conserving state resources would not be convincing in Hawai'i either because the state allows gay couples to become reciprocal beneficiaries, and thereby to receive some of the rights of married couples.[171] The reciprocal beneficiaries designation is also an example of an inconsistent state policy used by the *Goodridge* court to conclude that marriage discrimination was incongruent in light of other state policies protective of gay persons.[172]

2. Goodridge *highlighted incongruencies in state policies toward gay persons, and offered a historical retrospective on changing marriage policies.*

Goodridge addressed other ancillary arguments and issues that were sometimes incorporated into the California and Connecticut opinions. Most important among these was the fact that the *Goodridge* court rejected the State's assertion that the "community consensus" is that homosexuality is

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People who have never consummated their marriage, and never plan to may be and stay married").

[166] *Id.* at 962 (citing MASS. GEN. LAWS ch. 210, § 1 (LEXIS through 2008 legislation); Adoption of Tammy, 619 N.E.2d 315 (Mass. 1993)).

[167] *Id.* at 963 (citing Doe v. Doe, 452 N.E.2d 293, 296 (Mass. App. Ct. 1983), for the proposition that "parent's sexual orientation [is] insufficient ground to deny custody of child in divorce action").

[168] *Id.* at 964.

[169] *Id.*

[170] *Id.*

[171] *See, e.g.*, HAW. REV. STAT. § 88-1(4) (2006) (allowing payment of sixty percent payment of public employee's pension to reciprocal beneficiary so long as that person has not remarried or entered into another reciprocal beneficiary agreement).

[172] *Goodridge*, 798 N.E.2d at 967.

immoral.[173] The court proved this by cataloging the State's "strong affirmative policies" contained in Massachusetts statutes of: (1) preventing sexual orientation discrimination in employment, housing, accommodations, public education and credit; (2) protecting gay persons from hate crimes; (3) decriminalizing private, consensual adult sexual conduct; and (4) allowing custody of children by gay parents.[174]

The *Goodridge* court also engaged in an important historical retrospective of the abrogation of common law marriage that takes us beyond "the *Loving* analogy."[175] This is a critical contribution because "the *Loving* analogy" has been criticized by some scholars. For example, two commentators suggest that use of the *Loving* analogy is "bad law, based on bad precedent, logically flawed, historically inconsistent, repugnant to the core principles of *Loving* . . . deliberately stigmatizing, and abusive."[176] Yet for most, it is difficult to conceive how using landmark civil rights precedent to confer more rights on a historically oppressed group could somehow be regarded as "dangerous to civil rights" as some claim.[177]

The court noted that common law marriage has undergone many transformations, most notably abolishing coverture, allowing prisoners to marry, and allowing interracial marriages.[178] The court further noted that just as in the same-sex marriage debate, "[a]larms about the imminent erosion of the

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[173] *Id.*

[174] *Id.* (citing MASS. GEN. LAWS ch. 151B (LEXIS through 2008 legislation) (employment, housing, credit, services); MASS. GEN. LAWS ch. 265, § 39 (LEXIS through 2008 legislation) (hate crimes); MASS. GEN. LAWS ch. 272, § 98 (LEXIS through 2008 legislation) (public accommodation); MASS. GEN. LAWS ch. 76, § 5 (LEXIS through 2008 legislation) (public education)); *see also* Commonwealth v. Balthazar, 318 N.E.2d 478 (Mass. 1974) (decriminalization of private consensual adult conduct); Doe v. Doe, 452 N.E.2d 293 (Mass. App. Ct. 1983) (custody to homosexual parent not per se prohibited). It is time for Hawai'i to re-examine its own conflicting state policies with regard to gay persons in the context of increasing societal acceptance and support for gay persons.

[175] Loving v. Virginia, 388 U.S. 1 (1967) (abolishing antimiscegenation laws). "The *Loving* Analogy" has been employed by marriage equality proponents. Some critics argue that this is not an apt analogy, and that using *Loving* in a gay rights context somehow demeans the legacy of *Loving*. *See, e.g.*, Lynn D. Wardle & Lincoln C. Oliphant, *In Praise of* Loving*: Reflections on the "*Loving *Analogy" for Same-Sex Marriage*, 51 HOW. L.J. 117, 168-69 (2007).

[176] Wardle & Oliphant, *supra* note 175, at 168-69; *see also* David Orgon Coolidge, *Playing the* Loving *Card: Same-Sex Marriage and the Politics of Analogy*, 12 B.Y.U. J. PUB. L. 201 (1998) (arguing that "The *Loving* Analogy" is inapposite to the debate on same-sex marriage and its use is a disingenuous political maneuver by gay civil rights activists).

[177] Wardle & Oliphant, *supra* note 175, at 169.

[178] *Goodridge*, 798 N.E.2d at 966-67 (citing Turner v. Safley, 482 U.S. 78 (1987)) (allowing prisoners to marry without warden's permission); *Loving*, 388 U.S. 1 (allowing interracial marriage); Bradford v. Worcester, 69 N.E. 310 (Mass. 1904) (establishing the incidents of separate legal identity for wives).

natural order of marriage were sounded over the demise of antimiscegentation laws, the expansion of the rights of married women, and the introduction of no-fault divorces."[179] The historical analysis of marriage concluded with "[m]arriage has survived all these transformations, and we have no doubt that marriage will continue to be a vibrant and revered institution."[180]

Just as the Massachusetts Supreme Court offered a unique contribution in tracing the changes in the institution of civil marriage, so too did the Iowa Supreme Court by offering the first marriage equality opinion to analyze Establishment Clause principles as applied to the same-sex marriage ban. Furthermore, the court undertook this analysis sua sponte.

D. Iowa: Varnum v. Brien

Like the Massachusetts, Connecticut and California courts, the Iowa Supreme Court overturned Iowa's gay-marriage ban on equal protection grounds.[181] The court found that gay persons comprise a quasi-suspect class, and that classifications based on sexual orientation require heightened judicial scrutiny under Iowa's equal protection clause. The court found that the State's interest in maintaining traditional dual-gender marriage was not an important governmental objective and therefore did not satisfy equal protection.

Additionally, the court found the statute banning same-sex marriage was not substantially related to any of the respondent's stated governmental interests: (1) ensuring an optimal environment for raising children, (2) promoting procreation, (3) promoting stability in opposite-sex relationships, and (4) conserving state resources.[182] For each of those interests, the court focused on the under and over inclusivity of the statute.[183] To underscore the statute's under-inclusivity, the court reasoned that violent felons, sexual predators and previously neglectful parents, who are "undeniably less than optimal parents," are still allowed to procreate and raise children in Iowa.[184]

The analysis and rejection of these governmental interests was similar to the other state marriage cases. However, the Iowa court offered a novel approach to the debate by employing Iowa's establishment clause.

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[179] *Goodridge*, 798 N.E.2d at 967.

[180] *Id.*

[181] Varnum v. Brien, No. 07-1499, 2009 WL 874044, at *30 (Iowa Apr. 3, 2009).

[182] *Id.* at *22-27.

[183] *See id.* at *26 (noting, for example, that excluding gay persons from civil marriage to conserve state resources is a "blunt instrument" that is both over and under inclusive and offering the example that "[e]xcluding any group from civil marriage—African-Americans, illegitimates, aliens, even red-haired individuals—would conserve state resources" but would "obviously offend our society's collective sense of equality").

[184] *Id.* at *23.

1. Varnum *enters uncharted territory: The establishment clause prevents basing same-sex marriage ban on religious sentiment.*

The unanimous opinion contains a bold, novel section in which the court addressed the "unspoken" reason for the same-sex marriage ban: "religious opposition."[185] The court acknowledged that respondents were constrained by the establishment clause from citing this as an important governmental interest, but nevertheless noted that religious sentiment seemed to be behind most opposition to gay marriage.[186]

The court held that religious anti-gay sentiment "cannot . . . be used to justify a ban on same-sex marriage."[187] Additionally the court signaled that free exercise claims would fail because allowing same-sex marriage does not offend the free exercise of religion when the state only regulates "civil marriage."[188] Furthermore, religious sects are still free to "define marriage as a union between a man and a woman."[189]

In a few short paragraphs, the *Varnum* decision squarely confronted the Christian hegemonic tendency to commandeer and control the definition of marriage.[190] The court offered a bifurcated definitional approach focusing on the difference between sacred marriage, regulated and conducted by the church, and civil marriage, regulated and licensed by the state.[191] Critics will likely attack this analysis as simplistic because the court's establishment and free exercise analysis was minimal.[192] However, the court actually offered an ingenious solution that clearly separates sacramental, religious marriage from secular, civil marriage.[193] This solution will likely be met with opposition

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[185] *Id.* at *28.

[186] *Id.* at *27 (citing Ben Schuman, *Gods & Gays: Analyzing the Same-Sex Marriage Debate from a Religious Perspective*, 96 GEO. L.J. 2103 (2008)) (analyzing research completed by the Pew Center on religious belief and opposition to same-sex marriage).

[187] *Id.*

[188] *Id.* at *29.

[189] *Id.*

[190] *See* McKinley & Johnson, *supra* note 144 (discussing the millions of dollars funneled into Proposition 8 by fundamentalist Christian groups). The Christian influence is pervasive in Hawai'i too. *See* Coolidge, *supra* note 23, at 100 (discussing the $600,000 donation from Mormons to pass the Hawai'i marriage amendment); *see also* DePledge, *supra* note 64 and accompanying text.

[191] *Varnum*, 2009 WL 874044, at *28 ("The statute at issue in this case does not prescribe a definition of marriage for religious institutions. Instead, the statute declares, 'Marriage is a civil contract' and then regulates that civil contract." (quoting IOWA CODE §595.1A (LEXIS through 2008 legislation))).

[192] *Id.* at *27-29 (covering both establishment and free exercise issues in under three pages).

[193] *Id.* at *28 ("[C]ivil marriage must be judged under our constitutional standards of equal protection and not under religious doctrines or the religious views of individuals."); *see also id.* at *29 ("A religious denomination can still define marriage as a union between a man and a

however, in Hawai'i and elsewhere, because it requires some Christian sects to give up their monopoly on defining marriage.[194]

Nevertheless, the establishment clause argument may be effective in Hawai'i because the Iowa and Hawai'i establishment clauses are nearly identical.[195] In Hawai'i, a helpful step to support an establishment clause claim would be to investigate the role of religious opposition in passing the 1998 same-sex marriage ban, and failure of the 2009 civil union bill. If religious opposition is the primary reason for the continued denial of basic civil rights to gay persons in Hawai'i, gay rights activists may have yet another way to revive the debate in Hawai'i.

V. CONCLUSION

Four state supreme court cases and two United States Supreme Court cases seriously compromise the legitimacy of Hawai'i's continued ban on same-sex marriages. In each of those cases, courts have been willing to embrace evolving, and more inclusive notions of liberty, privacy, equal treatment, and freedom of religion.

The Connecticut, California, Massachusetts, and Iowa courts were forthright in examining incongruencies in state policies that, on the one hand, afforded many benefits and protections to gay persons, while on the other hand maintained a caste system that stigmatized gay persons, and excluded them from one of the most important civil institutions in our culture. The Iowa court forthrightly admitted that religious opposition was the primary, yet unspoken, and unacceptable reason for excluding gay persons from civil marriage.[196] And, religious opposition is a salient feature of the debate in Hawai'i too.

Two U.S. Supreme Court decisions, *Lawrence* and *Romer*, further destabilize Hawai'i's same-sex marriage ban by holding that legislation and

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woman, and a marriage ceremony performed by a minister . . . does not lose its meaning as a sacrament or other religious institution.").

[194] *Cf. id.* at *28 ("[S]uch views are not the only religious views of marriage .... [O]ther equally sincere groups and people in Iowa and around the nation have strong religious views" that support gay marriage."). The *Varnum* court actually utilized the split of opinion among Christian groups to bolster the establishment clause reasoning noting: "[t]his contrast of opinions in our society largely explains the absence of any religion-based rationale to test the constitutionality of Iowa's same-sex marriage ban. Our constitution does not permit any branch of government to resolve these types of religious debates and entrusts to courts the task of ensuring government avoids them." *Id.*

[195] *Compare* HAW CONST. art. I, § 4 ("No law shall be enacted respecting an establishment of religion, or prohibiting the free exercise thereof."), *with* IOWA CONST. art. I, § 3 ("The general assembly shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.").

[196] *See Varnum*, 2009 WL 874044, at *27.

voter initiatives cannot be motivated by animus toward gay persons,[197] and that criminalization of homosexual conduct violates gay persons' fundamental due process and privacy rights.[198]

In light of *Romer*'s prohibition against animus-based legislation and *Lawrence*'s expanded definition of liberty, Hawai'i's marriage amendment is vulnerable to federal constitutional claims. Furthermore, even though the Hawai'i Supreme Court has denied claims based on equal protection and privacy arguments, the marriage amendment is vulnerable to a state constitutional attack under Hawai'i's due process and anti-establishment constitutional provisions.[199] The four state marriage equality cases provide the road map for this attack.

Kristin D. Shotwell[200]

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[197] *See* Romer v. Evans, 517 U.S. 620, 634 (1996) (animosity and "bare desire to harm a politically unpopular group" are not legitimate state interests for purposes of Equal Protection Analysis).

[198] *See* Lawrence v. Texas, 539 U.S. 558, 583 (2003) (O'Connor, J., concurring) ("Moral disapproval of a group cannot be a legitimate governmental interest under the Equal Protection Clause because legal classifications must not be drawn for the purpose of disadvantaging the group burdened by the law." (citation and internal quotation marks omitted)).

[199] *See* HAW. CONST. art. I, § 5 (due process); *id.* art. I, § 4 (freedom of religion).

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