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NOTES

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The Privacy Rights of Public School Students

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I. INTRODUCTION

Minors have constitutional rights, but the constitutional protections given to them are reduced in some situations because of their age.[1] They have the right to speak, even in a public school setting, so long as they speak in a nondisruptive manner and do not interfere with the educational mission of the school.[2] They have the right to privacy, including the right to an abortion.[3] And they have the right under the Fourth Amendment to be free from an unreasonable search.[4] The U.S. Supreme Court ruled in the 1985 decision of

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[1] In Belotti v. Baird, 443 U.S. 622, 634 (1979), the U.S. Supreme Court recognized three reasons justifying reduced constitutional rights for minors: "[T]he peculiar vulnerability of children; their inability to make critical decisions in an informed, mature manner; and the importance of the parental role in childrearing." *See generally* JON M. VAN DYKE AND MELVIN M. SAKURAI, CHECKLIST FOR SEARCHES AND SEIZURES IN PUBLIC SCHOOLS 13-17 (2009).

[2] Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 506, 513 (1969) (ruling that students have a right to wear armbands protesting the Vietnam war to school); Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 270-71 (1988) (distinguishing personal student speech from speech related to school activities and permitting more control over the latter); Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 676 (1986) (holding that a school can punish a student for using offensive speech in a student election campaign); Morse v. Frederick, 551 U.S. 393 (2007) (ruling that a high school principal did not violate a student's right to free speech by confiscating a banner she reasonably viewed as promoting illegal drug use at a school-sanctioned and school-supervised event).

[3] Planned Parenthood of Central Missouri v. Danforth, 428 U.S. 52, 72-75 (1976) (holding that the state cannot authorize an absolute parental veto over a minor's decision to obtain an abortion); Carey v. Population Services, Intern., 431 U.S. 678, 691-99 (1977) (plurality opinion) (explaining that the Constitution will not permit a blanket prohibition on the right to sell or distribute contraceptives to a minor); Belloti v. Baird, 443 U.S. 622, 643 (1979) (holding that a Massachusetts statute prohibiting minors from obtaining abortions without parental notification is unconstitutional unless the state offers an alternative method of obtaining consent).

[4] The Fourth Amendment of the U.S. Constitution guarantees that:

> 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.

New Jersey v. T.L.O.,[5] that a public school official can engage in a search of a student to determine if a school rule has been violated without meeting the "probable cause" standard that would apply to a search conducted by a police officer, so long as the school official has an individualized "reasonable suspicion" that the student being searched has violated a school rule and that the search will produce evidence of such a violation.[6] This standard has proved to be workable in the wide range of situations faced by school officials, although some details regarding its applicability are still being worked out.

Recently, however, the Hawai'i Board of Education took a drastic departure from the *T.L.O.* rule and authorized school officials to search student lockers without the need to provide any justification whatsoever.[7] Under this new rule, school officials are authorized to look through the personal items students may be putting into their lockers, including items related to the students' intimate relations and reproductive cycle, even if the students have reached the age of eighteen.

The U.S. Supreme Court returned to this issue in the 2009 case of *Safford Unified School District No. 1 v. Redding*,[8] and reconfirmed that students have an expectation of privacy in the personal items that they bring to public schools.[9] Hawai'i's Board of Education should, therefore, revisit and change its new rule permitting unlimited searches of lockers without cause. If this rule remains unchanged, and if a school official does in fact search a student's locker without any individualized suspicion, this action is likely to be struck down as a violation of the student's rights under the Fourth Amendment and article I, sections 6 and 7 of the Hawai'i Constitution.

II. CONSTITUTIONALITY OF SCHOOL SEARCHES

A. Strip Searches

In 2009, the U.S. Supreme Court ruled that the strip search of a thirteen-year-old female student by a school official looking for prescription-grade ibuprofen was unconstitutional and explained that any search involving an examination of a student's private areas stands in a different category from other searches.[10] Such searches of underwear and sensitive bodily areas intrude deeply into a student's "subjective expectation of privacy" and can be "embarrassing,

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[5] New Jersey v. T.L.O, 469 U.S. 325 (1985).

[6] *Id.* at 340-41.

[7] *See infra* text accompanying notes 53-61.

[8] Safford Unified Sch. Dist. No. 1 v. Redding, 129 S. Ct. 2633 (2009).

[9] *Id.* at 2641 n.3.

[10] *Id.* at 2637-38.

frightening, and humiliating."[11] Indeed, because they are "so degrading . . . a number of communities have decided that strip searches in schools are never reasonable and have banned them no matter what the facts may be."[12] The Court's 8-1 ruling did not outlaw such searches,[13] but did require a higher justification, explaining that they cannot be based solely on "general background possibilities"[14] and instead require reasonable suspicion of danger or "suspicion that it will pay off."[15]

The case that came before the Court involved a 2003 search of Savana Redding, a thirteen-year-old female honor student at Safford Middle School in rural southeastern Arizona. Based on an accusation by a fellow student that she had brought prescription-grade ibuprofen to school (and in the context of recent incidents involving drug and alcohol abuse), the vice principal searched Redding's backpack and then instructed a female school official and a female school nurse to search her body for pills. The thirteen-year-old student was asked

> to remove her jacket, socks, and shoes, leaving her in stretch pants and a T-shirt (both without pockets), which she was then asked to remove. Finally, Savana was told to pull her bra out and to the side and shake it, and to pull out the elastic on her underpants, thus exposing her breasts and pelvic area to some degree. No pills were found.[16]

Justice David Souter's opinion for the Court's majority said that the search of Savana Redding's backpack was a "search" governed by "the *T.L.O.* standard of reasonable suspicion, for it is common ground that Savana had a reasonable expectation of privacy covering the personal things she chose to carry in her backpack."[17] The search of the backpack and her outer clothing was reasonable based on the accusation of a fellow student that Savana had brought unauthorized pills to school.[18] The subsequent examination of her private areas, which the Court characterized as a "strip search,"[19] was not justified by the information available to the school officials, especially in light of the limited danger created by the pills. Such an intrusive search requires "distinct elements of justification,"[20] and in this case "the content of the

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[11] *Id.* at 2641.

[12] *Id.* at 2642.

[13] *Id.*

[14] *Id.*

[15] *Id.*

[16] *Id.* at 2638.

[17] *Id.* at 2641 n.3. The "*T.L.O.* standard" referred to by the Court was the "reasonable suspicion" standard articulated in *T.L.O.*, 469 U.S. at 341.

[18] *Redding*, 129 S. Ct. at 2641.

[19] *Id.*

[20] *Id.*

suspicion failed to match the degree of intrusion."[21] Explaining "that the *T.L.O.* concern to limit a school search to reasonable scope requires the support of reasonable suspicion of danger or of resort to underwear for hiding evidence of wrongdoing before a search can reasonably make the quantum leap from outer clothes and backpacks to exposure of intimate parts,"[22] the Court held that the school officials had no reason to suspect that students were in danger from the drugs or "to suppose that Savana was carrying pills in her underwear."[23]

This decision was consistent with the views of most lower courts, which had carefully restricted strip searches, and was also consistent with the Court's 1985 ruling that searches should "not [be] excessively intrusive in light of the age and sex of the student and the nature of the infraction."[24] "In fact, strip searches are probably only permissible in the school setting, if permissible at all, where there is a threat of imminent, serious harm."[25]

Examples of strip searches conducted in the school setting where the courts found no reasonable suspicion include requiring students to strip to their underwear during a search for a diamond ring,[26] requiring a student to pull down his pants when he was being investigated for skipping school,[27] requiring a strip search for drugs when a search of pockets produced no contraband,[28] requiring a fifteen-year-old girl who was hiding in a parking lot during school to remove her jeans,[29] a strip search of an entire fifth grade class for three dollars,[30] requiring a strip search of a male student to find a stolen one hundred dollars,[31] and requiring a search of a student who had been under observation for suspected drug-dealing, had entered the rest room twice in one hour, and had lunch with another student suspected of drug-dealing.[32]

A federal district court in Illinois[33] allowed a claim for unlawful search and seizure to go forward based on allegations that the school counselor, as part of a search for marijuana, had taken a student to the teachers' lounge, required him to strip to his boxer shorts, patted him down "between the thighs and the butt

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[21] *Id.* at 2642.

[22] *Id.* at 2643.

[23] *Id.* at 2642-43.

[24] *T.L.O.*, 469 U.S. at 342.

[25] Jenkins ex rel. Hall v. Talladega City Bd. of Educ., 95 F.3d 1036, 1047 n.20 (11th Cir. 1996), *reh'g en banc granted, opinion vacated on other grounds*, 115 F.3d 821 (11th Cir. 1997).

[26] Kennedy v. Dexter Consol. Sch., 10 P.3d 115, 117 (N.M. 2000).

[27] Coronado v. State, 835 S.W.2d 636, 641 (Tex. Crim. App. 1992).

[28] State v. Sweeney, 782 P.2d 562, 565 (Wash. Ct. App. 1989).

[29] Cales v. Howell Pub. Sch., 635 F. Supp. 454, 455-57 (E.D. Mich. 1985).

[30] Bellnier v. Lund, 438 F. Supp. 47, 54 (N.D.N.Y. 1977).

[31] State ex rel. Galford v. Mark Anthony B., 433 S.E.2d 41, 49 (W. Va. 1993).

[32] People v. Scott D., 315 N.E.2d 466, 467 (N.Y. 1974).

[33] Hill v. Hood, No. 04-678-GPM, 2006 WL 39092, at *2 (S.D. Ill. 2006).

cheeks," and later apologized to the student's mother for the strip search. The judge explained that these allegations went beyond what had been permitted in *Cornfield ex rel. Lewis v. Consolidated High School District No. 230*,[34] because that decision:

> requires not only that there be reasonable grounds for suspecting that a search will turn up evidence that the student has violated or is violating either the law or the rules of the school, but also that the measures adopted by the school official are reasonably related to the objectives of the search and are not excessively intrusive in light of the age and sex of the student and the nature of the infraction .... Here, contrary to school policy, Hill was searched without any witnesses and he was not given clothes to wear.[35]

Another example of an unreasonable strip search is found in *Oliver ex rel. Hines v. McClung*,[36] where the court ruled that a strip search of seventh-grade girls conducted in an effort to find four dollars and fifty cents that had been stolen was unreasonable. This opinion discusses and distinguishes *Cornfield*,[37] *Williams*,[38] and *Widener*[39] and emphasizes that a strip search for illegal drugs or weapons can be defended much more easily than a strip search for a modest sum of money.[40]

The court in *Konop for Konop v. Northwestern School District, 1998 DSD 27*[41] reached the same decision, denying a motion to dismiss claims brought by two eighth-grade female students against the school district, the principal, and a female music teacher who took them into the bathroom and searched their bodies in an effort to find two hundred dollars thought to have been stolen. The music teacher pulled the girls' underwear away from their bodies and touched one in the process.[42] One girl "was menstruating at the time and the students were embarrassed and humiliated but did not think they had a right to say 'no.' Both students were crying during the search ."[43] The court felt this highly intrusive search was unjustified, given that "[t]here was no imminent serious harm of any kind,"[44] and that the school officials "did not have any

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[34] 991 F.2d 1316 (7th Cir. 1993).

[35] *Hill*, No. 04-678-GPM, 2006 WL 39092, at *4 (S.D. Ill. 2006).

[36] 919 F. Supp. 1206 (N.D. Ind. 1995).

[37] 991 F.2d 1316 (7th Cir. 1993).

[38] Williams by Williams v. Ellington, 936 F.2d 881 (6th Cir. 1991); *see also infra* note 49.

[39] Widener v. Frye, 809 F. Supp. 35 (S.D. Ohio 1992), *aff'd*, 12 F.3d 215 (6th Cir. 1993); *see also infra* note 49.

[40] *Oliver*, 919 F.Supp. at 1218.

[41] 26 F. Supp. 2d 1189, 1207 (D. S.D. 1998).

[42] *Id.* at 1203.

[43] *Id.*

[44] *Id.*

reasonable cause to believe the plaintiffs stole the missing $200" or even "whether, in fact, $200 was missing."[45]

Similar facts produced a similar result in *Kennedy v. Dexter Consolidated Schools*,[46] where students were individually taken to the restroom, told to strip to their underwear, and examined (with their underwear pulled away from their bodies to facilitate inspection) in an attempt to find a missing diamond ring.[47] The court ruled that such a search was unconstitutional, particularly in the absence of any individualized reasonable suspicion.[48]

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[45] *Id.* at 1207.

[46] 10 P.3d 115 (N.M. 2000).

[47] *Id.* at 118.

[48] *Id.* at 121-22; *see also* Brannum v. Overton County Sch. Bd., 516 F.3d 489 (6th Cir. 2008) (ruling that the installation of video surveillance equipment in the boys' and girls' athletic locker rooms, which observed them changing clothes, constituted a search and violated their rights under the Fourth Amendment); Beard v. Whitmore Lake Sch. Dist., 402 F.3d 598 (6th Cir. 2005) (ruling that searches of fifteen male students requiring them to remove their underwear and of five female students to remove their underwear after several hundred dollars of another student's prom money was missing was not reasonable and was thereby unconstitutional, but holding also that this conclusion had not been "clearly established" prior to this decision and hence that the school officials had qualified immunity for their actions); H.Y. ex rel. K.Y. v. Russell County Bd. of Educ., 490 F. Supp. 2d 1174 (M.D. Ala. 2007) (ruling that school officials acted unreasonably in requiring fifteen students to lift their shirts and lower their pants during a suspicionless search for money and a make-up bag); Carlson ex rel. Stuczynski v. Bremen High Sch. Dist. 228, 423 F. Supp. 2d 823, 827 (N.D. Ill. 2006) (allowing a Section 1983 claim to go forward against school officials who strip-searched the last two students seen in a locker room after sixty dollars had been reported missing, even though the complaint was vague regarding any physical touching during the search, saying that such a search would "fail the balancing test articulated in T.L.O., given the invasiveness of the search and the relatively unserious nature of the infraction" and explaining that "a strip search in which students are visually inspected by school officials still may be invasive enough to qualify as a constitutional violation absent sufficient justification for the search."); Holmes v. Montgomery, 2003 WL 1786518 (Ky. Ct. App. 2003), *rev'd on other grounds* 162 S.W.3d 902 (Ky. 2005) (characterizing a search requiring female high school students to raise their shirts above their bras and lower their pants below their knees as a "strip search . . . exposing partially clad midriffs, thighs, and undergarments for visual inspection in the backdrop of an accusatory ambiance" and ruling that the search was unjustified in the context of an effort to find a missing pair of shorts); Sanchez v. Stockstill, 2005 WL 552139 (W.D. Tex. 2005) (stating that a reasonable person could conclude that a search of a high school student, accused of stealing candy, down to his underwear was "an overly intrusive strip search in violation of the Fourth Amendment."); Watkins v. Millennium Sch., 290 F. Supp. 2d 890 (S.D. Ohio 2003) (ruling that the taking of a second or third-grade student into a supply closet and requiring her to pull out her waistband so that the teacher could look underneath her pants, in a search for a missing ten dollar bill, constituted a significant intrusion that could not be justified, in the absence of individualized suspicion and any emergency situation); Bell v. Marseilles Elementary Sch. 160 F. Supp. 2d 883, 888-90 (N.D. Ill. 2001) (holding that requiring thirty students in a gym class to remove their shirts and/or lower their pants to mid-thigh for a visual inspection or waist band check of their underwear to search for a "relatively small amount of money" was "undoubtedly

Some courts prior to 2009 had held strip searches to be permissible, and these may no longer be good law in light of the 2009 decision in *Safford Unified School District No. 1 v. Redding.*[49]

B. Locker Searches

How are these cases related to searches of student lockers and their personal belongings? The U.S. Supreme Court stated in *Redding* that thirteen-year-old Savana Redding "had a reasonable expectation of privacy covering the personal things she chose to carry in her backpack"[50] and that the school official's

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intrusive" and unreasonable, and that the officer did not have qualified immunity because "there is no question that plaintiffs' Fourth Amendment rights were clearly established in the factual context of student searches by school agents.").

[49] 129 S. Ct. 2633 (2009). A strip search was found reasonable in Singleton v. Bd. of Educ. USD 500, 894 F. Supp. 386, 389 (D. Kan. 1995), where a school official searched a student for stolen money in the amount of one hundred fifty dollars by patting the student's crotch, unbuttoning and lowering the student's cut-offs and searching the inside band of his boxers, and removing the student's shirt. Because the search was conducted in private and the student was never required to remove his underwear, the district court found the search to be reasonable. *Id.* at 391. Another example involving the removal of clothes is the case of Cornfield ex rel. Lewis v. Consol. High Sch. Dist. No. 230, 991 F.2d 1316, 1323 (7th Cir. 1993), where the student was believed to be concealing drugs in the crotch of his sweat pants. The court felt that requiring the student to remove his clothes was the least intrusive means. For other decisions permitting intrusive strip searches, *see* Widener v. Frye, 809 F. Supp. 35 (S.D. Ohio 1992), *aff'd*, 12 F.3d 215 (6th Cir. 1993), where school officials were allowed to remove the jeans (but not the undergarments) of a fifteen-year-old male thought to be in possession of marijuana; Williams by Williams v. Ellington, 936 F.2d 881 (6th Cir. 1991), where the court permitted a search of a high school student's undergarments by a school official looking for a vial of cocaine based on an allegation by a fellow student; Richardson v. Bd. of Educ. of Jefferson County Kentucky, 2006 WL 2726777 (W.D. Ky. 2006) and 2007 WL 2319785 (W.D. Ky. 2007) (ruling that a search of a male student's boxer pants, revealing his groin area in a search for an explosive device, after an explosion had occurred, was reasonable and "not excessively intrusive in light of Richardson's age, the fact that the search was conducted and only visible to other males, and that the search was for an explosive device which posed a threat to the safety to others within the school"); Lindsey ex rel. Lindsey v. Caddo Parish Sch. Bd., 954 So. 2d 272 (La. Ct. App. 2007), *writ denied*, 962 So. 2d 441 (La. 2007) (holding that school's security coordinator had acted reasonably in requiring a male student to fold down his waist band in the boys' bathroom, without any touching of the student's body, as part of a search for missing currency); Rudolph ex rel. Williams v. Lowndes County Bd. of Educ., 242 F. Supp. 2d 1107 (M.D. Ala. 2003) (ruling that requiring a student to remove his underwear down to his knees did not constitute a constitutional violation in the context of a search for drugs); Rinker v. Sipler, 264 F. Supp. 2d 181 (M.D. Pa. 2003) (ruling that a search requiring a male student to lower his pants to his knees, followed by a school security officer running his hands around the interior of the student's boxer shorts to determine if anything was hidden inside, was justified to find out if the student possessed drugs).

[50] 129 S.Ct. 2633, 2641 n.3 (2009).

"decision to look through it was a 'search' within the meaning of the Fourth Amendment" of the U.S. Constitution.[51] A search of her backpack would therefore be unconstitutional unless supported by a "reasonable suspicion" that the search of this particular student's backpack would produce evidence of a violation of school rules.[52]

A year before the *Redding* ruling, Hawai'i's Board of Education voted that school lockers "are subject to opening and inspection . . . by school officials at any time *with or without cause.*"[53] These lockers frequently contain students' backpacks and other highly personal items and it would therefore appear that the Supreme Court's ruling in *Redding* makes it clear that any "inspection" of these backpacks and other personal items in the lockers "without cause" will violate the Constitution.

On March 6, 2008, the Hawai'i State Board of Education voted 7-2 to approve significant changes in the regulations governing searches of public school students and their lockers, and these changes became effective September 10, 2009.[54] The changes amended the regulations governing School Searches and Seizures found in Section 8-19-14 *et seq* of the Hawai'i Administrative Rules. The previous language of these rules was as follows:

SUBCHAPTER 4 – SCHOOL SEARCHES AND SEIZURES

§ 8-19-14 *Policy on school searches and seizures.* Students have a legitimate expectation of privacy in school and during department-supervised activities, on or off school property. Their expectation of privacy extends to their persons and personal effects as well as school property assigned for their individual use. School officials shall respect and uphold these privacy rights of students. Schools, on the other hand, have an equally legitimate need to maintain order and an environment where learning can take place. In fulfilling this legitimate need, school officials may on occasions need to carry out searches and seizures on school premises or during department-supervised activities. As a general policy, such searches and seizures are permissible only when the health or safety of a person or persons would be endangered if a search or seizure is not carried out by school officials. Searches and seizures conducted by school officials shall abide by the provisions of this subchapter.

§8-19-15 *Authority.* Searches and seizures may be carried out on school premises, or during department-supervised activities, on or off school property,

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[51] *Id.*

[52] *T.L.O.*, 469 U.S. 325, 341 (1985). *See generally* VAN DYKE AND SAKURAI, *supra* note 1.

[53] *See* General Business meetings, Haw. Bd. of Educ. (2008), *http://www.boe.k12.hi.us* (follow "Meeting Minutes" hyperlink; then follow "Board of Education General Business and Meetings" hyperlink; then follow "March 6, 2008" hyperlink) (emphasis added).

[54] *Id.*

by any school official who is responsible for the supervision of the student or property to be searched. A school official conducting a search shall be accompanied by another school official serving as a witness unless it is an emergency where prompt action is necessary to protect the health or safety of a person or persons. It is not necessary for school officials to obtain a warrant before conducting a search of a student or property.

§8-19-16 *Conditions under which searches and seizures may be carried out.*

(a) Searches and seizures may be carried out by school officials when all of the following conditions are met:

(1) At the time of the search there are reasonable grounds to suspect, based on the attendant circumstances, that the search will turn up evidence that the student or students have violated or are violating either the law or the student conduct prohibited under this chapter.

(2) The manner in which the search is to be conducted is reasonably related to the purpose of the search and not excessively intrusive in the light of the student's age and sex and the nature of the suspected offense.

(3) Unless the health or safety, or both, of an individual is in jeopardy, the student who will be subjected to a search shall be informed of the purpose of the search and shall be given an opportunity to voluntarily relinquish the evidence sought by the school official.

(b) The principal or designee of the school shall be informed by the school official who will conduct the search that a search is to be conducted and of the purpose of the search unless it is an emergency where prompt action is necessary to protect the health or safety of a person or persons.

(c) If more than one student is suspected of committing a violation, then the school official conducting the search shall start with the student most suspected of having the item which is related to the purpose of the search.

§8-19-17 *Prohibited searches and seizures.*

(a) Random searches are prohibited.

(b) Strip searches are prohibited.

(c) A school official shall not conduct a search requiring bodily contact of a student of the opposite sex except when such a search is necessary to prevent imminent harm to the health or safety of a person or persons.

(d) In the course of a search, the use of force against a student is prohibited unless the school official believes that the force to be used is necessary to prevent imminent harm to the health or safety of a person or persons. When the use of force is necessary, the degree of force shall not be designed to cause or known to create a substantial risk of causing death, serious bodily injury, disfigurement, extreme pain or mental distress, or gross degradation.

> (e) Seizure of the personal effects of a student resulting from a search conducted under the provisions of this subchapter shall be limited to the object or objects for which the search was conducted. However, any other object observed during a search may be seized by a school official when possession of the object is a violation of law or the provisions of this chapter, including the possession of contraband constituting a class D offense under this chapter, or when non-seizure may pose a serious threat to the health or safety of a person or persons, including the school official conducting the search.
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> §8-19-18 *Searches and seizures involving law enforcement officers.* School officials shall cooperate with law enforcement officers in the conduct of criminal investigations on school premises and during department-supervised activities in accordance with the provisions of sections 22, 23, and 24 of this chapter relating to police interviews and arrests. However, school officials shall not conduct any search and seizure in conjunction with, or at the request of, law enforcement officers as part of a criminal investigation. Law enforcement officers shall be permitted to carry out searches and seizures which they deem necessary under the prevailing legal standards of criminal investigations.[55]

This language was excellent, and it conformed to the constitutional principles articulated by the U.S. Supreme Court in *T.L.O* and *Redding* as well as those governing privacy in Hawai'i. In particular, it was consistent with the important rights of privacy recognized in Hawai'i's Constitution, in article I, sections 6 and 7.[56] The new language, however, directly violates the U.S. and Hawai'i Constitutions. Authorizing school officials to open lockers and allowing dogs to sniff these lockers, without any particularized suspicion that an individual student has violated any school rule, sends the very inappropriate message to students that they have no privacy rights and that our school officials have no respect for the constitutional rights that our predecessors have fought and died for. As Justice Louis Brandeis said, arguing that wiretaps should be viewed as searches for Fourth Amendment purposes, "[o]ur Government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example."[57] By changing this language, Hawai'i's Board of Education appears to be teaching our students, who will shortly become voters and community leaders, that their personal rights to privacy are unimportant and can be ignored even when there is no basis for suspecting that they have done anything wrong.

As quoted above, the previous language in Hawai'i Administrative Rules section 8-19-14 stated that "[s]tudents have a legitimate expectation of privacy in school" and that this expectation extended to "school property assigned for

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[55] HAW. CODE R. §§ 8-19-14 – 19-18 (repealed 2009).

[56] *See infra* text accompanying notes 93-111.

[57] Olmstead v. United States, 277 U.S. 438, 485 (1928).

their individual use," such as school lockers.[58] In its 2008-09 changes, the Board reversed this position to say, in equally strong language, the opposite. The language approved by the 2008-09 Board as the new "Section 8-19-14 *Policy on opening and inspection of student lockers*" now reads as follows:

> School lockers provided to the students on campus are subject to opening and inspection (and external dog sniffs) by school officials *at any time with or without cause*, provided that the searches are not because of the student's race, color, national origin, ancestry, sex, gender identity and expression, religion, disability or sexual orientation. Section 15 shall have no applicability to the opening and inspection (and external dog sniffs) of student lockers. None of the restrictions in sections 8-19-15 through section 8-19-18 or section 8-19-19 or related to general school searches and seizures shall in any way be construed to create an expectation of privacy in student lockers. *Students should assume that their lockers are subject to opening and inspection (and external dog sniffs) any time with or without cause.*[59]

This provision allows intrusive searches in school lockers *at any time by any school official*, without any need for any particularized reason for the search.

The adoption of this new language marks a complete turnaround from the language previously found in Section 8-19-14 and, as explained in more detail below, is inconsistent with the holdings of the Hawai'i Supreme Court in *In re Jane Doe*,[60] and *In re John Doe*.[61] This new approach is also inconsistent with the holding of the U.S. Court of Appeals for the Ninth Circuit in *B.C. v. Plumas Unified School District*.[62] Litigation challenging suspicionless searches can be predicted.

III. THE GENERAL FEDERAL CONSTITUTIONAL STANDARD GOVERNING SEARCHES OF STUDENTS IN PUBLIC SCHOOLS

As explained earlier, in *New Jersey v. T.L.O.*,[63] the U.S. Supreme Court laid out the central standards governing searches in schools:

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[58] HAW. CODE R. § 8-19-14 (repealed 2009).

[59] HAW. CODE R. § 8-19-14 (Weil 2010) (emphasis added).

[60] 77 Haw. 435, 436-37, 887 P.2d 645, 646-47 (1994) (stating that "individualized suspicion" is a necessary element in determining" whether a search of a student's personal effects is reasonable under the U.S. and Hawai'i Constitutions. *Id.* at 445, 887 P.2d at 655) (internal quotation marks omitted).

[61] 104 Haw. 403, 91 P.3d 485 (2004) (confirming that individualized suspicion is a necessary precondition to conduct a search, and concluding that an anonymous Crime Stoppers' tip was not sufficient to serve as reasonable grounds to search a student for contraband).

[62] 192 F.3d 1260, 1268 (9th Cir. 1999) (ruling "that the random and suspicionless dog sniff search of B.C. was unreasonable in the circumstances . . ."). The facts and holdings of *B.C.* are discussed *infra* text at notes 70-82.

[63] 469 U.S. 325 (1985).

- Students in public schools do have legitimate expectations of privacy which are protected by the Fourth Amendment.[64]
- Public school officials are government officials and must comply with Fourth Amendment requirements when conducting searches or seizures.[65]
- School officials do not need search warrants or probable cause to search a student, but they must still have a "reasonable suspicion" that the student being searched has violated a school rule and that evidence of the violation will be found in the particular place being searched.[66] The search conducted must be consistent with its original objective and must not be excessively intrusive in relation to the nature of the suspected infraction or the student's age or sex.[67]

Traditionally, American citizens have had an abhorrence of random and suspicionless searches. The U.S. Supreme Court has, however, permitted random urinalysis testing of student-athletes and others students who engage in extracurricular activity, because of the school's "custodial and tutelary" responsibilities for its students.[68] Courts have also upheld the use of metal detectors at entrances to schools when the use or threat of weapons has become a problem at the particular school.[69]

IV. THE GOVERNING NINTH CIRCUIT DECISION REGARDING CANINE SNIFFS

The U.S. Court of Appeals for the Ninth Circuit has addressed the question of canine searches in *B.C. v. Plumas Unified School District*.[70] In that case, the Principal and Vice Principal of Quincy High School in Plumas County, California, instructed the students to vacate their classroom, and to pass by "Keesha," a drug-sniffing dog. The record states that "[t]he dog was always three to four feet from the students as they exited and re-entered the classroom," and "did not sniff around each student [or] touch the students in any manner."[71] After they departed, Keesha "sniffed backpacks, jackets, and other belongings which the students left in the room."[72] Keesha drew attention

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[64] *Id.* at 334.
[65] *Id.*
[66] *Id.* at 341-42.
[67] *Id.* at 342.
[68] Bd. of Educ. v. Earls, 536 U.S. 822 (2002); Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 655-56 (1995).
[69] *See, e.g., In Re* F.B. 726 A.2d 361 (Pa. 1999).
[70] 192 F.3d 1260 (9th Cir. 1999).
[71] *Id.* at 1270 (Brunetti, J., concurring).
[72] *Id.* at 1263.

to one student on two separate occasions, but no drugs were found on the student, indicating a false positive.[73]

The court's majority opinion in *B.C.* does not separate the two aspects of the search—the the students passing by the dog and the dog's subsequent search of the belongings of the students—but concludes that the event, taken as a whole, "constitutes a search," because it "infringed B.C.'s reasonable expectation of privacy."[74] The court emphasized that it is this "expectation of privacy" that is key, and that "the reach of the Fourth Amendment cannot turn on the presence or absence of a physical intrusion."[75] In reaching the conclusion "that the random and suspicionless dog sniff search of B.C. was unreasonable in the circumstances,"[76] the court distinguished *Vernonia*, on two grounds: (1) *Vernonia* involved student-athletes "who voluntarily participate in school athletics [and who] have reason to expect intrusions upon normal rights and privileges, including privacy,"[77] while "the search in this case took place in a classroom where students were engaged in compulsory, educational activities,"[78] and (2) the Vernonia School District's student drug use "had sharply increased"[79] while "the record here does not disclose that there was any drug crisis or even a drug problem at Quincy High in May 1996."[80] Because of "the absence of a drug problem or crisis at Quincy High, the government's important interest in deterring student drug use would not have been placed in jeopardy by a requirement of individualized suspicion."[81] The Ninth Circuit thus required the government to carry the burden that the search was necessary to serve its goals, and that no other less intrusive alternative was available. The court also emphasized that "[i]t is well-settled that students do not shed their constitutional rights . . . at the schoolhouse gate."[82]

As explained above, the Ninth Circuit noted in the *B.C.* case that the dog Keesha had twice alerted on a student, but that no drugs were found on the student. In his dissent in *Illinois v. Caballes*,[83] Justice David Souter

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[73] *Id.*

[74] *Id.* at 1266.

[75] *Id.* at 1266 n.8 (quoting Katz v. United States, 389 U.S. 347, 353 (1967)) (internal quotation marks omitted).

[76] *Id.* at 1268.

[77] *Id.* at 1267 n.10 (quoting Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 657 (1995)).

[78] *Id.*

[79] *Id.* at 1268 n.11.

[80] *Id.* at 1268.

[81] *Id.* (quoting Chandler v. Miller, 520 U.S. 305, 314 (1997)) (internal quotation marks omitted).

[82] *Id.* at 1267 (quoting Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 506 (1969)) (internal quotation marks omitted).

[83] 543 U.S. 405, 411-12 (2005).

emphasized that "[t]he infallible dog, however, is a creature of legal fiction"[84] and explained that "the evidence is clear that the dog that alerts hundreds of times will be wrong dozens of times."[85] He cited evidence introduced by the State of Illinois in the *Caballes* case showing "that dogs in artificial testing situations return false positives anywhere from 12.55% to 60% of the time," and he listed rulings from other courts that had reported that dogs gave false positives from 7% to 38% of the time.[86] These failures result, in part, from the fact that a "substantial portion of United States currency . . . is tainted with sufficient traces of controlled substances to cause a trained canine to alert to their presence."[87]

V. OTHER DECISIONS RECOGNIZING PRIVACY INTERESTS IN STUDENT LOCKERS

Although case law is inconsistent on this point, many courts have agreed with Hawai'i's traditional position that students have privacy interests in their school lockers. The California Supreme Court ruled in 1985, for instance, that a student "has the highest privacy interests in his or her own person, belongings, and physical enclaves, such as lockers."[88] This conclusion was confirmed more recently by a California appellate court that explained that "[i]n California, a student has an expectation of privacy in his school locker."[89] One of the most eloquent statements regarding the importance of protecting students' privacy interests in the contents of their lockers is found in *In re Adam*,[90] where the court explained that students have a legitimate expectation of privacy in their school lockers, and that this expectation is not eliminated by a sign posted on all locker bays that said:

> The lockers supplied by the Board of Education and used by the students are the property of the Board of Education. Therefore, the student lockers and the contents of all the student lockers are subject to random search at any time *without regard to whether there is a reasonable suspicion* that any locker or its contents contains evidence of a violation of a criminal statute or a school rule.

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[84] *Id.* at 411.

[85] *Id.* at 412.

[86] *Id.*

[87] *Id.* (quoting United States v. Carr, 25 F.3d 1194, 1214-17 (3rd Cir. 1994) (Becker, J., concurring and dissenting in part)).

[88] In re William G., 709 P.2d 1287, 1295 (Cal. 1985).

[89] In re Cody S., 16 Cal.Rptr.3d 653, 657 (Cal. Ct. App. 2004). Other decisions reaching the same conclusion include State v. Michael G., 748 P.2d 17, 19 (N.M. Ct. App. 1987) ("The state concedes that the *T.L.O.* standard applies to searches of lockers, as well as the student. We agree."); State v. Brooks, 718 P.2d 837, 839 (Wash. Ct. App. 1986) (applying the *T.L.O.* standards to a locker search); State v. Joseph T., 175 W.Va. 598, 336 S.E.2d 728 (1985).

[90] 697 N.E.2d 1100, 1103 (Ohio Ct. App. 1997) (emphasis in original).

> Random searches of lockers may include a search with the assistance of dogs trained to detect the presence of drugs.[91]

The court explained that such a school policy, even when accompanied by prominently posted signs, could not eliminate the students' constitutional rights:

> Indeed, *one cannot envision any rule which minimizes the value of our Constitutional freedoms in the minds of our youth more dramatically than a statute proclaiming that juveniles have no right to privacy in their personal possessions.* The contents of a student's book bag in all likelihood represent the most personal of all student belongings. Included within this ever-present repository would be letters which are never meant to be sent: diaries which are not intended to be read by anyone; photographs of long lost friends or pets: and any other unmistakable evidence of the particularly unique stages of growing up. *The government simply has no right to proclaim that, contrary to the right of privacy guaranteed by the United States Constitution, these personal articles will be subject to observation and dissemination by the adult community at will.* It is hypocritical for a teacher to lecture on the grandeur of the United States Constitution in the morning and violate its basic tenets in the afternoon.[92]

VI. HAWAI'I'S RIGHT TO PRIVACY

Hawai'i's Constitution contains two privacy provisions, emphasizing the particular importance we give to privacy in our community.[93] Article I, section 7 lays out the traditional formulation to provide protection from unreasonable searches and seizures:

> 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.[94]

The words referring to "invasions of privacy" and "communications sought to be intercepted" were added by the 1968 Constitutional Convention to "protect the individual's wishes for privacy as a legitimate social interest" and to protect against "undue government inquiry into and regulation of the areas of

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[91] *Id.* at 1103.

[92] *Id.* at 1108 (emphasis added).

[93] *See generally* Jon M. Van Dyke, Marilyn M.L. Chung & Teri Y. Kondo, *The Protection of Individual Rights Under Hawai'i's Constitution*, 14 U. HAW. L. REV. 311, 345-60 (1992).

[94] HAW. CONST. art. I, § 7.

a person's life which are defined as necessary to insure man's individual and human dignity."[95]

In *State v. Heapy*,[96] the plurality opinion of the Hawai'i Supreme Court explained that this provision has been interpreted repeatedly as providing a broader protection to individual privacy than does the Fourth Amendment to the U.S. Constitution:

> Significantly, this court has declared that, compared to the Fourth Amendment, article I, section 7 of the Hawai'i Constitution guarantees persons in Hawai'i a "more extensive right of privacy[.]" *State v. Navas*, 81 Hawai'i 113, 123, 913 P.2d 39, 49 (1996); *see also State v. Dixon*, 83 Hawai'i 13, 23, 924 P.2d 181, 191 (1996) (noting that "article I, section 7 of the Hawai'i Constitution provides broader protection than the [F]ourth [A]mendment to the United States Constitution because it also protects against unreasonable invasions of privacy"); *State v. Tanaka*, 67 Haw. 658, 661-62, 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.").[97]

In *Navas*, the court explained that article I, section 7 of Hawai'i's Constitution "was designed to protect the individual from arbitrary, oppressive, and harassing conduct on the part of government officials."[98] In *Tanaka*,[99] the Hawai'i Supreme Court held that police cannot search opaque, closed trash bans placed on the street or located in a trash bin without a search warrant, even though federal courts have interpreted the Fourth Amendment to allow such searches.[100] Also, in *State v. Rothman*,[101] the Hawai'i Supreme Court found that persons using telephones have a reasonable expectation of privacy under the Hawai'i Constitution to the telephone numbers they call or receive on their private lines,[102] even though the U.S. Supreme Court had ruled previously in *Smith v. Maryland*,[103] that the Fourth Amendment did not require a warrant for the interception of such numbers.

The *Heapy* case involved whether a police officer had the necessary "reasonable suspicion" to justify stopping a driver, based on the driver's

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[95] Stand. Comm. Rep. No. 55 (Majority), *reprinted in* 1 PROCEEDINGS OF THE CONST. CONVENTION OF HAWAI'I OF 1968, at 233-34 (1973) (internal quotation marks omitted).

[96] 113 Haw. 283, 151 P.3d 764 (2007).

[97] *Id.* at 298, 151 P.3d at 779.

[98] State v. Navas, 81 Haw. 113, 123, 913 P.2d 39, 49 (1996) (quoting Nakamoto v. Fasi, 64 Haw. 17, 23, 635 P.2d 946, 952 (1981)) (internal quotation marks omitted).

[99] State v. Tanaka, 67 Haw. 658, 701 P.2d 1274 (1985).

[100] *See, e.g.*, California v. Greenwood, 486 U.S. 35 (1988) (holding that the Fourth Amendment does not prohibit warrantless search and seizure of garbage bags left for collection on curb outside home).

[101] 70 Haw. 546, 779 P.2d 1 (1989).

[102] *Id.* at 547, 779 P.2d at 2.

[103] 442 U.S. 735, 742 (1979).

decision to turn away from (and thus avoid) an alcohol checkpoint.[104] The Court's conclusion was that the driver's decision to turn away did not provide evidence of operating the vehicle while intoxicated, and therefore that the police officer had no "objective basis-specific and articulable facts" to justify stopping and searching the driver,[105] even though courts in other jurisdictions had reached the opposite result.

The 1978 Constitutional Convention added an entirely new provision, which has become article I, section 6, to protect each individual's "personal autonomy." The language of this new provision is:

> The right of the people to privacy is recognized and shall not be infringed without the showing of a compelling state interest. The legislature shall take affirmative steps to implement this right.

This language thus emphasizes that privacy interests can be limited only when the government has a "compelling" need to do so, and that legislative action is required to protect privacy concerns. The committee report supporting this right quoted from Justice Brandeis' opinion in *Olmstead v. United States*,[106] and emphasized that the right to privacy was designed to protect each individual's "right to personal autonomy, to dictate his lifestyle, to be oneself."[107] Again, the Hawai'i Supreme Court has interpreted this provision to ensure that the people of Hawai'i have broader privacy protections than are afforded under the U.S. Constitution.[108]

With regard to searches of students, the Hawai'i Supreme Court has followed the *T.L.O.* ruling and has found that "children in school have legitimate expectations of privacy that are protected by article I, section 7 of the Hawai'i Constitution and the fourth amendment to the United States Constitution,"[109] and "that 'individualized suspicion' is a necessary element in determining" whether a search of a student's personal effects is reasonable under the U.S. and Hawai'i Constitutions.[110] In 2004, the Hawai'i Supreme Court confirmed those rules, particularly that individualized suspicion is a necessary precondition to conduct a search, and concluded that an anonymous Crime

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[104] State v. Heapy, 113 Haw. 283, 151 P.3d 764 (2007).

[105] *Id.* at 286, 151 P.3d at 767.

[106] 277 U.S. 438 (1928).

[107] Stand. Comm. Rep. No. 69, *reprinted in* 1 PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF HAWAI'I OF 1978, at 674 (1980).

[108] *See, e.g.*, State v. Kam, 69 Haw. 483, 748 P.2d 372 (1988) (departing from federal precedents to find a privacy right to sell pornographic material for personal use in the privacy of one's home).

[109] In re Jane Doe, 77 Haw. 435, 436-37, 887 P.2d 645, 646-47 (1994).

[110] *Id.* at 443, 887 P.2d at 655.

Stoppers' tip was not sufficient to serve as reasonable grounds to search a student for contraband.[111]

VII. CONCLUSION

The change adopted by the Hawai'i Board of Education in 2008-2009 reversed long-standing Hawai'i policies regarding the privacy rights of our public school students. Its new language is directly inconsistent with (1) the principles found in article I, sections 6-7 of Hawai'i's Constitution, (2) the consistent rulings of the Hawai'i Supreme Court which have required individualized suspicion for searches of students, (3) the governing ruling of the U.S. Court of Appeals for the Ninth Circuit, which declared a canine sniff of students and their possessions to be unconstitutional, and (4) language in the U.S. Supreme Court's 2009 *Redding* decision. The people of Hawai'i, through the changes developed in the 1968 and 1978 State Constitutional Conventions, have pushed hard to expand the scope of personal privacy, but this change by the Board of Education moves in the opposite direction. The adoption of this proposal constitutes a rejection of the values of individual freedom that citizens of the United States and of Hawai'i have fought and died for during previous generations, and sends a completely inappropriate message to our students, who will soon become active members of our political community.

[111] In re John Doe, 104 Haw. 403, 408, 91 P.3d 485, 490 (2004).

Blast It All: *Allen* Charges and the Dangers of Playing With Dynamite

Samantha P. Bateman*

I. INTRODUCTION

Over forty-five years ago, Justice Thomas C. Clark penned a straightforward eulogy for the supplemental jury instruction known as the "*Allen* charge." *Allen* charges are special instructions given to potentially deadlocked juries to exhort—indeed, to pressure or even to coerce—them into continuing deliberations and reaching a verdict. Although *Allen* charges had a long history in the jury system, in 1963, Justice Clark felt that their end was drawing near. "Nor do we circulate the 'Allen charge' to the new judges as I used to do when heading up the criminal division in the Department of Justice," Clark wrote.[1] "*Allen* is dead and we do not believe in dead law."[2]

As it turned out, however, Justice Clark's eulogy was premature; the *Allen* charge is alive and well today, having persisted in the majority of American jurisdictions despite significant concerns about its coerciveness and even its constitutionality. This article seeks to chronicle and explain the puzzling persistence of *Allen* charges. It builds on the work of scholars who have long been critical of *Allen* charges as ineluctably coercive, particularly towards the members of the jury holding the minority position—the so-called "holdout" jurors. Moreover, it seeks to draw attention to and partially fill a glaring gap in the literature and case law alike, both of which have failed to account for the results of recent cognitive psychological research on *Allen* charges.[3] In what follows, I argue that the results of that research reveal a basic truth: no matter how "neutral" or sanitized judges render their *Allen* charges, those charges nonetheless exert an impermissible form of pressure on deliberating jurors.

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[1] Justice Thomas C. Clark, *Progress of Project Effective Justice—A Report on the Joint Committee*, 47 J. AM. JUD. SOC'Y 88, 90 (1963).

[2] *Id.* (italics added).

[3] *See* Saul M. Kassin et al., *The Dynamite Charge: Effects on the Perceptions and Deliberation Behavior of Mock Jurors*, 14 LAW & HUM. BEHAV. 537 (1990).

This article further situates the widespread and continuing acceptance of *Allen* charges within the broader narrative of a general trend towards seeking judicial "efficiency" at the expense of decreasing the quality of jury deliberations. Along with smaller juries and non-unanimous juries, *Allen* charges are blunt instruments that may help decrease the costs of some litigation, blasting out more final verdicts with marginally less expenditure of time and resources. But as with many jury reforms undertaken in the name of efficiency, *Allen* charges come at a price: in this case, the price of coerced verdicts that undermine true unanimity and destabilize the role of the judge as a neutral arbiter. Yet these costs are not fully internalized, nor even explicitly recognized, by the myriad courts still employing *Allen* charges.

Ultimately, it is impossible to understand the persistence of *Allen* charges as anything other than a choice, conscious or unwitting, to prefer quantity in jury verdicts over quality. Increasingly, and particularly as the empirical evidence mounts, courts are making this choice with a kind of willful blindness to its negative consequences. I argue that this "ostrich effect" helps to explain not only the continuing popularity of *Allen* charges, but also the bizarre contours of the *Allen* doctrine in some jurisdictions, such as the Ninth Circuit and the Fourth Circuit. Finally, I conclude by presenting a range of potential alternatives to the *Allen* charge. I ultimately settle on the most neutral and simplistic of all possible supplemental instructions—"please continue deliberating"—as the best, or at least the most practical and least problematic, alternative to overly coercive *Allen* charges.

II. THE EVOLUTION OF THE MODERN *ALLEN* DOCTRINE

A. Historical Development and Antecedents

Historically, hung juries were regarded as a significant problem in the jury trial system. Faced with a jury that appears close to deadlock, and with the specter of a costly and time-consuming retrial looming in the distance, judges have routinely experimented with ways to encourage, persuade, or even coerce jurors into reaching a final verdict. In fourteenth to nineteenth century England, the solution to potential deadlocks was simple, if extreme: the jurors were loaded into oxcarts and hauled from town to town as the judge rode circuit until a decision was finally "bounced out" of them.[4] Jurors were frequently denied food or drink until they reached a decision.[5] American judges took

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[4] *Deadlocked Juries and Dynamite: A Critical Look at the "Allen Charge,"* 31 U. CHI. L. REV. 386, 386 (1963) [hereinafter *Deadlocked Juries*].

[5] GEORGE CRABB, HISTORY OF ENGLISH LAW: OR AN ATTEMPT TO TRACE THE RISE, PROGRESS AND SUCCESSIVE CHANGES OF THE COMMON LAW 287 (1829).

similar approaches in the early days of the Republic; in addition to the practice of "bouncing" verdicts out, judges sometimes subjected deliberating jurors to strictly rationed diets of bread and water or purposely turned off the heat in the jury room until the potentially hung jury reached a consensus.[6]

Such egregiously coercive approaches to preventing deadlocked juries have long since earned their retirement, and no appellate court today would countenance their use.[7] However, today's trial judges still have a number of tools at their disposal to prod deliberating juries along toward a verdict, albeit in a slightly more subtle fashion. Modern approaches used to encourage a verdict often rely on psychological pressure, rather than physical deprivation, yet these ostensibly more "enlightened" methods may still be fraught with inherent dangers of coerciveness. Perhaps foremost among these methods is a device known as the "*Allen* charge," or, more colloquially, the "dynamite charge." The *Allen* charge is a special instruction given to jurors who indicate that they are in danger of deadlocking; it is designed to blast them out of their impasse by exhorting them to continue their deliberations, and it often targets the jurors holding the minority position. A typical *Allen* charge in a criminal case might communicate the following:

> In a large proportion of cases, absolute certainty cannot be expected. No juror is required to yield his conscientiously-held opinion, and "the verdict must be the verdict of each individual juror, and not a mere acquiescence in the conclusion of his fellows."[8] However, the jury "should examine the question submitted with candor, and with a proper regard and deference to the opinions of each other,"[9] and individual jurors "should listen, with a disposition to be convinced, to each other's arguments."[10] It is the duty of the jury to decide the case if they can do so consistent with their conscience. If the much larger number [is] for conviction, a dissenting juror should consider whether his doubt [is] a reasonable one which made no impression upon the minds of so many men, equally honest, equally intelligent with himself. If, upon the other hand, the majority [is] for acquittal, the minority ought to ask themselves whether they might not reasonably doubt the correctness of a judgment which [is] not concurred in by the majority.[11]

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[6] *Deadlocked Juries*, *supra* note 4, at 386.

[7] *Id.* The sort of "frontier justice" characterized by depriving the jurors of basic necessities of human life gave rise, for example, to Mead v. City of Richland Center, 297 N.W. 419 (Wis. 1941). The appellate court in *Mead* held that the trial judge acted inappropriately in insinuating "that the jury would be kept out in a cold room all night unless they agreed." *Id.* at 421. "[T]he natural tendency of the statements of the trial judge taken all together was coercive," and a new trial was therefore granted. *Id.*

[8] *Id.*

[9] *Id.*

[10] *Id.*

[11] *Id.*

Other formulations of the instruction are also possible, including ones geared toward civil instead of criminal trials.[12] Some variations on the *Allen* charge "appeal not only to the spirit of open mindedness and concession [of the jury] but also to the importance of a verdict to the parties, the public, and the court."[13] Some judges even explicitly appeal to the jurors' sense of shame or guilt, going so far as to tell them that if they fail to discharge their duty to reach a verdict, they will merely be shifting their civic responsibilities to another group of citizens serving on a future jury.[14] One courtroom reporter captured the force behind a particularly robust *Allen* charge: "In a stern voice, [the judge] read a prepared statement. . . . Try harder. If you can't reach an agreement, there will be serious consequences. There probably will be another trial. Another jury probably will have to do your job. You may simply be passing on your responsibility to someone else."[15]

Regardless of the precise wording used, however, judges and litigants alike have come to view the *Allen* charge as an effective means of inducing a timely verdict. In fact, the charge works so well that it has earned a variety of monikers signifying its sheer power; in addition to the common "dynamite charge," the *Allen* charge is also known by such colorful phrases as the "third-degree"[16] instruction, the "shotgun instruction,"[17] and the "nitroglycerin charge."[18]

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[12] *See, e.g.*, Vichare v. AMBAC Inc., 106 F.3d 457, 461 (2d Cir. 1996); Carter v. Burch, 34 F.3d 257, 260 (4th Cir. 1994). *See* AMERICAN JUDICATURE SOCIETY, JURY DECISION MAKING 1 (2009), http://www.ajs.org/jc/juries/jc_decision_dynamite.asp (noting that while jury deadlock instructions in civil cases have not given rise to nearly as much litigation as in criminal cases, neither the *Allen* charge nor the ABA Standard instruction (quoted *infra* at note 166) are specific to any particular type of case, and they constitute the two predominant models in civil as well as criminal cases.). The observations that follow in this paper regarding the coerciveness of *Allen* instructions therefore apply equally well to civil as well as criminal cases.

[13] SAUL M. KASSIN & LAWRENCE S. WRIGHTSMAN, THE AMERICAN JURY ON TRIAL: PSYCHOLOGICAL PERSPECTIVES 193 (1988).

[14] *See* People v. Prim, 289 N.E.2d 601, 607 (Ill. 1972) ("If you should fail to agree on a verdict, the case must be retried . . . . And there is no reason to believe that the case would ever be submitted to 12 men and women more competent to decide.").

[15] Marc Davis, *Judicial Tactic Raises Questions: Do Instructions Pressure Jury Holdouts to Vote with Majority?*, VA. PILOT, Dec. 5, 1999, at B1 (internal quotation marks omitted).

[16] Leech v. People, 146 P.2d 346, 347 (Colo. 1944).

[17] State v. Nelson, 321 P.2d 202, 204 (N.M. 1958).

[18] Huffman v. United States, 297 F.2d 754, 759 (5th Cir. 1962) (Brown, J., dissenting).

B. The Current Lay of the Land: General Approval of Allen *Charges*

1. Supreme Court endorsement

From their very inception, *Allen* charges were greeted with broad support from trial and appellate judges alike. An early form of the *Allen* charge was first used and approved in Massachusetts in 1851, in the case of *Commonwealth v. Tuey*.[19] Similar instructions quickly caught on in other jurisdictions. For example, the Supreme Court of Connecticut endorsed their use in the 1881 case of *State v. Smith*.[20] The United States Supreme Court entered the fray several years later, in 1896, to decide the constitutionality of the supplemental charge. The Court sanctioned the use of such instructions in *Allen v. United States*,[21] thereby popularizing the phrase "*Allen* charge" as a shorthand term for that form of judicial instruction.

The defendant in *Allen* was sentenced "to death for the murder of . . . a white man, in the Cherokee Nation of the Indian Territory."[22] Allen himself was only fourteen at the time of the incident.[23] The Court had already set aside his conviction twice before to remedy errors in the jury instructions, first with respect to the law on self-defense,[24] and later with respect to the instructions on premeditation and intent to kill.[25] After his second victory in the Court, Allen was again retried and convicted, and again appealed his case to the Court, alleging multiple errors in the jury charge.[26] One alleged error dealt with a supplemental instruction given to the jurors "after the main charge was delivered, and when the jury had returned to the court, apparently for further instructions."[27] The instruction was the classic *Allen* charge set forth above:[28] as the Court described it, "[the] instructions were taken literally from a charge in a criminal case which was approved of by the supreme court of

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[19] 62 Mass. 1, 2-3 (1851) (holding that the trial "court did nothing more than to present to the minds of the dissenting jurors a strong motive to unanimity," and that the instructions, "were entirely sound, and well adapted to bring to the attention of the jury one of the means by which they might be safely guided in the performance of their duty.").

[20] 49 Conn. 376, 386 (1881).

[21] 164 U.S. 492 (1896).

[22] *Id.* at 493-94.

[23] Allen v. United States, 150 U.S. 551, 552 (1893).

[24] *Id.* at 562.

[25] Allen v. United States, 157 U.S. 675, 681 (1895).

[26] *Allen*, 164 U.S. at 494.

[27] *Id.* at 501.

[28] *See id.*; United States v. Mason, 658 F.2d 1263, 1272 (9th Cir. 1981); Sullivan v. United States, 414 F.2d 714, 716 n.2 (9th Cir. 1969).

Massachusetts in *Commonwealth v. Tuey*, and by the supreme court of Connecticut in *State v. Smith*."[29]

This time, the Court upheld Allen's conviction, finding no error in the jury charge.[30] The *Allen* Court noted that "[t]he very object of the jury system is to secure unanimity by a comparison of views, and by arguments among the jurors themselves."[31] "While, undoubtedly, the verdict of the jury should represent the opinion of each individual juror, it by no means follows that opinions may not be changed by conference in the jury room."[32] The Court concluded that the *Allen* charge stated only that which was indisputably true, for "[i]t certainly cannot be the law that each juror should not listen with deference to the arguments, and with a distrust of his own judgment, if he finds a large majority of the jury taking a different view of the case from what he does himself."[33] Similarly, "[i]t cannot be that each juror should go to the jury room with a blind determination that the verdict shall represent his opinion of the case at that moment, or that he should close his ears to the arguments of men who are equally honest and intelligent as himself."[34] The *Allen* Court thus found no constitutional difficulty in communicating to the jurors these fundamental concepts by means of a supplemental charge.

Most recently, the Supreme Court affirmed its *Allen* holding in dictum in *Lowenfield v. Phelps*,[35] handed down in 1988. *Lowenfield* involved a petition for *habeas corpus* relief made by a defendant who had been convicted of first-degree murder and sentenced to death after his jury, which had reported difficulties in reaching a verdict and sentence, was issued a supplemental instruction.[36] The judge advised the jurors that he would impose a life sentence if they could not reach a unanimous sentencing decision, and he exhorted them to return to their deliberations and consider each other's views with an eye towards reaching consensus; he did caution, however, that they should "not surrender [their own] honest belief[s]" in doing so.[37] In upholding the conviction and death sentence, the Court emphasized that "[t]he continuing validity of this Court's observations in *Allen* are beyond dispute, and they apply with even greater force in a case such as this, where the charge given . . . does not speak specifically to the minority jurors."[38] Notably, the state's strong

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[29] *Allen*, 164 U.S. at 501 (internal citations omitted).
[30] *Id.* at 502.
[31] *Id.* at 501.
[32] *Id.*
[33] *Id.*
[34] *Id.* at 501-02.
[35] 484 U.S. 231 (1988).
[36] *Id.* at 233-35.
[37] *Id.* at 235.
[38] *Id.* at 237-38.

interest in encouraging jurors in capital cases to "express the conscience of the community on the ultimate question of life or death" was deemed sufficient to justify the use of a supplemental instruction even where there was no danger of having to actually retry the guilt phase of the case itself were the jury to hang with regard to sentencing.[39]

The supplemental instruction upheld in *Lowenfield* was not, strictly speaking, a classic *Allen* charge because it did not specifically exhort the jurors in the minority position to reconsider their verdicts—a crucial and defining feature of a complete *Allen* charge. The Court nevertheless went out of its way to emphasize the "continuing validity" of its *Allen* holding in *Lowenfield*,[40] and it has never since questioned the basic premise that full-fledged *Allen* charges are constitutional, even when they specifically target jurors holding the minority view. *Lowenfield* thus vividly demonstrates that the *Allen* doctrine is still alive and well. Barring a drastic reversal of recent precedent, the Supreme Court is unlikely to ever find that a standard *Allen* charge is unconstitutionally coercive.

2. Skepticism in some lower courts

In the years since *Allen*, a few state courts have voluntarily dispensed with the *Allen* charge or set forth presumptions discouraging its use in all but the most extreme circumstances. Courts in Tennessee, Michigan, Minnesota, New Hampshire, Illinois, Maine, Alaska, Colorado, Idaho, Pennsylvania, Oregon, South Dakota, Wyoming, Arizona, and Iowa have all expressed qualms about the *Allen* charge and taken steps to dissuade judges from using it.[41] Kansas courts have explicitly disapproved any use of *Allen* charges, noting that "[t]he minority may be right and the majority wrong," and indicating that judges "should not suggest, even faintly, that the opinion of the minority is to be controlled by that of the majority."[42] The Kansas court in *Eikmeier v. Bennett*

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[39] *Id.* at 238 (quoting Witherspoon v. Illinois, 391 U.S. 510, 519 (1968)).

[40] *Id.* at 237.

[41] *See, e.g.*, Fields v. State, 487 P.2d 831 (Ala. 1971); State v. Thomas, 342 P.2d 197, 200 (Ariz. 1959); Taylor v. People, 490 P.2d 292, 295 (Colo. 1971); State v. Flint, 761 P.2d 1158, 1164 (Idaho 1988); People v. Prim, 289 N.E.2d 601, 610 (Ill. 1972); State v. Peirce, 159 N.W. 1050, 1055 (Iowa 1916); State v. White, 285 A.2d 832, 838 (Me. 1972); People v. Sullivan, 220 N.W.2d 441, 450 (Mich. 1974); State v. Martin, 211 N.W.2d 765, 772 (Minn. 1973); State v. Blake, 305 A.2d 300, 306 (N.H. 1973); State v. Marsh, 490 P.2d 491, 501 (Or. 1971); Commonwealth v. Spencer, 275 A.2d 299, 304 (Pa. 1971); State v. Ferguson, 175 N.W.2d 57, 61 (S.D. 1970); Kersey v. State, 525 S.W.2d 139, 144 (Tenn. 1975); Elmer v. State, 463 P.2d 14, 21-22 (Wyo. 1969). All of the states rejecting the *Allen* charge, with the exception of South Dakota, have adopted the alternative instruction set forth in section 5.4 of the American Bar Association's *Standards Relating to Trial by Jury*.

[42] Eikmeier v. Bennett, 57 P.2d 87, 92 (Kan. 1936).

was scathing in its critique of *Allen* charges: "[t]o say to a minority that they should re-examine their views in the light of the opinion held by the majority, without putting a like duty on the majority . . . is wrong."[43] Meanwhile, the Supreme Court of California in *People v. Gainer*[44] explicitly disallowed the use of *Allen* charges in any future cases, holding that while the charge may be effective, "it achieves such efficacy as it may have through a subtle mixture of inaccuracy and impropriety, in a manner which can dramatically distort the fact-finding function of the jury in a criminal case."[45] The *Gainer* court held that "the admonition to minority jurors . . . constitutes . . . excessive pressure on the dissenting jurors to acquiesce in a verdict"[46] and that the "open encouragement given by the charge to such acquiescence is manifestly incompatible with the requirement of independently achieved jury unanimity."[47] The *Gainer* court further noted "that even if it were possible to demonstrate that Allen's admonition to dissenters were without appreciable effect on a jury, it would nevertheless be objectionable as a judicial attempt to inject illegitimate considerations into the jury debates as an appeal to dissenting jurors to abandon their own independent judgment."[48]

Federal appellate courts have also questioned the appropriateness and constitutionality of *Allen* charges. The Third Circuit, for example, entirely rejected the use of *Allen* charges due to concerns about their propriety. In *United States v. Fioravanti*,[49] the court held that trial judges should not give such instructions because they rest on a faulty premise that the viewpoint of the majority is superior in its rationality to that of the minority,[50] and because the trial court imperils the constitutional requirement of a unanimous jury verdict in federal trials by giving its "blind imprimatur" to the majority viewpoint, thereby encouraging dissenting jurors to distrust their own judgments.[51] The Seventh Circuit[52] and the District of Columbia Circuit[53] have also abandoned use of the *Allen* charge in favor of a standard instruction recommended by the American Bar Association.[54] However, the Seventh Circuit at least appears to have done

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[43] *Id.*

[44] 566 P.2d 997 (Cal. 1977).

[45] *Id.* at 1009.

[46] *Id.* at 1005.

[47] *Id.* at 1004.

[48] *Id.*

[49] 412 F.2d 407 (3d Cir. 1969).

[50] *Id.* at 416.

[51] *Id.* at 417.

[52] United States v. Silvern, 484 F.2d 879 (7th Cir. 1973).

[53] United States v. Thomas, 449 F.2d 1177 (D.C. Cir. 1971) (en banc).

[54] The ABA's alternative instruction is quoted and analyzed *infra* at notes 168-179. Three other circuit courts, the Fourth Circuit, the Eight Circuit, and the Tenth Circuit, also favor the ABA charge, despite not actually forbidding use of *Allen* charges. *See* United States v. Davis,

so less out of strong principled disagreement with *Allen* charges generally, and more out of a pragmatic concern that minute variations in the exact wording of *Allen*-type instructions were leading to an unwieldy proliferation of appeals.[55] Other federal courts have also expressed unease with the practice of blasting the jury with *Allen*'s dynamite; even in several jurisdictions that uphold the use of *Allen* charges, there is "evidence of a judicial attitude that the instruction approaches maximum permissible limits."[56] For example, the Fourth Circuit noted in *United States v. Smith* that "[u]naccented and unembellished, the *Allen* charge is quite bold enough,"[57] while the Fifth Circuit in *Green v. United States* stated that "[t]here is small, if any, justification for [a dynamite instruction's] use."[58]

3. *General, though qualified, acceptance of the* Allen *doctrine*

Those courts prohibiting the use of *Allen* charges, however, are in the distinct minority.[59] In fact, a majority of jurisdictions have approved some version of the *Allen* charge, often due to the combination of its effectiveness in avoiding the inconvenience of hung juries, the general sense that juries have a civic responsibility to work together to reach consensus, and the air of authority that dynamite instructions garnered from receiving the Supreme Court's seal of approval in *Allen* itself.[60] The Supreme Court, for its part, has never overturned *Allen*'s basic holding that the language of the dynamite instruction is not unduly coercive on its face, and it is rare for a state or lower federal court to hold otherwise.

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481 F.2d 425, 429 (4th Cir. 1973); United States v. Skillman, 442 F.2d 542, 560 (8th Cir. 1971); Munroe v. United States, 424 F.2d 243, 246-47 (10th Cir. 1970).

[55] *See Silvern*, 484 F.2d at 883 ("Experience has now shown that variants in language or supplements or additions serve merely to proliferate appeals."); *Thomas*, 449 F.2d at 1185 (quoting United States v. Johnson, 432 F.2d 626, 632-33 (D.C. Cir. 1970)) (noting that "[a] prime consideration motivating the promulgation of the ABA Standard . . . [was] the large amount of litigation which the use of the original *Allen* charge has engendered" and that eliminating the element of the *Allen* charge directed at the minority jurors "may well be in the interest of the efficient administration of justice because that would avoid recurring controversies, turning upon subtle questions of coercion in the context of each case.") (internal quotation marks omitted).

[56] *Deadlocked Juries*, *supra* note 4, at 388.

[57] 303 F.2d 341, 343 (4th Cir. 1962).

[58] 309 F.2d 852, 854 (5th Cir. 1962).

[59] Nine of thirteen federal circuit courts of appeals have allowed *Allen* charges within their jurisdictions, as have thirty-two states. The Federal Circuit has not yet weighed in on the matter. *See infra* note 71.

[60] *Deadlocked Juries*, *supra* note 4, at 387-88.

Admittedly, trial judges generally use the rather extreme expedient of an *Allen* charge only as a last resort,[61] perhaps due to unarticulated concerns about its potential coerciveness. Meanwhile, appellate courts are sometimes willing to step in and reverse when trial judges are perceived to have overstepped their bounds or deviated from the specific language in *Allen*, again perhaps reflecting the nascent belief that overly coercive supplemental instructions are unconstitutional. For example, appellate courts have reversed, or at the very least expressed strong judicial disapproval, when a trial judge supplemented the standard *Allen* charge with additional comments about "swallowing" one's own view,[62] the "duty" of the jury "to agree,"[63] or threats of imprisonment.[64] Reversals are also possible when the trial judge omits the traditional language stressing that jurors have an individual right to maintain their conscientiously-held opinions,[65] or when the judge polls the jury or otherwise inquires into, or is made aware of, the numerical breakdown of their voting deadlock before delivering the charge.[66] Finally, courts will sometimes reverse when the deliberation time following an *Allen* charge is so short as to indicate that the jury must have decided to go with the "majority rule," rather than truly re-examining their beliefs to reach consensus.[67]

However, absent extreme circumstances or judicial misconduct in the delivery of the dynamite charge, courts tend to hold that *Allen* charges are appropriate—even helpful. The Second Circuit upheld the use of a slight variation of the *Allen* charge in *United States v. Miller*[68] and noted in *United*

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[61] *See, e.g.*, People v. Richards, 237 N.E. 848, 441 (Ill. App. 1929) ("First, the 'Allen type' charge is an admitted and vestigial last resort measure to exact or 'blast' a verdict from a hung jury . . . ."); *see also* People v. Bais, 31 Cal. App. 3d 663, 675 (1973) (noting that a jury reached its verdict "only after receiving the 'Allen instruction' in last resort").

[62] United States v. Smith, 303 F.2d 341, 343 (4th Cir. 1962).

[63] People v. Barmore, 117 N.W.2d 186, 188 (Mich. 1962).

[64] Kelsey v. United States, 47 F.2d 453, 454 (5th Cir. 1931).

[65] United States v. Rogers, 289 F.2d 433, 436 (4th Cir. 1961), *abrogated on other grounds by* Bell v. U.S., 462 U.S. 356 (1983).

[66] *See, e.g.*, Brasfield v. United States, 272 U.S. 448, 449-50 (1926); *see also* United States v. Williams, 547 F.3d 1187, 1202-03 (9th Cir. 2008) (finding the use of even a "neutral" *Allen* charge inappropriate because the judge was made aware via a note of the identity of the lone dissenter on the jury prior to issuing the charge).

[67] *Rogers*, 289 F.2d at 436 ("The time interval [fifteen minutes] was quite long enough for acceptance of a theory of majority rule, but was hardly long enough to have permitted a painstaking re-examination of the views which the minority had held steadfastly until the charge was given.").

[68] 478 F.2d 1315, 1320 (2d Cir. 1973) (holding that

> [t]he '*Allen*-charge' variation, that 'if much the larger number of jurors would hold one way, a dissenting juror should consider whether his or her position was a reasonable one,' when read in context was not unduly coercive; other statements delivered at the same time reaffirmed the need for each juror to vote his conscience and in no way to violate 'a

States v. Melendez that such instructions can be useful in avoiding "the expense and delay of a new trial."[69] The Ninth Circuit has also sanctioned the use of a proper *Allen* charge as "not impermissibly coercive,"[70] while the Eleventh Circuit has emphasized that *Allen* charges can "avoid[] any implication of coercion," even when those charges specifically encourage jurors in the minority to reconsider their verdicts.[71] These views are typical. While courts sometimes disagree as to the particular language that should or should not be used in a valid *Allen*-type charge, the majority of courts are in general agreement that some form of "dynamite" charge can be appropriate to shake things up when the jury appears headed for inevitable deadlock—even when those instructions single out the minority jurors for special criticism.[72]

III. CAUSE FOR CONCERN: EMPIRICAL FINDINGS ON THE ADVERSE EFFECTS OF THE *ALLEN* INSTRUCTION

Empirical research on the effects of *Allen* charges on juror deliberations, however, undermines the central premise behind the courts' basic agreement on the propriety and desirability of the standard *Allen* charge. The results of several relatively recent studies suggest that, far from encouraging jurors to fulfill their duty to reach a reasoned and conscientious judgment on the evidence, *Allen* charges coerce minority jurors into abdicating their beliefs and substituting the majority's views for their own. Indeed, the available empirical evidence demonstrates that no matter how carefully the trial judge adheres to the "proper" language in *Allen*, a dynamite instruction in any formulation is

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conviction which he conscientiously holds predicated upon the weight and effect of the evidence.').

[69] 60 F.3d 41, 51 (2d Cir. 1995), *vacated on other grounds by* Colon v. United States, 516 U.S. 1105 (1996).

[70] United States v. Ajiboye, 961 F.2d 892, 894 (9th Cir. 1992).

[71] United States v. Chigbo, 38 F.3d 543, 546 (11th Cir. 1994). The Eleventh Circuit calls its pattern instruction a "modified" *Allen* charge, but it includes all of the essential elements of the instruction upheld in *Allen* itself, including an exhortation to the minority jurors in particular, advising them that "[i]f a substantial majority . . . are in favor of a conviction, those . . . who disagree should reconsider whether your doubt is a reasonable one since it appears to make no effective impression upon the minds of the others," while "[o]n the other hand, if a majority or even a lesser number . . . are in favor of an acquittal, the rest . . . should ask . . . again and most thoughtfully whether you should accept the weight and sufficiency of evidence which fails to convince your fellow jurors beyond a reasonable doubt." *Id.* at 545.

[72] For federal appellate courts that have upheld some form of a supplemental *Allen* charge, including language specifically targeting minority jurors, see United States v. McKinney, 822 F.2d 946, 950-51 (10th Cir. 1987); United States v. Rey, 811 F.2d 1453, 1459-60 (11th Cir. 1987); United States v. Kelly, 783 F.2d 575, 576-77 (5th Cir. 1986); United States v. Bonam, 772 F.2d 1449, 1450-51 (9th Cir. 1985); United States v. Sawyers, 423 F.2d 1335, 1339 (4th Cir. 1970).

inescapably coercive, especially for those jurors holding the dissenting viewpoint.

The term "coercive" in this context carries both process-oriented and result-oriented connotations. On the process-oriented end of the scale, "coercion" simply means that jurors, particularly jurors taking the minority approach, *feel* coerced—that regardless of whether or not they ultimately alter their vote, they leave the courthouse after their jury service has concluded with the sense that the *Allen* charge exerted on them an impermissible or unwelcome form of pressure. From the result-oriented perspective, "coercion" also means that the *Allen* charge is prone to cause a juror, particularly a juror in the minority position, to cast a vote contrary to his or her conscience purely for the sake of reaching a final verdict. In other words, the concern on this score is that an *Allen* charge may do precisely what it purports to eschew: encourage jurors to yield their "conscientiously-held opinions" and acquiesce in the majority's decision despite their own abiding doubts or disagreement.

Coercion in either form is deeply problematic in its implications for the jury system. Disturbingly, the psychological studies conducted to date indicate that *both* forms of coercion are present whenever an *Allen* charge is employed, even when the language of the charge hews closely to the specific wording allowed by *Allen* and its progeny. The results of research simulations conducted with mock jurors provide strong support for the hypothesis "that the dynamite charge causes jurors in the minority to feel coerced and to change their votes and encourages those in the majority to exert increasing amounts of social pressure" on their fellow jurors throughout the deliberation process.[73]

The two primary studies of the effects of dynamite charges were conducted by Saul M. Kassin and Vicki L. Smith, with William F. Tulloch also contributing to the first of the two experiments. In the first study, Kassin, Smith, and Tulloch randomly assigned participants in a mock jury exercise to either the "majority or minority faction of a 3-to-1 split."[74] The participants were given a hypothetical fact pattern and told that they would be "deliberating" about the case with three other participants by passing notes back and forth from different rooms.[75] In fact, all subjects participated alone, with experimenters supplying pre-written notes to the participants at the appropriate times.[76] The subjects who were assigned to the "majority" condition received two notes in the initial round of deliberations "that agreed with their guilty or not guilty verdict," and one note that disagreed, while subjects in the "minority" condition received three "notes that all disagreed

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[73] Kassin et al., *supra* note 3, at 537.

[74] *Id.*

[75] *Id.* at 540.

[76] *Id.*

with their verdicts."[77] Deliberations continued by means of the note-passing exercise for seven rounds.[78] After the third round of voting, subjects in the "no-instruction control" condition were simply reminded that they should continue to deliberate.[79] Subjects assigned to the "dynamite" condition, however, were read an instruction modeled after a typical *Allen* charge in between the third and fourth rounds of deliberations.[80]

The results of the experiment were striking. First, the *Allen* charge's impact on minority voters in deadlocked juries was apparent: "minority" jurors in the dynamite condition "were more likely to capitulate."[81] Even more significantly, subjects who received the dynamite instruction reported feeling pressured by the instruction. "[D]ynamited subjects felt more pressure from the judge than those in the control group," and "[r]emarkably, a similar, though weaker, interaction pattern also characterized subjects' perceptions of the pressure exerted from their peers."[82] This result was particularly revealing because the subjects had all received the same pre-written notes at the exact same times. Thus, the data indicated that "even though the dynamite-minority group

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[77] *Id.*

[78] *Id.*

[79] *Id.* at 541.

[80] *Id.* The exact instruction read by the experimenter was:

> As you know, the verdict requires a unanimous decision, which has not yet been reached. This verdict must take into account the views of each individual juror, and should not represent the mere acquiescence of an individual to his or her peers. Each of you should examine the question submitted for your consideration with candor and with a proper regard and deference to the opinions of each other. As it is your duty to decide the case if you can conscientiously do so, you should listen, with a disposition to be convinced, to each other's arguments. If most members of the jury are for conviction, a dissenting juror should consider whether his or her doubt is a reasonable one, considering that it made no impression upon the minds of so many other equally honest and intelligent jurors. If, on the other hand, the majority is for acquittal, the minority ought to ask themselves whether they might not reasonably doubt the correctness of a judgment which is not concurred in by the majority.

Id.

[81] *Id.* at 543. "Among subjects who received the control instruction, the minority were not more likely to change their votes than the majority . . . . Among subjects who were subjected to the dynamite charge, however, those in the minority were more likely to capitulate than those in the majority (56.3% & 17.7% [respectively])." *Id.*

[82] *Id.* at 544. The researchers had subjects rate the overall pressure they experienced during deliberations, the pressure they perceived from the judge, and the pressure they perceived from their fellow jurors, all on a 1-10 point scale "where 1 = *not* [any pressure] *at all*, and 10 = *very much* [pressure]." *Id.* at 541. They found that "subjects in the voting minority reported feeling more pressured on all three measures than those in the majority (overall *M*'s [rating measures] = 6.86 and 1.69, respectively, . . .; from the judge *M*'s = 2.89 and 1.88 . . . ; [and] from their peers *M*'s = 5.44 and 1.89)," and that "ratings of pressure from the judge were higher among dynamited minority subjects than in all other groups." *Id.* at 543-44.

received the same deliberation notes as everyone else,"[83] they interpreted those notes quite differently. After being given the *Allen* charge, "there was a tendency for them to feel as if majority jurors had exerted more pressure on them to change their verdicts."[84]

Kassin, Smith, and Tulloch also analyzed the notes written by participants in the majority condition to determine the kinds of pressure exerted in those notes pre- and post-*Allen* charge. They coded the notes according to whether they displayed informational or normative persuasive influences.[85] Informational influences are those that rely on facts, evidence, or other information to persuade, while normative influences are those that rely purely upon social pressures to conform.[86] Once again, the results indicated that the *Allen* charge had a significant effect. Compared to subjects in the no-instruction control condition, "those who received the dynamite charge exhibited a greater reduction across deliberation rounds in the length of their notes and their use of *informational* influence."[87] They also exhibited "the greatest increase in *normative* influences—at least on a temporary basis, from the round before to the round after the judge's [*Allen*] instruction."[88] In other words, after receiving the dynamite charge, jurors in the majority scaled back their efforts to engage their fellow jurors in a discussion of the evidence, and instead upped the ante on their peer pressure. As the experimenters noted, "[c]learly, the dynamite charge may tip in an undesirable direction the balance of forces operating on individual jurors."[89]

A follow-up study conducted by Smith and Kassin with six-member mock juries yielded much the same results as in the notes-passing experiment.[90] In the follow-up design, "12 subjects read a transcript of an aggravated assault trial and indicated their pre deliberation verdict preferences."[91] These initial responses were then used to construct juries "that were stacked 4-to-2 in favor of either conviction or acquittal."[92] The jurors then deliberated face-to-face, with a subset of them receiving an *Allen* charge while another "control" group continued to deliberate without interruption.[93] At the conclusion of the study,

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[83] *Id.* at 544.
[84] *Id.*
[85] *Id.* at 538.
[86] *Id.* at 547.
[87] *Id.*
[88] *Id.*
[89] Vicki L. Smith & Saul M. Kassin, *Effects of the Dynamite Charge on the Deliberations of Deadlocked Mock Juries*, 17 LAW & HUM. BEHAV. 625, 627 (1993).
[90] *Id.* at 628.
[91] *Id.*
[92] *Id.*
[93] *Id.*

the jurors were asked to report on their perceptions of the deliberation process, their fellow jurors, and the *Allen* instruction, if given.[94]

Once again, the supplemental dynamite charge did not affect the votes of the jurors in the majority position, but it did lead jurors in the minority to change their votes more often than did minority jurors who were not read the *Allen* charge.[95] Subjects in the dynamite condition also reported feeling more pressure from the instruction and from their fellow jurors with "the largest increases occur[ing] immediately after the charge."[96] Moreover, the jurors who reported feeling more pressure were also more likely to change their votes. The experimenters concluded that "vote changes were significantly and highly correlated with perceived pressure," such that "[t]he more pressure jurors reportedly felt, the more likely they were to change their votes."[97]

Consistent with the results in the note-passing study, the *Allen* charge was perceived as selectively picking on the "holdout" jurors in the minority position, many of whom remarked during the deliberations that they felt singled out by the charge.[98] Notably, although the minority jurors reported feeling more pressure from their fellow participants after the dynamite charge was given, the experimenters did not actually code the statements of the majority jurors as exerting substantially more normative pressure following the *Allen* charge.[99] Smith and Kassin speculated that "[p]erhaps [the] subjects were reluctant to exert too much pressure in a live interaction lasting for less than an hour" and that an *Allen* charge might increase normative influences more significantly in actual trials, "after long and extensive discussions" spanning "days, rather than minutes."[100] This study might "underestimate the power of the dynamite instruction to influence juries in the real world."[101]

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[94] *Id.*

[95] *Id.* at 632.

[96] *Id.* at 639. The study found minority jurors' pressure ratings increased by "an average of .54 scale points" on a 1-10 point scale immediately after the dynamite instruction was read. *Id.* Meanwhile, jurors holding the majority viewpoint actually experienced a "*decrease* in reported pressure after the instruction;" while the decrease was not large enough to be statistically significant, Smith and Kassin concluded that "the dynamite charge insulated majority jurors from the build-up of pressure experienced in the other conditions." *Id.*

[97] *Id.* at 637.

[98] *Id.* at 640. In fact, Smith and Kassin found that "[m]any of [the] subjects were quick to apprehend that the charge targets those in the voting minority." *Id.* For example:

> As one minority juror put it, "Well that shoots *me* down." Another said that, "Being in the minority I guess I'd better reconsider." Similarly, one majority juror asked of the minority, "What are they saying, since there's four of us and two of you that you're supposed to change your minds?"

Id.

[99] *Id.* at 640-41.

[100] *Id.* at 641. "Indeed, after long and extensive discussions, majority jurors may be more willing to exploit the judge's instruction to strengthen their hold on the minority." *Id.* This

Even so, the results are compelling. "In short, the dynamite charge clearly tipped the balance of power within groups, increasing the pressure felt by minority jurors and minimizing that felt by those in the majority."[102] The *Allen* charges were effective at producing a higher quantity of unanimous decisions among the deliberating groups, but at what cost to the deliberations process itself?

IV. IMPLICATIONS AND ALTERNATIVES: SAFEGUARDING THE INTEGRITY OF THE JURY SYSTEM

A. Implications

The results of empirical research into the effects of *Allen* charges on deliberating juries are profoundly troubling. The data suggest that while dynamite instructions may avoid hung juries and increase the quantity of verdicts,[103] they do so at the cost of decreasing the quality of jury deliberations. "Dynamited" juries discuss the evidence less and engage in significantly higher levels of normative peer pressuring.[104] Given that the standard *Allen* charge singles out dissenting jurors, asking them to reconsider their opinions while making no similar demand of the jurors in the majority, the dissenting jurors tend to feel as though the judge and their fellow jurors are conspiring to encourage them—and them alone—to switch their votes.[105] The results from the Smith, Kassin, and Tulloch studies indicate that *Allen* charges may simply sacrifice verdicts of conscience for verdicts of convenience.

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would be a fruitful avenue for further research involving actual deliberating jurors.

[101] *Id.*

[102] *Id.* at 639.

[103] United States v. Bailey, 468 F.2d 652, 666 (5th Cir. 1972) (holding that "[t]he charge is used precisely because it works, because it can blast a verdict out of a jury otherwise unable to agree.").

[104] Kassin et al., *supra* note 3, at 547.

[105] *See* United States v. Fioravanti, 412 F.2d 407, 417 (3rd Cir. 1969) (finding "this to be the "real treachery of the Allen Charge. It contains no admonition that the majority reexamine its position; it cautions only the minority to see the error of its ways."); *see also* Fields v. State, 487 P.2d 831, 841 (Alas. 1971) (noting that the *Allen* instruction encourages inaction and entrenchment by the majority); People v. Gainer, 566 P.2d 997, 1005 (Cal. 1977) (noting that "[t]he dissenters, struggling to maintain their position in a protracted debate in the jury room, are led into the courtroom and, before their peers, specifically requested . . . to reconsider their position . . . . The charge places the sanction of the court behind the views of the majority") (internal quotation marks omitted); Note, *On Instructing Deadlocked Juries*, 78 YALE L.J. 100, 139-40 (1968) (stating that "[i]f he addresses his remarks primarily to dissenters, the judge will appear to support the majority . . . . This danger is particularly acute in connection with the standard *Allen* instruction that each dissenter should examine his views in the light of the views of the majority.").

Allen charges therefore threaten fundamental guarantees in both the Sixth and Seventh Amendments to impartial jury deliberations based upon the law and the evidence, not upon improper exogenous pressures.[106] It is undeniable that by favoring one faction (the jurors in the majority), while criticizing the other (the jurors in the minority), "the court effectively injects its own interests into the jury's deliberations."[107] The *Allen* charge invades the jury's province, encouraging jurors to surrender their opinions in response to pressure both "by the judge, who has made it obvious that he wishes a verdict, and by the majority [jurors], who can point to the instruction for tacit approval of their position and of their efforts to attain unanimity."[108] The unmistakable thrust of the *Allen* charge is that the majority should rule. It "is in effect a tacit suggestion to the unsophisticated members of the jury . . . that the views of the majority are correct and should be regarded with deference simply because they prevail in number."[109] The Third Circuit perhaps put it best: "[i]t departs from the sole legitimate purpose of a jury to bring back a verdict based on the law and the evidence received in open court, and substitutes therefore a direction that they be influenced by some sort of Gallup Poll conducted in the deliberation room."[110]

The use of *Allen* charges to specifically target minority jurors and pressure "holdouts" into agreement with the majority is particularly disturbing in light of evidence that most jurors holding the minority position are not rogue, obstinate holdouts at all, but in fact are conscientious and reasonable decision-makers exhibiting a "genuine response to close and difficult cases in which the evidence allows for well-reasoned disagreement."[111] Many appellate judges who favor dynamite instructions do so because of their common misconceptions about what causes a hung jury: "[p]roponents of the instruction

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[106] U.S. CONST. amend. VI (guaranteeing criminal defendants the right to "an impartial jury of the State and district wherein the crime shall have been committed."); McCo v. Goldston, 652 F.2d 654, 657 (6th Cir. 1981) (noting that the Seventh Amendment does not explicitly contain any language regarding impartiality; however, together with the due process clause of the Fifth Amendment, the Seventh Amendment has been held to guarantee civil litigants the right to an impartial jury).

[107] Note, *An Argument for the Abandonment of the Allen Charge in California*, 15 SANTA CLARA L. REV. 939, 944 (1975) [hereinafter *Argument*]; *see also* Huffman v. United States, 297 F.2d 754, 759 (5th Cir. 1962) (Brown, J., dissenting) (noting that the use of an *Allen* instruction results in "an intrusion by the Judge into the exclusive domain of fact finding by the jury.").

[108] *Argument*, *supra* note 107, at 945; *see also* Thaggard v. United States, 354 F.2d 735, 741 (5th Cir. 1965) (Coleman, J., concurring) (arguing that "every juror . . . understands from the Allen charge that what the Judge wants is a verdict. So, there the previously reluctant juror stands, fancying himself in opposition to the wishes of a United States Judge, which is about the last position in which he ever wanted to find himself.").

[109] People v. Richards, 237 N.E.2d 848, 852 (Ill. App. 1968).

[110] United States v. Fioravanti, 412 F.2d 407, 417 (3d Cir. 1969).

[111] KASSIN & WRIGHTSMAN, *supra* note 13, at 194.

base their opinion on the belief that juries hang because of an obstinate, uncooperative, and closed-minded individual, the chronic nonconformist."[112] As one court put it, such "holdout" jurors "may properly be warned against stubbornness and self-assertion."[113]

Empirical research undermines the foundation for this assumption, suggesting that "most hung juries occur in close cases, a fact that lends support to the more rational image of the phenomenon."[114] In fact, juries rarely hang as a result of one or two eccentric individuals. Rather, deadlocked juries much more commonly result from a sizable number of jurors' initial disagreement with the majority position, such that the primary cause of a hung jury is the "ambiguity of the case," and not "an eccentric juror . . . refusing to play his proper role."[115] Researchers have found "no evidence that the holdouts and their positions are either odd or extreme."[116] To the contrary, studies of actual deliberating Arizona juries revealed that "[i]n each case, the holdout jurors articulated reasons for their positions"[117] and that in six out of fourteen holdout cases, the judge who presided over the trial agreed with the holdouts.[118]

Even acknowledging that "there are . . . exceptional trials in which the hung jury fits the . . . nonrational profile,"[119] and that in a few rare cases, juries may be heading for deadlock because of one or two stubborn, biased, or eccentric jurors, those truly obstinate holdouts are the precise jurors one would expect to be *least* likely swayed by an *Allen* charge. Instead, *Allen* charges put pressure on those jurors who are truly attempting to discharge their civic duties. The charge comes at a low point during the deliberation process and plays upon already extant stressors to encourage those jurors to abandon their conscientiously-held beliefs in order to appease the judge and their fellow jurors.[120]

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[112] *Id.*

[113] People v. Randall, 174 N.E.2d 507, 515 (N.Y. 1961) (citing People v. Faber, 92 N.E. 674, 676 (N.Y. 1910)).

[114] KASSIN & WRIGHTSMAN, *supra* note 12, at 194.

[115] HARRY KALVEN, JR. & HANS ZEISEL, THE AMERICAN JURY 462 (1966); *see also* Hans Zeisel, . . . *And Then There Were None: The Diminution of the Federal Jury*, 38 U. CHI. L. REV. 710, 719 (1971) (noting that "[h]ung juries almost always arise from situations in which there were originally several dissenters. Even if only one holds out, his having once been the member of a group is essential in sustaining him against the majority's efforts to make the verdict unanimous.").

[116] Shari Seidman Diamond et al., *Revisiting the Unanimity Requirement: The Behavior of the Non-Unanimous Civil Jury*, 100 NW. U.L. REV. 201, 205 (2006).

[117] *Id.* at 220.

[118] *Id.* at 222.

[119] KASSIN & WRIGHTSMAN, *supra* note 12, at 194.

[120] *See* Monica K. Miller & Brian H. Bornstein, *Do Juror Pressures Lead to Unfair Verdicts?*, MONITOR ON PSYCHOL., Mar. 2008, at 18, *available at* http://www.apa.org/monitor/2008/03/jn.aspx (noting that "[b]eing in a minority faction during a group task is stressful, even

The implications of this judicially-sanctioned coercion on the integrity of the jury system are unsettling. The Supreme Court has consistently held that "the principle that jurors may not be coerced into surrendering views conscientiously held is so clear as to require no elaboration."[121] Given that both common sense and data from psychological experiments suggest that such coerced capitulation is exactly what happens in the wake of an *Allen* charge, courts' continued refusal to question the constitutionality of *Allen* charges is all the more puzzling.[122] Indeed, perhaps the only way to understand the persistent appeal of dynamite charges is as an admittedly effective means of blasting out more verdicts, collateral consequences to the deliberation process be damned.

B. Part of a Troubling Trend

In a broader sense, the widespread acceptance of *Allen* charges can be seen as part of a larger trend to prefer processes that yield more, and more easily reached, verdicts, even when those same processes undermine the group deliberation dynamic upon which a robust and successful jury system depends. Most notably, the Court's approval of *Allen* charges also closely parallels its holdings with regard to two other developments aimed at solving the "problem" of hung juries: non-unanimity and reduced jury size. As with *Allen* charges, both of those additional attempts to reform the jury system may reduce the costs of hung juries, but they also pose their own unique threats to the integrity of the jury system.

Along with *Allen* charges, allowing non-unanimous verdicts is another relatively common reform designed to decrease the number of deadlocked juries. This practice is premised on the theory that a few obstinate holdouts will not lead to a deadlock when the holdout votes can simply be discarded under a rule allowing for the validity of non-unanimous verdicts. The tradition

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without these additional pressures" and that "individuals who are tired and under social and time pressures are much more likely to lose willpower and give in"); *see also* Note, *On Instructing Deadlocked Juries*, *supra* note 105, at 110-14 (exploring the "coalition pressures" and "verbal pressures" that are often brought to bear during jury deliberations).

[121] Jenkins v. United States, 380 U.S. 445, 446 (1965) (internal citations omitted); *see also* Brasfield v. United States, 272 U.S. 448, 450 (1926) ("[E]very consideration other than that of the evidence and the law as expounded in a proper charge, should be excluded [from the jury's deliberations].").

[122] Due primarily to the Supreme Court's holding in *Allen* and its dicta in *Lowenfield*, no lower court has gone so far as to declare the use of an *Allen* instruction unconstitutional. Instead, those few courts that have forbidden its use have simply held that it is potentially coercive and inefficient, and have grounded their decisions in their supervisory powers to regulate the administration of judicial proceedings within their jurisdiction. *See, e.g.*, United States v. Brown, 411 F.2d 930, 933 (7th Cir. 1969); People v. Prim, 289 N.E.2d 601, 609-10 (Ill. 1972); State v. Marsh, 490 P.2d 491, 498 (Or. 1971).

of complete unanimity remains the rule for felony trials in all federal jurisdictions and all but two states, but "the unanimity standard . . . has significantly eroded for verdicts in civil cases."[123] All federal juries must be unanimous,[124] and the American Bar Association recommends unanimity as the ideal rule for all jury trials,[125] but "only eighteen states require unanimity and another three accept a non-unanimous verdict after six hours of deliberation. The remaining [twenty-nine] states permit super-majorities of between two-thirds and five-sixths in civil cases."[126] The Supreme Court upheld the constitutionality of non-unanimous verdicts in state trials in two consolidated cases heard jointly in 1972, *Johnson v. Louisiana*[127] and *Apodaca v. Oregon*.[128]

As with the *Allen* charge studies, however, social psychological research on the effects of non-unanimity has demonstrated that while non-unanimous juries are slightly less likely to deadlock, the process by which they reach their decisions is markedly inferior to that of traditional unanimous juries. Mock juror studies have found that jurors' awareness that their verdicts need not be unanimous often led to shorter and less thorough deliberations, earlier and more frequent ballots, and an increased focus on driving toward an outcome, rather than fully sifting through the evidence.[129] Researchers Shari Seidman Diamond, Mary R. Rose, and Beth Murphy studied the deliberations of fifty actual Arizona civil juries, where verdicts of six jurors out of eight are

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[123] Diamond et al., *supra* note 116, at 203.

[124] FED. R. CRIM. P. 31(a); *see also* Johnson v. Louisiana, 406 U.S. 356, 369-70 (1972) (Powell, J., concurring) (finding that the Court consistently and "virtually without dissent" has recognized unanimity as "one of the indispensable features of *federal* jury trial" in both criminal and civil cases and that unanimity in federal trials is "mandated by history") (emphasis in original).

[125] AMERICAN BAR ASSOCIATION, PRINCIPLES FOR JURIES & JURY TRIALS 21, Principle 4(A) (2005).

[126] Diamond et al., *supra* note 116, at 203.

[127] 406 U.S. 356, 362 (1972).

[128] 406 U.S. 404, 406 (1972). In a strange configuration of opinions, the Court upheld non-unanimous verdicts in state criminal trials even though five Justices held that the Sixth Amendment required unanimity, and eight Justices agreed that the Sixth Amendment applied to the states in the same manner as it did to the federal government. The odd result was the product of Justice Powell's controlling concurrence in *Johnson*, which concluded that the Sixth Amendment was not fully incorporated to the states via the Fourteenth Amendment, such that the Sixth Amendment required unanimity in federal prosecutions, while the Fourteenth Amendment did not require the same in state trials. *Johnson*, 406 U.S. at 375-77 (Powell, J., concurring). The Supreme Court has never directly ruled on the constitutionality of a non-unanimous verdict in a federal civil case under the Seventh Amendment, but it has indicated its tacit approval of the practice by standing mute while state after state enacted rules permitting non-unanimous civil verdicts.

[129] *See, e.g.*, REID HASTIE ET AL., INSIDE THE JURY 102 (2002). For a review of this research, see Dennis J. Devine et al., *Jury Decision Making: 45 Years of Empirical Research on Deliberating Groups*, 7 PSYCHOL. PUB. POL'Y & L. 622, 669 (2001).

permissible, and concluded that the "benefits of unanimity outweigh its costs."[130] The study revealed that non-unanimity "in some instances translates into dismissive treatment of minority jurors ('holdouts') whose agreement is not needed to produce the requisite quorum" and that "both outvoted holdouts and majority jurors are less positive about their juries than jurors who reach unanimous verdicts, giving lower assessments of their jury's thoroughness and the open-mindedness of their fellow jurors."[131] Despite these findings, the Supreme Court has refused to reconsider its holdings in *Johnson* and *Apodaca*, denying certiorari on that very issue in *Lee v. Louisiana*.[132]

Many courts have begun to experiment with reductions in jury size as a further cost-saving and efficiency-enhancing mechanism. The move to decrease the size of juries began in earnest in the late 1960s and focused primarily on civil juries; some states, however, have reduced the size of even their criminal juries to a minimum of six individuals.[133] The Supreme Court in *Williams v. Florida*[134] upheld the use of six-person juries in both criminal and civil trials at the state court level, and subsequently extended its support for the six-person jury to civil trials in federal courts in *Colgrove v. Battin*.[135] The Court reasoned that the number twelve was merely an insignificant "historical accident," and that the size of the jury should be permitted to fluctuate, provided that the reduced size does not undermine the essential functions of the jury trial.[136]

Empirical research, however, has conclusively demonstrated that reductions to six-member juries decrease both the predictability and accuracy of jury verdicts.[137] Selecting smaller juries also results in panels that are less diverse and less representative of the general population.[138] Moreover, as with non-unanimous decision rules and *Allen* charges, reductions in jury size may lead to fewer hung juries, but that superficially positive effect on numerical outcomes only masks the harmful effects that smaller juries have on jury deliberations.[139] Research shows that smaller juries achieve higher levels of unanimity largely by magnifying the effects of coercive decisional pressures. Smaller juries are statistically less likely to include allies for those holding the minority position, and those without allies in a deliberating group are significantly less likely to be

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[130] Diamond et al., *supra* note 116, at 206.

[131] *Id.* at 205.

[132] ___ U.S. ___, 129 S. Ct. 130 (2008).

[133] *See* Valerie P. Hans, *The Power of Twelve: The Impact of Jury Size and Unanimity on Civil Jury Decision Making*, 4 DEL. L. REV. 1, 6-7 (2001).

[134] 399 U.S. 78, 103 (1970).

[135] 413 U.S. 149, 150 (1973).

[136] *Williams*, 399 U.S. at 102.

[137] *See, e.g.*, Zeisel, . . . *And Then There Were None*, *supra* note 115, at 717.

[138] *Id.* at 717-19.

[139] *Id.*

able to successfully resist conformity pressures.[140] Therefore, the lone holdout on a six-person jury, who might otherwise maintain her position if assisted by a single other likeminded individual on a twelve-member jury, will often simply abandon her conscientiously-held belief in the face of normative pressure from the five other jurors. The inevitable result is a sharply limited role for minority voices.[141]

The data thus expose several common features of *Allen* charges, non-unanimous decision rules, and reductions in jury size: all are approved ways in which courts can attempt to avoid hung juries, yet the results of psychological studies on their effects counsel strongly against their use. All three "reforms" may yield slight increases in the quantity of verdicts, but they also lead to detrimental effects on the quality of the deliberation process.[142] In short, these practices sacrifice fair and desirable deliberation procedures for marginal increases in judicial efficiency. And in so doing, they threaten the core foundational model of productive jury deliberations. In place of the ideal of a large, diverse deliberative body jointly reasoning to a shared consensus, they substitute a smaller and less diverse group, a decision made by the consent of some but not all, or a decision reached by peer pressure and veiled judicial threats.

Moreover, the doctrines are often interrelated: *Allen* charges and non-unanimity requirements, for example, can be used together, but each tends to decrease the necessity of the other.[143] The key insight from social science

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[140] *Id.* at 719 ("Hung juries almost always arise from situations in which there were originally several dissenters. Even if only one holds out, his having once been the member of a group is essential in sustaining him against the majority's efforts to make the verdict unanimous.").

[141] Hans, *The Power of Twelve*, *supra* note 133, at 29-31.

[142] Saul M. Kassin, *The American Jury: Handicapped in the Pursuit of Justice*, 51 OHIO ST. L.J. 687, 709 (1990) (noting that

> [n]either the dynamite charge nor suspension of the unanimity requirement have desirable effects on the quality of the jury's decisionmaking apparatus. Used to implore the deadlocked jury to return a verdict, the dynamite charge may well encourage members of the voting majority to exert increasing amounts of normative pressure without added informational influence, thus intimidating members of a voting minority into compliance. The net result, of course, is an illusion of unanimity. Even worse is the outright acceptance of nonunanimous verdicts. This policy weakens and inhibits dissenting jurors, breeds closed-mindedness, impairs the quality of discussion, and leaves many jurors unsatisfied with the final verdict. And yet, without a potent and vocal dissent based on legitimate differences of opinion, the jury is reduced to a mere collection of individuals, losing its strength as a vital decisionmaking group.

Id.

[143] After all, a jury that only needs a super-majority in order to reach a verdict is less likely to ever be in serious danger of hanging, meaning that *Allen* charges are less likely to prove necessary. Meanwhile, robust use of *Allen* charges to prevent deadlock may render non-

research, however, is that there are harmful consequences attendant upon all three strategies for combating hung juries. Non-unanimity, smaller juries, and *Allen* charges all operate with decidedly negative effects on the process of jury deliberations. In fact, dynamited juries and smaller juries may simply be the functional equivalent of non-unanimous juries: after all, if holdout jurors suppress their verdicts of conscience in response to escalating normative pressures, switching their votes not because of a change of heart but simply to conform to the majority's will, the final rendered verdict is "unanimous" in name only.[144]

C. The Perils of Willful Blindness

Scholars have criticized *Allen* charges for approximately half a century, and the results of Kassin, Smith, and Tulloch's studies have been publicly available for almost two decades, yet courts have not moved in any significant fashion toward abandoning the use of *Allen* charges. There are several potential accounts that may explain the odd persistence of the *Allen* doctrine in the face of such harsh and pervasive criticism. J. Alexander Tanford has suggested one possible explanation for the phenomenon: "a growing body of research show[s] that courts are ignorant of social science, may be hostile to using it as a basis for legal policy, and prefer to base laws on expediency, precedent, and intuition."[145]

Tanford's explanation certainly captures part of the dynamic: courts often are incredibly reticent to recognize the results of empirical research in deciding the cases before them.[146] In some senses, this hesitation is understandable, and indeed even laudable: courts are not particularly well-equipped to evaluate social science research, and should generally reach their decisions by applying legal precedent to a particular set of facts instead of reaching outside the contours of a particular case to a broader swath of empirical data. However, a problem arises when courts base their decisions upon unfounded normative or descriptive assumptions that ultimately prove to be empirically false. For example, the *Williams* Court that upheld six-member juries simply asserted, without proof or even citation, that "certainly the reliability of the jury as a

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unanimity rules less significant.

[144] *See Deadlocked Juries*, *supra* note 4, at 389-90 ("If unanimity is to have any real meaning in criminal jury trials, *each* juror must be convinced by the evidence presented . . . before the jury can be said to be convinced. Under such a view the tentative opinions of a mere majority should have no legal significance.") (emphasis in original).

[145] J. Alexander Tanford, *Law Reform by Courts, Legislatures, and Commissions Following Empirical Research on Jury Instructions*, 25 LAW & SOC'Y REV. 155, 166 (1991).

[146] *See* J. Alexander Tanford, *The Limits of a Scientific Jurisprudence: The Supreme Court and Psychology*, 66 IND. L.J. 137, 138 (1990).

factfinder hardly seems likely to be a function of its size."[147] As the Court noted:

> [T]he essential feature of a jury obviously lies in the interposition between the accused and his accuser of the commonsense judgment of a group of laymen, and in the community participation and shared responsibility that results from that group's determination of guilt or innocence. The performance of this role is not a function of the particular number of the body that makes up the jury.[148]

But actual data demonstrate that the Court could not be further from the truth; the size of the jury actually has a profound effect upon its ability to perform the essential tasks with which it is charged. And yet the Court has never changed course, nor admitted its error in *Williams*. A similar narrative holds true for *Allen* charges: the *Allen* Court assumed that opinions could be "changed by conference in the jury room" following a dynamite instruction without undue coercion.[149] Despite empirical evidence suggesting otherwise, the Court has never reconsidered its position sanctioning the use of *Allen* charges.

This sort of determined refusal to acknowledge empirical realities cannot be explained by mere ignorance of the social science data, because even when confronted with the data, courts persist in refusing to apply it. The cognitive and social psychological research illuminating the dangers of non-unanimous juries, for example, was fully briefed in the petition for certiorari in *Lee v. Louisiana*,[150] but the Court proved unconcerned and instead was apparently content to allow the rule in *Apodaca*[151] to stand. The better explanation, then, for the continued vitality of *Allen* charges and similar doctrines is that it derives from a kind of willful blindness to the harmful effects of those doctrines—an ostrich mentality in the service of an overwhelming preference for "efficiency" above all else. Courts, in other words, may understand at both a factual and intuitive level that *Allen* charges, along with non-unanimous decision rules and smaller juries, can have detrimental consequences for the integrity of jury deliberations, but they nonetheless see those "reforms" as simply too effective to discard.

Perhaps one of the clearest examples of that willful blindness lies in the strange contours of the *Allen* doctrine in the Ninth Circuit, the largest federal appellate jurisdiction in the country. The Ninth Circuit has upheld the use of *Allen* charges in ordinary cases,[152] but has concluded that an *Allen* charge may

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[147] Williams v. Florida, 399 U.S. 78, 100-01 (1970).

[148] *Id.* at 100.

[149] *See* Allen v. United States, 164 U.S. 492, 501 (1896).

[150] Petition for Writ of Certiorari, Lee v. Louisiana, ___ U.S. ___, 129 S. Ct. 130 (2008).

[151] Apodaca v. Oregon, 406 U.S. 404, 406 (1972) (sanctioning non-unanimous verdicts).

[152] United States v. Bonam, 772 F.2d 1449, 1450 (9th Cir. 1985).

be impermissibly coercive if the judge issuing the instruction either has polled the jury or has other reason to know the identities of the holdout jurors.[153] If the trial judge gives an *Allen* charge after inquiring into the numerical division of the jury, "the charge is per se coercive and requires reversal."[154] "Even when the judge does not inquire but is inadvertently told of the jury's division, reversal is necessary if the holdout jurors could interpret the charge as directed specifically at them—that is, if the judge knew which jurors were the holdouts *and* each holdout juror knew that the judge knew he was a holdout."[155] However, when the judge is unaware of exactly which jurors are holding the dissenting position, the Ninth Circuit typically finds the *Allen* charge perfectly permissible.[156] In fact, whether "the judge was aware of the dissenting juror's identity" is often a dispositive question when the Ninth Circuit decides whether to approve or reverse the use of an *Allen* charge in any given case.[157]

That approach is utterly nonsensical. The Ninth Circuit contends that when a judge knows the identity of a holdout juror, "[u]nder [those] circumstances the charge [can] only be read by the dissenting juror as being leveled at him."[158] The truth, however, is that whether the judge knows who the holdout jurors are or not, the jurors in the minority will inevitably interpret the *Allen* charge as being directed against them; indeed, targeting the jurors holding the minority position is often the entire point of issuing a supplemental dynamite charge.[159] Whether the judge is aware of the precise breakdown of votes on the panel or not, he or she must know that there is at least one dissenter on the jury whom the *Allen* charge will pointedly single out. Any additional coercive pressure derived from the fact that the judge has been made explicitly aware of the dissenting jurors' identities is therefore negligible, at best. And given the already inherently coercive nature of the situation, whether the judge can assign a name and a face to the holdout juror(s) should not be a factor carrying any sort of talismanic significance.

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[153] *See, e.g.*, United States v. Williams, 547 F.3d 1187, 1207 (9th Cir. 2008); United States v. Sae-Chua, 725 F.2d 530, 532 (9th Cir. 1984); *see also* Brasfield v. United States, 272 U.S. 448, 449-50 (1926) (reversing a judgment following an *Allen* charge because the court specifically inquired as to the numerical division on the jury); Burton v. United States, 196 U.S. 283, 307 (1905) (expressing disapproval of courts' inquiring into the breakdown on the jury before issuing an *Allen* charge).

[154] United States v. Ajiboye, 961 F.2d 892, 893-94 (9th Cir. 1992).

[155] *Id.* at 894 (citing *Sae-Chua*, 725 F.2d at 532) (emphasis in original).

[156] *See, e.g.*, United States v. Changco, 1 F.3d 837, 842 (9th Cir. 1993); United States v. Green, 962 F.2d 938, 944 (9th Cir. 1992).

[157] *See Williams*, 547 F.3d at 1205 (describing whether the judge knew the dissenting jurors' identities as a "critical" factor); *see also Ajiboye*, 961 F.2d at 894.

[158] *Sae-Chua*, 725 F.2d at 532.

[159] *See* Kassin et al., *supra* note 72.

Instead, the Ninth Circuit's unusual approach exposes the courts' increasingly willful blindness to the coerciveness of *Allen* charges. After all, while a judge's awareness of the identities of the holdout jurors makes little to no difference for those jurors, it may make a profound difference for the judge himself. When the judge does not know who the holdouts are, it is much easier to issue an *Allen* charge and pretend that the charge is perfectly neutral. But once the judge must look a particular juror in the eyes and issue the instruction, knowing that that individual is the holdout dissenter, the coerciveness of the instruction leaps to the fore. The contours of the Ninth Circuit's *Allen* doctrine thus suggest that courts are developing an awareness that *Allen* charges are problematic, but they are willing to suppress their concerns in most situations, intervening to strike down the use of an *Allen* charge only under circumstances where it is no longer so easy to remain blind to the charge's coerciveness.

Other jurisdictions have drawn their own illogical lines in the sand, and many of the resulting compromise doctrines similarly reflect a latent recognition of the dangers of *Allen* charges. The Fourth Circuit, for example, has approved of *Allen* charges in general,[160] but will strike down a particular use of an *Allen* charge if the instruction is not given with the proper language and the jury returns with a verdict within such a short time frame that the verdict must have been the result of normative pressures, not true consensus. In *United States v. Rogers*, for example, a Fourth Circuit panel concluded that a fifteen minute time interval between the *Allen* charge and the verdict "was quite long enough for acceptance of a theory of majority rule, but was hardly long enough to have permitted a painstaking re-examination of the views which the minority had held steadfastly until the charge was given."[161] Yet the court never indicated exactly how long the jurors must deliberate in order for their verdict to be considered the result of a sufficiently "painstaking re-examination" of their beliefs. Moreover, any such distinction is bound to be both arbitrary and at odds with the psychological research, which indicates that verdicts after *Allen* charges are likely to be the product of a simple "majority rule" *regardless* of how long the jury continues to deliberate after the dynamite instruction is given.

The approaches taken by the Fourth Circuit and the Ninth Circuit are mildly encouraging because they indicate that some courts are at least attuned at some level to the risks of using *Allen* charges. Yet the fact that those circuits still persist in allowing *Allen* charges in the average case is also telling. It suggests that courts are failing to act on their concerns with dynamite charges and that

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[160] *See* United States v. Sawyers, 423 F.2d 1335, 1339-40 (4th Cir. 1970).

[161] United States v. Rogers, 289 F.2d 433, 436 (4th Cir. 1961); *see id.* at 437 ("Because the 'Allen charge' was incomplete and one-sided, and was followed immediately by a verdict of a jury which had just reported itself hopelessly deadlocked, we think a new trial is required.").

they are not yet prepared to accept the consequences of fully abolishing the *Allen* doctrine. Ultimately, however, the sort of piecemeal solutions that courts such as the Fourth Circuit and the Ninth Circuit have fashioned are simply not sufficient to address the problem of coercion in the courtroom. The time has come for more jurisdictions to take a hard look at *Allen* charges and begin to actively explore other alternatives to their use. In the next Part, I set forth a range of potential alternative approaches to dealing with deadlocked juries that may help to avoid the adverse consequences of the *Allen* charge.

D. Alternatives

Given the significant problems identified with the use of standard dynamite charges, courts should investigate and develop alternatives to the overly coercive *Allen* doctrine. These alternatives could take a number of different forms. For ease of comparison, I will outline the various options along a spectrum, from the changes requiring the least departure from the current *Allen* doctrine, to the changes requiring the broadest practical or theoretical overhauls. While any of these options would be an improvement over the use of traditional *Allen* charges, I would ultimately support a position that falls somewhere towards the middle of the spectrum: allowing judges, in their discretion, to issue potentially hung juries the simple supplemental instruction to "Please continue deliberating," without further comment. That alternative, if accompanied by the wise exercise of judgment on the part of the courts issuing that supplemental charge, would offer a pragmatic, yet effective, solution to the persistent problem of coercion in juror deliberations.

1. "Balanced" Allen charges

Since the most glaring problem with *Allen* charges is their exclusive focus on jurors holding the minority position,[162] one possibility would be to render the instruction more balanced by directing the charge to the jurors in the majority, as well, or by simply declining to discuss the majority-minority breakdown at all. Some courts have already begun to require trial judges to use more even-

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[162] *See* Note, *Due Process, Judicial Economy and the Hung Jury: A Reexamination of the* Allen *Charge*, 53 VA. L. REV. 123, 129-30 (1967) (noting that

> The language of the *Allen* charge itself is inherently unbalanced, for the emphasis is always upon a reconsideration by the minority .... It is only they who are instructed to reconsider their views. The majority can remain adamant and still not violate the judge's instructions in any way. Such an inherently unbalanced charge places the sanction of the court behind the views of the majority, whatever they may be, and tempts the minority juror to relinquish his position simply because he has been the subject of a particular instruction).

handed supplemental instructions that deviate from the standard *Allen* language by also urging the majority jurors to re-examine their views.[163] The Seventh Circuit has even suggested that charges recommending that the minority jurors rethink their positions without making similar demands of the majority jurors are categorically improper.[164]

More balanced blasting that focuses on both sides of the majority-minority split might at least be a slight semantic improvement over the traditional *Allen* charge, lending the trial judges' instruction a greater appearance of impartiality, while helping "to limit the . . . instruction's effect . . . by keeping the judge's expertise from being attributed to the majority."[165] Ultimately, however, this approach is likely to yield only superficial or temporary improvements in the quality of deliberations; after all, "[a]s a practical matter . . . juries are hardly ever turned around by a minority,"[166] and once they return to deliberating, jurors blasted even with equally "balanced" dynamite are still likely to conclude that the easiest way to comply with the judge's clear request for a final verdict is simply to prevail upon the minority jurors to switch their votes to match the majority's ballots.

2. *"Neutral"* Allen *instructions*

A slightly more appealing alternative is to require trial judges to use a more facially "neutral" supplemental instruction, one that does not even mention the division of the jury into majority and minority factions. The charge used in *Lowenfield* was such a neutral instruction, and the Court aptly noted that there is at least a somewhat diminished risk of coercion "where the charge given . . . does not speak specifically to the minority jurors."[167] In order to fully reap the benefits of a more neutral instruction, including a decline in appeals alleging that a judge's instructions were coercive, it would be ideal for all courts to use the same uniform language in their "neutral" supplemental charges.

One of the most promising alternative options in this vein is a model instruction proposed by the American Bar Association, which successfully eliminates many of the most serious concerns with traditional *Allen* charges by not singling out the minority jurors for particular negative attention. The ABA

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[163] *See, e.g.*, Hyde v. State, 26 S.E.2d 744, 754-55 (Ga. 1943); Eikmeier v. Bennet, 57 P.2d 87, 92 (Kan. 1936); Acunto v. Equitable Life Assurance Soc'y, 60 N.Y.S.2d 101, 103 (N.Y. 1946); Mead v. City of Richland Center, 297 N.W. 419, 421-22 (Wis. 1941).

[164] Mangan v. Broderick & Bascom Rope Co., 351 F.2d 24, 30 (7th Cir. 1965), *cert. denied*, 383 U.S. 926 (1966).

[165] Note, *On Instructing Deadlocked Juries, supra* note 105, at 140.

[166] *Id.* ("As a practical matter, [balancing the instruction by targeting majority jurors, too] is almost useless").

[167] Lowenfield v. Phelps, 484 U.S. 231, 238 (1988).

instruction reminds the jurors of their duty to deliberate conscientiously and with open minds, but unlike the standard *Allen* charge, it is directed to all members of the jury, not only those holding the dissenting view. The instruction reads:

> The verdict must represent the considered judgment of each juror. In order to return a verdict, it is necessary that each juror agree thereto. Your verdict must be unanimous.
>
> It is your duty, as jurors, to consult with one another and to deliberate with a view to reaching an agreement, if you can do so without violence to individual judgment. Each of you must decide the case for yourself, but do so only after an impartial consideration of the evidence with your fellow jurors. In the course of your deliberations, do not hesitate to reexamine your own views and change your opinion if convinced it is erroneous. But do not surrender your honest conviction as to the weight or effect of evidence solely because of the opinion of your fellow jurors, or for the mere purpose of returning a verdict.[168]

The ABA instruction thus avoids much of the coercion stemming from the *Allen* charge's selective pressure on the minority faction. It provides an interesting alternative to the *Allen* charge because instead of implicitly signaling that the majority is right and the minority is wrong, it merely "emphasizes jurors' duty to consult with one another, and to be accountable to defend their positions."[169] Provided that jurors follow these instructions, the ABA charge "succeeds in encouraging further exchange of views and . . . increasing informational rather than normative influence."[170]

The ABA also recommends that judges read its instruction as part of their initial charge to the jury, before the jurors retire to begin deliberations.[171] Using the instruction as part of the initial charge may help to prevent it from being seen as an implicit critique of the minority jurors, even if it is read again as a supplemental instruction later in the process. For these reasons, a number of jurisdictions have already endorsed the ABA charge as preferable to an *Allen* charge.[172] The ABA charge is a definite improvement over *Allen* charges, and

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[168] AMERICAN BAR ASSOCIATION PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO TRIAL BY JURY, § 5.4 commentary (Approved Draft 1968).

[169] KASSIN & WRIGHTSMAN, *supra* note 12, at 195.

[170] *Id.*

[171] AMERICAN BAR ASSOCIATION PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE, *supra* note 168 (proposing that

> Before the jury retires for deliberation, the court may give [the proposed ABA instruction] .... If it appears to the court that the jury has been unable to agree, the court may require the jury to continue their deliberations and may give or repeat an instruction as provided [above]. The court should not require or threaten to require the jury to deliberate for an unreasonable length of time or for unreasonable intervals).

[172] *See supra* notes 51-55 and accompanying text.

more courts should consider embracing the ABA's alternative formulation if they elect to proceed with any form of supplemental charge.[173]

Further research, however, is needed to fully ensure that the ABA instruction is in fact not coercive; after all, any exhortation by the court that jurors continue their deliberations may place heightened stress on the minority jurors in particular, especially if the jurors fail to recognize that they can hang if they are genuinely unable to agree and instead erroneously believe that they absolutely *must* reach a verdict. Both anecdotal evidence and the results of psychological studies lend support to the idea that many jurors are simply ignorant of the fact that they are legally entitled to hang. Experienced trial lawyers find that "juries often believe (because their judges fail to inform them otherwise) that they are going to be held in the jury room until they reach a verdict."[174] Meanwhile, Kassin, Smith, and Tulloch supplemented their study of dynamite charges in the note-passing experiment with a survey of local residents, all of whom "read about the events of the case . . . in which a jury deliberated for 2 days, reported it was deadlocked, was reconvened by the judge, and remained hung after a third day of deliberation."[175] Half heard the judge deliver an *Allen* charge while half did not.[176] The subjects were asked whether they believed that the judge in the case would ultimately accept a hung jury or whether they would insist upon a verdict.[177] "Much to [the experimenters'] surprise, the majority of subjects (several of whom had previously served on real juries) believed the judge would 'require' a verdict—55% in the control group, and 91% in the dynamite group."[178]

Thus, any supplemental instruction issued by the trial judge, even if it avoids the truly coercive language in *Allen* and is instead framed in the more neutral ABA language, may merely "pragmatically impl[y]" to "the many jurors who are uncertain of their options . . . that they have no choice but to reach a unanimous verdict."[179] And particularly if the jurors are unaware that they are permitted to hang in the event of truly ineradicable conscientious disagreement, those jurors holding the minority position will likely still bear the brunt of their colleagues' attempts to persuade them to "agree" with the majority in order to render a verdict. In that case, even a neutral ABA charge may again be nothing

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[173] Note, *The Allen Charge: Recurring Problems and Recent Developments*, 47 N.Y.U. L. REV. 296, 318 (1972) ("[T]he [s]tandards formulated by the American Bar Association take a significant step forward by providing the basis for a jury instruction which avoids many of the pitfalls of the traditional Allen charge.").

[174] KASSIN & WRIGHTSMAN, *supra* note 12, at 192.

[175] Kassin et al., *supra* note 3, at 547.

[176] *Id.*

[177] *Id.* at 547-48.

[178] *Id.* at 548.

[179] *Id.*

more than a superficial solution that fails to solve the substantive coerciveness problem inherent in *any* supplemental instruction, beyond perhaps a mere exhortation to "please continue deliberating."

3. The optimal alternative: "Please continue deliberating"

A simple, succinct "try again"-type instruction would therefore be the best alternative out of all potential supplemental instructions at avoiding judicial coercion and excessive normative pressures on deliberating jurors. It could also help "cut through the Gordian knot of confusing *Allen* law, thereby saving judicial time and resources, especially on appeals."[180] I would therefore join with those who advocate the use of a simple four-word supplemental instruction to juries in danger of hanging: "Please continue your deliberations."[181] This instruction is ideal because it allows judges to avoid hung juries while at the same time being "extremely careful [as to] how they interfere."[182]

Judges would still need to exercise their discretion and their best judgment in determining when it would be appropriate to issue such an instruction; factors to consider might be the length of time that the jury has already been deliberating in comparison to the length of the trial and the complexity of the issues involved, and whether it seems realistic that the jury could in fact reach a true consensus if given additional time. If the jury has already expended significant time and energy in its deliberations, and appears entrenched in its division, the best course of action might be for the court to allow the jury to deadlock.[183] However, if the jury has only been deliberating for a short while, and might benefit from continued discussions, the judge could simply ask the jurors to retire and deliberate a bit longer, without giving any further supplemental charge.

Additional research would prove useful in order to ensure that merely asking jurors to return to their deliberations is not itself an overly coercive instruction. After all, even a pithy "please continue" instruction could be impermissibly coercive if given after such prolonged deliberations that the minority jurors could only interpret it as meaning that they would have to capitulate to reach a verdict, rather than simply meaning that all jurors should discuss the case with one another a bit longer.[184] Particularly if jurors do not understand that they are

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[180] George C. Thomas III & Mark Greenbaum, *Justice Story Cuts the Gordian Knot of Hung Jury Instructions*, 15 WM. & MARY BILL RTS. J. 893, 920 (2007) (italics supplied).

[181] *Id.*

[182] United States v. Perez, 22 U.S. 579, 580 (1824).

[183] *See infra* Part IV.D.5.

[184] *But see* United States v. Degraffenried, 339 F.3d 576, 580 (7th Cir. 2003) (finding that an instruction telling the jurors "Members of the jury, I've read your note. Please continue

permitted to deadlock in cases of truly intractable division, a "try again" instruction might itself place undue pressures on the jury, and on the dissenting jurors in particular. Trial judges should therefore strongly consider coupling the "Please continue deliberating" instruction with an acknowledgement that the jury is allowed to hang, provided that the jurors have deliberated in good faith and exhausted all reasonable efforts to reach consensus.

However, even without explicitly admitting the possibility of a hung jury (a prospect that might seem unappealing to many judges because it could be interpreted as encouraging jurors to give up, and might thereby lead to more deadlocks), an unadorned "please continue deliberating" instruction is less coercive, less controversial, and therefore more desirable than other supplemental instructions of the *Allen*, "balanced" *Allen*, or even "neutral" *Lowenfield* or ABA variety. Indeed, this alternative has been dubbed "the Silent Charge" by some commentators because unlike other supplemental instructions, it does not allow room for the judge to inject his or her own preferences into the debate, nor does it—explicitly or implicitly—throw the court's weight behind the majority's viewpoint.[185] Moreover, by virtue of its brevity and simplicity, the charge is easy to administer and would aid in cutting down on the appeals that inevitably result from minor variations in the wording of a traditional *Allen* charge.[186] Finally, the "please continue deliberating" instruction is a pragmatic alternative: it allows courts some latitude to intervene to prevent a jury from deadlocking, while preventing judges from directly or indirectly using coercive pressure tactics in order to achieve that result. Thus, it is a reform that could carry tremendously positive effects for the quality of jury deliberations, without being overly difficult or controversial to implement.

4. Transcripts and other alternatives to supplemental charges

Another alternative to the use of supplemental instructions entirely would be to experiment with other methods of encouraging jurors to reach consensus. Particularly if future research suggests that even neutral instructions have a tendency to coerce dissenting jurors into abandoning their views, creative

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deliberations . . . was not coercive.") (internal quotation marks omitted).

[185] *See* Thomas & Greenbaum, *supra* note 185, at 919-20 ("We have named the suggested procedure [instructing the jury to simply please continue their deliberations—] the 'Silent Charge.' . . . If implemented correctly, the Silent Charge is no more than an invitation to continue deliberation. By eliminating court inefficiency and coercion, the Silent Charge would improve criminal justice administration.").

[186] *See, e.g.*, United States v. Rogers, 289 F.2d 433, 437 (4th Cir. 1961) (reversing use of supplemental *Allen*-type instruction because the judge failed to include the admonition that no juror should yield his or her conscientious conviction).

exploration of alternative solutions may prove quite valuable. For example, some scholars have proposed warning jurors against taking ballots early and often, a process that can frequently lead to entrenchment of views.[187] Such process-oriented reforms might produce favorable results both in terms of quantity of verdicts *and* quality of deliberations simply by educating jurors as to the most constructive ways to deliberate.

In another concrete example that was tested empirically, Kassin and Smith proposed providing juries in danger of deadlocking with a copy of the complete trial transcript instead of issuing them a supplemental instruction. The theory was that this might be "an intervention that would prompt deadlocked juries to reach a verdict by refocusing their attention on the evidence and arguments," as opposed to normative peer pressure.[188] "The goal of this intervention was to keep the jury's discussion focused on the evidence, thus maintaining the level of informational influence."[189] The transcript intervention was relatively successful on that score. While it did not increase the use of informational influence during deliberations, "it appeared to prevent the *decrease* that otherwise occur[ed]" in both dynamited juries and control juries that had been deliberating for thirty minutes.[190]

Unfortunately, however, the transcript condition did not succeed in producing higher levels of consensus and more unanimous juries, as had been hoped. Instead, the researchers found that "there were actually somewhat fewer vote changes following this intervention" than in the control or dynamite conditions, and while "the rate of vote changes in the transcript condition [soon] rebounded to its former level [i.e. the level in the control condition]," supplying the transcript "did not effectively move deadlocked juries toward a verdict."[191] Videotapes of the jurors' deliberations revealed that the stagnation in verdicts immediately following the transcript intervention "was due to the fact that jurors tended to page through the transcripts and quote individual pieces of evidence during this segment, rather than integrate information and discuss the case as a whole," and jurors in both the majority and the minority condition were able to find pieces of evidence or excerpts of testimony in the transcripts that supported their views.[192]

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[187] PAULA L. HANNAFORD-AGOR ET AL., NATIONAL CENTER FOR STATE COURTS, ARE HUNG JURIES A PROBLEM? 5 (2002), www.ncsconline.org/WC/Publications/Res_Juries_HungJuries Problem.Pub.pdf (noting that "members of hung juries report taking a vote . . . earlier than the members of verdict juries").

[188] Smith & Kassin, *supra* note 88, at 627.

[189] *Id.* at 628.

[190] *Id.* at 636.

[191] *Id.* at 632-33.

[192] *Id.* at 633.

The ineffectiveness of the transcript intervention in producing consensus, combined with the time and cost that would be required to produce transcripts in all cases of potentially deadlocked juries, may render this alternative a non-starter from a pure efficiency standpoint. The inefficacy of this alternative also means that it is less practically feasible than other solutions involving variations on the language in the supplemental charge, such as the proposed "Please keep deliberating" alternative, which can still successfully encourage jurors to deliberate to a verdict. The transcript intervention remains attractive, however, as a means to encourage jurors who disagree with one another to continue to focus on the shared information upon which they must base their decision, rather than simply resorting to normative peer pressure strategies. Courts using the transcript alternative or other reforms designed to non-coercively guide jurors to consensus (such as encouraging them to deliberate with an open mind and discuss the case first before voting) may therefore simply have to accept that the trade-off for using these "gentler," less coercive strategies might be that such efforts will also prove less effective in avoiding hung juries—at least as compared to the robust use of a traditional or even modified *Allen* charge.

5. The acceptance alternative: allowing more juries to hang

The final alternative is likely the most controversial but in some circumstances is arguably the most respectful, both of the views of the minority jurors and of the integrity of the jury system as a whole. That alternative is to simply allow more truly deadlocked juries to hang. If the jurors have already been deliberating for a reasonable to extended length of time, and certainly if they have already been instructed in a neutral and restrained fashion to "please continue deliberating" and yet *still* have not been able to reach a verdict, the odds are that only two outcomes are probable at that point. Either the jury will hang, or the dissenting jurors will eventually be pressured, through a combination of normative influences, time constraints, and inherent stressors, to abandon their views and yield to the majority in order to render a verdict.[193] After all, the idea that jurors who steadfastly maintained the dissenting position through several rounds of deliberations will suddenly experience a genuine change of heart and quickly be convinced of the error of their ways by the evidence and informational arguments, rather than "persuaded" to change their vote by normative and exogenous pressures, is as absurd as it is aspirational. Given the binary choice of possible outcomes outlined above, a non-verdict may actually be preferable to a coerced verdict, even acknowledging that hung

[193] Most juries that are issued a supplemental *Allen* or ABA instruction have already indicated their deadlock once before and have been exhorted by the court to continue deliberating for a bit longer; *Allen* charges are traditionally avenues of last resort.

juries do impose costs on the system, both in terms of time and money and in terms of confidence in the jury's decision-making process.[194]

Moreover, particularly in light of empirical findings that dissenting jurors are typically quite reasonable[195] and that hung juries are relatively rare, the costs of blasting a few additional juries into unanimity with forceful supplemental instructions of any form may well outweigh the benefits. The National Center for State Courts found that "[f]rom 1980 to 1997, the total federal hung jury rate varie[d] only 0.8 %, with a low of 1.2 % of all jury trials in 1985 and again in 1987 to a . . . high of 2.0 % in 1991."[196] Further research would be necessary to determine how eliminating *Allen* charges as supplemental instructions would affect these rates, perhaps by comparing the hung jury rates in jurisdictions that use *Allen* charges with the rates in jurisdictions, such as the Third Circuit, that do not. However, the nationwide deadlocked jury rates are low enough that abolishing standard *Allen* charges entirely, and perhaps also abolishing "neutral" supplemental instructions of the form used in *Lowenfield* or suggested by the ABA, as well, would likely not have overwhelming significant effects.[197]

Finally, a certain number of deadlocked juries can in fact serve as an indication that the system is working exactly as it should. In some cases "a mistrial from a hung jury is a safeguard to liberty,"[198] and in fact the right of a jury to hang has traditionally been safeguarded precisely "because it represents the legal system's respect for the minority viewpoint that is held strongly enough to thwart the will of the majority."[199] While a mistrial due to a hung jury is never an ideal outcome in any particular case, accepting a marginally higher percentage of deadlocks due to the elimination of coercive *Allen* charges seems a small price to pay for respecting dissenting viewpoints so strongly

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[194] *See* NATIONAL CENTER FOR STATE COURTS, ARE HUNG JURIES A PROBLEM?, *supra* note 187; Note, *Due Process, Judicial Economy and the Hung Jury*, *supra* note 162, at 123 (noting that "[h]ung juries are expensive in a system in which time is virtually the only chargeable commodity and in which the increasing pressure of crowded dockets threatens serious adverse effects on the administration of criminal justice.").

[195] *See supra* notes 114-118 and accompanying text.

[196] NATIONAL CENTER FOR STATE COURTS, ARE HUNG JURIES A PROBLEM?, *supra* note 185, at 22.

[197] *See* JON M. VAN DYKE, JURY SELECTION PROCEDURES: OUR UNCERTAIN COMMITMENT TO REPRESENTATIVE PANELS 209 (1977) (noting that jury trials are so rare in the first place that a small change in their number "would not have much influence on the overall efficiency of the system in resolving cases"); *see also* NATIONAL CENTER FOR STATE COURTS, ARE HUNG JURIES A PROBLEM?, *supra* note 187, at 7 ("In our data, we did not detect any difference for whether a jury hung or not based on the types of deadlock instructions").

[198] Huffman v. United States, 297 F.2d 754, 759 (5th Cir. 1962) (Brown, J., dissenting).

[199] Zeisel, . . . *And Then There Were None*, *supra* note 115, at 719 n.42; *see also* HASTIE ET AL., *supra* note 129, at 232 (suggesting that "the presence of some hung juries is a desirable property of the jury institution").

held. Thus, whatever alternative instruction or intervention courts choose to address hung juries, it should be used sparingly and with restraint, for in some situations, a truly deadlocked jury is not in fact a "problem" to be solved at all.

V. CONCLUSION

One thing seems clear: the disadvantages of the *Allen* charge greatly outweigh its advantages. *Allen* charges pressure conscientious jurors holding the minority viewpoint, decrease the quality of jurors' deliberations, and produce verdicts by majority rule rather than true unanimity. The desire to blast juries into verdicts by means of coercive dynamite charges at best represents an unfortunate triumph of efficiency over justice. *Allen* charges may even be inefficient on their own terms; admittedly, they are successful in manufacturing more verdicts and preventing a few costly retrials, but those administrative gains are likely counterbalanced to some degree by the numerous appeals generated by the use of *Allen* instructions. The quality of the deliberation process should be just as important to courts and lawmakers as the quantity of verdicts reached, and the sorts of normative and coercive pressures to which *Allen* charges inevitably lead are deeply troubling in their implications for the jury system.[200] Normative influences can never fully be eradicated from the interpersonal dynamics of the jury room, but at the very least, the law should not allow the court itself to exploit normative pressures just to reach a final verdict.[201]

We can no longer afford to remain blind to the implications of coercive *Allen* charges. A minority of jurisdictions have taken tentative first steps toward abandoning the longstanding *Allen* doctrine, and others have implicitly recognized the dangers of dynamite instructions by developing doctrines that curb their use in some limited contexts. Yet the majority of jurisdictions have failed to recognize, or have remained willfully blind to, social science research exposing the detrimental effects of *Allen* charges on the deliberation process. Courts and legislatures should take heed of the sobering results of such studies, and more jurisdictions should follow the lead of those that have already rejected the use of supplemental *Allen* charges. Dynamite charges are "dead law a long time dying."[202] The time has now come for the *Allen* doctrine to be permanently laid to rest.

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[200] *See* KASSIN & WRIGHTSMAN, *supra* note 13, at 195 (noting that "[w]hat we do know—that most juries hang because of close cases, and that previously deadlocked juries often return a verdict shortly after being blasted—suggests that the dynamite charge may be too explosive.").

[201] *See id.* at 191 (articulating that "[i]t is bad enough that juries are sometimes subject to normative influences emanating from outside the courtroom. It is intolerable when that pressure is applied from the judge's bench.").

[202] *See* Mike Hennessey, *The* Allen *Charge: Dead Law a Long Time Dying*, 6 U.S.F. L. REV. 326, 326 (1972).

Intextication: Txting Whl Drvng. Does the Punishment Fit the Crime?

A. Starkey De Soto*

I. INTRODUCTION

Craig McCaw is the "Wireless Wizard of Oz."[1] In the mid-1980s, McCaw envisioned changing lives by changing the way people communicate.[2] McCaw aspired to develop the first nationwide cellular network that would give people the freedom to communicate with each other outside of the home or office and without the constraint of telephone cords.[3] By 1993, in less than a decade, McCaw's vision became a reality when he built the largest cellular company in the country, which included nearly twenty percent of the twelve million subscribers in the United States cellular market.[4] Over the next decade and a half, the use of cell phones exploded in American society[5] and spread throughout the world.[6]

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[1] *See* Jeffrey S. Young, *Craig McCaw—The Wireless Wizard of Oz*, FORBES.COM, June 22, 1998, http://www.forbes.com/1998/06/22/feat.html; *see also* Jonathan B. Levine & John J. Keller, *Craig McCaw's High Risk Empire*, BUSINESS WEEK, Dec. 5, 1988, at 140 (discussing the unparalleled success of McCaw's company, McCaw Cellular Communications, in the budding cell phone industry).

[2] *See* James Bernstein, *Craig McCaw Connects With His Vision of Future*, NEWSDAY, Aug. 22, 1993, Business, at 72 (discussing McCaw's vision of wireless voice communication).

[3] *See id.* ("McCaw said . . . people should not be slaves to their phones."); *see also* Bart Zeigler et al., *Building a Wireless Future*, BUSINESS WEEK, Apr. 5, 1993, at 56 (discussing the "rapid embrace" of the cellular industry around the world and several pioneers, such as McCaw, that envisioned wireless communications). Referring to the mobility provided by cell phones, McCaw stated, "[m]an started out as nomadic. . . . It may be the most natural state for human beings." *Id.*

[4] *See* Ronald Rosenberg, *AT&T Sets $12.6B Deal for McCaw Cellular; Takeover Could Revamp Industry*, BOSTON GLOBE, Aug. 17, 1993, Business, at 1 (describing the AT&T and McCaw Cellular Communications, Inc. merger as the fifth-largest merger in United States history).

[5] *See, e.g.*, Andrew F. Amendola, Note, *Can you Hear Me Now?: The Myths Surrounding Cell Phone Use While Driving and Connecticut's Failed Attempt at a Remedy*, 41 CONN. L. REV. 339, 341 (2008) (stating that cell phones have become a ubiquitous feature in American society). Cell phones initially appealed to executives and professionals because wireless technology provided the ability for someone to keep up with his or her hectic travel schedule while conducting business outside the office. Zeigler et al., *supra* note 3.

The realization of McCaw's vision created a "wireless revolution" that changed the way people communicate.[7] An increasing number of people began to use cell phones in an effort to free themselves of the restraint of telephone wires.[8] As a result, people began using cell phones everywhere: on the golf course, at the mall, and on the beach.[9] Notably, people even began to use their cell phones while behind the wheel of a car.[10] As cell phones became a staple of many Americans' day-to-day lives,[11] using a cell phone while driving became so common that people began to view their cars as a second office and their phones as a "professional lifeline."[12]

The growth of cell phones brought increased technology to the phone itself,[13] as cell phone features expanded beyond verbal communication to

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However, the appeal of cell phones quickly spread to the general public. *Id.* The "almost overnight" success of this wireless technology also spread McCaw's vision of "anytime, anywhere" communication to many top executives of other communication companies. *Id.* The realization of this vision increased competition in the wireless communications industry, which then led to the increased availability of cell phones and drove down the price of cellular communication—providing more Americans with the opportunity to own a cell phone. *Id.*

[6] *See, e.g.*, Amendola, *supra* note 5, at 341 (explaining the explosion of the popularity of cell phones worldwide).

[7] *See* Stephanie N. Mehta, *Cellular Evolution; It Took Decades for an Old Technology Called Mobile Telephony to Take Off. But it Did Take Off—And Changed the Way the World Communicates*, FORTUNE, Aug. 23, 2004, at 80. Business moguls turned their "chauffeur-driven cars into offices." *Id.* Cell phones provided people the ability to "walk down the street and talk on the phone—simultaneously[.]" *Id.* The widespread use of cell phones has altered people's behavior as they have grown to rely on them. *Id.* People often turn the car around and return home because they have left their cell phone behind. *Id.* Others check their voicemail obsessively and call in to the office more frequently while on business trips. *Id.*; *see also* Eve Tahmincioglu, *Life in a Wireless World*, ST. PETERSBURG TIMES, July 26, 1999, Business, at 8 (finding that cell phones provide people with a better quality of life by allowing them freedom to play a round of golf without the worry of missing an important phone call).

[8] *See, e.g.*, Mehta, *supra* note 7 (reporting that cell phones "became so convenient that some people started ditching their home phones").

[9] *Id.*

[10] *See, e.g., id.* (stating that cars were one of the many places where people were using their cell phones).

[11] *See, e.g.*, Jessica Croze, Note, *How Hands-On Will Regulation of Hands-Free Be? An Analysis of SB 1613 and the Effectiveness of its Proposed Regulation*, 31 HASTINGS COMM. & ENT. L.J. 463, 465 (2009).

[12] *See, e.g.*, Stephanie Hanes, *Texting While Driving: The New Drunk Driving*, CHRISTIAN SCIENCE MONITOR, Nov. 5, 2009, at 25 (providing the account of a real estate agent).

[13] *See, e.g.*, Edward C. Baig, *IPhone Adds to Notable Features; Text Functions, Voice Control Especially Handy*, USA TODAY, June 18, 2009, at 3B (describing technological advancements to text messaging as one of many features of the new iphone).

text-based communication, or "texting"—the process of sending and receiving electronic text messages. Over the past few years, texting has exploded into American culture and is considered the newest phenomenon among cell phone users.[14] Nearly one in every five driving-age cell phone users admit to sending or receiving text messages while driving ("texting while driving").[15] Recently, however, the grave dangers of texting while driving have come to light.[16] The National Safety Council estimated that texting while driving caused as much as eighteen percent of motor vehicle crashes in the nation in 2008.[17] Thus, it comes as no surprise that texting while driving is considered a deadly epidemic that is sweeping across the nation.[18]

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[14] *See, e.g.*, Jocelyn Noveck, *Few States Have Ban On Texting While Driving*, VIRGINIAN-PILOT, Sept. 17, 2008, at A6 (stating that texting is a phenomenon that is only a few years old); Press Release, Sen. Charles Schumer; Sen. Robert Menendez; Sen. Mary Landrieu; Sen Kay Hagan, Co-Sponsors Introduce Federal Legislation to Combat the Growing Problem of Texting While Driving (July 29, 2009), *available at* http://schumer.senate.gov/new_website/record.cfm ?id=316529 (last visited Jan. 23, 2010) [hereinafter Senate Press Release] (statement of Sen. Charles Schumer).

[15] *See Driven to Distraction: Technological Devices and Vehicle Safety: J. Hearing Before the Subcomm. on Commerce, Trade, and Consumer Protection and the Subcomm. on Commc'n, Tech., and the Internet of the H. Comm. on Energy and Commerce*, 111th Cong. (2009) [hereinafter *Driven to Distraction Hearing*] (statement of Rep. Doris Matsui), *available at* http://energycommerce.house.gov/Press_111/20091104/transcript_11042009_ctcp.pdf, at 18 (last visited Jan 28, 2010) (providing a preliminary transcript of the *Driven to Distraction Hearing*); *see also* http://energycommerce.edgeboss.net/wmedia/energycommerce/2009.11.04.ctc.wvx; http://energycommerce.edgeboss.net/wmedia/energycommerce/2009.11.04.ctc-2.wvx (providing a two-part videotape of the hearing).

[16] *See, e.g.*, Matt Richtel, *In Study, Texting Lifts Crash Risk by Large Margin*, N.Y. TIMES, July 28, 2009, at A1 (reporting results of a study that revealed "texting is in its own universe of risk" as compared to other potential driving behaviors).

[17] NATIONAL SAFETY COUNCIL, SUMMARY OF ESTIMATE MODEL 1, *available at* http://www.nsc.org/news_resources/Resources/Documents/NSC%20Estimate%20Summary.pdf (last visited Feb. 11, 2010). The NSC noted that the relative risk of text messaging has not been studied extensively enough to establish a solid estimated risk level. *Id.* Instead, it reported a range of increased crash risk of eight to twenty-three times that of a non-distracted driver. *Id.* Transposing this range onto the total number of crashes in 2008, the NSC found that the percentage of motor vehicle crashes attributable to texting in 2008 could have been as low as three percent and as high as eighteen percent. *Id.*; *see also Driven to Distraction Hearing*, *supra* note 15 (statement of Rep. Rick Boucher, Chairman, Subcomm. on Commc'n, Tech., and the Internet). Distracted driving accounted for nearly twenty-five percent of all traffic crashes last year, which resulted in 5,870 fatalities and over 500,000 injuries. *Id.* at 3. Although the exact number of deaths or serious injuries caused by texting while driving is not clear, the Department of Transportation found the majority of distracted driving deaths were due to texting. *See id.* at 65 (testimony of Ray LaHood, Sec'y, United States Dep't of Transp.).

[18] *See Driven to Distraction Hearing*, *supra* note 15, at 64. (testimony of Julius

This Comment explores the legislative response to texting while driving. Part II discusses the epidemic of drunk driving that was widespread on America's roadways only twenty years ago, and the legislative initiatives used to combat that problem. Part III explores the unparalleled growth of cell phones in America and the latest phenomenon of texting. This part also discusses the legislative efforts of several states to protect the general welfare, and various recent studies that have compared drunk driving to texting while driving. Part IV provides an analysis of the various laws banning texting while driving and highlights the dissonance between the legislative purposes and the lax penalties for violation. In addition, this part discusses a proposed federal bill that would require every state to pass a law to prohibit texting while driving that would include mandatory minimum penalties upon violation. Finally, this Comment proposes a penalty for texting while driving that would appropriately address the gravity of the offense.

II. DRUNK DRIVING: THE PAST EPIDEMIC

In the 1980s, America was experiencing a nationwide epidemic that posed a threat to public safety on the nation's highways—drunk driving.[19] Drunk driving has existed since the invention of the automobile, but the original laws imposed lax penalties that served little deterrent effect.[20] As a

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Genachowski, Chairman, Fed. Commc'n Comm'n). Texting while driving is the most pressing, vital issue regarding safety on our nation's highways. *Id.* The epidemic is getting worse every year. *See id.* at 51 (testimony of Ray LaHood, Sec'y, United States Dep't of Transp.). Although any kind of distraction, such as eating a hamburger, shaving, or putting on makeup takes one's eyes off the road, hands off the wheel, and affects a person's ability to drive, the focus is on texting because it is the overwhelming distraction that is harming our nation's younger drivers and those around them. *Id.* at 64.

[19] *See, e.g.*, Tina Wescott Cafaro, *You Drink, You Drive, You Lose: Or Do You?*, 42 GONZ. L. REV. 1, 2 (2006); Christopher O'Neill, Note, *Legislating Under the Influence: Are Federal Highway Incentives Enough to Induce State Legislatures to Pass a 0.08 Blood Alcohol Concentration Standard?*, 28 SETON HALL LEGIS. J. 415, 418 (2004) (referring to drunk driving as "a scourge on the highways of the United States of America").

[20] *See* John Hoffman, Note, *Implied Consent With a Twist: Adding Blood to New Jersey's Implied Consent Law and Criminalizing Refusal Where Drinking and Driving Results in Death or Serious Injury*, 35 RUTGERS L.J. 345, 347 (2003). Laws prohibiting drunk driving were enacted nearly everywhere soon after invention of the automobile. *Id.* These early anti-drinking-and-driving measures were based on criminal law and focused on the "grossly intoxicated driver." *Id.* "These laws proved ineffective because it was difficult to define and prove a state of drunk driving, driving under the influence of alcohol (DUI), or driving while impaired by alcohol (DWI) . . . ." *Id.* (internal quotation marks omitted). Thus, offenders were often able to escape conviction and the laws failed to deter drinking and driving. *Id.*

result, the number of serious or fatal car crashes caused by drunk driving kept rising and reached an all-time high in 1982.[21] Consequently, the public clamored for legislative responses to strengthen drunk driving laws.[22] The dangers posed by drunk driving came to the attention of the federal government, which induced federal legislation that required every state to improve their laws against drunk driving.[23] This legislation was passed in an effort to make highways safer.[24] In turn, state legislatures responded by passing more stringent laws against drunk driving.[25]

The severity of the dangers posed by drunk driving, and the seriousness with which state legislatures view those dangers are best reflected in the penalties for drunk driving. The penalties imposed upon conviction clearly show that lawmakers viewed drunk driving as a significant threat to public

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[21] Cafaro, *supra* note 19, at 2.

[22] *Id.* At this time, according to a Gallup poll, ninety-seven percent of the driving-age public viewed drunk driving as a threat to their own personal safety and to the safety of others. *Id.* at 19 n.112.

[23] *See* O'Neill, *supra* note 19, at 415–18. "[T]he federal government passed 23 U.S.C. [§] 163 to encourage states to lower the legal blood alcohol concentration ("BAC") level . . . to 0.08." *Id.* at 415. Passed under the spending power, the law permitted the government to withhold two percent of a particular state's federal highway funding, starting in 2004, for any state that failed to comply with the statute. *Id.* at 416. "The percentage withheld increase[d] by [two] percent for each successive year" that a state refused to comply with the statute, until 2007, when the amount withheld "[would] reach [eight] percent of the total budget." *Id.* at 417–18. If a state initially chose not to comply with the statute, but enacted such a law before the statutory deadline of October 1, 2006, it would be able to "recover the funds lost in previous years." *Id.* at 418. However, if a state elected not to enact a law by the deadline provided, all funds withheld would be "permanently lost." *Id.* "In addition, the federal government [would] continue to withhold [eight] percent [of the] state highway funding" each subsequent year, which would not be recoverable, until the state enacted such a law. *Id.*

[24] *See* David G. Dargatis, Note, *Put Down that Drink!: The Double Jeopardy Drunk Driving Defense is Not Going to Save You*, 81 IOWA L. REV. 775, 799 (1996) (finding the purpose of heightened laws against drunk driving was to save lives, thereby improving public safety).

[25] *See generally* Hoffman, *supra* note 20, at 346–47. By the early 1980s, drinking and driving had become so prominent that half of all fatal crashes nationwide were attributed to instances of drunk driving. Lewis R. Katz & Robert D. Sweeney, Jr., *Ohio's New Drunk Driving Law: A Halfhearted Experiment in Deterrence*, 34 CASE W. RES. L. REV. 239, 239 (1984). The increased number of fatalities brought a heightened awareness of the dangers associated with the behavior, and placed pressure on state governments to adopt stricter laws against drunk driving. *Id.* at 241. The goal of enhanced drunk driving laws was accomplished in August 2005, as all fifty states passed a law declaring that any person operating a motor vehicle with blood-alcohol content at or above 0.08 "has per se committed the offense of impaired driving." Cafaro, *supra* note 19, at 25. The enactment of such stringent laws made it easier to convict someone of drunk driving, thus increasing enforceability and providing a greater deterrent effect. *Id.*

safety.[26] In many states, the penalty for a first time offender includes a fine ranging from five hundred to one thousand dollars,[27] suspension of driving privileges for three months,[28] and the possibility of spending several days in jail.[29] A second offense can bring a fine ranging from two thousand dollars to five thousand dollars,[30] suspension of driving privileges for at least one year,[31] and mandatory jail time.[32] Thus, while the current laws against drunk driving provide strict penalties upon violation, it is important to note that these laws evolved over time as legislators learned that lax laws were ineffective to prevent the behavior.

III. EXPLOSION OF CELL PHONES INTO AMERICAN CULTURE: THE GROWING EPIDEMIC OF TEXTING WHILE DRIVING

The dangers of using a cell phone while driving were first realized nearly a decade ago.[33] Crashes resulting in death or serious injury caused by use

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[26] *See* Dargatis, *supra* note 24, at 799 (finding that state legislatures explicitly declared the purpose of stricter drunk driving laws was to protect the public safety).

[27] *See, e.g.*, COLO. REV. STAT. § 42-4-1301(7)(a)(I)(B) (2009) (not less than six hundred dollars nor more than one thousand dollars); N.H. REV. STAT. ANN. § 265-A:18(I)(a)(2) (2008) (not less than five hundred dollars); N.Y. VEH. & TRAF. LAW § 1193(1)(b) (2007) (not less than five hundred dollars nor more than one thousand dollars). *But see* ALASKA STAT. § 28.35.030(b)(1)(A) (2008) (not less than one thousand five hundred dollars); N.J. STAT. ANN. § 39:4-50(a)(1)(i) (2004) (not more than four hundred dollars).

[28] *See, e.g.*, ALASKA STAT. § 28.15.181(c)(1) (2002) (not less than ninety days); MINN. STAT. § 169A.54(1) (2009) (not less than thirty days). *But see* OR. REV. STAT. § 809.428(2)(a) (2007) (one year).

[29] *See, e.g.*, CAL. VEH. CODE § 23536(a) (West 2007) (not less than ninety-six hours); N.C. GEN. STAT. § 20-179(k) (not less than twenty-four hours); WASH. REV. CODE § 46.61.5055(1)(a)(i) (2008) (not less than one day nor more than one year).

[30] *See, e.g.*, ALASKA STAT. § 28.35.030(b)(1)(B) (2008) (not less than three thousand dollars); MD. CODE ANN. TRANSP. § 27-101(k)(1)(ii) (LexisNexis 2009) (not more than two thousand dollars); WASH. REV. CODE § 46.61.5055(2)(a)(ii) (not more than five thousand dollars).

[31] *See, e.g.*, N.Y. VEH. & TRAF. LAW § 1193(2)(b)(3) (one year); UTAH CODE ANN. § 41-6a-509(1)(a)(i)(B) (2009) (two years); VA. CODE ANN. § 18.2-271(B) (2002) (three years).

[32] *See, e.g.*, 625 ILL. COMP. STAT. 5/11-501(c)(2) (2009) (five days); LA. REV. STAT. ANN. § 14:98(C)(1) (2008) (two days); N.H. REV. STAT. ANN. § 265-A:18(IV)(a)(3)(B) (three days). Although the mandatory minimum jail sentence upon a second drunk driving conviction is generally a few days, an offender may receive a sentence up to one year at the discretion of the court. *See* 625 ILL. COMP. STAT. 5/11-501(c)(2) (2009).

[33] *See, e.g.*, Kathleen Sweeney, *Law Orders Tracking of Cause of Collisions*, DAILY NEWS OF LOS ANGELES, Dec. 29, 2001, at SC1 (reporting that 149 physical injuries and 192 property damage incidents were attributed to cell phone use while driving in a span of six months).

of a cell phone while driving became a popular topic in the media.[34] Studies were conducted to determine the magnitude of the threat to the general welfare,[35] which increased public awareness of the dangers. States struggled with how to resolve the issue, and yet failed to take action.[36] This led local municipalities to pass ordinances banning or restricting the use of cell phones while driving in an attempt to encourage state legislative action.[37]

Finally, in 2001, New York became the first state to enact a restriction on cell phone use while driving.[38] The law was passed in an effort to reduce traffic accidents and save lives.[39] Still, this law did not completely ban cell

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[34] *See, e.g.*, Lisa Kozleski & Diane Marczely Gimpel, *Driver Sued in Cell Phone Death; He Was Dialing Phone Before Accident that Killed 2-Year Old Bucks Girl*, MORNING CALL (Allentown, Pa.), Jan. 19, 2000, at A1 (reporting a campaign to ban cell phone use while driving).

[35] *See* JANE C. STUTTS, ET AL., AAA FOUNDATION FOR TRAFFIC SAFETY, THE ROLE OF DRIVER DISTRACTION IN TRAFFIC CRASHES 11 (2001), http://www.aaafoundation.org/pdf/distraction.pdf. The first in-depth study that measured the enhanced risk of crash caused by a cell phone was conducted by researchers from the University of North Carolina at Chapel Hill. *Id.* at 6. Its purpose was to determine the frequency of serious crashes caused by particular driver distractions. *Id.* at 1. The study included thirteen different types of distractions and distinguished between conversing on a cell phone and dialing a cell phone. *Id.* at 8. Due to the limited amount of data on cell phone use while driving, these two activities were combined. *Id.* at 11. Researchers found that, although cell phone use was a distraction, the results were not statistically significant due to the unavailability of substantial data. *Id.* at 12. However, the researchers noted the findings had important implications. *Id.* at 12–13. For example, while the number of drivers who reported using a cell phone just before a crash had declined over the five-year period from 1995 to 1999, overall cell phone use had more than doubled, increasing from 35,000,000 subscribers to 85,000,000 subscribers. *Id.* at 34–35.

[36] *See* Matthew C. Kalin, Note, *The 411 on Cellular Phone Use: An Analysis of the Legislative Attempts to Regulate Cellular Phone Use By Drivers*, 39 SUFFOLK U.L. REV. 233, 245 (2005) (noting that many state legislatures were determining whether to pass statewide legislation).

[37] *See id.* at 244–45. These ordinances were passed in Ohio, Pennsylvania, and New York throughout 1999 and 2000 as a result of several crashes that had been caused by the use of cell phones while driving. *Id.* at 244. Many of the ordinances were passed in an effort to spark awareness of the issue and to encourage action at a statewide level. *Id.* at 244–45.

[38] Croze, *supra* note 11, at 468.

[39] *See* Carl L. Marcellino, Letter to James M. McGuire, Counsel to the Governor, S. 224-69, Reg. Sess., at 4 (N.Y. 2001). The legislation was deemed an important step in promoting the safety of New York's public highways because it was intended to advocate the responsible use of mobile phones by motorists. *Id.* Highlighting how the law would save laws, one proponent provided the following two examples:

> Case #1; In March of 1999, Lisa Duffner was walking the family dog with her two-year old son Ryan. They were struck by a teen who was using her cell phone while driving. Ryan and the dog were killed instantly and Lisa spent three days in a coma.

phone use; it merely placed a ban on people talking on their cell phones while holding the phone to their ear.[40] Thus, people could talk on a cell phone using an earpiece, or similar hands-free device.[41] In effect, the statute allowed people to talk on the phone, so long as they were able to also keep both hands on the steering wheel.[42]

Over the next four years, legislatures in every state proposed similar restrictions,[43] but New Jersey and the District of Columbia were the only two that followed New York's example.[44] The popularity of cell phones

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> The driver took off and has never been found. Case #2; James Austin, a fire investigator for Santa Barbara, CA, was driving down the road when he was struck head on by Ezekial Bahena who drifted into his lane while dialing his cell phone. Mr. Austin spent months in the hospital while Mr. Bahena was ticketed for reckless driving. Had Mr. Bahena pulled to the side of the road before dialing, this accident might not have happened.

Peter J. Stoller, Letter to the Governor, S. 224-69, Reg. Sess., at 44 (N.Y. 2001).

[40] *See* N.Y. VEH. & TRAF. LAW § 1225-c (McKinney 2001). The statute provides:

> [N]o person shall operate a motor vehicle upon a public highway while using a mobile telephone to engage in a call while such vehicle is in motion. . . . An operator of a motor vehicle who holds a mobile telephone to, or in the immediate proximity of his or her ear while such vehicle is in motion is presumed to be engaging in a call within the meaning of this section.

Id. § 1225-c(2)(a), (b).

[41] *See id.* The statute first defines "hand-held mobile telephone" as "a mobile telephone with which a user engages in a call using at least one hand." *Id.* § 1225-c(1)(d). Then it defines "hands-free mobile telephone" as:

> [a] mobile telephone that has an internal feature or function, or that is equipped with an attachment or addition, whether or not permanently part of such mobile telephone, by which a user engages in a call *without the use of either hand*, whether or not the use of either hand is necessary to activate, deactivate or initiate a function of such telephone.

Id. § 1225-c(1)(e) (emphasis added). Finally, the statute bans the use of hand-held phones, but expressly allows for the use of hands-free mobile phones. *Id.*; *see also* Letter to the Editor, *Make a Call While Driving, and a Judge May Collect*, POST-STANDARD (Syracuse, N.Y.), Nov. 8, 2001 (Oswego Ed., Neighbors) (noting the law does not prohibit using a cell phone while driving, but merely requires the use of a hands-free device).

[42] *See* Brenda Rios, *GM Urges Hands-Free Calls; Carmaker Expects Employees to Reduce Distractions While Driving*, DETROIT FREE PRESS, Nov. 1, 2001, at 1C. The same day that New York's hands-free law went into effect, General Motors (GM) instituted a similar policy for its workers. *Id.* The policy strongly urged employees to use hands-free devices when talking on the phone. *Id.*

[43] *See* Kalin, *supra* note 36, at 234–35 (noting that between 2001 and 2005, legislatures in every state had "proposed bills designed to reduce or eliminate a driver's ability to talk and drive at the same time").

[44] *See* D.C. CODE § 50-1731.04 (2004) (prohibiting the use of cell phones while operating a motor vehicle unless the phone is equipped with a hands-free device); N.J. STAT. ANN. § 39:4-97.3 (West 2004) (amended 2008).

has since exploded, and technology in wireless communication has greatly improved.[45]

As the popularity of cell phones increased, the percentage of cell phone owners who used their phones while driving swelled to over eighty percent;[46] and this percentage has remained constant for nearly a decade.[47] During this period, however, the total number of cell phone subscribers has increased significantly.[48] In 2000, there were ninety-four million cell phone subscribers in the United States;[49] by the end of 2009, there were over 270 million subscribers,[50] and it was estimated that four out of every five Americans owned a cell phone.[51] Consequently, although the percentage of people that use their phones while driving has remained constant over the past decade, the number of people engaging in the activity has tripled, which has greatly increased the potential for harm.[52]

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[45] *See, e.g.*, Karen Brown, *Sending a Message to Enterprises; Business-Oriented SMS Products are Starting to Arrive, but They Face Competition From Other Messaging Options*, WIRELESS WEEK, Aug. 1, 2004, at 20 (discussing the growing trend of consumers sending text messages and the corporate world's efforts to join this trend); Sue Marek, *Internal Antenna Craze; As Mobile Handsets Morph into Music Players and Video Devices, Embedded Antennas Become More Critical. In Fact, Developers Say the Average Handset Could Have Four or More Antennas by 2008*, WIRELESS WEEK, Sept. 1, 2006, at 16 (describing the requirements of new technologies in cell phones "such as Bluetooth, WiFi, mobile TV and mobile music"); Tom Murphy, *TI, Microsoft Unveil Latest Media-Rich Cellular Platform; Stinger to Drive Demand for Handsets*, ELECTRONIC NEWS, Nov. 13, 2000, at 42 (announcing the capability to access outlook e-mail services from a cell phone); Brad Smith, *Mobile Navigation Finds its Way; Using a Cell Phone to Get Directions and Maps Hasn't Been Widely Available, But Some New Applications Are on the Way*, WIRELESS WEEK, Aug. 15, 2006, at 20 (describing a new global positioning system navigation technology developed for a cell phone).

[46] Jesse A. Cripps, Jr., Comment, *Dialing While Driving: The Battle Over Cell Phone Use on America's Roadways*, 37 GONZ. L. REV. 89, 91 (2002).

[47] *See Nationwide: New Nationwide Insurance Survey Shows Overwhelming Support for Laws Banning Texting While Driving*, LAW AND HEALTH WEEKLY, Sept. 19, 2009, at 913 (finding more than eighty percent of all cell phone owners use their cell phone while driving).

[48] *See* Amendola, *supra* note 5, at 341–42 (asserting that the number of cell phone subscribers has grown exponentially).

[49] Nelson Hernandez, *Resolute Lawmaker Vows New Attack on Drivers' Cell Phones; Study Reports That Using Devices Causes About 2,600 Deaths Annually*, WASH. POST, Dec. 3, 2002, at B04.

[50] *See Driven to Distraction Hearing*, *supra* note 15, at 18 (statement of Rep. Doris Matsui).

[51] AAA FOUNDATION FOR TRAFFIC SAFETY, CELL PHONES AND DRIVING: RESEARCH UPDATE 6 (Dec. 2008), http://www.aaafoundation.org/pdf/CellPhonesandDrivingReport.pdf.

[52] Ashley Halsey III, *What Does It Take to Get Texting Off Roads?; Consequences Are Only Way, Some Say*, WASH. POST, Oct. 5, 2009, at B01. "There are 136 million cars on the road and 270 million cell phones." *Id.* With more than eighty percent of drivers admitting

Today, cell phones are used not only for voice communication, but for other forms of wireless communication as well.[53] One major form is texting.[54] Texting has received increased national attention in the media[55] and is recognized as the newest fad among cell phone users.[56] In a relatively short period of time, texting has nestled deep into American culture, and it shows no signs of slowing down.[57] For instance, five years ago few people communicated by texting because it was a relatively new technology.[58] In 2006, the texting trend began to pick up steam as cell phone users sent 158 billion text messages.[59] By December 2008, however, the texting rage was in full force as users were sending over 110 billion text messages in a *single month*,[60] with some people sending or receiving

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they talk on their cell phone while driving, that means there are over 800,000 people using their cell phones while driving at any given moment. *Id.*

[53] *See* Baig, *supra* note 13. Features of the new Apple iPhone include: voice controls, a video camera, a screen reader that describes what is on the screen for the visually impaired, internet capability with parental controls, Bluetooth, ability to buy or rent movies, ability to purchase TV shows and music videos, video voice recorder, "copy and paste" option for e-mail purposes, search option to find stored files on the phone, and the ability to erase the contents of the phone from a remote location in the instance that it is lost or stolen. *Id.*

[54] *See* Press Release, Sen. Charles Schumer, Schumer Releases New Report Showing Nearly 100 NY Metro Area Teens Were Killed in Accidents Involving Texting While Driving—Calls on Congress to Quickly Pass His Legislation Banning Dangerous Practice (Oct. 4, 2009), *available at* http://schumer.senate.gov/new_website/record.cfm?id=318624& (noting that ten years ago texting did not exist, but now Americans use it as a major form of communication).

[55] *See, e.g.*, Jennifer Steinhauer & Laura M. Holson, *Cellular Alert: As Texts Fly, Danger Lurks*, N.Y. TIMES, Sept. 20, 2008, at A1. Texting as a form of communication has become extremely widespread, as it has become the preferred form of communication for millions of people in less than three years. *Id.* This is demonstrated by the thousands of Americans that use text messages to vote for their favorite American Idol contestant on a weekly basis. *Id.* Due to the recent explosion of text messaging into the American culture, restrictions on texting are reaching beyond the realm of public safety. *Id.* For example, the National Collegiate Athletic Association recently placed a ban on coaches sending text messages to recruits. *Id.* Parents across the nation have begun seeking ways to limit the ability of their teenagers to send text messages. *Id.* To meet this demand, cell phone companies now offer a service that provides parents the ability to block texting on their teenagers' cell phones during certain times of the day. *Id.*

[56] *See, e.g.*, Noveck, *supra* note 14, at A6 (referring to texting as a phenomenon).

[57] *See, e.g.*, Stenhauer & Holson, *supra* note 55, at A1 (reporting that seventy-five billion text messages were sent in the U.S. in June 2008, compared to only seven billion sent over the same period three years earlier).

[58] *See id.*; Senate Press Release, *supra* note 14 (statement of Sen. Charles Schumer).

[59] Laura Bruno, *Stop Text Messaging, Drivers Urged*, USA TODAY, June 12, 2007, at 3A.

[60] Richtel, *supra* note 16, at A1 (reporting a tenfold increase in texting over a three year period).

hundreds of text messages every day.[61] Further, statistics reveal that cell phone users are currently texting more than they are talking on the phone.[62]

Texting is most prevalent among younger teenagers,[63] and is considered a principal pastime among America's youth.[64] The trend extends to older generations as well;[65] as nearly twenty-five percent of adults over the age of fifty use their cell phones to send or receive text messages.[66] In fact, texting has become so popular that even our President recognizes it as an expedient form of communication.[67] This was demonstrated when then-Senator and presidential candidate Barack Obama announced his running mate to the world via text message.[68]

The popularity of texting has also increased the number of cell phone users that engage in the behavior while driving.[69] Texting while driving has become the most recent deadly epidemic threatening public safety on our nation's highways since drunk driving in the 1980s.[70] Furthermore, as a

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[61] *See* Hanes, *supra* note 12, at 25. A college student in Ohio claimed to send and receive more than five hundred text messages each day. *Id.* She said "I prefer to text and drive, rather than talk and drive." *Id.*

[62] *See* Alex Mindlin, *Letting Our Fingers Do the Talking*, N.Y. TIMES, Sept. 29, 2008, at C4. A study by Nielsen Mobile revealed that the average volume of text messages shot upward by sixty-four percent over the one-year period from September 2007 to September 2008, while the average number of calls dropped slightly during the same period. *Id.*

[63] *See id.* Teenagers between the ages of thirteen and seventeen are "by far the most prolific texters." *Id.* The volume of text messages sent or received by teenagers within this age range is twice the volume of text messages sent or received by eighteen to twenty-four year olds. *Id.* Over a one-year period, there were 1,742 text messages sent or received by teenagers between the ages of thirteen to seventeen compared to only 790 text messages sent or received by eighteen to twenty-four year olds. *Id.*

[64] *Rethinking the Children's Television Act for a Digital Media Age: Hearing Before the S. Comm. on Commerce, Science, and Transp.*, 111th Cong. (2009) [hereinafter *Digital Media Hearing*] (testimony of the Honorable Julius Genachowski, Chairman, Fed. Commc'ns Comm'n).

[65] *See Teens Texting While Driving; Trend in Survey Seen as Dangerous Mix*, GRAND RAPID PRESS (Mich.), July 30, 2007, at D1 (noting that teens are not the only ones with "busy thumbs" as there were seventy-nine million cell phone users texting on a regular basis).

[66] Noveck, *supra* note 14.

[67] *See* Stenhauer & Holson, *supra* note 55 ("Almost overnight, text messaging has become the preferred form of communication for millions.").

[68] *Id.*

[69] *See* Senate Press Conference, *supra* note 14 (statement of Sen. Robert Menendez). Once, the dangers of drunk driving were the greatest concern on the highways. *See id.* The advent of the cell phone brought an increase in the number of accidents caused by people driving while dialing. *See id.* Now, the newest and most deadly concern is texting while driving. *See id.*

[70] *See Driven to Distraction Hearing*, *supra* note 15, at 51 (testimony of Ray LaHood, Sec'y, United States Dep't of Transp.) (concluding that texting while driving is a deadly

greater number of younger teenagers become licensed drivers in upcoming years, the dangers of texting while driving will likely increase.[71]

A. Legislative Response to the Risks Associated with Texting While Driving

As awareness of the dangers of texting while driving has intensified over the past few years, an increasing number of states are outlawing the behavior.[72] In each instance, one or more texting-related crashes has induced the legislation. For example, in December 2006 in Seattle, Washington, a BlackBerry was blamed for a five-car pileup on the interstate when a Dodge van slammed into the back of a Mazda.[73] The Mazda had stopped in the express lanes due to morning commuter traffic.[74] The impact caused the Mazda to collide with a Honda, pushing the Honda into another lane.[75] This collision caused the Honda to strike a public transportation bus carrying close to thirty people, resulting in injuries to a young child.[76] The pileup caused thousands of people to be late to work.[77] In the aftermath, the driver of the van admitted he never saw the vehicle stopped in front of him because he had been looking at his cell phone for nearly a minute.[78]

Soon after, in January 2007, the Washington State Legislature proposed a bill to expressly ban texting while driving.[79] The bill was signed into law

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epidemic); *see also supra* notes 18 & 19 and accompanying text.

[71] *See Driven to Distraction Hearing*, *supra* note 15, at 13 (statement of Rep. George Radanovich, Chairman, Consumer Protection Subcomm.). Given that texting is predominantly conducted by younger teenagers, the risks associated with texting while driving are likely to increase as the population most likely to text actually becomes a larger percentage of drivers on the nation's highways. *Id.*

[72] *See generally* Anna Badkhen & Matt Viser, *Fatal Hit-Run Driver Was Texting, DA Says; Legislators Calling for Ban on Practice*, BOSTON GLOBE, Dec. 29, 2007, at A1 (reporting a fatal accident where a driver who was texting struck and killed a thirteen-year old boy on his bicycle); Jason Stein, *Bill Aims at Driver Text Messaging*, WISCONSIN ST. J. (Madison), Nov. 25, 2007, at D1 (predicting that texting while driving would be a hot topic in lawmakers' upcoming sessions).

[73] Brad Wong, *PDA Blamed for Chain-Reaction Pileup; Man's Eyes on BlackBerry, Not Car in Front of Him*, SEATTLE POST-INTELLIGENCER, Dec. 6, 2006, at A1.

[74] *Id.*

[75] *Id.*

[76] *Id.*

[77] *See id.* (reporting on the front page of the newspaper that the collision caused a several hour delay on the interstate).

[78] *Id.* The driver claimed he was completely unaware of anything happening on the highway around him and that he "did not know" how fast he was traveling upon impact. *Id.*

[79] H. 1214, 60th Leg., 1st Reg. Sess., Act of May 11, 2007, ch. 416, § 1, 2007 Wash. Sess. Laws 416 (codified at WASH. REV. CODE § 46.61.668) (noting the bill was introduced on Jan. 15, 2007); *see* Melissa Santos, *Texting While Driving: Should it Be a Crime? Bills Target Cell Phone Use in Vehicles*, SEATTLE POST-INTELLIGENCER, Jan. 29, 2007, at A1

less than four months later, and went into effect on January 1, 2008.[80] The enactment made Washington the first state to expressly ban texting while driving.[81]

As Washington's ban on texting while driving made its way through the state legislative process, the Governor of New Jersey witnessed first-hand the dangers of texting while driving.[82] In April 2007, the Governor was involved in a near-fatal crash because his driver "may have been distracted by e-mails sent to his mobile phone or Blackberry."[83] The Governor's driver, a state trooper, had received e-mails from a Berkeley Heights police sergeant while traveling on the interstate at over ninety miles per hour.[84] The driver lost control of the vehicle after he failed to timely react to a vehicle that had swerved into his lane.[85] The Governor's vehicle spun around and crashed into a guardrail.[86] As a result of the crash, the Governor suffered eleven broken ribs, fractured his breastbone, collarbone, and femur and required a breathing ventilator.[87]

After recovering from his injuries, the Governor signed into law a bill that banned texting while driving, making New Jersey the second state to enact such a law.[88] At the end of 2007, Washington and New Jersey

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(claiming the pileup on the interstate inspired the proposal of a bill in the Washington State Legislature).

[80] *See* H. 1214, 60th Leg., 1st Reg. Sess., Act of May 11, 2007, ch. 416, § 1, 2007 Wash. Sess. Laws 416 (codified at WASH. REV. CODE § 46.61.668).

[81] Shawne K. Wickham, *A Message to Texting Drivers*, UNION LEADER (Manchester, N.H.), Oct. 28, 2007, at A1 (discussing similar proposals by the New Hampshire State Legislature). The law in Washington makes it illegal for a person to send, read, or write a text message while driving. WASH. REV. CODE § 46.61.668 (2007). The law further explains: "[a] person does not send, read, or write a text message when he or she reads, selects, or enters a phone number or name in a wireless communications device for the purpose of making a phone call." *Id.*

[82] Jan Hefler, *Did Corzine's Driver Get an E-Mail?; A Police Officer Said He Sent a Message Confronting the Trooper Over an Extra-Marital Affair Just Before the April 12 Crash*, PHILADELPHIA INQUIRER: JERSEY EDITION, Apr. 23, 2007, at B01 (reporting New Jersey Governor Corzine was involved in a serious car accident in early April 2007).

[83] *Id.* The investigation into the cause of the crash revealed the driver had received an e-mail before the crash. *Id.* One particular message received minutes before the crash included a photograph of the sergeant's family because the driver was having an affair with the sergeant's wife. *Id.*

[84] *Id.*

[85] *Id.*

[86] *Id.*

[87] *Id.*

[88] *See* Badkhen & Viser, *supra* note 72; Act of Nov. 2, 2007, ch. 198, sec. 1, §§ 1(a), 1(b)(2), 1(d), 2006 N.J. Laws 198 (codified at N.J. STAT. ANN. § 39:4-97.3 (West)). When New Jersey enacted a ban against texting while driving, the legislature amended the present law restricting the use of hand-held cell phones while driving. *See* N.J. STAT. ANN. § 39:4-

remained the only states that had passed legislation aimed at prohibiting texting while driving.[89] In each instance, the legislature proactively passed the law as a result of non-fatal accidents that "could have been catastrophic."[90] Following these, however, lawmakers in other states were forced to take more reactive measures and passed prohibitive legislation only after what are now infamous, fatal crashes.[91] Nonetheless, in each instance, the legislature was concerned with the rising number of deaths attributed to texting while driving.[92]

For instance, Minnesota banned texting while driving in response to a growing number of fatal crashes involving teenage drivers.[93] The

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97.3 (2004) (amended 2007).

[89] *See* Badkhen & Viser, *supra* note 72. Although these laws were passed in 2007, they were not effective until 2008. *See* Act of May 11, 2007, ch. 416, § 2, 2007 Wash. Sess. Laws 416 (codified at WASH. REV. CODE § 46.61.668); Act of Nov. 2, 2007, ch. 198, § 3, 2006 N.J. Laws 198 (codified at N.J. STAT. ANN. § 39:4-97.3 (West)).

[90] Wong, *supra* note 73 (quoting Washington state patrol trooper Jeff Merrill).

[91] *See, e.g.*, Matt Richtel, *Not Driving Drunk, But Texting? Utah Law Sees Little Difference*, N.Y. TIMES, Aug. 29, 2009, at A1. The issue of texting while driving forced itself upon the Utah Legislature after a fatal crash that killed two prominent scientists. *Id.* On the morning of September 22, 2006, a nineteen-year old college student was driving to work on a two-lane highway when his Chevrolet Tahoe crossed the double yellow line and clipped a Saturn sedan. *Id.* The driver of the Saturn and his passenger were senior scientists on their way to a laboratory where they helped to design and build rocket boosters. *Id.* After the Saturn was clipped, it spun across the highway where it was struck by a pickup truck hauling a trailer filled with two tons of horseshoes. *Id.* Both scientists were killed instantly. *Id.* After the crash, witnesses testified they had seen the nineteen-year old driver swerve several times just before the crash. *Id.* Upon investigation, the police learned that the teenage driver had exchanged eleven text messages with his girlfriend in the thirty minutes prior to the crash, the last one sent one minute before he reported the incident. *Id.* Investigators concluded he sent this last text at the moment he crossed the double yellow line. *Id.*

[92] *See, e.g.*, S. COMM. ON TRANSP., SENATE B. REPORT ON H.B. 1214, H. 60-EHB 1214, 1st Reg. Sess., Staff Summary of Public Testimony (Wash. 2007). Proponents of the ban in Washington pronounced it was "lethal to text message and drive" and concluded that all motorists should be prohibited from endangering the lives of others. *Id.* Armed with this pronouncement, the Washington Legislature outlawed texting while driving. *Id.*

[93] *See* Curt Brown, *Teen Drivers: Preventing Deaths; Stopping Teen Deaths*, STAR TRIBUNE (Minneapolis, Minn.), Feb. 17, 2008, at 1A (reporting that a Minnesota lawmaker began pushing the ban on texting while driving after seeing statistics that showed two-thirds of teenagers admitted to the behavior); *see also* Emily Johns, *Hands on the Wheel, Thumbs Off the Phone*, STAR TRIBUNE (Minneapolis, Minn.), May 31, 2008, at 1B (reporting that proponents of the law pointed to one high-profile crash that had resulted in the deaths of two high school senior girls). When the law was passed, statistics showed that a teenager in Minnesota died in a traffic accident every five days. *See* Brown, *supra* note 93 (reporting these statistics in February 2008); *see also* Act of May 23, 2008, ch. 350, § 28, 2007 MINN. LAWS 350 (codified at MINN. STAT. § 169.475); Jim Adams, *Distraction of IPod Led to*

enactment of this law made Minnesota the third state to ban the practice of texting while driving.[94]

After Minnesota's law was passed, the growing epidemic[95] of texting while driving persuaded three more states to outlaw the behavior in 2008: Louisiana, Alaska, and California.[96] In Louisiana, lawmakers quickly responded to the dangers of texting while driving by passing a law within a year.[97] Lawmakers in California, on the other hand, debated the bill for nearly two years before approving it.[98]

California lawmakers did not have to wait long for the texting prohibition to—unfortunately but clearly—be justified. On September 12, 2008, two weeks after the bill passed both the House and the Senate, California experienced one of the worst train crashes in the state's history.[99] The crash occurred during the afternoon commute when a passenger train, carrying over two hundred people, collided head-on with a freight train.[100] The passenger train had been traveling at about forty miles per hour before impact.[101] The impact caused the engine of the freight train to become embedded in the front car of the passenger train, and turned another car filled with passengers onto its side.[102] The emergency crews described the

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Crash that Killed 2, STAR TRIBUNE (Minneapolis, Minn.), Dec. 11, 2007, at 4B.

[94] *See* Johns, *supra* note 93. The Minnesota law banned drivers from texting-related activities and additionally banned emailing and surfing the internet. *See* MINN. STAT. § 169.475 (2008).

[95] *McLaughlin Group* (PBS television broadcast Oct. 11, 2009). United States Secretary of Transportation Ray LaHood explained that distracted driving accounted for nearly twenty-five percent of all traffic crashes, and that texting while driving was the principal distraction. *Id.* He called texting while driving an epidemic and said that distracted driving in general was a "menace to society." Hanes, *supra* note 12, at 25 (reporting a statement by Secretary LaHood that texting while driving is a deadly epidemic and is getting worse every year).

[96] *See* ALASKA STAT. § 28.35.161 (2008) (amended 2009); LA. REV. STAT. ANN. § 32:300.5 (2008); CAL. VEH. CODE § 23123.5 (2008).

[97] *See* BILL HISTORY, S.B. 137, 2008-137, Reg. Sess., Summary of Act 665 (La. 2008) (stating the bill was pre-filed on Mar. 19, 2008, and signed by the Governor on July 1, 2008), *available at* http://www.legis.state.la.us/ (under "Bill Search" select "2008 Regular Session," "SB," and "137"; then follow "View" button; then follow "History" hyperlink).

[98] *See* BILL HISTORY, S. 28, 2007–08 Leg., Reg. Sess., Act of Sept. 24, 2008, ch. 270, 2008 CAL. STAT. 270 (codified at CAL. VEH. CODE § 23123.5), *available at* http://www.leginfo.ca.gov/pub/07-08/bill/sen/sb_0001-0050/sb_28_bill_20080924_history.html.

[99] Joel Rubin et al., *Metrolink Crash: Carnage in Chatsworth*, L.A. TIMES, Sept. 13, 2008, at A1; *see also* Robert J. Lopez et al., *Train Engineer Sent Text Message Just Before Crash*, L.A. TIMES, Oct. 2, 2008, at A1.

[100] *Id.* The passenger train consisted of three cars, carrying 225 people on their commute home from work. *Id.* The crash occurred at 4:23 p.m. *Id.*

[101] *See id.*

[102] *Id.*

wreckage as "total destruction [and] . . . chaos," as they were forced to search through bodies to locate survivors.[103] Ultimately, the crash left twenty-five people dead and 135 people injured.[104] An investigation revealed that the engineer of the passenger train sent or received fifty-seven text messages while on duty on the day of the crash.[105] He sent his final text message twenty-two seconds before the collision, five seconds after passing a signal that would have warned him to stop and given the freight train an opportunity to pull off the main track so that the passenger train could proceed safely.[106] However, instead of hitting the brakes, the engineer hit "send" on his cell phone after typing his last text message.[107] Five days after the accident, the bill banning text messaging while operating a motor vehicle landed on the governor's desk and was soon signed into law.[108]

After California's law banning texting while driving, the number of states that enacted similar legislation tripled over the course of a year.[109]

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[103] *Id.* The dead bodies were lying on top of the survivors. *Id.* The Los Angeles City Fire Captain commented "it was as if somebody had just [removed] all the seats and thrown [the bodies] in there." *Id.*

[104] Jeff Gottlieb, *Crash Thrusts Metrolink's Chief into the Limelight*, L.A. TIMES, Dec. 11, 2008, at B1.

[105] Lopez et al., *supra* note 99.

[106] *Id.* The crash occurred at a part of the tracks where passenger trains must regularly stop at a warning signal to allow freight trains to pull off the main track onto a spur. *Id.* An expert estimated the engineer sent a text message from his cell phone five seconds after he should have seen the warning signal that would have alerted him of the oncoming freight train. *Id.* The protocol of an engineer upon seeing this signal was to bring the train to a stop a short distance before a "switch." *Id.* The switch would then guide the freight train onto a sidetrack, allowing the passenger train to proceed safely. *Id.* The expert believed that the engineer was distracted by sending a text message and saw the warning signal too late, giving him little or no time to react to the oncoming freight train. *Id.*

[107] *Id.* (correlating the time of the engineer's text message with the timing of the warning signal).

[108] *See* BILL HISTORY, *supra* note 98.

[109] *See* Badkhen & Viser, *supra* note 72 (stating that Washington and New Jersey were the only two states that had banned texting while driving by the end of 2007); January W. Payne, *Now Hear This: Use MP3 Players With Care*, ORLANDO SENTINEL (Florida), Dec. 23, 2008, at E3 (finding that six states, including California had banned texting while driving by the end of 2008). It has been widely reported that the District of Columbia had also banned texting by the end of 2008. *See, e.g.*, *CNN Newsroom 1:00 P.M. EST* (CNN television broadcast Nov. 12, 2008) [hereinafter *CNN Newsroom*] (reporting that the District of Columbia was among the jurisdictions that had banned texting while driving at the end of 2008). This is likely due to a mistaken interpretation of the District of Columbia's Distracted Driving Safety Act of 2004. The Act provides "Distracted driving means inattentive driving while operating a motor vehicle that results in the unsafe operation of the vehicle where such inattention is caused by . . . using personal communications technologies, or engaging in any other activity which causes distractions." D.C. CODE § 50-

The movement against texting while driving was only beginning to pick up steam. Texting while driving had become a serious public safety concern.[110] Throughout 2009, the instances of serious injury or death caused by a person sending or reading text messages while driving garnered even more national media attention,[111] and once again the public was clamoring for legislative response.[112] Consequently, state lawmakers acted quickly, as twelve more states banned texting while driving by the end of

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1731.02(1) (2004). However, District of Columbia lawmakers made it clear this law was not intended to include a ban on texting while driving when Council members introduced a bill on October 1, 2009 which would amend the Distracted Driving Safety Act of 2004 to include a prohibition of text messaging. Council 465, § 227, 2009 Council, Period 18 (D.C. 2009).

[110] *See generally* Senator Amy Klobuchar, Minnesota, Address at the National Distracted Drivers Summit in Washington, D.C.: "Texting While Driving" Evidence Demands Action (Sept. 30, 2009), *available at* http://ecmpostreview.com/index.php?option=com_content&task=view&id=3759 [hereinafter Klobuchar Address]. Klobuchar stated that "[n]o text message is so urgent or important that it's worth dying for." *Id.* She also urged that texting while driving is not safe, and claimed that it is a "national problem, and it deserves a national response." *Id.*

[111] *See, e.g.*, *Nationwide*, *supra* note 47, at 913 (concluding that more states are considering legislative action as awareness of the dangers of texting while driving intensifies); *see also* Eloisa Ruano Gonzalez, *Victim's Family: Ban Texting While Driving*, ORLANDO SENTINEL (Florida), Feb. 13, 2009, at B1 (reporting the story of a young woman who was killed by a truck driver sending a text message while she was on the way to Disney World to plan her dream wedding); Katie Zezima & Liz Robbins, *Cell Phones to Be Banned After Crash of a Trolley*, N.Y. TIMES, May 10, 2009, at A16. The Massachusetts Bay Transportation Authority in Boston banned the use of cell phones by public transportation vehicle operators the day after two trolleys were involved in a collision. *Id.*

[112] *See* Richtel, *supra* note 16, at A1 (revealing results of a study showing that eighty-seven percent of people consider texting while driving to be a "very serious" safety threat); Elizabeth Stull, *Monroe County Legislators Push for Texting Ban*, DAILY REC. OF ROCHESTER (Rochester, N.Y.), Oct. 23, 2008, News ("Ninety-one percent of Americans believe that driving while text messaging is as dangerous as drunk driving."); *see also Nationwide*, *supra* note 47, at 913. A survey conducted by Nationwide Insurance revealed that eight of ten drivers would support a ban on texting while driving. *Nationwide*, *supra* note 47, at 913. The results of the survey were announced as hundreds of highway traffic safety advocates and officials gathered at the annual conference of the Governor's Highway Safety Association in Savannah, Georgia to discuss major highway safety issues in advance of a presidential summit on the same topic. *Id.*

the year.[113] The devastating crashes were proving that texting while driving was as dangerous as drunk driving.[114]

In January 2009, New York lawmakers proposed a bill aimed at texting while driving in response to public outcry over a tragic crash that had attracted national media attention for two years.[115] The crash resulted in the deaths of five high school graduates who were best friends and former cheerleaders on their way to a post-graduation party.[116] Phone records revealed the driver had received a text message less than thirty seconds before she swerved her Trailblazer into oncoming traffic and crashed head-first into a tractor-trailer.[117] The vehicle burst into flames upon impact,

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[113] *See* ARK. CODE ANN. §§ 27-51-1501 to -1506 (2009); COLO. REV. STAT. § 42-4-239 (2009); 625 ILL. COMP. STAT. 5/12-610.2 (2009); MD. CODE ANN., TRANSP. § 21-1124.1 (2009); N.H. REV. STAT. ANN. § 265:105-a (2009); N.Y. VEH. & TRAF. LAW § 1225-d (McKinney 2009); N.C. GEN. STAT. § 20-137.4A (2009); OR. REV. STAT. § 811.507 (2009); R.I. GEN. LAWS § 31-22-30 (2009); TENN. CODE ANN. § 55-8-199 (2009); UTAH CODE ANN. § 41-6a-1716 (2009); VA. CODE ANN. § 46.2-1078.1 (2009).

[114] *See* Corey Friedman, *Family, Classmates Gather at Memorial for Stanley Teen Killed in Wreck*, GASTON GAZETTE (Gastonia, N.C.), Sept. 7, 2009, *available at* http://www.gastongazette.com/articles/stanley-37658-classmates-teen.html. In September 2009, after North Carolina's prohibition on texting while driving was signed into law, but before it went into effect, a high school junior was killed in a single car accident caused by reading and typing text messages while driving. *Id.* Her car ran off the road, struck an embankment, overturned in a ditch, and slid on its side into a utility pole. *Id.* She was killed instantly. *Id.* Her phone records revealed that she had received two text messages, sent one text, and received an incoming call within one minute before the wreck. *Id.* In the aftermath of the crash, a Sergeant with the North Carolina Highway Patrol commented "here's the proof[,] [texting while] driving is just as dangerous as drunk driving." *Id.* It was also reported that her cell phone was found with an unfinished text message to her mother. Meghan Cooke, *Students Get Lesson in 'Dnt Txt & Drv'*, DESERETNEWS.COM, Jan. 10, 2010, http://www.deseretnews.com/article/705357522/Students-get-lesson-in-dnt-txt--drv.html?pg=1.

[115] *See, e.g., NBC News: Teenagers who Text While Driving is a Growing Problem* (NBC Television Broadcast Oct. 20, 2007) (opining that a fiery crash in New York was among the most tragic of a recent string of texting-related crashes); Stull, *supra* note 112 (stating that legislation to ban texting while driving passed the New York State Senate in May 2009 in response to the texting–related death of five teens two years earlier).

[116] *See* James Barron, *Friends and Graduates, Now Victims in a Fiery Crash*, N.Y. TIMES, June 28, 2007, at B1 (stating that the girls "were on their way to spend a few carefree days in the Finger Lakes before one last round of post-graduation parties").

[117] *Id.*; *see also Text Messages Sent on Phone of Driver Before Fatal Wreck*, N.Y. TIMES, July 14, 2007, at B3. The driver received a text message on her cell phone at 10:06:29 p.m., thirty-one seconds before the crash was reported. *Id.* The sheriff investigating the crash said, although "[w]e will never be able to clearly state that [the driver] was the one doing the text messaging," the evidence shows that she was speeding on a winding, two-lane highway, and had sent a succession of text messages from her cell phone. *Id.* These facts, coupled with her inexperience at the wheel, lead to the likely conclusion that texting while driving was the cause of the crash. *Id.* The sheriff added that the series of text messages began only

killing the driver and all four passengers.[118] In late August 2009, the bill was signed into law.[119]

After the enactment of New York's ban on texting while driving, the number of states that made it illegal for a person to type or read a text message while operating a motor vehicle had tripled for the second year in a row, and by early 2010, the total number of states banning the dangerous practice had risen to twenty-one.[120] Additionally, fifteen more states were considering a ban,[121] and by April 2010, legislation aimed at outlawing the behavior had been proposed in every state.[122]

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two minutes before the crash was reported. *Id.*

[118] *See* Barron, *supra* note 116. The Trailblazer ended up wedged under the tractor-trailer, and all five girls were trapped in the car by the fire. *Id.*

[119] Act of Aug. 26, 2009, ch. 403, 2009 N.Y. Laws 4 (2009) (codified at N.Y. VEH. & TRAF. LAW § 1225-d).

[120] *See* Act of Apr. 1, 2010, 2010 Iowa Acts § 6 (to be codified at IOWA CODE § 321.276); Act of Apr. 13, 2010, 2010 Neb. Laws § 3 (to be codified at NEB. REV. STAT. § 60-601); Act of Mar. 10, 2010, ch. 105, § 1, 2010 Wyo. Sess. Laws § 1 (to be codified at WYO. STAT. ANN. § 31-5-237); ARK. CODE ANN. § 27-51-1501 (2009); COLO. REV. STAT. § 42-4-239 (2009); 625 ILL. COMP. STAT. 5/12-610.2 (2009); MD. CODE ANN., TRANSP. § 21-1124.1 (LexisNexis 2009); N.H. REV. STAT. ANN. § 265:105-A (2009); N.Y. VEH. & TRAF. LAW § 1225-d (McKinney 2009); N.C. GEN. STAT. § 20-137.4A (2009); OR. REV. STAT. § 811.507 (2009); R.I. GEN. LAWS § 31-22-30 (2009); TENN. CODE ANN. § 55-8-199 (2009); UTAH CODE ANN. § 41-6A-1716 (2009); VA. CODE ANN. § 46.2-1078.1 (2009); ALASKA STAT. § 28.35.161 (2008); CAL. VEH. CODE § 23123.5 (2008); LA. REV. STAT. ANN. § 32:300.5 (2008); MINN. STAT. § 169.475 (2008); N.J. STAT. ANN. § 39:4-97.3 (WEST 2007); WASH. REV. CODE § 46.61.668 (2007); *see also supra* note 109 and accompanying text. The last state to enact such a ban at the time of publication was Nebraska. *See* Act of Apr. 13, 2010, 2010 Neb. Laws § 3 (to be codified at NEB. REV. STAT. § 60-601). However, a texting ban has been quickly moving through the legislature in Idaho. On March 10, 2010, the Idaho Senate passed a bill intended to outlaw texting while driving. *See* S. 1352, 60th Leg., 2d Reg. Sess. (Idaho 2010). The Idaho House subsequently shelved the bill. Doug Nadvornick, *Idaho Lawmakers Eye Ban on Texting While Driving*, OR. PUB. BROAD. NEWS (Coeur d'Alene, Idaho), Mar. 29, 2010, *available at* http://news.opb.org/article/7012-idaho-lawmakers-eye-ban-texting-while-driving/. Although the reason the House did not pass the bill remains unknown, it was believed that many members of the House believed the bill's penalty for the offense went too far, as the maximum penalty provided for a $300 fine and ninety days in jail. S. 1352, 60th Leg., 2d Reg. Sess. (Idaho 2010). Less than three weeks later, on March 26, 2010, the Idaho House introduced a bill aimed at texting while driving. *See* H. 729, 60th Leg., 2d Reg. Sess. (Idaho 2010). This bill was passed by the House on the same day, and by the Senate three days later. *Id.* At the time of publication, the bill was waiting to be enrolled to the Governor for approval.

[121] *See* S. 196, 2010 Leg., Reg. Sess. (Ala. 2010) (introduced Jan. 12, 2010); S. 1334, 49th Leg., 2d Reg. Sess. (Ariz. 2010) (passed Senate Mar. 22, 2010); S. 324, 112th Leg., Reg. Sess. (Fla. 2010) (Referred to the Senate Committee on Communications, Energy and public utilities on Mar. 30, 2010); S. 328, 112th Leg., Reg. Sess. (Fla. 2010) (Referred to Senate Committee on Transportation and Economic Development Appropriations on Mar. 2, 2010); S. 360, 150th Gen. Assem., Reg. Sess. (Ga. 2010) (applying only to drivers under the

B. Studies Reveal that Texting While Driving is More Dangerous than Drunk Driving

Increasing media coverage of the risks associated with texting while driving sparked several studies aimed at measuring the level of impairment of a driver's visual, manual, and cognitive abilities while engaged in the behavior.[123] These studies conclusively confirmed that texting while

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age of eighteen) (passed Senate Mar. 18, 2010); H. 1279, 116th Gen. Assem., 2d Reg. Sess. (Ind. 2010) (passed House Feb. 2, 2010); S. 351, 83d Leg., Reg. Sess., (Kan. 2010) (passed Senate Feb. 19, 2010); S. 23, 2010 Gen. Assem., Reg. Sess. (Ky. 2010) (passed Senate Mar. 23, 2010); S. 402, 95th Leg., 1st Reg. Sess. (Mich. 2009) (passed Senate Jan. 26, 2010); H. 1721 95th Gen. Assem., 2d Reg. Sess. (Mo. 2010); S. 89, 49th Leg., 2d Reg. Sess. (N.M. 2010) (introduced Jan. 20, 2010); S. 164, 128th Gen. Assem., Reg. Sess. (Ohio 2009) (introduced Sept. 1, 2009); H. 270, 128th Gen. Assem., Reg. Sess. (Ohio 2009) (introduced Aug 18, 2009); H. 261, 128th Gen. Assem., Reg. Sess. (Ohio 2009) (introduced Aug. 4, 2009); H. 262, 128th Gen. Assem., Reg. Sess. (Ohio 2009) (introduced Aug. 4, 2009); H. 4189, 118th Gen. Assem., 2d Reg. Sess. (S.C. 2009) (introduced Jan. 12, 2010); S. 280, 2010 Leg., Adjourned Sess. of the 2009-10 Biennium (Vt. 2010) (passed both houses of congress and awaiting concurrence by House); H. 4472, 79th Leg., 2d Reg. Sess. (W. Va. 2010) (introduced Feb. 12, 2010); S. 103, 99th Leg., Reg. Sess. (Wis. 2009) (passed Senate Oct. 20, 2009 and went to Assem. Comm. on Rules).

[122] *See* H. 6060, 2009 Gen. Assem., Jan. Sess. (Conn. 2009) (failed to pass joint favorable deadline in House); H. 40, 145th Gen. Assem., Reg. Sess. (Del. 2009) (passed House but died in Senate); Council 465, §227, 2009 Council, Period 18 (D.C. 2009) (provision regarding texting while driving was amended out of the bill); H. 89, 25th Leg., Reg. Sess. (Haw. 2009) (died in House). A bill introduced in late December 2008 in Maine died in the House Joint Committee on Transportation in early March 2009. H. 36, 124th Leg., 1st Reg. Sess. (Me. 2009). Subsequently, four separate legislative requests relating to texting while driving were filed on Oct. 1, 2009—each by different sponsors. H. 2056, 124th Leg., 2d Reg. Sess. (Me. 2009); H. 2058, 124th Leg., 2d Reg. Sess. (Me. 2009); H. 2098, 124th Leg., 2d Reg. Sess. (Me. 2009) (defining texting while driving as a reckless act); H. 2100, 124th Leg., 2d Reg. Sess. (Me. 2009). However, all of these bills were rejected by the Legislative Council less than two weeks later. *See, e.g.*, Me. H.B. 2058 (rejecting the bill on Oct. 15, 2009). Therefore, Maine remains one of the states that has considered, but failed to pass, legislation banning texting while driving. *See also* S. 3020, 2009 Leg., Reg. Sess. (Miss. 2009) (died in Senate); S. 278, 2009 Leg., 61st Reg. Sess. (Mont. 2009) (died in Senate); S. 136, 2009 Leg., 75th Reg. Sess. (Nev. 2009) (passed Senate but died in Assembly); H. 1208, 61st Legis. Assem., Reg. Sess. (N.D. 2009) (failed to pass House); S. 1162, 52d Leg., 1st Sess. (Okla. 2009) (died in Senate); S. 950, 193d Gen. Assem., Reg. Sess. (Pa. 2009) (died in Senate); H. 1125, 84th Leg., Reg. Sess. (S.D. 2009) (died in House); H. 758, 81st Leg., Reg. Sess. (Tex. 2009) (died in House).

[123] *Driven to Distraction Hearing*, *supra* note 15, at 53 (testimony of Ray LaHood, Sec'y, United States Dep't of Transp.). There are three types of driving distraction—visual, manual, and cognitive. *Id.* Visual distraction causes a driver to take his or her eyes off the road; manual distraction causes a driver to take their hands off the wheel; cognitive distraction causes a person to take their minds off the road. *Id.* While each of type of distractions has an adverse effect on safety, texting while driving is the most dangerous

driving significantly increases the overall risk of crash or near-crash events.[124] One study revealed that engaging in texting increases the amount of time that a driver spends with his or her eyes off the road by as much as four hundred percent.[125]

The effects of texting while driving are referred to as "inattention blindness"[126] because when people send text messages while driving, they typically take their eyes off the road for nearly five seconds at a time.[127] During this short period, a vehicle can travel the length of a football field and both end zones when traveling at highway speeds of fifty-five miles per hour.[128] Moreover, it often takes a driver five to ten seconds to readjust his

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distraction because it concurrently involves all three types of distractions. *Id.*; *see also* THOMAS A. RANNEY, U.S. DEPARTMENT OF TRANSPORTATION, NATIONAL HIGHWAY TRAFFIC SAFETY ADMIN., DRIVER DISTRACTION: A REVIEW OF THE CURRENT STATE OF KNOWLEDGE 15 (2008), http://www.nhtsa.dot.gov/staticfiles/DOT/NHTSA/NRD/Multimedia/PDFs/Crash%20Avoidance/2008/810787.pdf (predicting the combination of an increasing number of cell phone users coupled with the growing popularity of texting will increase the dangers associated with cell phone use while driving); DAVID D. PERLMUTTER ET AL., THE UNIVERSITY OF KANSAS TRANSPORTATION RESEARCH INSTITUTE, TOP TRANSPORTATION AND ENERGY ISSUES FACING THE NATION 22–23 (2008), *available at* http://www.docstoc.com/docs/4062215/TOP-TRANSPORTATION-ENERGY-ISSUES-FACING-THE-NATION-Organized-and-Hosted (discussing recent headlines across the country of fatal automobile accidents caused by a person texting while driving and several studies currently underway).

[124] *See, e.g.*, VIRGINIA TECH TRANSPORTATION INSTITUTE, NEW DATA FROM VTTI PROVIDES INSIGHT INTO CELL PHONE USE AND DRIVING DISTRACTION 1 tbl.1 (July 2009), http://www.vtti.vt.edu/PDF/7-22-09-VTTI-Press_Release_Cell_phones_and_Driver_Distraction.pdf [hereinafter VTTI STUDY] (finding a higher risk of crash or near-crash event when a driver was text messaging); Michael Austin, *Texting While Driving: How Dangerous is it?*, CAR AND DRIVER, June 2009, *available at* http://www.caranddriver.com/features/09q2/texting_while_driving_how_dangerous_is_it_-feature (finding a slower reaction time when a driver was sending a text message).

[125] *See* SIMON HOSKING ET AL., DISTRACTED DRIVING: AUSTRALASIAN COLLEGE OF ROAD SAFETY, THE EFFECTS OF TEXT MESSAGING ON YOUNG NOVICE DRIVER PERFORMANCE 172 (2007), http://www.acrs.org.au/srcfiles/7Hosking-Young--Regan.pdf. Sending and receiving text messages has a significant detrimental effect on a number of critical safety driving measures. *Id.* According to this study, the high amount of time a driver spent with his or her eyes off the road impaired the driver's ability to maintain a lateral position on the road. *Id.* at 171. Additionally, the driver's ability to detect hazards, and to detect and respond appropriately to traffic signals was significantly reduced. *Id.* at 173.

[126] Lopez et al., *supra* note 99, at A1. Strayer, a University of Utah researcher, explains, "If you're busy text messaging and you're taking a minute or so to key in a message, you're obviously not going to see the things that go by when you're looking at the keyboard and screen." *Id.*

[127] *CNN Newsroom*, *supra* note 109 (statement of David Strayer, researcher, University of Utah).

[128] Hanes, *supra* note 12, at 25; *see also CNN Newsroom*, *supra* note 109 (statement of Tom Foreman, CNN Correspondent) (noting that an individual is "essentially driving blind

or her focus to the road.[129] Thus, when a driver is engaged in texting, he or she is driving "blind" for approximately ten to fifteen seconds.

To put this increased risk of crash into perspective, recent studies have compared the road hazard response time of a legally drunk driver with that of the same person using a cell phone while driving.[130] Researchers concluded that the increased risk of crash for a driver using a cell phone is nearly the same as that of a legally drunk driver.[131]

While many of these studies were conducted in a laboratory setting using simulators, the first reality-based study of the effects of texting while driving was released in July 2009, by the Virginia Tech Transportation Institute (VTTI).[132] This study revealed that a person sending a text message while driving was more than twenty-three times more likely to be involved in a crash or a near-crash event than a similar but non-distracted driver.[133] Researchers concluded that text messaging poses a level of impairment that exceeds that of someone who is driving under the influence of alcohol.[134]

Similarly, *Car and Driver* conducted an experiment comparing the reaction time of individuals engaged in texting while driving with the reaction time of individuals driving under the influence of alcohol.[135] The

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the entire time" while sending a text message).

[129] Lopez et al., *supra* note 99.

[130] *See, e.g.*, David L. Strayer, *A Comparison of the Cell Phone Driver and the Drunk Driver*, HUMAN FACTORS, Summer 2006, at 381, *available at* http://www.psych.utah.edu/AppliedCognitionLab/HFES2006.pdf. The purpose of the research was to determine the relative impairment associated with a person using a cell phone while driving. *Id.* The researchers explained that, in order to put the level of impairment in perspective, the study sought to provide a direct comparison of the performance of a cell phone driver with that of a drunk driver. *Id.*

[131] *Id.* at 389. The risk of crash for a legally drunk driver ranges from 3.76 to 6.25 times higher than for a non-impaired driver, depending on factors such as the age of the driver and the amount of alcohol in the driver's system. *Id.* at 389. The study revealed that the risk of crash for a cell phone driver was 5.36 times higher than that of a non-distracted driver. *Id.* at 390. Thus, the researchers concluded the increased risk of crash for a driver using a cell phone was comparable to that of a legally drunk driver. *Id.*

[132] Richtel, *supra* note 16, at A1. The study equipped tractor trailers with video cameras, and tracked them for three million miles as they traveled across the country. *Id.* Although the study involved only long-haul truck drivers, the results of the study apply generally to all drivers. *See* Editorial, *Texting, Driving: A Risky Combo*, INTELLIGENCER J./LANCASTER NEW ERA (Lancaster, Pa.), July 30, 2009, at A11.

[133] VTTI STUDY, *supra* note 124, at 1 tbl.1. The study also found the risk of crash or near crash event was twice as likely as a similar but non-distracted driver when a person was talking or listening on a cell phone. *Id.*

[134] *CNN Newsroom*, *supra* note 109.

[135] *See* AUSTIN, *supra* note 124. The experiment was conducted on the same day, under the same conditions, using the same drivers. *Id.* Therefore, the *only* variable in the

researchers found that, when forced to come to an immediate stop while traveling at seventy miles per hour, a legally drunk driver traveled four feet farther than when he was sober, but seventy feet farther when he was texting while driving.[136] Thus, the *Car and Driver* experiment overwhelmingly showed that texting while driving is more dangerous than drunk driving.

IV. IMPORTING LESSONS FROM HISTORY TO IMPOSE APPROPRIATE PENALTIES FOR TEXTING WHILE DRIVING

Every state that has passed a law banning texting while driving has done so for the same reason laws against drunk driving were enhanced twenty years ago: to preserve public safety.[137] Proponents of a texting ban often refer to the correlative dangers imposed by the two activities.[138] But the correlation stops there. A closer analysis reveals that most lawmakers do not consider texting while driving to be as dangerous as drunk driving. The penalties imposed for a person convicted of texting while driving are notably lenient compared to the stringent penalties imposed for a person convicted of drunk driving.[139]

In the majority of states that have outlawed texting while driving, a violation is no more than a minor traffic infraction, warranting a small fine

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experiment was the impairment of the driver due to texting or alcohol. *Id.*

[136] *Id.*

[137] *See, e.g.*, COLO. REV. STAT. § 42-4-239 (2009); H. 67-H.B. 09-1094, 1st Reg. Sess., § 4 (Colo. 2009). The Colorado Legislature found the law necessary for the immediate preservation of public safety. *See Vehicles: Electronic Wireless Communications: Hearing on S.B. 28 Before the S. Transp. & Housing Comm.*, 2007–2008 Leg., Reg. Sess. 2 (Cal. 2008) (statement of Sen. Joe Simitian, Member, S. Transp. & Housing Comm.). Sen. Simitian, sponsor of California's bill, proclaimed the law was necessary because texting while driving created a hazard to the individual driver and to the public as a whole; *see also supra* note 24 and accompanying text.

[138] *See, e.g.*, Klobuchar Address, *supra* note 110. Sen. Klobuchar, one of the co-sponsors of a federal texting while driving ban, highlighted the devastating effects of the behavior at the Distracted Drivers Summit in Washington, D.C., explaining:

> Not too long ago, most people viewed drunk driving as just a traffic offense—not really a crime. As a [former] prosecutor, I joined with law enforcement officials and safe driving advocates to change the law to make our roads safer. We need to do the same for texting and distracted driving. When the rubber meets the road, the BlackBerry should be put away—no text message is worth dying for.

Id.

[139] *See, e.g.*, TENN. CODE ANN. § 55-8-199 (2009); *id.* § 55-10-403. A person convicted of texting while driving is subject to fine of not more than fifty dollars. *Id.* § 55-8-199(d). A person convicted of drunk driving is subject to a fine of up to one thousand five hundred dollars, one year suspension of driving privileges, and forty-eight hours of either jail time or community service. *Id.* § 55-10-403(a).

with no points attributed to the offender's driving record.[140] In these states, the maximum penalty upon conviction is generally less than one hundred dollars.[141] For example, in California and Virginia, a conviction brings a small fine of only twenty dollars;[142] in Tennessee the fine is fifty dollars.[143] Although many of these states impose an increased fine upon subsequent offenses, it is generally not much higher than for the first offense.[144] None of these laws contemplate suspension of driving privileges, or jail time for recidivist offenders.[145] Conversely, laws against drunk driving in these states impose fines at least ten times higher for the first offense with the possibility of suspension of driving privileges and jail time, and significantly increased penalties for each subsequent offense.[146]

Several states view texting while driving as more than a minor traffic infraction, yet not quite as serious as drunk driving.[147] The fine can be as much as five hundred dollars.[148] The difference in treatment of the two

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[140] *See, e.g.*, COLO. REV. STAT. § 42-4-239 (as amended June 1, 2009) (finding a violation of texting while driving is an infraction); N.Y. VEH. & TRAF. LAW § 1225-d (McKinney 2009); N.C. GEN. STAT. § 20-137.4A (2009).

[141] *See, e.g.*, ARK. CODE ANN. § 27-51-1607 (2009) (stating that a violation results in a warning for the first offense and a penalty of fifty dollars for each subsequent offense); N.H. REV. STAT. ANN. § 265:105-a (2009) (declaring the fine upon conviction is one hundred dollars); R.I. GEN. LAWS § 31-22-30 (2009) (imposing a fine of eighty-five dollars for the first offense).

[142] CAL. VEH. CODE § 23123.5 (2008); VA. CODE ANN. § 46.2-1078.1 (2009).

[143] TENN. CODE ANN. § 55-8-199.

[144] *See, e.g.*, CAL. VEH. CODE § 23123.5 (imposing a fine of fifty dollars for each subsequent offense); R.I. GEN. LAWS § 31-22-30 (fining a motorist eighty-five dollars for the first offense, one hundred dollars for the second offense, and one hundred twenty-five dollars for each subsequent offense); VA. CODE ANN. § 46.2-1078.1 (imposing a fine of fifty dollars for each subsequent offense).

[145] *See, e.g.*, N.C. GEN. STAT. § 20-137.4A; TENN. CODE ANN. § 55-8-199 (2009); WASH. REV. CODE § 46.61.668 (2007).

[146] *See, e.g.*, COLO. REV. STAT. § 42-4-1301 (2009) (imposing penalties which include a fine up to one thousand dollars, nine months suspension of driving privileges, and up to one year jail time); N.Y. VEH. & TRAF. LAW § 1193 (McKinney 2007) (including a fine up to one thousand dollars, a six month suspension of driving privileges, and up to one year jail time).

[147] *See, e.g.*, MD. CODE ANN., TRANSP. §§ 27-101, 21-1124.1 (2009). Violation of any part of the Maryland Vehicle Law, including texting while driving, is a misdemeanor, which results in a fine of not more than five hundred dollars. *Id.* In contrast, a conviction for drunk driving, also a misdemeanor, brings a fine of one thousand dollars. MD. CODE ANN., TRANSP. § 27-101(k) (2009). However, an offense of either texting while driving or drunk driving may be declared a felony by any other law of the state. § 27-101(a).

[148] *See, e.g.*, LA. REV. STAT. ANN. § 32:300.5 (2008). The first offense brings a fine of one hundred seventy-five dollars. *Id.* Each subsequent offense brings a fine of up to five hundred dollars. *Id.* Additionally, the law allows for an increased fine double the amount of the standard fine where the offender is involved in a crash at the time of violation. *Id.* Nonetheless, the law falls short of treating texting while driving as a serious offense because

offenses becomes apparent upon subsequent violations.[149] For example, in Minnesota, the first violation for either offense is a misdemeanor.[150] Upon subsequent violations, a conviction for drunk driving becomes a felony,[151] but a conviction for texting while driving remains a misdemeanor, because, under the law, it is devoid of factors that would raise the offense to a felony.[152]

Only two states have penalties for texting while driving that are comparable to their penalties for drunk driving: Alaska[153] and Utah.[154] In

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it may only be enforced as a secondary offense. *Id.* Thus, a driver may only be issued a citation for texting while driving when the person has been stopped for violating another law, such as speeding or reckless driving. *Id.*

[149] *See, e.g.*, MD. CODE ANN., TRANSP. § 27-101 (2009). In Maryland, there is no provision for an increased penalty upon subsequent offenses of the texting while driving law. *Id.* Thus, the penalty for a subsequent offense is the same as a penalty for the first offense—five hundred dollars. *Id.* On the other hand, a first offense of drunk driving brings a fine of up to one thousand dollars and the possibility of jail time, whereas a second conviction brings a fine of two thousand dollars and the possibility of as much as two years in jail. § 27-101(k).

[150] MINN. STAT. §§ 169.89, 169.475 (2000). A conviction for texting while driving is a petty misdemeanor. *Id.* A person charged with a petty misdemeanor is not entitled to a jury trial, and is subject to a fine of not more than three hundred dollars. *Id.* Conversely, a drunk driving offense is classified according to whether the offense is a first or a subsequent conviction. MINN. STAT. § 169A.20(3). A conviction for the first offense is a misdemeanor, and brings a fine of one thousand dollars. MINN. STAT. § 169A.27.

[151] MINN. STAT. § 169A.24, subdiv. 2 (2007). The penalty for drinking and driving is enhanced with each subsequent violation. *Id.* § 169A.275 (2009). A second offense brings a fine of three thousand dollars, with a six-month suspension of driving privileges, and a mandatory minimum sentence of two days in jail with a possibility of up to one year in. *Id.* §§ 169A.275, subdiv. 1(a)(1) (2009), 169A.54, subdiv. 1(3)(i) (2009), 609.0341, subdiv. 1 (1993). A third offense brings a fine of three thousand dollars, an indefinite suspension of driving privileges (based on treatment, rehabilitation, or abstinence), and a mandatory minimum sentence of thirty days in jail, with a possibility of up to one year. *Id.* §§ 169A.275, subdiv. 2(a)(1) (2009), 169A.54, subdiv. 1(4) (2009), 609.0341, subdiv. 1 (1993) A fourth offense brings a fine of fourteen thousand dollars, indefinite revocation of driving privileges, and a mandatory minimum sentence of six months in jail, with a possibility of up to seven years. *Id.* §§ 169A.275, subdiv. 3(a)(1) (2009), 169A.54, subdiv. 1(5) (2009), 169A.24, subdiv. 2 (2007). Additionally, a fourth drunk driving offense is enhanced to a felony. *Id.* § 169A.24, subdiv. 2 (2007). A fifth or subsequent offense remains a felony, and requires a mandatory minimum sentence of one year in jail. *Id.* § 169A.275, subdiv. 4(a)(1) (2009).

[152] *See* MINN. STAT. § 169.475 (2008) (providing no stipulation of enhanced penalty for subsequent texting while driving violations); *see also id.* § 169.89.

[153] *See* ALASKA STAT. § 28.35.030 (2008) (declaring fines upon drunk driving violation); *id.* § 28.15.181 (2002) (requiring suspension of driving privileges upon drunk driving violation); *id.* § 28.35.161 (2009) (defining penalties for texting while driving).

[154] *See* UTAH CODE ANN. § 41-6a-505 (2005) (defining requirements for fines and jail time for drunk driving violations); *id.* § 41-6a-509 (2009) (stating terms of suspension of

Alaska, violation of either offense is a misdemeanor.[155] Yet, either offense can be enhanced to a felony under enumerated aggravating conditions, such as when the violation causes death or physical injury to another person.[156] Similarly, in Utah, violation of either offense is classified as a misdemeanor,[157] but may be enhanced to a felony where the driver caused the death of a third person.[158] The law in Utah, however, goes further to equate texting while driving with drunk driving by expressly providing for suspension of a person's driving privileges upon conviction of either offense,[159] and imposing increased penalties for both offenses upon subsequent violations.[160]

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driving privileges for drunk driving violations); *id.* §§ 41-6a-1715, 76-3-204 (providing possibility of jail time for texting while driving violation); *id.* § 76-3-201 (declaring possible suspension of driving privileges for texting while driving violation).

[155] ALASKA STAT. § 28.35.161 (2008); *id.* § 28.35.030, *declared unconstitutional on other grounds by* Valentine v. State, 215 P.3d 319 (Alaska 2009).

[156] *See* ALASKA STAT. § 28.35.161 (2008). A conviction for texting while driving in Alaska is classified as a class A misdemeanor, but is enhanced to a class C felony if the offense results in physical injury to another person, a class B felony if the offense causes serious physical injury to another person, or a class A felony if the offense results in the death of another person. *Id.* A conviction for drunk driving is a class A misdemeanor, but is enhanced to a class C felony where the offender has two or more prior convictions within the previous ten years. *Id.* § 28.35.030, *declared unconstitutional on other grounds by Valentine*, 215 P.3d 319.

[157] *See* UTAH CODE ANN. § 41-6a-1716 (2009); *id.* § 41-6a-503.

[158] *See* UTAH CODE ANN. § 41-6a-1716. A person convicted for texting while driving in Utah is guilty of a class C misdemeanor, but the offense is enhanced to Class B misdemeanor if the offense caused serious bodily injury to another person. *Id.* However, Utah carved out a separate automobile homicide offense for a motorist who causes the death of another person as a result of texting while driving. *See id.* § 76-5-207.5 (2009). Under this statute, texting while driving may rise to the level of a second or third-degree felony, depending on whether the motorist was found to have been acting with a reckless disregard for human life, or was just acting with simple negligence. *Id.* Likewise, a conviction for drunk driving is a class B misdemeanor. *Id.* § 41-6a-503. The offense is enhanced to a class A misdemeanor where the offender is carrying a passenger under the age of sixteen at the time of commission of the offense, was twenty-one years or older and had a passenger under eighteen years of age at the time of the offense, or where another person suffers bodily injury as a result of the offense. *Id.* A conviction for drunk driving is further enhanced to a third-degree felony where the offense caused serious bodily injury to another person and had two or more prior convictions within ten years of the current conviction. *Id.*

[159] UTAH CODE ANN. § 53-3-218(5) (2009) (providing a judge discretion to suspend driving privileges of a motorist convicted of texting while driving for a period of three months); *id.* § 41-6a-509(1)(a)(i)(A) (requiring suspension of driving privileges for 120 days upon conviction of drunk driving). Additionally, Utah mandates immediate revocation of driving privileges where either offense results in the death of another person. *See id.* § 53-3-220(1)(a)(i).

[160] UTAH CODE ANN. § 41-6a-1716(4)(b)(ii) (2009) (enhancing the offense of texting

With less than half of all states taking measures to prevent texting while driving, and the apparent struggle over the best way to appropriately deal with the problem, the severity of the epidemic has garnered the attention of the federal government.[161] While Congress has agreed that every state must take action,[162] there is debate over the best way to induce states to do so.[163] Members of Congress have proposed numerous strategies to combat the problem.[164] The most notable federal proposal to date, however, is the Avoiding Life-Endangering and Reckless Texting by Drivers Act of 2009, (ALERT Drivers Act).[165] To emphasize the importance of the issue,

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while driving where an offender has a prior conviction within the previous three years); *id.* § 41-6a-503(2)(b) (providing for increased penalties where a drunk driving offender has two or more convictions within the previous ten years).

[161] *See* Senate Press Release, *supra* note 14 (statement of Sen. Charles Schumer). Senator Schumer of New York called a press conference to discuss the serious safety issue of texting while driving. *Id.* A rash of horrible accidents brought to life the dangers involved in the behavior. *Id.* The press conference was called to announce the introduction of the Avoiding Life-Endangering and Reckless Texting by Drivers Act of 2009. *Id.* Schumer stated, "[t]exting is a go-to method of communication in today's interconnected world, but it should not be happening behind the wheel." *Id.*

[162] *See, e.g.*, *Driven to Distraction Hearing*, *supra* note 15, at 7 (statement of Rep. Cliff Stearns, Chairman, Commc'ns Subcomm.) ("Along with drunk driving, the use of electronic devices is becoming the biggest threat to driver safety . . . ."); *see also id.* at 11 (statement of Rep. Anna G. Eshoo) ("We have an epidemic of electronic distraction."); Senate Press Release, *supra* note 14 (statement of Sen. Robert Menendez) ("The danger of texting while driving is far too great for us to do nothing.").

[163] *See Driven to Distraction Hearing*, *supra* note 15. Many members of congress believe legislation regarding texting while driving should be left to the states. *Id.* at 8 (statement of Rep. Cliff Stearns, Chairman, Commc'ns Subcomm.) (preferring to allow states to address the issue without a federal mandate); *see also id.* at 18 (statement of Rep. John Shimkus) (stating that the federal government should never extort highway funds to obtain some means to an end that should otherwise be decided by the states). Other officials believe that a federal mandate would be the most effective way to attack the problem. *See id.* at 129 (testimony of David Teater, Senior Dir., Transp. Strategic Initiatives of the Nat'l Safety Council) (stating national legislation to prohibit texting while driving needs to move forward as fast as possible, hence federal legislation is appropriate since it moves faster at the federal level than at the state level).

[164] *See, e.g.*, *id.* at 13–14 (statement of Rep. George Radanovich, Chairman, Consumer Protection Subcomm.) (suggesting that states should continue to act in this area and that the federal government should supplement their efforts with a public-private educational campaign).

[165] *See* Avoiding Life-Endangering and Reckless Texting by Drivers Act, S. 1536, 111th Cong. (2009) (introduced July 29, 2009). The ALERT Drivers Act was first introduced in the Senate, but advocates for a federal movement against texting while driving introduced an identical bill in the House less than two months later. *See* Avoiding Life-Endangering and Reckless Texting by Drivers Act, H.R. 3535, 111th Cong. (2009) (introduced Sept. 8, 2009). In proposing the ALERT Drivers Act, Congress found: (1) people in the United States are texting with more frequency, (2) the frequency with which text messages were sent

proponents of the bill point out that the ALERT Drivers Act is modeled after the federal strategies used to induce states to pass more stringent drunk driving laws in the 1980s.[166]

The ALERT Drivers Act is a joint bill that would require every state to enact legislation banning texting while driving within two and a half years of its enactment or else risk the loss of federal highway funding.[167] Under the proposed bill, any state that fails to pass such a law will lose twenty-five percent of its federal highway funding.[168]

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increased by more than ten times in just three years, and (3) texting creates an extreme risk when used by individuals who are operating motor vehicles. ALERT Drivers Act § 2. Congress relied on several statistics and studies in the proposal of the bill. *Id.* For example, a survey conducted by Nationwide Insurance revealed that twenty percent of drivers in the United States engage in texting while driving. *Id.* Other studies and experiments on which Congress relied include the experiment by *Car and Driver*, and studies by the Virginia Tech Transportation Institute, and the University of Utah. *Id.*; *see also supra* notes 125–36 and accompanying text. Congress also found the risks created by texting while driving are increasing nationwide as the use of texting increases. *Id.*

[166] Halsey, *What Does It Take*, *supra* note 52. "We're really where we were 20 years ago on drunk driving." Ashley Halsey III, *Tighter Cellphone Laws Might Face Static*, WASH. POST, Aug. 13, 2009, at B01. Few states were willing to reduce the blood-alcohol level to 0.08 in their drunk driving laws until their federal highway funds were threatened. *Id.* Congress likely needs to employ a similar strategy to induce states to pass strict cell phone laws concerning texting while driving. Senate Press Release, *supra* note 14 (statement of Sen. Charles Schumer). While the purpose of this bill is to induce states to ban texting while driving, it is modeled on the drunk driving laws passed by the federal government. *Id.* Many members of Congress have concluded that "a [f]ederal law to address the problem of texting while driving is necessary to ensure minimum standards of protection across the United States, in the same manner as the national minimum drinking age provides a uniform standard of protection." ALERT Drivers Act § 2(16). Senator Schumer, the author of the bill, has added that the proposed bill would not require states to enact a ban on texting while driving, but only proposes to withhold federal highway funds for any state that chooses not to enact such a law. Senate Press Release, *supra* note 14 (statement of Sen. Charles Schumer). He explained that the funds are provided to the states to ensure safety on the nation's highways, and that Congress has the right to withhold funding because texting while driving is a threat to public safety. *Id.* He further stated that the drunk driving laws passed by Congress demonstrated its ongoing role in safety and that a national law against texting while driving would be passed in the same spirit. *Id.*

[167] ALERT Drivers Act § 3. The statute provides in part:

> A State shall meet the requirement under this paragraph if the State has enacted and is enforcing a law that: (A) except in the event of an emergency, prohibits an operator of a moving motor vehicle from writing, sending, or reading a text message using a hand-held mobile telephone; and (B) requires, upon conviction of a violation of that prohibition, the imposition of penalties in accordance with the requirements for minimum penalties described in the regulations promulgated [within this statute].

Id. at § 3(a).

[168] *Id.* The act declares:

> On October 1 of the second fiscal year beginning after the date of promulgation of the

The laws enacted in each state would also be required to adhere to particular minimum requirements: (1) the law must specify a minimum penalty for the first offense, and (2) it must stipulate that penalties be graduated for repeated offenses.[169] The bill, however, does not enumerate the minimum penalty to which state laws must adhere. Instead, it grants responsibility to the Secretary of Transportation to "promulgate . . . requirements for minimum penalties" for persons who violate the prohibition of texting while driving.[170]

The Department of Transportation has given no indication as to what such minimum penalties might entail. In response to an inquiry regarding what the minimum penalties might be if the ALERT Drivers Act becomes law, Ray LaHood, the United States Secretary of Transportation, refused to comment on the bill and replied only that he was committed to working with Congress to combat the problem.[171]

Regardless of whether the Act ultimately becomes law, the growing epidemic of texting while driving must be attacked in every state with legislation that provides penalties appropriately dealing with the problem.[172]

> regulations [enumerated in this statute], and annually thereafter, the Secretary shall withhold 25 percent of the amount required to be apportioned to any State under [the federal highway funding act] for the fiscal year if the Secretary determines that the State does not meet the requirement[s] . . . as of that date.

Id.; *see also* Senate Press Release, *supra* note 14 (statement of Sen. Charles Schumer). The states would be allowed two and a half years after enactment of the bill to pass a law banning texting while driving. *Id.* After that time, every state would risk losing twenty-five percent of their federal highway funds for each year that it refused to comply. *Id.* However, any state that passed a law after this period would be eligible to recoup the lost funds. *Id.*

[169] *See* ALERT Drivers Act § 3(a).

[170] *See id.* The bill directs only that states must pass a law requiring "the imposition of penalties in accordance with the requirements for minimum penalties described in the regulations promulgated [within the statute]." *Id.* The bill further proscribes that "[n]ot later than 180 days after the date of enactment of this section, the Secretary shall promulgate regulations to carry out this section, including requirements for minimum penalties for violations of the prohibition." *Id.*

[171] *See Driven to Distraction Hearing*, *supra* note 15, at 81–82 (statement of Ray LaHood, Sec'y, Dep't of Transp.). On November 4, 2009, Secretary LaHood was asked to give a ballpark figure of what the minimum penalties might be if the ALERT Drivers Act was to become law. *Id.* He responded that the Department of Transportation would not endorse any particular bill, but that he was committed to working with Congress toward the goal of banning texting while driving. *Id.*

[172] *See, e.g.*, *Driven to Distraction Hearing*, *supra* note 15, at 58–60 (statement of Julius Genachowski, Chairman, Fed. Commc'n Comm'n) (discussing ways of "[p]utting the brakes on the distracted driving epidemic . . . ."). The epidemic of texting while driving is a public health issue that affects everyone, not just younger drivers. *See id.* at 22 (statement of Del. Donna M.C. Christensen). Although the ALERT Drivers Act is not guaranteed to pass, nearly all members of Congress are in concurrence that action must be taken on this issue.

To best determine these penalties, well-defined principles of jurisprudence compel one to consider the past.[173] Hence, the penalties imposed must reflect the familiar maxim that those who do not heed the lessons of history are condemned to repeat it.[174]

Given the frequent comparisons between the dangers of texting while driving and drunk driving, laws against texting while driving should draw from the evolution of laws against drunk driving. When laws against drunk driving were first enacted, the penalties were lax and most people did not consider it a serious offense.[175] As a result, fatalities associated with drunk driving continued to increase.[176] When those fatalities reached an all-time high twenty years ago, the hazards and heartbreak of allowing such lax laws against the behavior induced both federal and state legislatures to impose stricter penalties, thereby providing a greater deterrent effect.[177]

Currently, the hazards of texting while driving are at the point where the hazards of drunk driving were twenty years ago.[178] Although most people believe that texting while driving is dangerous,[179] one in five drivers

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For example, Senator Mary Landrieu, although generally against federal initiatives requiring states to take a particular action, is in full support of the ALERT Drivers Act. She explains:

> I've been hesitant to actually take positions like this with states .... But the reason that I agreed to come this morning ... is because I think this technology revolution and explosion is an important federal issue. These technologies are changing so quickly and they just cry out for action.... I don't want to have to wait 20 years to debate this. The study was very startling when it came back and said that texting while driving is more dangerous than drinking while driving.... And I don't think it's up to each state on technology. It's really sort of a federal issue on this expansion of technology. And so that's what really kind of put me over when [Sen. Charles Schumer] asked me ... to be a part of it. I said, okay, I will do it. But I had to think about it because I generally say, well, the states should take action.

Id.

[173] *See* Marie A. Failinger, *"No More Deaths": On Conscience, Civil Disobedience, and a New Role for Truth Commissions*, 75 UMKC L. REV. 401, 426 (2006) (discussing the jurisprudential importance of importing lessons of history into modern decisions).

[174] Thomas B. Colby, *Revitalizing the Forgotten Uniformity Constraint on the Commerce Power*, 91 VA. L. REV. 249, 321 (2005).

[175] Cafaro, *supra* note 19, at 3.

[176] *Id.* at 2.

[177] Katz & Sweeney, *supra* note 25, at 241 (finding that all fifty states and the District of Columbia had passed stricter laws against drunk driving in an effort to provide greater deterrence).

[178] Halsey, *Tighter Cellphone Laws*, *supra* note 166, at B01 (quoting Jonathan Adkins, spokesman for the Governor's Highway Traffic Association).

[179] Hanes, *supra* note 12, at 25 (reporting results of a study conducted by the AAA Foundation in 2009 revealing that ninety-seven percent of people believe it is completely unacceptable to send a message while driving).

engages in the activity on a regular basis.[180] The general acceptance of this behavior shows that most drivers do not consider texting while driving a serious offense. Failure to take suitable action now will likely result in increased fatalities as a greater percentage of the generation that is most prone to texting and driving obtain driving privileges in the near future.[181] To prevent the heartbreak that will surely result from lax laws against texting while driving, laws prohibiting texting while driving should impose strict penalties from the start.[182]

While the minimum penalties proposed in the ALERT Drivers Act may eventually serve as the standard for penalties imposed upon conviction for drunk driving, states that have not yet banned the behavior and those that impose only minor penalties upon conviction should look to the examples set by Alaska and Utah as approaches to curtail this pandemic scourge on our nation's highways.[183] The penalties should mirror those of a particular state's laws against drunk driving. The first offense should bring a significant monetary fine, points on the offender's driving record, mandatory suspension of the offender's driving privileges, and a possibility of jail time when the offense results in death or physical injury to another person.[184] Additionally, each of these penalties should be increased for subsequent offenses, and should provide for mandatory jail time after an enumerated number of offenses.

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[180] *Driven to Distraction Hearing*, *supra* note 15, at 3 (statement of Rep. Rick Boucher). Twenty-one percent of all drivers admit to texting while driving within a previous month. *Id.* With younger, inexperienced drivers, that number increases to forty-six percent. *Id.*

[181] *See supra* note 71 and accompanying text.

[182] *See* Senate Press Release, *supra* note 14 (statement of Sen. Mary Landrieu). The hazards and heartbreak caused by drunk driving-related crashes were a result of laws with lax penalties. *Id.* Stricter laws were finally passed in every state. *Id.* Given the current state of texting while driving, it is important that the laws banning the practice are strict from their inception in order to prevent the heartbreak that will otherwise inevitably result. *Id.*

[183] *See supra* Part IV.

[184] *See Driven to Distraction Hearing*, *supra* note 15, at 113 (testimony of Tom Dingus, Director, Virginia Tech Transportation Institute). Some of the penalties discussed at the Congressional Hearing on texting while driving included a significant monetary fine and points on an offender's driving record. *Id.* It was also suggested that one possible penalty should include a total cell phone ban for newly-licensed drivers. *Id.*

Personally, however, I do not believe that any law should impose a total cell phone ban. Without discussing the substantial social value of cell phones, it is important to note that exchanging text messages is not a dangerous behavior. The danger comes when a person is sending a text message from behind the wheel of a car. Therefore, I have proposed suspension of driving privileges upon conviction of texting while driving. Driving is a privilege regulated by the state, which can be revoked or suspended as the state deems necessary for protection of the general welfare. *See* Cafaro, *supra* note 19, at 16.

V. CONCLUSION

People have been driving for over one hundred years and talking on the phone for about seventy-five years.[185] Only recently have people started to combine the two.[186] Craig McCaw's dream to place a cell phone in the hands of every American has come to fruition,[187] but has wrought devastating effects. People now use their phones for purposes other than verbal communication—namely, texting. In recent years, texting while driving has become a pandemic scourge on our nation's highways, causing many to refer to the behavior as a deadly epidemic. The heartbreak suffered by many Americans has prompted legislation in nearly half of all states and encouraged a federal legislative response.[188] Further, the number of serious and fatal crashes linked to texting while driving is likely to increase in the near future unless appropriate legislation is enacted.

To effectuate the appropriate legislation, principles of jurisprudence compel lawmakers to consider the legislative response of another recent epidemic that threatened public safety on the nation's highways—drunk driving. The evolution of laws against drunk driving taught us that lax laws against prevalent behavior serve little deterrent effect. Failure to heed this lesson of history will condemn us to repeat it. Accordingly, to effectively deter people from texting while driving, laws against the behavior must impose strict penalties from their inception. Given that the hazards of texting while driving and drunk driving pose the same threat to public safety, there is no more fitting penalties for texting while driving than those imposed for drunk driving.

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[185] *Driven to Distraction Hearing*, *supra* note 15, at 94 (testimony of David Teater, Senior Dir., Transp. Strategic Initiatives of the Nat'l Safety Council).

[186] *Id.*

[187] Zeigler et al., *supra* note 3, at 56.

[188] *See* Avoiding Life-Endangering and Reckless Texting by Drivers Act, H.R. 3535, 111th Cong. (2009).

Indigenous Ancestral Lands and Customary International Law

Seth Korman*

INTRODUCTION

[T]he right of abode is a creature of the law. The law gives it and the law may take it away.

– Lord Hoffman (majority opinion)[1]

[T]here is no indication that the Government gave any real weight to the common law right of abode which the Chagossians . . . still enjoyed . . . by virtue of their birth and connections with [their homeland].

– Lord Mance (dissenting)[2]

With this 2008 three-two decision, the British House of Lords shut the door on the hopes of the Chagossian people, a group of native Indian Ocean islanders seeking property rights to their ancestral lands. The decision overturned the opinions of several lower courts, which had ruled that the Chagossians, who were forcefully deported from their homeland in the early 1970s to make way for a United States military airbase on Diego Garcia,[3] did in fact have such rights. The Law Lords' decision marked the end of the Chagossians' eight-year battle in the British courts, and quashed their hopes of obtaining the right to return to their ancestral lands.[4]

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* Editor-in-Chief, UCLA Law Review. B.A., M.A., J.D. (UCLA, 2010). I'd like to thank Kal Raustiala and Angela Riley for their help and comments, Sam Ennis for assistance on all things Indian Law related, and Kristin Shotwell and the editors of the Hawai'i Law Review for their fine editing. Finally, special thanks to Meredith Lynn for bearing with me through this and everything else over the past years.

[1] R (on the application of Bancoult) v. Sec'y of State for Foreign and Commonwealth Affairs (*Bancoult*), [2008] UKHL 61, [2008] All E.R. 1055, ¶ 45. Lord Hoffman, one of the five Law Lords hearing the case, wrote the first of three supporting opinions. The right of abode refers to the British law doctrine that no one can be deported from their homeland. In the final *Bancoult* case, the Law Lords weighed whether the British government had the inherent power to revoke this right. For a further discussion, see Thomas Poole, *United Kingdom: The Royal Prerogative*, 8 INT'L J. CONST. L. 146, 151–52 (2010).

[2] *Bancoult*, [2008] UKHL 61, [2008] All E.R. 1055, at ¶ 183 (appeal taken from Eng.) (U.K.). Lord Mance filed the second of two dissenting opinions.

[3] *See id.* at ¶¶ 3–9.

[4] *See* Vidisha Biswas, *The Story of the Chagossians*, NEW STATESMAN, Oct. 4, 2007,

The Chagossians' story is like that of many other indigenous peoples. For many years, they lived a peaceful and isolated existence until, in the words of Lord Hoffman, "[i]nto this innocent world there intruded . . . the brutal realities of global politics."[5] In 2000, Oliver Bancoult, a Chagossian exiled at age three, brought suit against the British government to restore his peoples' ancestral property rights. Bancoult was victorious both at the initial trial and in the subsequent appeal. Unfortunately, in the final appeal before the Law Lords, the court ignored Bancoult's substantive arguments—including Britain's required obedience to international law[6]—and decided the case on separate, technical grounds. This rejection by the House of Lords marked yet another case in which a native population was denied both access to and property interests in its ancestral lands.

To the casual observer, this may have been viewed as an unfortunate but unsurprising conclusion to a case that at one point may have offered hope to this small and near-forgotten group of indigenous people.[7] Yet to the student of

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available at http://www.newstatesman.com/world-affairs/2007/10/british-government-chagossians. The Chagossians had previously been granted the right to their ancestral lands by two lower courts. The Blair government in 2000 had also supported their return. Foreign Secretary Robin Cook agreed, after the first *Bancoult* decision in 2000, to accept the court's opinion and let the Chagossians return. *See, e.g.*, Ewen MacAskill, *Evicted Islanders to Go Home: Cook Caves in, Giving Evicted Islanders Freedom to Return*, GUARDIAN, Nov. 4, 2000, at 1. Instead of using this opportunity to establish the Chagossians' legal right of abode in their ancestral homeland, the high court ruled that, as a colony of the crown, the Chagos Islands were not subject to the protections of British law, but instead were governed solely by royal prerogative, an obscure remnant of British Crown authority. *See generally Bancoult*, [2008] UKHL 61, [2008] All E.R. 1055.

[5] *Bancoult*, [2008] UKHL 61, [2008] All E.R. 1055, at ¶ 6. *Bancoult* also presents the issue of whether the Chagossians do in fact qualify as indigenous peoples, given that their descendants arrived in the archipelago with the French in the 1700s. *See* JOHN PILGER, FREEDOM NEXT TIME 19 (2006). Although the British government in *Bancoult* argued otherwise, scholars, relying in part on the near-universally accepted UN Special Rapporteur Martinez Cobo's report on indigenousness, have contended that the Chagossians are in fact indigenous. *See, e.g.*, Stephen Allen, *Looking Beyond the Bancoult Cases: International Law and the Prospect of Resettling the Chagos Islands*, 7 HUM. RTS. L. REV. 441, 468–75 (2007). In the report, commissioned by the UN Commission on Human Rights, Martinez Cobo explained the idea of indigenousness to be one of self-identity, and wrote that "an indigenous person is one who belongs to these indigenous peoples through self-identification as indigenous (group consciousness) and is recognized and accepted by the group as one of its members (acceptance by the group)." Sub-Comm. on Prevention of Discrimination & Prot. of Minorities, *Study of the Problem of Discrimination Against Indigenous Populations*, ¶¶ 368–77, U.N. Doc. E/CN.4/Sub.2/1986/7/Add.4 (1986) (*prepared by* José Martinez Cobo). A discussion of who in fact qualifies as indigenous is beyond the scope of this article.

[6] *Bancoult*, [2008] UKHL 61, [2008] All E.R. 1055, at ¶ 107.

[7] *See generally Bancoult*, [2008] UKHL 61, [2008] All E.R. 1055. By ruling that the British government had inherent plenary authority over the Chagos territory, the Court dodged

international humanitarian and indigenous law, the final *Bancoult* decision was far more surprising. Despite public perceptions to the contrary, courts throughout the world have in the past twenty years begun to change their attitudes towards indigenous peoples, and states have begun to create mechanisms and pass laws that run contrary to the Lords' decision in the Chagossian case.

The results have been dramatic. Many countries with large indigenous populations have gone from ignoring the property claims of indigenous citizens to, in some instances, openly accepting certain property rights. Examples abound: In the 1990s, the Australian judiciary paved the way for the eventual legal recognition of aboriginal titles to land taken by the British Crown and its subjects.[8] New Zealand and, to a lesser extent, South Africa followed Australia's lead and passed similar laws.[9] In the Western Hemisphere, several Central American nations have recently accepted the decisions of international judicial bodies to return land to native populations, while the United States and Canada have adopted their own internal mechanisms to respect some autonomy of native populations on native lands.[10] Elsewhere, from East Asia to Oceana to Africa, the Caribbean and the Americas, national courts and legislatures have not just protected or returned land to indigenous peoples, but have more importantly recognized the legal rights underpinning native land claims.

Indigenous peoples throughout the world have traditionally based their land claims on the domestic laws of their nations. Recently, however, international law has made its way into domestic proceedings. States have looked to the international sphere for direction on how best to legally treat indigenous land interests, and advocates for indigenous peoples now allude to international norms supporting such claims.[11] This article delves deeper into these allusions, and assesses the viability of such claims by looking at available evidence—state practice, *opinio juris*, and international treaties and conventions—that may support the existence of a relevant customary norm, a primary pillar of international law.

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the more difficult question concerning which international laws protected the Chagossian people, and to what extent Britain was required to follow the laws. Moreover, the Court's reliance on the centrality of the centuries-old royal prerogative—a law that evinces the imagery of colonial domination—reinforced the second-class status of native Chagossians, and demonstrated the continued marginalization of indigenous peoples living in modern, affluent, post-colonial societies.

[8] *See infra* Part II.B.

[9] *See infra* Part II.B.

[10] *See generally infra* Part II.

[11] *See, e.g.*, S. JAMES ANAYA, INDIGENOUS PEOPLES IN INTERNATIONAL LAW 61–72 (2004) [hereinafter ANAYA, INDIGENOUS PEOPLES].

The debate over the existence of customary law protecting the land rights of indigenous peoples is relatively new. While there is commentary and scholarship on the emergence of indigenous land rights in various countries and in international law, arguments supporting an international right tend to look mostly at treaties and some accumulated state practice, and not to the deeper underpinnings of customary law.[12] This is understandable, as the absence of a universally signed treaty or a definitive International Court of Justice (ICJ) ruling on the issue of indigenous property rights forces observers to dive into the murky field of customary international law, a body of law derided by outspoken critics like Justice Scalia as a "20th-century invention of internationalist law professors and human rights advocates,"[13] yet recognized as real law by the United States Supreme Court,[14] the ICJ, and most nations throughout the world.

This article looks at the existence of a customary norm protecting indigenous ancestral territory by applying contemporary understandings of customary international law to the current state of indigenous real property protections in various parts of the world. By looking at the many domestic, international, and supranational developments in the campaign for increased protection for native property rights through a lens of state action and international legal obligation, this article seeks to demonstrate that the framework for the establishment of such a norm is in fact already in place, especially amongst post-colonial nations[15] with large indigenous populations.

Part I of this article provides a contemporary assessment of the relevant aspects of customary international law, and looks at the existing requirements for proving its existence. Parts II and III then examine the various domestic and international developments protecting indigenous ancestral lands that might demonstrate—or at least provide evidence towards—the potential existence of custom: Part II surveys both state action and legal obligations of various nations, while Part III looks at secondary indicators, including treaties, international instruments, and additional international law that bears on the

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[12] *See, e.g., id.*; Claire Charters, *Developments in Indigenous Peoples' Rights under International Law and Their Domestic Implications*, 21 N.Z. U. L. REV. 511 (2005); Leonardo J. Alvarado, *Prospects and Challenges in the Implementation of Indigenous Peoples' Human Rights in International Law: Lessons from the Case of* Awas Tingni v. Nicaragua, 24 ARIZ. J. INT'L & COMP. L. 609 (2007).

[13] Sosa v. Alvarez-Machain, 542 U.S. 692, 750 (2004) (Scalia, J., dissenting).

[14] *See generally, e.g., id.* (majority opinion).

[15] By "post-colonial," I refer to the nations and societies colonized by European colonial powers—for the most part Great Britain and, to a lesser extent, Spain—and that are today administered by descendents or partial descendents of the colonial occupier. These include most countries in North and South America, as well as other members of the British Commonwealth that are today predominantly dominated by Anglo-descendants, including Australia, New Zealand, and to a lesser extent South Africa.

issue of indigenous land rights. Parts II and III simply present evidence, following the rule of thumb that, when trying to prove custom—a job the International Law Commission (ILC) admits to be "a herculean task"[16]—the *volume* of evidence is of utmost importance. Part IV then applies this evidence to the framework for proving customary international law, and demonstrates that the current body of law relating to customary land rights may reveal an emerging custom in international law, albeit one that remains vague and ill-defined.

I. CUSTOMARY INTERNATIONAL LAW: CONTEMPORARY UNDERSTANDINGS AND PROOF OF EXISTENCE

While there is no Magna Carta, constitution, or other binding, authoritative codification from which all international law is derived, international law is real and, despite popular assumptions to the contrary, it is accepted and followed throughout the world alongside domestic laws.[17] International law can take multiple forms,[18] but is generally divided into two categories: treaty and custom. Treaties, such as the North American Free Trade Agreement or the United Nations (UN) Law of the Sea Convention, provide structural and legal frameworks for trade, economic activity, and international commerce, and bind their signatories to the treaties' terms. At the same time, statements and declarations, such as the Universal Declaration of Human Rights or the Declaration on the Rights of Indigenous Peoples, serve as nonbinding analogs, and, although not enforceable, can reveal international trends or expedite the formation of more formal international conventions.[19]

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[16] Int'l Law Comm'n, *Report of the International Law Commission on Ways and Means for Making the Evidence of Customary International Law More Readily Available*, ¶ 55, *delivered to the General Assembly*, U.N. Doc. A/CN.4/34 (July 29, 1950), *available at* http://untreaty.un.org/ilc/texts/instruments/english/reports/1_4_1950.pdf (referring specifically to the collection of national legal decisions).

[17] *See, e.g.*, MICHAEL AKEHURST, A MODERN INTRODUCTION TO INTERNATIONAL LAW 2 (1984).

[18] Statute of the International Court of Justice, art. 38, ¶ 1, June 26, 1945 [hereinafter Statute of the ICJ]. Article 38 of the Statute of the International Court of Justice (ICJ) is the generally accepted enumeration of the sources of international law, which include:

> (a) international conventions, whether general or particular, establishing rules expressly recognized by the contesting states; (b) international custom, as evidence of a general practice accepted as law; (c) the general principles of law recognized by civilized nations; (d) . . . judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

Id.

[19] *See* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 102 (1987) [hereinafter RESTATEMENT OF FOREIGN RELATIONS]. These nonbinding resolutions are not themselves international law, but can in fact be suggestive of customary international law.

The second primary source of international law—customary international law—can be similarly divided into two subgroups. First, *jus cogens*—background principles or preemptory norms—include fundamental and universally agreed-upon understandings, such as prohibitions on genocide or slavery, cannot be ignored or abrogated, and remain universally binding.[20] While some *jus cogens* have been codified in international conventions,[21] these background principles remain operative law even if there is no binding treaty or domestic code; nor can nations object to and ignore these norms.[22] Second, international law is also derived from custom, or the "general practice [of states] accepted as law."[23] As explained by the United States Supreme Court, "where there is no treaty, and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations . . . ."[24]

Examples of customary international law range from vague and generalized norms (for example, the humane treatment of civilians during war[25]) to the more discrete and specific (for example, the exemption for coastal fishing boats seized as spoils of war[26]). Unlike *jus cogens*, however, customary international laws are not necessarily binding on all nations; states that can demonstrate a history of non-abidance—persistent objectors—are exempt from such customary law.[27] However, the failure of normally abiding states to follow a specific customary law does not necessarily make the custom nonbinding.

See id. See also RYSZARD CHOLEWINSKI, MIGRANT WORKERS IN INTERNATIONAL HUMAN RIGHTS LAW 48 (1997) (describing the Universal Declaration of Human Rights as the "precursor to all international human rights instruments").

[20] *See* GENNADII MIKHAILOVICH DANILENKO, LAW-MAKING IN THE INTERNATIONAL COMMUNITY 211 (1993) ("The concept of international *jus cogens* presupposes the emergence of a body of fundamental legal principles binding upon all members of the international community in all circumstances. The idea of 'higher' law of overriding importance is steadily gaining ground both in state practice and in legal doctrine.").

[21] *See, e.g.*, Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 78 U.N.T.S. 277.

[22] Examples include the general practice of diplomatic immunity and the concept of state borders.

[23] CLIVE PARRY, THE SOURCES AND EVIDENCES OF INTERNATIONAL LAW 57 (1965).

[24] The Paquete Habana, 175 U.S. 677, 700 (1900).

[25] *See, e.g.*, CUSTOMARY INTERNATIONAL HUMANITARIAN LAW (Jean-Marie Henckaerts & Louise Doswald-Beck, eds., 2005) at 457–74.

[26] *See Paquete Habana*, 175 U.S. at 689 ("The doctrine which exempts coast fishermen with their vessels and cargoes from capture as prize of war has been familiar to the United States from the time of the War of Independence.").

[27] *See, e.g.*, Asylum Case (Colom. v. Peru), 1950 I.C.J. 266 (Nov. 20) (explaining that because Peru had explicitly refrained from ratifying certain conventions relating to diplomatic asylum, it was not required to abide by the agreements, even though most other American countries had ratified the treaties).

Rather, an act of non-abidance (by a normally abiding state) is a violation, and does not unmake the law. As the ICJ has explained, "in order to deduce the existence of customary rules, . . . the conduct of States should, in general, be consistent with such rules, and that instances of State conduct inconsistent with a given rule should [be] treated as *breaches* of that rule, not as indications of the recognition of a new rule."[28] Yet this of course begs the more important question, and an apparent conundrum: If custom is proved only by evidence of states following that custom, how does such circular logic ever establish real customary international law. As this Part explains, establishing a particular custom is inherently problematic.

A. Custom is Inherently Difficult to Establish

The problem with identifying international custom is twofold. First, custom is inherently vague; although legally binding, it is, as some argue, as much a set of guiding, normative principles as it is discrete law.[29] Second, there exists no single definition of what custom entails or what its required elements actually constitute. While commentators agree that custom is predicated upon state practice and *opinio juris*,[30] or legal obligation, and while there exists a generally accepted notion that state conviction can be assumed through a repetition[31] of a particular action (via judicial decisions, domestic law, executive actions, etc.), there further exists no specific temporal criteria needed to establish custom. The ICJ compounded this problem in the *North Sea Continental Shelf Cases*,[32] in which it said that in order for state actions to demonstrate custom, there had to exist "evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it,"[33]—or what

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[28] Military and Paramilitary Activities in and against Nicaragua (Nicar. v. U.S.), 1986 I.C.J. 14, 74 (June 27) (emphasis added).

[29] *See* Jack Goldsmith, *Federal Courts, Foreign Affairs, and Federalism*, 83 VA. L. REV. 1617, 1640 (1997). Goldsmith criticizes this as the "federalization of customary international law." *Id.*

[30] *See* John Bellinger & William Haynes, *Initial Response of U.S. to ICRC study on Customary International Humanitarian Law with Illustrative Comments* (Nov. 3, 2006), *available at* http://www.state.gov/s/l/2006/98860.htm ("There is general agreement that customary international law develops from a general and consistent practice of States followed by them out of a sense of legal obligation, or *opinio juris*."). *See also* MICHAEL BYERS, CUSTOM, POWER AND THE POWER OF RULES: INTERNATIONAL RELATIONS AND CUSTOMARY INTERNATIONAL LAW 18 (1999) ("Although most international lawyers agree that *opinio juris* plays a role in transforming State practice into rules of customary international law, they have not been able to agree on its character . . . .").

[31] *See* PARRY, *supra* note 23, at 61.

[32] North Sea Continental Shelf Cases (F.R.G./Den.; F.R.G./Neth.), 1969 I.C.J. 3 (Feb. 20).

[33] *Id.* at 44.

one commentator dubbed "the chronological paradox."[34] Although the court ruled that eleven years was sufficient to establish the existence of custom in the case at hand, it noted that determinations must be made on a case-by-case basis, and that widespread acceptance of a customary norm might even preclude the need for evidence of long-term practice: "[I]t might be that, even without the passage of any considerable period of time, a very widespread and representative participation in [a] convention might suffice of itself, provided it included that of States whose interests were specially affected."[35] Some have thus argued for "instant custom," which eliminates the temporal element entirely by ignoring state practice and focusing entirely on *opinio juris*.[36] However, given the uncertainty (or really lack of need for certainty) over the requisite timeframe, this article does not substantively focus on it; rather, it instead focuses here on the primary indicators of customary international law—state practice and *opinio juris*—and then in Part III on the secondary indicators.[37]

B. State Practice

Although the UN can produce declarations and hasten the creation of international norms, and although multilateral conventions can establish states' agreed-upon duties to other nations, the enforcement, promulgation, and manifestation of international norms and laws must occur within the states. The various practices of individual states, then, serve as the fundamental basis for customary international law.[38] Both the American Law Institute (ALI)[39] and the ICJ confirm this notion, with the latter explaining that a "large number of customary rules have been developed by the practice of states and are an integral part of the international law."[40] As such, the first task in determining

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[34] BYERS, *supra* note 30, at 130–31 ("One problem with the traditional bipartite conception of customary international law is that it involves the apparent chronological paradox that States creating new customary rules must believe that those rules already exist, and that their practice, therefore, *is* in accordance with law.").

[35] *North Sea Continental Shelf*, 1969 I.C.J. at 44. This also lends credence to the proposition that treaties and other international agreements can provide evidence of custom. For further discussion, see *infra* Part III.A.

[36] PETER MALANCZUK & MICHAEL BARTON AKEHURST, AKEHURST'S MODERN INTRODUCTION TO INTERNATIONAL LAW 47–48 (1997).

[37] This, argues the ICJ and supporters of instant custom, should be enough time to eliminate the need for serious debate.

[38] *See, e.g.*, MARK E. VILLIGER, CUSTOMARY INTERNATIONAL LAW AND TREATIES: A MANUAL ON THE THEORY AND PRACTICE OF THE INTERRELATION OF SOURCES 16 (1997) ("State practice is the raw material of customary law.").

[39] RESTATEMENT OF FOREIGN RELATIONS, *supra* note 19, at § 103, cmt. a.

[40] Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226,

the existence of international custom is necessarily a study of various state practices manifesting the proposed norm.

1. What is state practice?

Commentators and organizations classify state practice differently. The ALI explains that "for customary law the 'best evidence' is proof of state practice, ordinarily [discerned in] reference to official documents and other indications of governmental action."[41] The International Law Commission similarly points to "Decisions of National Courts"[42] and "National Legislation"[43] as leading indicators. The International Committee on the Red Cross (ICRC), in a recent study, further breaks down state practice into physical and verbal acts: the former includes state "behavior, . . . and the treatment provided to different categories of persons," while the latter refers to "manuals, national legislation, national case-law, . . . opinions of official legal advisors, . . . statements in international organizations and at international conferences, and government positions . . . ."[44] The International Criminal Tribunal for the Former Yugoslavia (ICTY) and the International Law Association describe state practice similarly.[45]

Problematically, there are no established criteria for assessing the *quantity* of state practices necessary to establish custom. This leaves unaddressed several questions: How many states are required to agree on a norm? And how many examples of state practice are required to establish the existence of custom? While most commentators would seem to agree that custom requires unanimity (or, in the case of persistent objectors, near unanimity), a foresighted dissent in

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256 (July 8).

[41] RESTATEMENT OF FOREIGN RELATIONS, *supra* note 19, at § 103, cmt. a.

[42] Int'l Law Comm'n, *supra* note 16, at ¶ 54 ("It may be concluded that the decisions of the national courts of a State are of value as evidence of that State's practice, even if they do not otherwise serve as evidence of customary international law."). Numerous legal scholars agree that judicial interpretation and opinions can also be viewed as state action. *See, e.g.*, Philip M. Moremen, *National Court Decisions as State Practice: A Transnational Judicial Dialogue?*, 32 N.C. J. INT'L L. & COM. REG. 259, 308 (2006) ("Treating national court decisions as state practice is one way that national courts can participate in transnational judicial dialogue. Indeed, there is little doctrinal justification against treating such decisions as state practice."); John H. Barton & Barry E. Carter, *International Law and Institutions for a New Age*, 81 GEO. L.J. 535, 548 (1993) (explaining that international customary law is also often "developed further by international and regional courts.").

[43] Int'l Law Comm'n, *supra* note 16, at ¶ 60 ("The term legislation is here employed in a comprehensive sense; it embraces the constitutions of States, the enactments of their legislative organs, and the regulations and declarations promulgated by executive and administrative bodies.").

[44] CUSTOMARY INTERNATIONAL HUMANITARIAN LAW, *supra* note 25, at xxxii.

[45] *See id.* at xxxiii.

the *North Sea Continental Shelf Cases* seemed to push back, noting that "the matter at issue is not the number or figure of . . . examples of subsequent state practice, but the meaning which they would imply in the particular circumstances."[46] These circumstances would seem to pertain to the countries affected by said custom. For example, the equidistance principle at issue in the *North Sea Continental Shelf Cases*, which relates to the delineation of countries' sea boundaries, was understandably irrelevant to landlocked countries; thus, a lack of relevant state practice by landlocked countries should not affect the need for unanimity.[47] The ICRC, in its 2005 treatise on international custom, clarifies this point by distinguishing "specially affected States" as those for whom the customary legal issue at hand is relevant.[48] For example, it explains that "[i]n the area of humanitarian aid, States whose population is in need of such aid or States which frequently provide such aid are to be considered specially affected."[49] Instead of requiring full or near unanimity, the ICRC instead settles on an "*extensive and representative*" requirement.[50]

This final point is directly relevant to this article's discussion of state practice relating to recognitions of indigenous land rights. It helps explain the scope of Part II's survey of various domestic laws and protective regimes—it follows the premise that those nations with extensive indigenous populations have a much greater impact on the development of relevant customary international law—and speaks to the need to focus only on those countries "specially affected" by this issue.

2. Evidence of state practice: an example

Jonathan Charney best summarized the general presentation of evidence needed to support international custom: "The evidence traditionally used to establish new norms of international law is considerably less comprehensive and persuasive than some theory would suggest and substantively less than is necessary to establish that all states actually or tacitly consent to all new rules of customary international law."[51] And as discussed, there exists no benchmark number or minimum evidentiary requirement. Instead, and to the chagrin of international legal scholars forced to fill articles with example after example,

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[46] North Sea Continental Shelf Cases (F.R.G./Den.; F.R.G./Neth.), 1969 I.C.J. 3, 176 (Feb. 20) (Tanaka, J., dissenting).

[47] *See generally id.* (majority opinion).

[48] CUSTOMARY INTERNATIONAL HUMANITARIAN LAW, *supra* note 25, at xxxviii–ix.

[49] *Id.*

[50] *Id.* (internal quotation marks omitted).

[51] Jonathan I. Charney, *Universal International Law*, 87 AM. J. INT'L L. 529, 537–38 (1993).

the refrain seems to be simply that "more is always better than less." Despite the contemporary arguments of a "representative" and "specially affected" standard, proof of international custom still requires a significant body of evidence. That the number of accepted customary international laws remains extremely limited still attests however to the need for abundant evidence.

When a sufficient body of evidence does exist, custom seems to become immediately apparent—though again, not by meeting specific categorical requirements. Rather, custom exists when states agree that it exists—and when the sufficient evidence of state practice has accumulated. The customary international norm proscribing genocide, for example, gained acceptance only with sufficient state practice prohibiting the action.

The prohibition against genocide serves as a classic contemporary example of customary international law (even though it has since been established as *jus cogen*), and thus provides examples of state practice aggregated into an admission of custom. Although various states first publicly condemned genocidal acts nearly a century ago, and despite the passage of the Genocide Convention in 1948,[52] prohibitions against genocide did not gain customary international legal status until recently.[53] While the Convention certainly affirmed that the movement to globally prohibit genocide was underfoot, evidence of affirmative state practice was still required to convert the emerging norm into fully established custom. In the genocide context, then, commentators have pointed to various examples of state practice, including:

- Diplomatic protests by Britain, France, and Russia in 1915 over Turkey's treatment of its Armenian population, and ultimately failed attempts by the Allies in 1919 to arrest and try some of the Turkish perpetrators.[54]
- Various levels of national involvement in the Nuremberg Trials.[55]
- National legislation explicitly prohibiting genocidal acts, including the Proxmire Act[56] in the United States, Artículo §607 del Codigo Penal in Spain, the Genocide Act of 1964 in the Netherlands, or Brazil's Lei N°2.889, De 1° De Outubro De 1956, among others.[57]

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[52] Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 78 U.N.T.S. 277.

[53] *See* WILLIAM A. SCHABAS, GENOCIDE IN INTERNATIONAL LAW 4 (2000) (discussing how the norms within the convention are now accepted as binding international custom).

[54] *Id.* at 16, 19.

[55] The Judges and prosecutors in the trials were from the United States, Britain, France, and the Soviet Union.

[56] 18 U.S.C. § 1091.

[57] *See* Prevent Genocide Int'l, *The Crime of Genocide in Domestic Laws and Penal Codes*, http://www.preventgenocide.org/law/domestic/ (last visited Mar. 30, 2009) (listing over fifty domestic prohibitions against genocide).

- The support of countries, in the form of missions to or positions supporting, for the International Criminal Tribunal for the former Yugoslavia (ICTY) and International Criminal Tribunal for Rwanda (ICTR).
- The acceptance by the EU, and it various member states, of the ICJ decisions in the Genocide Cases.[58]
- Cambodia's creation (and request for international support) of domestic trials of Khmer Rouge officials.

Taken together, these examples, although only a small fraction of available evidence, highlight the types of state practices required for the existence of customary international law. And because so many types of evidence—diplomatic action, participation in international regimes and tribunals, acceptance of treaties, acceptance of extranational court opinions, and the development of domestic code, among others—are accepted, proof of custom necessitates a wide lens.

C. Opinio Juris *as the Crux of Customary International Law*

Opinio juris sive necessitates—an opinion of law or necessity—is the need or obligation a state feels to follow a particular international law.[59] The existence of *opinio juris* transforms ordinary state practice into international custom. Without state practices existing at least in part from some sense of international legal duty or obligation, such practices remain state action, and not part of customary international law.

On its face, *opinio juris* seems the classic catch-22: The law exists only once states follow it, but in order for states to follow it, the law must already exist. This chicken-or-egg paradigm seems to preclude the actual discovery and identification of *opinio juris*—and, in fact, there remains no agreed-upon test to determine its existence—yet its doctrinal existence is incontrovertible, and this paradox has not, according to the ALI, "prevented acceptance of customary law."[60] Yet *opinio juris* is needed to distinguish normal state actions from those that actually occur from state obligation. For example, many laws or state practices common throughout the world—abolition of the juvenile death penalty, or compulsory education, among others—may in fact be general (or, in some cases, near-universal) practice, but not customary international law. For this additional reason, few protections have transcended the plane of common

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[58] *See, e.g.*, Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Yugo. (Serb. & Mont.)), 1993 I.C.J. 3 (Apr. 8).

[59] *See generally* George Norman & Joel P. Trachtman, *The Customary International Law Game*, 99 AM. J. INT'L L. 541 (2005) (discussing *opinio juris* and the myriad questions its existence raises).

[60] RESTATEMENT OF FOREIGN RELATIONS, *supra* note 19, § 102, n.2.

state practice and emerged as international custom, not for want of state actions, but for a lack of *opinio juris*.

1. Contemporary understandings

Although various understandings (and misunderstandings) of *opinio juris* pervade contemporary analyses of custom, many legal scholars agree that "belief" and "consent" remain crucial components of international legal obligation.[61] States must actively choose to be bound by law or accept influences that emerge extranationally (outside their borders). They must also accept the resulting diminution in domestic autonomy in favor of the rulings or authority of other nations. This then begs the question: Where, domestically, is such belief or consent localized? Again, commentators disagree. Some would have *opinio juris* inferred directly from state practice,[62] whereas others desire a "more rigorous approach to establishing *opinio juris*."[63] However, there is no established location in which such obligation—explicit or inferred—must exist.

The ICJ, in looking for evidentiary support of *opinio juris*, generally returns to state behavior. In the *North Sea Continental Shelf Cases*, the court explicitly highlighted the fact that many states had established maritime boundaries through equitable agreements, and had not relied on the equidistance principle.[64] Although the court did not find sufficient evidence of custom, it looked to prior actions to discern legal obligation.[65] In the 1986 ICJ case *Military and Paramilitary Activities in and against Nicaragua*, the court expanded on its *North Sea Continental Shelf Cases* ruling by explaining that

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[61] *See* O. A. ELIAS & C.L. LIM, THE PARADOX OF CONSENSUALISM IN INTERNATIONAL LAW (1998) (discussing the various components and types of consent).

[62] *See, e.g.*, CUSTOMARY INTERNATIONAL HUMANITARIAN LAW, *supra* note 25, at xl.

> Practice establishing the existence of an obligation, for example, the rule that the wounded and sick must be cared for, can be found primarily in behavior in conformity with such a requirement. . . . Where there is sufficiently dens practice, an opinio juris is generally contained within that practice and, as a result, it is not usually necessary to demonstrate separately the existence of opinio juris.

Id. (internal citations omitted).

[63] Bellinger & Haynes, *supra* note 35 (noting, "[i]t is critical to establish by positive evidence, beyond mere recitations of existing treaty obligations or statements that as easily may reflect policy considerations as legal considerations, that States consider themselves legally obligated to follow the courses of action reflected in the rules").

[64] *See* North Sea Continental Shelf Cases (F.R.G./Den.; F.R.G./Neth.), 1969 I.C.J. 3, 44 (Feb. 20).

[65] *Id.*

> [states] must have behaved so that their conduct is "evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it. The need for such a belief, i.e., the existence of a subjective element, is implicit in the very notion of the *opinio juris sive necessitatis*."[66]

This *subjective* element remains the elusive needle in the haystack, and by its nature calls into question the evidence of actual importance: Are we looking for evidence of an international legal obligation, or are we instead looking for some unquantifiable consensus that our search for such an obligation is both appropriate and rational? Regarding this latter point, if all countries find an eventual outcome acceptable, then evidence of legal obligation becomes of secondary importance. Anthony A. D'Amato, in his treatise on international custom, notes that "[r]ules of law and states of mind appear *only* as manifestations of conduct; they are generalizations we make when we find recurring patterns of behavior or structured legal arguments."[67] Thus, acts that "convert practice into law"[68] might be manifested in judicial statements claiming as such, or statements by state representatives in international forums, or even, as some have argued, votes in favor of United Nations General Assembly (UNGA) resolutions.[69] This then forces observers to look not just to the actual acts, but to the psychological states of the relevant actors. Again, this further adds to the difficulty in proving custom, and lends credence to those who doubt its doctrinal existence.[70]

The idea that there exists a psychological element to *opinio juris* is troubling, especially when commentators conclude their analyses by explaining that, for example, "the *opinio juris* requirement is satisfied if states in general *believe* that a rule has the status of [customary international law]."[71] Again, the psychological element of "belief" remains unqualified. How do we know if a state believes something to be the case but for inferring or observing it from

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[66] Military and Paramilitary Activities in and against Nicaragua (Nicar. v. U.S.), 1986 I.C.J. 14, 109 (June 27).

[67] ANTHONY A. D'AMATO, THE CONCEPT OF CUSTOM IN INTERNATIONAL LAW 268 (1971) (emphasis in original).

[68] *See* CHITTHARANJAN FÉLIX AMERASINGHE, PRINCIPLES OF THE INSTITUTIONAL LAW OF INTERNATIONAL ORGANIZATIONS 190 (2005).

[69] *Id.* This last piece of evidence may be too much of a stretch, given the political and public-relations components of UN decision-making and the dichotomy between statements given in international forums and true domestic opinion. Such evidence can however still serve as indicators of emerging national thought.

[70] *See generally, e.g.*, Curtis A. Bradley & Jack L. Goldsmith, *Customary International Law as Federal Common Law: A Critique of the Modern Position*, 110 HARV. L. REV. 815 (1997) (concluding that, at least in the U.S., courts should not be required to follow customary international law).

[71] Andrew T. Guzman, *Saving Customary International Law*, 27 MICH. J. INT'L L. 115, 145 (2005) (emphasis added).

state practice? This leads a substantial minority of jurists to argue that *opinio juris* need not be proven at all as an independent factor; rather, it can be inferred entirely from state practice.[72] The ICRC holds as such, explaining that it is "difficult and largely theoretical to strictly separate elements of practice and legal conviction."[73] Others agree, arguing that vague notions of "'right process,' 'value set,' 'habit,' and 'morality' are stand-ins for the concept of *opinio juris* and do not explain *why* states are pulled toward compliance by customary international law."[74]

Yet this does not mean that states cannot *choose* to be "pulled toward compliance." In this regard, psychology really does matter. So long as states choose to accept the possibility that an international norm exists, and so long as they allow themselves to be persuaded by a belief in the existence of that international norm, *opinio juris* can be show to exist. To return to D'Amato: "[*O*]*pinio juris is* a psychological element associated with the formation of a customary rule as a characterization of state practice."[75] The task of those seeking evidence of *opinio juris* is thus to capture the real-world manifestations of the subjective psychological evidence that resides primarily within the neurons and synapses of judges, jurists, and policymakers. A substantial body of literature—and a dearth of established customary international law—suggests that this is not easy. As a result, evidence of extranational influence—proof that domestic decisions rely on international precedent and are not created within a domestic vacuum—becomes a logical proxy for the psychological proof.

2. *Evidence of* opinio juris

The late Ian Brownlie notes that the ICJ has taken "two methods of approach" in dealing with its search for evidence of *opinio juris*.[76] Sometimes, the ICJ simply assumes "the existence of an *opinio juris* on the bases of evidence of a general practice, or a consensus in the literature, or the previous determinations of the Court or other international tribunals."[77] In other cases, however, the ICJ probes deeper, looking for actual subjective psychological

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[72] *See id.* at 149 (citing H. LAUTERPACHT, THE DEVELOPMENT OF INTERNATIONAL LAW BY THE INTERNATIONAL COURT 380 (1958)); Michael Akehurst, *Custom as a Source of International Law*, 47 BRIT. Y.B. INT'L L. 1, 34 (1977)).

[73] CUSTOMARY INTERNATIONAL HUMANITARIAN LAW, *supra* note 29, at xl.

[74] JACK L. GOLDSMITH & ERIC A. POSNER, THE LIMITS OF INTERNATIONAL LAW 26 (2005) (emphasis added).

[75] Anthony D'Amato, *Trashing International Law*, 81 AM. J. INT'L L. 101, 102 (1987) (emphasis added).

[76] IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 8 (2003).

[77] *Id.*

evidence or overt proof of consent.[78] Though both appear similar, the former does not have to encapsulate the latter. In the first method, the court accepts inference; whereas in the latter, it requires actual evidence of intent. Given the conflicting analyses, while recognizing their inherent values, an approach that combines elements of the two seems the most appropriate solution.

A truly pragmatic analysis of evidentiary support for *opinio juris* would require an initial leap of faith: We would have to accept an immaculate conception of customary international law—something desired but not yet established. We would have to ignore the fact that the first revelation of a new customary norm was no doubt incorrect, but for whatever reason was sufficient to ignite the process of converting some psychological notion into a more accepted, and later codified, doctrine. We would also have to accept that evidence of that initial mistake very likely does not exist, else the norm could later be attacked and discredited.

Alternatively, in order to catalog evidence of *opinio juris*, we have to view such evidence as that which facilitates the development of an international norm. Put simply, we need to look for evidence of international influences on domestic decision-making. Let us return to the aforementioned example of the prohibitions on genocide. Domestic laws proscribing genocidal acts are not, in and of themselves, evidence of *opinion juris*. The state's admission that their ratification of such laws was predicated on some form of international pressure, on the other hand, *does* indicate an obligation to follow some extranational lead. Canada's domestic statute prohibiting genocide, for example, thus explicitly states that genocide "constitutes a crime against humanity according to customary international law."[79] Similarly revealing are high courts' admissions that a certain act is not just prohibited domestically but is in fact condemned by international law. For example, the United States Supreme Court, in *Sosa v. Alvarez-Machain*,[80] accepted the finding that "genocide by private actors violates international law."[81] This may thus be evidence of *opinio juris*.

Unfortunately, evidence of legal obligations to follow *emerging* international norms is frequently more subtle. In the absence of overt acceptance of the existence of a customary norm, indicators must instead be localized within or inferred from other actions. Some commentators, for example, thus call for the individual national "sentiments expressed during the preparation of treaties" to

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[78] *See generally* North Sea Continental Shelf (F.R.G./Den.; F.R.G./Neth.), 1969 I.C.J. 3 (Feb. 20); Military and Paramilitary Activities in and against Nicaragua (Nicar. v. U.S.), 1986 I.C.J. 14 (June 27).

[79] Crimes Against Humanity and War Crimes Act, 2000 S.C., ch. 24, § 4 (Can.).

[80] 542 U.S. 692 (2004).

[81] *Id.* at 732–33 n.20 (citing Kadic v. Karadzic, 70 F.3d 232, 239–41 (2d Cir. 1995)).

be seen as evidence of *opinio juris*.[82] But just as there is no categorical requirement for the amount of state practice needed to establish custom, there is no set evidence of legal obligations needed for a showing of *opinio juris*. At best, evidence should exist demonstrating a relationship between practice and international legal obligations. Part II of this article reveals that, in the case of domestic protections of indigenous land rights, this connection is quite real. Many (though not all) nations have in fact created their protective regimes by looking extranationally, and have drawn and relied on external international influences in the creation of indigenous legal rights to their ancestral lands.

II. A SURVEY OF DOMESTIC INDIGENOUS PROPERTY-PROTECTION REGIMES: PRIMARY EVIDENCE OF STATE PRACTICE AND *OPINIO JURIS*

This Part surveys the domestic laws, jurisprudence, and state practice from most of the large post-colonial countries[83] and other nations with large numbers of indigenous peoples, and looks at how these states are recognizing indigenous land rights (state practice) and why they are doing so (*opinio juris*), with a particular focus on the extranational influences that factor into individual domestic decision-making. This survey of states that are currently constructing

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[82] *See, e.g.*, Connie de la Vega & Jennifer Brown, *Can a United States Treaty Reservation Provide a Sanctuary for the Juvenile Death Penalty?*, 32 U.S.F. L. REV. 735, 757 (1998) ("treaties themselves clearly enunciate the intentions of the drafters—the countries of the world—that their treaty provisions must be unanimously applied international law"). *Accord* D'Amato, *supra* note 75, at 103 ("A treaty is obviously not equivalent to custom; it binds only the parties, and binds them only according to the enforcement provisions contained in the treaty itself.").

[83] This article does not address Brazil, mostly because of the Brazilian government's inability to enforce its mostly progressive official treatment of indigenous peoples, despite it being one of the only signatories of the countries discussed herein to the ILO Convention, which explicitly protects indigenous tribal lands. *See* Int'l Labour Org., Parties to Convention No. C169, http://www.ilo.org/ilolex/cgi-lex/ratifce.pl?C169 (last visited Mar. 8, 2010) [hereinafter Parties to Convention No. C169]. *See also* discussion *infra* Part III.A. Legally, one eighth of the country is set aside for indigenous peoples. *See* Judith Wise, *Hunger and Thieves: Anticipating the Impact of WTO Subsidies Reform on Land and Survival in Brazil*, 31 AM. INDIAN L. REV. 531 (2007). Under the Brazilian Constitution, "The lands traditionally occupied by Indians are intended for their permanent possession and they shall have the exclusive usufruct of the riches of the soil, the rivers and the lakes existing therein," Constituição Federal [C.F.] [Constitution] art. 231, ¶ 2 (Braz.). However, many of these rights have been violated, and the state has habitually failed to prevent deforestation and exploitation of indigenous peoples' lands. *See* Kristen Mitchell, *Market-Assisted Land Reform in Brazil: A New Approach to Address an Old Problem*, 22 N.Y. L. SCH. J. INT'L & COMP. L. 557, 558 (2003); Natalia Viana, *Brazil's Deadly Land Wars Put Indigenous Leaders in Firing Line*, THE INDEPENDENT (London), July 23, 2007, at 24 (describing the many indigenous leaders who have been killed in land disputes with ranchers and loggers).

workable mechanisms for protecting indigenous property rights addresses whether such protections transcend the domestic arena, and whether state decisions are part of a greater legal movement towards the establishment of international custom.

Almost all of the states discussed herein have created different domestic mechanisms with which to protect certain indigenous property rights. However, commonalities exist among the various systems. In examining the various state practices and evidence of *opinio juris*, this survey highlights certain common denominators among different states and draws attention to the ways in which many of these countries look to each other—and to international law—in crafting their own legal protections of indigenous lands.

The inherently vague nature of customary international law means that, although binding, such law is as much about principles as it is about actual specific requirements.[84] Although at times it can require specific discrete actions,[85] in most cases customary international law establishes baseline principles that serve as mere "interpretive forces," the development of which "may proceed glacially until a critical mass of states of sufficient influence have adopted the norm."[86] This survey then looks at the development of indigenous land protections with an eye towards the progress that various nations have made in recognizing the need to protect indigenous lands. It focuses on the development of a greater, vaguer (yet real and legally binding) idea that nations feel obliged to protect indigenous ancestral lands. Importantly, while accepting that many nations, such as Canada, New Zealand, and the United States, will not return fee simple property ownership to indigenous groups, this survey still examines those protections afforded to indigenous groups and the rationale behind such recognitions, which in many cases seem to stem from international obligation. Importantly, the aggregation of different types of state practice remains significant. As one commentator notes: "Often, the underlying policies pursued by the different systems can also be easily discovered hidden behind the conceptualism appropriate to each system and shown to be the same across national borders."[87]

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[84] *See* John O. McGinnis, *The Appropriate Hierarchy of Global Multilateralism and Customary International Law: The Example of the WTO*, 44 VA. J. INT'L L. 229, 233 (2003) ("The process of discovering customary international law is fraught with difficulty and uncertainty and tends to result in principles with vague and uncertain contours.").

[85] *See, e.g.*, The Paquete Habana, 175 U.S. 677, 689 (1900) (noting the "doctrine which exempts coast fishermen, with their vessels and cargoes, from capture as prize of war").

[86] Aaron Xavier Fellmeth, *State Regulation of Sexuality in International Human Rights Law and Theory*, 50 WM. & MARY L. REV. 797, 873 (2008).

[87] Basil S. Markesinis, *Foreign Law and Foreign Ideas in the English Courts*, *in* ALWAYS ON THE SAME PATH: ESSAYS ON FOREIGN LAW AND COMPARATIVE METHODOLOGY 2, 51 (2001).

A. Background

The notion that indigenous peoples have fundamental property rights over ancestral lands seems at first incompatible with the Westphalian system that forms much of the basis of international law. Moreover, the discovery doctrine,[88] used in the colonial era by European powers to justify the acquisition of colonial territory, mostly precluded native peoples from asserting ancestral property claims in the judicial systems of their colonial rulers.[89] The doctrine, and its doctrinal descendants, remained active well into the twentieth century. In the United States, courts continue to cite decisions such as *Johnson v. M'intosh*,[90] which affirmed the supremacy of conqueror's law by striking down Native American territorial sovereignty claims over ancestral lands.[91] Colonial administrators in other European colonies similarly assured that natives lacked the judicial access of colonial citizens.[92] In some parts of the world, for example, South Africa, legal regimes denied the majority native population real property rights until only recently.[93]

The idea of indigenous real property rights was effectively absent from discussions of international law prior to the twentieth century.[94] In fact, the emergence of indigenous rights seems tied directly to the emergence of human and minority rights, which took shape only in the postwar era. In most countries, indigenous groups often received little recognition as legal entities prior to the Second World War. One commentator explained:

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> The Doctrine of Discovery . . . [was] developed primarily by Spain, Portugal, England, and the Church in the fifteenth and early sixteenth centuries . . . to control and maximize European exploration and colonization in the New World and in other lands of non-European, non-Christian people. . . . Amazingly, perhaps, the Doctrine is still an active part of American law today.

Robert J. Miller, *The Doctrine of Discovery in American Indian Law*, 42 IDAHO L. REV. 1, 2 (2005)

[89] SHARON HELEN VENNE, OUR ELDERS UNDERSTAND OUR RIGHTS: EVOLVING INTERNATIONAL LAW REGARDING INDIGENOUS RIGHTS 2–3 (1998).

[90] 21 U.S. 543 (1823).

[91] *Id.*

[92] *See, e.g.*, GENERAL HISTORY OF AFRICA, VII: AFRICA UNDER COLONIAL DOMINATION 1880–1935 148 (A. Adu Boahen ed., 1990) (explaining that the French in colonial Africa took steps "to erode African [judicial] authority").

[93] *See* HEINZ KLUG, CONSTITUTING DEMOCRACY: LAW, GLOBALISM AND SOUTH AFRICA'S POLITICAL RECONSTRUCTION 21 (2000) (describing the lack of Black property rights under the apartheid regime).

[94] *See* Siegfried Wiessner, *Indigenous Sovereignty: A Reassessment in Light of the UN Declaration on the Rights of Indigenous Peoples*, 41 VAND. J. TRANSNAT'L L. 1141, 1152 (2008).

> The trend during the League of Nations period was not to recognize any collective or group rights of these populations. A British-American arbitration panel affirmed that tribes were not legal units of international law and that the agreements concluded with aboriginal groups were not treaties according to international law, but unilateral acts pertaining to domestic law.[95]

The postwar era, however, saw a radical blossoming of human rights as a legal concept, both in the international sphere and in many municipal legal systems.[96] Along with this development grew recognition that native peoples not only had a distinct international identity, but also that certain protections were needed to provide safeguards, both to their cultural identity and to their lands.[97] The problem was especially acute in post-colonial countries with large indigenous populations, many of which are discussed later in this section.

In the human rights context, "an integral part of international human rights law is the duty of states to secure enjoyment of human rights and to provide remedies where the rights are violated."[98] State action is the principle driving force behind the pronouncement of customary human rights.[99] And state practices relating to determinations of indigenous property rights are thus indicative of greater, customary trends, whereas state mindset—of policymakers, jurists, and high court judges—can indicate the rationale behind the various state practices. The following section then looks at the legal land-protection regimes through these two lenses: state practice and *opinio juris*.

B. Survey of Nations

1. Australia

Australia provides perhaps the best example of how a state has sought to redress past wrongs and recognize native Australians' right to compensation for lands lost. As one of the first post-colonial nations to address the complaints of

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[95] NATAN LERNER, GROUP RIGHTS AND DISCRIMINATION IN INTERNATIONAL LAW 111 (2d ed. 2003).

[96] From Nuremberg to the United States civil rights movement to the enactment of the UN Declaration of Human Rights, many western countries added legal human rights protections during the decades following the Second World War. *See, e.g.*, TONY EVANS, HUMAN RIGHTS FIFTY YEARS ON: A REAPPRAISAL 193 (1998) (noting "the post-war era during which the idea of human rights took hold").

[97] The Declaration on the Rights of Indigenous Peoples, G.A. Res. 61/295, Annex, U.N. Doc A/Res/61/295 (Sept. 13, 2007), holds that "Indigenous peoples have [a] distinctive spiritual relationship with their land and waters" (art. 25) and that "[g]overnments must obtain the consent of indigenous peoples before giving approval to activities affecting their land and resources, particularly the development of mineral, water and other resources" (art. 30).

[98] ANAYA, INDIGENOUS PEOPLES, *supra* note 11, at 185.

[99] *See supra* Part I.B.

a dispossessed native population, Australia has become a model to which other states frequently refer (though at the same time, as the first mover, Australia provides less evidence of a country relying on extranational influences—only because little influence existed at the time). This is due in part to the Australian courts' reliance on the concept of native title (known elsewhere as aboriginal title), a doctrine that establishes a dormant property interest in natives' ancestral lands that will technically vest when the controlling state eventually cedes ownership; the doctrine of native title is embedded in Australian law, and exists alongside, or possibly as part of, Australian common law.[100] The concept of native title as developed by Australia also serves as a model for other nations—almost all states discussed herein reference Australia's practice—and for a developing international understandings of aboriginal title.

a. Evidence of state practice

Prior to 1990, Australian courts continued to uphold the doctrine of *terra nullius*,[101] which affirmed that newly discovered lands became subject to the "discovering" power and was utilized by European colonial powers to justify legal claims to colonial territory. Whenever aboriginal land issues emerged in court, the government successfully argued that *terra nullius* trumped any native land claims.[102] However, in 1992, the High Court of Australia repudiated the *terra nullius* doctrine in the landmark case *Mabo v. Queensland [No. 2]*,[103] ruling that, "by any civilized standard, such a law is unjust and its claim to be part of the common law to be applied in contemporary Australia must be questioned."[104] The decision, reaffirmed in subsequent cases,[105] established the

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[100] *See* LISA STRELEIN, COMPROMISED JURISPRUDENCE: NATIVE TITLE CASES SINCE MABO 11–12 (2006). Native title, created by the Australian High Court and later codified in national law, explains that there exists a common law title to land "derived from and conforming to traditional custom but recognized and protected by the common law." *Id.* In order to claim native title, an indigenous group must demonstrate that they had a preexisting relationship with the lands in question at the time that the British crown possessed the particular territory (which in Australia's case was between 1788 and 1895). *Id.* at 14. The country later established administrative bodies to determine specific cases of possession. *See generally* PETER SUTTON, NATIVE TITLE IN AUSTRALIA: AN ETHNOGRAPHIC PERSPECTIVE 11–19 (2003) (discussing further the factors used to determine the existence of native title).

[101] BLACK'S LAW DICTIONARY 1512 (8th ed. 2004) (*Terra nullius* is defined as "[a] territory not belonging to any country," derived from Latin, meaning "the land of no one.").

[102] *See* STUART BANNER, POSSESSING THE PACIFIC: LAND, SETTLERS, AND INDIGENOUS PEOPLE FROM AUSTRALIA TO ALASKA 33–49 (2007).

[103] Mabo v. Queensland II (*Mabo II*) (1992) 175 C.L.R. 1 (Austl.).

[104] *Id.* at ¶ 28.

[105] *See, e.g.*, Western Australia v. Commonwealth (1995) 183 C.L.R. 373 (Austl.).

existence of indigenous property rights through tribes' traditional connections with their ancestral lands. The court explained that although British colonization altered title to the land, it did not strip natives of their "common law legal entitlements."[106] Following the decision, the Australian Government passed the Native Title Act of 1993 (NTA), which "provide[d] for the recognition and protection of native title" and established mechanisms to determine aboriginal land claims.[107]

From the NTA emerged tribunals, arbitration panels, and additional legislation aimed at discovering, determining, and ruling on native Australian land and property claims.[108] While the act "recognizes the need to rectify the consequences of past injustices" and promotes the "full enjoyment by native title holders of their rights and interests,"[109] it most importantly reasserts the idea of communal property rights as discussed in *Mabo*[110] and gives such property rights legal recognition in Australian courts.[111] Native title, as discussed by the *Mabo* majority and as codified in Australian law, in now fully accepted, and represents the emerging consensus of Australian jurists of the need for a distinct set of legal rights for those dispossessed of their lands by foreign or colonial conquerors.

Importantly, the Court in *Mabo* explained that native property rights have their "origin in . . . the traditional laws acknowledged by and the traditional customs observed by the indigenous inhabitants of a territory."[112] While native title is not itself "an institution of the common law," it is "recognized by the

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[106] KENT MCNEIL, EMERGING JUSTICE: ESSAYS ON INDIGENOUS RIGHTS IN CANADA AND AUSTRALIA 358 (2001); *see also Mabo II*, 175 C.L.R. at ¶¶ 58–65.

[107] Native Title Act, 1993, at § 3 (Austl.).

> The main objects of this Act are: (a) to provide for the recognition and protection of native title; and (b) to establish ways in which future dealings affecting native title may proceed and to set standards for those dealings; and (c) to establish a mechanism for determining claims to native title; and (d) to provide for, or permit, the validation of past acts, and intermediate period acts, invalidated because of the existence of native title.

Id.; *see also* Creative Spirits, Aboriginal Native Title—Australian Aboriginal Land Rights, http://www.creativespirits.info/aboriginalculture/land/native-title.html (last visited Mar. 8, 2010) (containing a timeline of the expansion of native title rights).

[108] *Id.*

[109] MELISSA PERRY & STEPHEN LLOYD, AUSTRALIAN NATIVE TITLE LAW 3 (2003).

[110] *Id.* at 16.

[111] *See* Lisa Strelein, *From Mabo to Yorta Yorta: Native Title Law in Australia*, 19 WASH.U. J.L. & POL'Y 225, 250 (2005) ("The High Court's decision in Mabo determined that Indigenous peoples in Australia may hold rights under their own laws and customs and that those rights, in relation to land at least, should be accommodated within the Australian legal system. The device used to provide recognition of those rights is now known as native title."). *See also id.* at 252 (discussing how Aboriginal and other native Australian populations must go about proving the existence of such property rights).

[112] Mabo v. Queensland II (*Mabo II*) (1992) 175 C.L.R. 1, ¶ 64 (Austl.).

common law."[113] However, as Australian courts continue to rely on native title, and as native title further intertwines with Australian common law, it should eventually (if it hasn't already) become part of the Australian legal tradition, and then Australian common law.

b. Evidence of opinio juris

Although *Mabo* was the first case of its kind decided by a domestic high court, it discussed issues that may have in fact extended beyond the contours of Australian law and Australian precedent. In his *Mabo* majority opinion, Justice Gerrard Brennan noted that indigenous property protections were not limited by domestic guarantees. He wrote:

> Whatever the justification advanced in earlier days for refusing to recognize the rights and interests in land of the indigenous inhabitants of settled colonies, an unjust and discriminatory doctrine of that kind can no longer be accepted. The *expectations of the international community* accord in this respect with the contemporary values of the Australian people.[114]

While the "expectations of the international community" remain unspecific, they likely refer to the evolving mores and human rights standards of the international community, from which can be (both legally and persuasively) inferred certain baseline treatment standards for indigenous peoples. Justice Brennan stated:

> The common law does not necessarily conform with international law, but international law is a legitimate and important influence on the development of the common law, especially when international law declares the existence of universal human rights .... It is contrary both to international standards and to the fundamental values of our common law to entrench a discriminatory rule which, because of the supposed position on the scale of social organization of the indigenous inhabitants of a settled colony, denies them a right to occupy their traditional lands.[115]

Because *Mabo* was one of the first decisions of a domestic high court affirming common (and international) legal rights to ancestral property, the Court cites no specific rulings of other national high courts—and thus must rely on adherence to more generalized "international standards." Yet despite this, the court still pronounced adherence to international law, even though there existed no widespread evidence of such an international custom. This then raises a notable (though still inconsequential) question: Was *Mabo*, in

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[113] *Id.* at ¶ 65.

[114] *Id.* at ¶ 42 (emphasis added).

[115] *Id.*

hindsight, and given the degree to which other courts cite it,[116] the moment of conception of a greater international norm? Though such a discussion remains beyond the scope of this article, *Mabo* may in fact have provided the spark that set in motion numerous other national high court decisions. However, even ignoring the moment-of conception-issue, *Mabo* provides real evidence that the Australian High Court's decision was formed not in an Antipodean vacuum, but in a larger context of international norm-setting. Commentators have noted as such, stating that the decision "amounts to a recognition and protection of some customary law by the wider Australian legal system."[117] One Australian law professor wrote that *Mabo* "set the foundations for [all indigenous] land dealings in the future,"[118] while the governmental Australian Law Reform Commission conceded that, post-*Mabo*, "there had been some recognition of customary law."[119]

2. *New Zealand*

The development of indigenous real property protections in New Zealand provides a second example of a national attempt to reconcile colonial land seizures with the limitations imposed by the realities of the modern state. The New Zealand situation was perhaps even more contentious than that in Australia because almost all of present-day New Zealand was once inhabited by the native Maori people.

When Europeans first arrived in New Zealand in the latter half of the eighteenth century, they encountered an organized and agrarian society built around large villages and plantations[120]—a society much more advanced than that in Australia. Because of the size and relative technological prowess of the Maori, British settlers rarely seized property, but instead purchased land from the natives, often at incredibly unfair rates of exchange.[121] As the European population increased and the demand for land exploded, the settlers established

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[116] *See infra* Parts II.B.1–II.B.10.

[117] Colin Bourke & Helen Cox, *Two Laws: One Land, in* ABORIGINAL AUSTRALIA: AN INTRODUCTORY READER IN ABORIGINAL STUDIES 69 (Colin Bourke et al. eds., 2d ed., 1998).

[118] *Id.* (internal citation omitted).

[119] *Id.* (internal citation omitted).

[120] *See generally* JAMES COOK, THE EXPLORATIONS OF CAPTAIN JAMES COOK IN THE PACIFIC: AS TOLD BY SELECTIONS OF HIS OWN JOURNALS 1768–1779 47 (A. Grenfell Price, ed., 1971). Cook, who sailed into New Zealand in 1769, noted in his journal the "[f]ortified towns, . . . such that the best [e]ngineer in Europe could not have choose'd [sic] a better" site. *Id.* Settlers and missionaries who arrived in the following century similarly commented on the Maori's advanced society. *See* BANNER, *supra* note 102, at 48.

[121] *See* BANNER, *supra* note 102, at 74 ("[T]he Maori were no match for the British when it came to negotiating a land purchase. 'Large tracts of land are parted with by the natives for a camp-kettle, or a few trinkets,' the *New Zealand Gazette* argued in 1839[.]").

Native Land Courts, formal administrative bodies that facilitated the transformation of vague Maori customary notions of property into actual land title,[122] which could then be sold to colonials. Though such courts nominally vested the Maori with real title, additional restrictions, such as fees and language barriers, left the Maori at an incredible disadvantage at hearings before the courts, and they frequently failed to establish de jure possession over their actual lands.[123] The situation remained as such for most of the colonial and modern eras; not until the late twentieth century did the New Zealand government begin to reconsider its position.

a. Evidence of state practice

The Native Land Courts have since been reformed and, in the 1990s, consolidated into the Maori Land Court, which now better protects Maori land claims.[124] The court's new mission is to arbitrate disagreements over property titles and to advise New Zealand courts when such issues appear before them. In fact, the court may eventually become the ultimate judicial body on all Maori property related issues.[125] Also of importance is the Waitangi Tribunal, created by the government in 1975 to redress the centuries of discrimination against Maori people and expropriation of Maori property.[126]

The New Zealand judiciary has also begun protecting Maori land interests. In the 1986 case *Te Weehi v. Regional Fisheries Officer*,[127] the courts for the first time recognized and relied on the doctrine of aboriginal title to establish Maori property interests in traditional fishing grounds and coastland areas.[128]

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[122] *See* NEW ZEALAND MINISTRY OF JUSTICE, MAORI LAND COURT: PAST AND PRESENT, http://www2.justice.govt.nz/maorilandcourt/pastpresent.htm (last visited Nov. 24, 2008) [hereinafter MAORI LAND COURT]; *see also* BANNER, *supra* note 102, at 53–55 (discussing Maori notions of property).

[123] BANNER, *supra* note 102, at 96–107.

[124] *See* MAORI LAND COURT, *supra* note 122. Since 1993, the court's functions are:

> to promote the management of Maori land by its owners by maintaining the records of title and ownership information of Maori land[;] to service the Maori Land Courts and related Tribunals[;] to provide land information from the Maori Land Court and Crown agencies[;] to contribute to the administration of Maori land[;] [and] to preserve taonga Maori[.]

Id.

[125] *See* UNFINISHED CONSTITUTIONAL BUSINESS?: RETHINKING INDIGENOUS SELF-DETERMINATION 100 (Barbara A. Hocking ed., 2005).

[126] *See* Waitangi Tribunal Background, http://www.waitangi-tribunal.govt.nz /about /established.asp (last visited Mar. 9, 2010). Like the land Courts, the tribunal also does not have final adjudicative powers, but instead makes recommendations to the government and judicial system on issues of reparations. *Id.*

[127] [1986] 1 N.Z.L.R. 680 (N.Z.).

[128] *See generally id. See also* Catherine J. Iorns Magallanes, *Reparations for Maori*

More importantly, in a 2003 case, *Attorney-General v. Ngati Apa*,[129] the New Zealand Court of Appeals affirmed that "New Zealand was never thought to be *terra nullius*."[130] The court explained:

> When the common law of England came to New Zealand its arrival did not extinguish Maori customary title. Rather, such title was integrated into what then became the common law of New Zealand. Upon acquisition of sovereignty the Crown did not therefore acquire wholly unfettered title to all the land in New Zealand. Land held under Maori customary title became known in due course as Maori customary land.[131]

Not only did this decision reinforce the concept of aboriginal title in New Zealand common law, but it also affirmed that the Maori Land Court had jurisdiction to rule on issues of customary property title. While the case involved property interests in the foreshore and seabed, it reinforced the concept of customary title over traditional lands, and paved the way for similar rulings on cases involving actual land claims.

2. *Evidence of* opinio juris

In *Ngati Apa*, the case in which the New Zealand courts established the current precedent on native land rights, the court did not limit its analysis to New Zealand's factual and judicial history. Instead, in order to determine whether the Maoris involved in the case retained property interest in an area of foreshore (the area of land exposed to the air at low tide), the court surveyed the opinions of other national high courts, including those of Australia and Canada,[132] both countries with similar populations of indigenous peoples. It also looked to African and American court decisions in deciding the scope of potential outcomes:

> Any property interest of the Crown in land over which it acquired sovereignty therefore depends on any pre-existing customary interest and its nature, [as discussed by a Nigerian Court]. The content of such customary interest is a question of fact discoverable .... [T]he customary rights might "be so complete as to reduce any radical right in the Sovereign to one which only extends to comparatively limited rights of administrative interference." The Supreme Court of Canada has had occasion recently to consider the content of customary property interests in that country. It has recognised that, according to the custom

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Grievances in Aotearoa New Zealand, *in* REPARATIONS FOR INDIGENOUS PEOPLES: INTERNATIONAL AND COMPARATIVE PERSPECTIVES 542 (Federico Lenzerini, ed., 2008).

[129] [2003] 3 N.Z.L.R. 643 (C.A.) (N.Z.).

[130] *Id.* at ¶ 37.

[131] *Id.* at ¶ 183 (Tipping, J., concurring).

[132] *Id.* at ¶ 148.

> on which such rights are based, they may extend from usufructory rights to exclusive ownership with incidents equivalent to those recognised by fee simple.[133]

The court also looked at British and American opinions, including *Johnson v. M'Intosh*,[134] in its evaluation of the discovery doctrine, reiterating that "the Crown's interest and any grant made by it of the land was subject to the native rights. They were rights at common law, not simply moral claims against the Crown."[135] It also referred to British law: "The Crown is bound, both by the common law of England and by its own solemn engagements, to a full recognition of Native proprietary right. Whatever the extent of that right by established Native custom appears to be, the Crown is bound to respect it."[136]

Most importantly, however, Judges Keith and Anderson, in a concurring opinion, analogized the Maori's ancestral use of certain lands to the customary international law of innocent passage, and then alluded to an international norm protecting some indigenous property right upon the transfer of land from one colonial nation to another.[137] And, in addition, they reaffirmed the understandings in *Johnson v. M'Intosh* that native inhabitants retain some rights (though not sovereignty) to their ancestral lands.[138]

Ngati Apa quickly became the basis for similar land claims in New Zealand. Importantly, it's reliance on extranational influences is unquestioned. A year after the decision, the New Zealand Crown Law Office commented: "The concept of the survival of indigenous property rights on the passing of sovereignty to another was recognised by the laws and usages of nations . . . . That was the starting point before considering the New Zealand situation."[139]

3. Nicaragua

Several Latin American countries have also dealt with problems surrounding the legal status of indigenous lands. In Nicaragua, in which roughly 5 percent of the population is of completely indigenous descent,[140] indigenous peoples have recently begun lobbying to reestablish their claims to land expropriated by

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[133] *Id.* at ¶ 31 (citations omitted).

[134] 21 U.S. (8 Wheat.) 543 (1823).

[135] *Ngati Apa*, [2003] 3 N.Z.L.R. at ¶ 19 (quoting *M'Intosh*, 21 U.S. at 603).

[136] *Id.* at ¶ 18.

[137] *Id.* at ¶¶ 133, 138.

[138] *Id.* at ¶¶ 136–38.

[139] Crown Law Office, Notes For Australian-New Zealand International Law Conference (June 2004), *available at* http://law.anu.edu.au/anzsil/conferences/2004/proceedings/nz%20crown%20law%20office%20_international%20law%20issues_.pdf.

[140] *See* Cent. Intelligence Agency, The World Factbook: Nicaragua, https://www.cia.gov/library/publications/the-world-factbook/geos/nu.html (last visited Mar. 9, 2010).

the government. The most famous case involved the Awas Tingni, a relatively large community of indigenous people who lived on mineral- and resource-rich lands in the eastern part of the country. In 1993, the government allowed foreign logging companies access to a large area of Nicaraguan rain forest, including the Awas Tingni's ancestral lands. This precipitated multi-year litigation, which began in domestic courts but later migrated to several international bodies established by the Organization of American States (OAS).[141] Most importantly, the evidence relied on in the international court opinion—as well as Nicaragua's eventual acceptance of the international opinion—provides further evidence of extranational influence affecting the decisions of sovereign states.

a. Evidence of state practice

The Nicaraguan Constitution, as written when the Awas Tingni brought suit, guaranteed "la existencia de distintas formas de propiedad"—the existence of distinct forms of property rights.[142] In addition, Nicaragua had several laws on the books that sought to protect indigenous peoples, including one that affirmed "that indigenous communal property consists of the land, waters, and forests that have traditionally belonged to the communities of the Atlantic Coast."[143] Yet, because the Awas Tingni and other indigenous tribes maintained only generalized protections and not legal title to the land, the Nicaraguan government ignored their claims, prompting a series of domestic legal challenges that left the issue undecided.[144]

With their efforts to litigate in domestic courts stalled,[145] the Awas Tingni appealed to the Inter-American Court of Human Rights—a treaty-based court to which most OAS members belong—and sought a reassurance of their property rights based on Nicaragua's membership in the OAS and ratification of the American Convention on Human Rights (ACHR).[146] In 2001, the court ruled

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[141] S. James Anaya & Claudia Grossman, *The Case of* Awas Tingni v. Nicaragua: *A New Step in the International Law of Indigenous Peoples*, 19 ARIZ. J. INT'L & COMP. L. 1, 3 (2002).

[142] Constitución Política de la República de Nicaragua, [Cn.] [Constitution] tit. I, art. 5, La Gaceta [L.G.] 9 January 1987, as amended by Ley No. 330, Reforma Parcial a la Constitución Política de la República de Nicaragua, Jan. 18, 2000, L.G. Jan. 19, 2000.

[143] Leonardo J. Alvarado, *Prospects and Challenges in the Implementation of Indigenous Peoples' Human Rights in International Law: Lessons from the Case of* Awas Tingni v. Nicaragua, 24 ARIZ. J. INT'L & COMP. L. 609, 611 (2007) (internal quotation marks omitted).

[144] *Id.*

[145] Anaya & Grossman, *supra* note 141, at 3.

[146] ANAYA, INDIGENOUS PEOPLES, *supra* note 11, at 145. Of particular importance is article 21, which states, "No one shall be deprived of his property except upon payment of just compensation, for reasons of public utility or social interest, and in the cases and according to the forms established by law." American Convention on Human Rights art. 21(2), Nov. 22,

in favor of the Awas Tingni, holding that Nicaragua had not "adopted effective measures to ensure the property rights of the Community to its ancestral lands"[147] and ordering the government to immediately "establish a legal procedure to allow rapid demarcation and official recognition of the property rights of the [Awas Tingni] Community."[148] Though the government delayed establishing the boundaries of the community's territory and granting it permanent title, it did pass a law in 2003 recodifying the "communal property rights regime for indigenous and black communities."[149] Finally, in 2008, the government granted title to the Awas Tingni to 74,000 hectares of their ancestral lands.[150] A precedent among OAS states was thus established.

b. Evidence of opinio juris

Though the Inter-American Court based its decision in part on self-determination arguments, the decision not only reaffirmed indigenous communal property rights in Nicaraguan law, but also confirmed the existence of such rights among the citizens of states party to the ACHR. Nicaragua accepted as much, and reluctantly handed over indigenous territory per its international legal obligation.[151] While the court's decision, on its face, drew these rights out of international law by treaty, the process by which the court came to its conclusion incorporated the greater body of evolving human rights law. The court stressed that international rights agreements are in fact "live instruments whose interpretation must adapt to the evolution of the times and, specifically, to current living conditions."[152] In a secondary ruling on the nature of indigenous property rights, the court stated:

> Indigenous groups, by the fact of their very existence, have the right to live freely in their own territory; the close ties of indigenous people with the land must be

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1969, 1144 U.N.T.S. 243.

[147] Mayagna (Sumo) Awas Tingni Cmty. v. Nicaragua, 2001 Inter-Am. Ct. H.R. (ser. C) No. 79, at ¶ 2 (Aug., 31, 2001).

[148] *Id.* at ¶ 3.

[149] Joe Bryan, *Dilemmas of Indigenous Land in Awas Tingni v Nicaragua*, ANTHROPOLOGY NEWS, Sept. 2006, *available at* http://www.aaanet.org/press/an/0606/global_prod.html#bryan.

[150] *See* UN News Centre, *Nicaragua's titling of native lands marks crucial step for indigenous rights—UN expert*, Dec. 17, 2008, http://www.un.org/apps/news/story.asp?NewsID= 29336&Cr=indigenous+rights&%20Cr1.

[151] *See id.* In late 2008, the Nicaraguan government handed over title to the Awas Tingni's land. S. James Anaya, now the UN Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous Peoples, was present at the ceremony, and noted that "it provides a model for other Governments to comply with their international legal obligations to recognize and protect the rights of indigenous peoples to their traditional lands and resources in practice[.]" *Id.*

[152] *Awas Tingni Cmty.*, 2001 Inter-Am. Ct. H.R., at ¶ 146.

> recognized and understood as the fundamental basis of their cultures, their spiritual life, their integrity, and their economic survival. For indigenous communities, relations to the land are not merely a matter of possession and production but a material and spiritual element which they must fully enjoy, even to preserve their cultural legacy and transmit it to future generations.[153]

Nicaragua has since not objected to the court's decisions, and has complied with the court's ruling by protecting the Awas Tingni's ancestral land and granting appropriate title.

The question of whether Nicaragua's acceptance of the Inter-American Court's decision qualifies as *opinio juris* is complicated. On one hand, the state clearly consented to an international legal decision against the interests of its own government, thereby sacrificing its own autonomy by way of an obligation to an international legal arrangement. On the other hand, the decision faulted Nicaragua for violating *treaty* law, not an international custom. The court, however, itself a manifestation of Nicaragua's conscious willingness to cede legal authority to a supranational body, decided that Nicaragua, and all other states party to the Inter-American Commission on Human Rights, must in fact uphold certain indigenous land protections, a conclusion accepted by Nicaragua. Moreover, under the notion that *opinio juris* can be inferred from action,[154] Nicaragua's actions might in fact evince such evidence.

4. Belize

Several years after the Inter-American Court ruled in favor of the Awas Tingni, the Inter-American Commission on Human Rights—the Court's parallel investigatory body—investigated a similar case, this time involving indigenous Mayan groups in Belize. As in Nicaragua, the Belizean government had granted logging and oil concessions to several companies over parcels of land on which sat several Mayan villages.[155] Unlike in Nicaragua, however, the Mayans, although indigenous to the country, had only lived in the disputed area for a short amount of time, and returned only after Spain ceded the colony to England.[156] After Belize secured its independence in 1981, this land became

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[153] *Id.* at ¶ 149.

[154] *See supra* Part I.C.2.

[155] S. James Anaya, *Reparations for Neglect of Indigenous Land Rights at the Intersection of Domestic and International Law—The Maya Cases in the Supreme Court of Belize*, *in* REPARATIONS FOR INDIGENOUS PEOPLES: INTERNATIONAL AND COMPARATIVE PERSPECTIVES 570 (Federico Lenzerini, ed., 2008) [hereinafter Anaya, *Reparations for Neglect*].

[156] *See id.* Their towns were relatively new, built only in the early 1900s by ancestors who had been driven from their land during the Spanish colonial era but returned under British rule. The British colonial administrators allowed the Mayans to resettle areas proximate to their

state property,[157] and, although the Mayans were allowed to remain in these territories, the government retained title, and thus believed it had to right to grant such concessions.

a. Evidence of state practice

In 2000, the Mayan villages of Conejo and Santa Cruz brought suit against the government to enjoin timber and petroleum companies from entering their land.[158] The Mayans and the government subsequently settled, and, with help from Inter-American Commission, reached a "Ten Points of Agreement," in which the state agreed to "address the urgent land needs of the Maya communities of the south, including the surveying and distribution of lands or establishing and protecting communal lands . . . ."[159] However, despite several subsequent agreements to implement the Ten Points,[160] the Belizean government continued to allow corporate exploitation of the disputed land, and so the Mayan leaders again turned to the Commission for assistance. In a 2004 report, the Commission issued its nonbinding opinion and recommended that the Belizean government recognize the Mayan's "communal property right to the lands that they have traditionally occupied and used . . . [and] demarcate and title the territory in which this communal property right exists, in accordance with the customary land use practices of the Maya people."[161]

With this report in hand, the Mayan leaders again brought suit against the government in domestic court, in which the international legal scholar (and now UN Special Rapporteur) S. James Anaya even testified on the Mayans' behalf.[162] In *Aurelio Cal v. Attorney General of Belize*, the court found for the Mayan parties on both domestic law grounds and Belize's treaty obligations.[163] The 2007 decision, written by the Chief Justice of the Belizean Supreme

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traditional lands, and created administrative zones on Crown land upon which the Mayan built several towns. *See id.*

[157] *See id.*

[158] *See* Matthew Solis et al., *International Legal Updates*, 15 HUM. RTS. BR. 28, 30 (2008).

[159] Ten Points Of Agreement between the Government of Belize and the Maya Peoples of Southern Belize, 2000, *available at* http://www.law.arizona.edu/depts/iplp/advocacy/maya_belize/documents/TENPOINTSOFAGREEMENT.pdf.

[160] *See, e.g.*, Ministry of Foreign Affairs Press Release, *Government Signs Agreement with Mayan Leaders*, *available at* http://www.governmentofbelize.gov.bz/press_release_details.php?pr_id=1961.

[161] Maya Indigenous Communities of the Toledo Dist. v. Belize, Case 12.053, Inter-Am. C.H.R., Report No. 40/04, OEA/Ser. L/V/II.122, doc. 5 rev. 1 at 727 ¶¶ 5–6 (2004).

[162] Anaya, *Reparations for Neglect*, *supra* note 155, at 574.

[163] *See generally* Aurelio Cal v. Attorney General of Belize, Claim Nos. 171 & 172 (Sup. Ct. Oct. 18, 2007) (Belize), *available at* http://www.law.arizona.edu/ Depts/iplp/advocacy/maya_belize/documents/ClaimsNos171and172of2007.pdf.

Court, not only affirmed a recognition of aboriginal title, but found that "the introduction of grants of lands by the various [British] Crown Lands Ordinances . . . did not operate so as to extinguish the pre-existing Maya people's interests in and rights to their land,"[164] and concluded "that the villagers of Conejo and Santa Cruz, as part of the indigenous Maya people of Toledo District, have interests in land based on Maya customary land tenure that still survive and are extant."[165]

The Court further interpreted the Belizean Constitution's guarantee of "life, liberty, [and] security of the person"[166] to infer protections for indigenous peoples, their land, and ways of life. Moreover, the opinion elaborated on Belizean constitutional law and noted its international sources: "[I]n the light of the issues raised . . . [in this case], some of the *obligations of the State [exist] in international law.* I find that some of these obligations resonate with certain provisions of the Belize Constitution itself . . . ."[167] Recent developments, however, have left unclear some of the practical results of the case. Although the two villages party to the suit won certain land rights, other townships and indigenous groups have yet to be afforded similar rights. At the time of writing, a second case applying the outcome in *Aurelio Cal* to these other lands is pending before the Supreme Court.[168]

b. Evidence of opinio juris

Equally important, the Belizean Supreme Court in *Aurelio Cal* looked at the Mayan's claim through the lens of customary international law. Unlike *Awas Tingni v. Nicaragua*, the Belize case never matriculated to the Inter-American Court, and thus failed to produce a binding international court ruling upon which Belize had to rely. The Inter-American Commission's report, though supportive of Mayan rights under the ACHR, was not binding, and thus Belize was free to ignore it. Instead, however, the country's highest court *chose* to respect the Commission's opinion by elaborating in its verdict on Belize's obligations under international law:

> I cannot part with this judgment without adverting to some of the obligations of the defendants, as representing the State of Belize, in international law. Of course, these are domestic proceedings; but undoubtedly in the light of the issues raised they engage in my view, some of the obligations of the State in

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[164] *Id.* at ¶ 86.

[165] *Id.* at ¶ 93.

[166] *Id.* at ¶¶ 115–17.

[167] *Id.* at ¶ 118 (emphasis added).

[168] *See* Mayan Communities of Southern Belize, Introduction, http://www.law.arizona.edu/depts/iplp/advocacy/maya_belize/index.cfm?page=advoc (last visited Mar. 23, 2010) (discussing, inter alia, relevant legal action taken after the 2007 Supreme Court decision).

> international law. I find that some of these obligations resonate with certain provisions of the Belize Constitution itself which I have adverted to earlier.[169]

The Chief Justice also noted: "[I]t is my considered view that both customary international law and general principles of international law would require that Belize respect the rights of its indigenous people to their lands."[170] Further, the court addressed the *Mabo* decision with some frequency; at one point, the Chief Justice noted, "I endorse with respect, the statement of principle on this point by Brennan J. in the High Court of Australia in *Mabo and others v Queensland (No. 2)*."[171] Finally, and most importantly, the court relied persuasively on ILO treaty 169 (a treaty discussed in Part III[172] to which Belize was *not* a signatory), and seemingly dispositively on the nonbinding Declaration of Rights of Indigenous Peoples: "[E]mbodying as it does, general principles of international law relating to indigenous peoples and their lands and resources, [the Declaration is] of such force that the defendants, representing the Government of Belize, will not disregard it."[173] These last two points are of particular importance, as Belize is not required to follow either the treaty or the declaration, as neither technically have any legal weight in Belizean domestic courts. Yet the court chose to give significant weight to these extranational influences—and thus provide real evidence of *opinio juris*.

5. South Africa

South Africa has similarly been forced to construct new protections for its indigenous minorities. Such attempts have been complicated by the difficult process of having to clarify property rights in the post-apartheid era. Recent laws, such as the Restitution of Land Rights Act of 1994 and the Land Rights Bill of 1999, aimed to transfer state owned land to minority inhabitants dispossessed through state racial policies, which should have included a number of South Africa's indigenous tribal populations.[174] However, the law was limited to peoples dispossessed after 1913, when the apartheid government enacted the racist Native Land Act (which prevented blacks from owning land

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[169] Aurelio Cal v. Attorney General of Belize, Claim Nos. 171 & 172, ¶ 118 (Sup. Ct. Oct. 18, 2007) (Belize), *available at* http://www.law.arizona.edu/Depts/iplp/advocacy/maya_belize/documents/ClaimsNos171and172of2007.pdf.

[170] *Id.* at ¶ 127.

[171] *Id.* at ¶ 81.

[172] *See infra* Part III.A.1.

[173] *Aurelio Cal*, at ¶ 133.

[174] Ben Cousins & Aninka Classens, *Communal tenure 'from above' and 'from below.' Land rights, authority and livelihoods in rural South Africa*, *in* COMPETING JURISDICTIONS: SETTLING LAND CLAIMS IN AFRICA 34–36 (Sandra Evers et al., eds. 2005)

outside of state townships and reservations),[175] and thus was not specifically tailored to protect indigenous South Africans.

a. Evidence of state practice

In the early twenty-first century, the post-Apartheid South African Parliament looked to expand previous laws to include groups dispossessed prior to 1913, and in 2004 passed the Communal Land Rights Act (CLRA),[176] which expressly sought to grant land back to indigenous South African communities.[177] The act intended to grant land rights back to indigenous groups, and "provide for legal security of tenure by transferring communal land, including KwaZulu-Natal Ingonyama land to communities, or by awarding comparable redress . . . ."[178]

During the debate leading up to the passage of the CLRA, a case touching on these issues was simultaneously working its way through the South African courts. The case involved the land and mineral rights of Nama people, a 3000-strong subgroup of a larger indigenous tribe located in the Richtersveld area of the Northern Cape Province.[179] The Richtersveld community had lived on this land since before the British annexed the territory in 1847, though they never held legal title in the eyes of the colonial government.[180] When the government awarded mining concessions to private concerns, the Richtersveld brought suit, and lost their initial case. Though they won on appeal, the mining companies then appealed to the South African Constitutional Court, the country's highest adjudicative body.[181]

The Constitutional Court found overwhelmingly for the Richtersveld. Although the opinion relied in part on the intent of the Land Rights Bill, which returned land to those dispossessed after 1913, the court also denied the state's *terra nullius* argument by showing that "the Richtersveld people had a social and political organisation at the time of annexation"[182] and that the land should not have been "amenable to acquisition by occupation or settlement."[183] The

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[175] *See, e.g.*, Online NewsHour, Key Dates in South African Land History, Apr. 14, 2004, http://www.pbs.org/newshour/bb/africa/land/ct_safrica.html (last visited Mar. 11, 2010).

[176] Communal Land Rights Act 11 of 2004 (S. Afr.).

[177] *See id.*

[178] *Id.*

[179] *See* Nsongurua J. Udombana, *Reparations and Africa's Indigenous Peoples*, *in* REPARATIONS FOR INDIGENOUS PEOPLES: INTERNATIONAL AND COMPARATIVE PERSPECTIVES 403 (Federico Lenzerini, ed., 2008).

[180] Alexkor Ltd v. The Richtersveld Cmty 2004 (5) SA 460 (CC) at ¶ 4 (S. Afr.).

[181] *See* Udombana, *supra* note 179, at 403.

[182] Richtersveld Cmty. & Others v. Alexkor Ltd & Another 2003 (2) All SA 27 (SCA) at ¶ 46 (S. Afr.).

[183] *Id.* at ¶ 52.

decision secured in South African law a local version of native title, holding that evidence of continuous possession by indigenous groups is sufficient to establish ancestral, and thus real title.

b. Evidence of opinio juris

The Constitutional Court could have stopped after addressing the Richtersveld community's rights under domestic common law, but it instead looked beyond the country's own laws to the idea of a separate, indigenous law. The court wrote that the doctrine of aboriginal title,[184] a common law principle that, while granting rights to native populations, gives some weight to the possessory interests of colonial occupiers, is in fact trumped by the "customary law interest . . . [that] has been established in the present case . . . ."[185] This customary indigenous law[186] is not to be confused with customary international law; instead, it refers to the general notions of customary indigenous property law that, the court ruled, are in fact incorporated in South African common law. As such, these indigenous laws and their conception of property rights are protected by the South African Constitution.[187]

While not international law per se, the indigenous customary law to which the South African Court felt obliged to accept has certain features of international law. The indigenous conception of property in South Africa—a right "to exclusive beneficial occupation and use, akin to that held under common law ownership"[188]—is nearly identical to the proffered indigenous property interests in nearly every other state addressed herein. Thus, while there is no *opinio juris* in the sense that South Africa is obliged to follow international custom, there is, from the Constitutional Court's opinion, the understanding that the country is obliged to accept the same view of indigenous property rights that is now being accepted by Australia, New Zealand, and

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[184] *See generally* PETER H. RUSSELL, RECOGNIZING ABORIGINAL TITLE: THE MABO CASE AND INDIGENOUS RESISTANCE TO ENGLISH-SETTLER COLONIALISM (2005); KENT MCNEIL, COMMON LAW ABORIGINAL TITLE (1989); Julie Cassify, *Aboriginal Title: "An Overgrown and Poorly Excavated Archeological Site"?*, 10 INT'L LEGAL PERSP. 39 (1998) (discussing Aboriginal title). The Doctrine of aboriginal title exists in Canada, New Zealand, Australia, and the United States, to a certain extent. Although the specific factors differ in each country, the doctrine essentially grants land titles to indigenous peoples who lived on their lands prior to European colonization and then remained on this territory during and even after the respective colonial eras.

[185] *Richtersveld Cmty. v. Alexkor Ltd* 2003 (2) All SA at ¶ 43.

[186] *Id.* at ¶ 7 (noting, "In this judgment we prefer to use the term 'indigenous law' which has the same meaning as 'customary law'").

[187] *See* JOAN CHURCH ET AL., HUMAN RIGHTS FROM A COMPARATIVE AND INTERNATIONAL LAW PERSPECTIVE 75 (2007).

[188] *Richtersveld Cmty. v. Alexkor Ltd* 2003 (2) All SA at ¶ 111(a).

other countries addressed in this study. While not an acceptance of international law, it is an apparent approval of a transnational understanding of indigenous rights and evidence of possible adherence to some greater norm.

6. Kenya

Although Kenya has to date taken no direct domestic action (reliant on extranational sources) to sufficiently protect indigenous ancestral lands, a recent decision by the African Court on Human and Peoples' Rights is about to change this. The African Court, which provides rulings on violations of the African Charter on Human And Peoples Rights, to which over fifty countries are party,[189] decided in February 2010 to affirm a Commission (similar to the Inter-American Commission) report that the Endorois people had customary land rights to lands from which they had be expelled by the Kenyan government.[190] The Commission found that, under the African Charter's pronouncement of basic rights and freedoms, Kenya's eviction of the Endorois was in violation of Article 14 of the Charter,[191] and that the state had to immediately "recognise rights of ownership to the Endorois and [r]estitute Endorois ancestral land."[192] The court further concluded that "(1) traditional possession of land by indigenous people has the equivalent effect as that of a state-granted full property title; [and] (2) traditional possession entitles indigenous people to demand official recognition and registration of property title . . . ."[193]

The Kenyan situation is similar to that in Nicaragua (to which the African court cited). Here, the Kenyan state (though still able to appeal the decision) was bound not by customary international law, but by separate treaty obligations. However, like in the Inter-American context, the African Court here too found a base protection for indigenous ancestral lands from the more

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[189] *See* List of Countries Which Have Signed, Ratified/Acceded to the African Union Convention on African Charter on Human Rights and People's Rights, African Union (May 26, 2007), *available at* http://www.achpr.org/english/ratifications/ratification_african%20charter.pdf.

[190] *See* 276 / 2003—Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v. Kenya, African C.H.R. (2010) [hereinafter *Endorois Welfare Council v. Kenya*].

[191] African (Banjul) Charter on Human and Peoples' Rights art. 14, June 27, 1981, 1520 U.N.T.S. 26363 ("The right to property shall be guaranteed. It may only be encroached upon in the interest of public need or in the general interest of the community and in accordance with the provisions of appropriate laws.").

[192] *Endorois Welfare Council v. Kenya*, *supra* note 190, at 80. The Commission further suggested that the state "[p]ay adequate compensation to the community for all the loss suffered." *Id.*

[193] *Id.* at 55.

generalized treaty rights protecting basic rights and freedoms. Kenya's (and other states') acceptance of this interpretation implies a recognition that such land protections are part of the greater set of more generalized protections. And further, the decision is likely to have significant spillover effects. One commentator noted that the decision "could open the floodgates for similar cases. The court's move creates a legal precedent, which minorities and indigenous communities with similar claims across Africa could seize."[194] Although Kenya does not have to comply fully with the decision until 2012,[195] indications point to eventual compliance. Kenya's response will thus likely establish further precedent for other African states who may soon be addressing similar indigenous claims.[196]

7. Canada

Canadian interaction with Native American peoples is dominated by the treaty system, which originated from French and British colonial-era trade and land treaties with Native Canadian populations.[197] The British, for example, frequently negotiated certain land or resource concessions in return for promising indigenous groups demarcated parcels of land.[198] Many of these treaties have existed through present day, and many still serve as the legal (though on its face antiquated) basis of the relationship between native groups and the Canadian government.[199] However, while some groups have maintained moderate autonomy, principally in the northern provinces, others have seen their lands taken by the British and then Canadian governments. While the indigenous inhabitants of these territories maintain Canadian

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[194] Peter Mwaura, *Endorois Land Issue Could Open the Floodgates for Similar Cases*, DAILY NATION, Mar. 26, 2010, *available at* http://www.nation.co.ke/oped/Opinion/Endorois%20land%20issue%20could%20open%20the%20floodgates/-/440808/887522/-/fbkq3rz/-/.

[195] *See* Human Rights Watch, Kenya: Landmark Ruling on Indigenous Land Rights, Feb. 4, 2010, http://www.hrw.org/en/news/2010/02/04/kenya-landmark-ruling-indigenous-land-rights.

[196] *See* Mwaura, *supra* note 194 ("The precedent recognises, for the first time in Africa, the rights of minorities and indigenous people over traditionally owned land. And there are large numbers of such people in Kenya and other African countries. . . . Elsewhere in Africa, there are many such dispossessed or downtrodden minorities and indigenous communities, including the Pygmies of Central Africa, the Swan of Botswana, the Batwa (Pygmies) of Rwanda, the Ogoni of Nigeria and the ethnic minorities in Sudan's Darfur and Southern Sudan, Angola, Uganda, Ethiopia, Somalia and Cote d'Ivoire.")

[197] DARCY MCNICKLE ET AL., NATIVE AMERICAN TRIBALISM: INDIAN SURVIVALS AND RENEWALS 57–58 (1993).

[198] *Id.* at 58.

[199] *See* GARY NETTHEIM ET AL., INDIGENOUS PEOPLES AND GOVERNANCE STRUCTURES: A COMPARATIVE ANALYSIS OF LAND AND RESOURCE MANAGEMENT RIGHTS 79–88 (2002).

citizenship (with full and equal protections), they have thus simultaneously lost legal title to land that was once theirs.[200]

a. Evidence of state practice

The history of the modern indigenous campaign for property recognition began in Canada in 1968 with a tribal suit against the province of British Columbia, in which the Nishga tribe claimed property rights over Canadian government territory. In the initial and subsequent trial, lower courts denied the existence of aboriginal title in Canadian law, and further explained that all indigenous land titles were extinguished by the British Crown upon the conquest of Canadian territory.[201] However, the Canadian Supreme Court, in *Calder v. Attorney-General of British Columbia*, held otherwise, and first acknowledged the existence of aboriginal title, holding:

> This aboriginal title does not depend on treaty, executive order or legislative enactment but flows from the fact that the owners of the interest have from time immemorial occupied the areas in question and have established a pre-existing right of possession. In the absence of an indication that the sovereign intends to extinguish that right the aboriginal title continues.[202]

In forming this determination, the court relied (persuasively) on American Supreme Court decisions to establish historical understanding of native title, particularly on two cases from within the Marshall Trilogy.[203] Justice Hall (in

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[200] *See* Thomas Flanagan & Christopher Alcantara, *Customary Land Rights on Canadian Indian Reserves*, *in* TERRY LEE ANDERSON ET AL. EDS., SELF-DETERMINATION: THE OTHER PATH FOR NATIVE AMERICANS 137 (2006). Native peoples in Canada who live on reservations essentially have complete sovereignty over their land, although the government still retains title to the real property. *See id.* For a further discussion of the relationship between Native Americans and the Canadian government, see MICHAEL ASCH, ED., ABORIGINAL AND TREATY RIGHTS IN CANADA: ESSAYS ON LAW, EQUALITY, AND RESPECT FOR DIFFERENCE (1997). *See also* BANNER, *supra* note 102, at 195–230; DIANE ENGELSTAD & JOHN BIRD, EDS., NATION TO NATION: ABORIGINAL SOVEREIGNTY AND THE FUTURE OF CANADA (1992).

[201] *See* Calder v. Attorney-General of British Columbia [1973] 34 D.L.R. (3d) 145, 145–47 (Can.) (explaining prior courts holdings).

[202] *Id.* at 146.

[203] *Id.* at 151, 169. For a concise discussion of the Marshall Trilogy and its importance in American Indian law, see Samuel E. Ennis, Comment, *Reaffirming Indian Tribal Court Criminal Jurisdiction Over Non-Indians: An Argument for a Statutory Abrogation of* Oliphant, 57 UCLA L. REV. 553, 603 n.299 (2010) ("The Marshall Trilogy consists of the three seminal Indian law cases that defined the relationships between the tribes, the states, and the federal government" and includes "Johnson v. M'Intosh, 21 U.S. (8 Wheat.) 543 (1823) (outlining and defining the nature of tribal title to their traditional lands post-colonization); Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1 (1831) (outlining and defining the guardian-ward relationship between the federal government and the tribes); [and] Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832) (determining that tribes are sovereign entities separate from classification as states or

dissent) even named *Johnson v. M'Intosh* as "the *locus classicus* of the principles governing aboriginal title."[204]

More recently, the Canadian Supreme Court decided the landmark case *Delgamuukw v. British Columbia*,[205] which involved the Gitksan and Wet'suwet'en peoples, a group of indigenous Americans living in British Columbia who claimed property rights to parts of 58,000 square kilometers of government-controlled land.[206] The 1997 opinion affirmed that aboriginal title is valid under Canadian common law, and granted further protections to natives by invalidating previous government sales of indigenous land to private parties. The court explained:

> Aboriginal title is *sui generis*, and so distinguished from other proprietary interests, and characterized by several dimensions. It is inalienable and cannot be transferred, sold or surrendered to anyone other than the Crown. Another dimension of aboriginal title is its sources: its recognition by the *Royal Proclamation, 1763* and the relationship between the common law which recognizes occupation as proof of possession and systems of aboriginal law pre-existing assertion of British sovereignty. Finally, aboriginal title is held communally.[207]

The court also elaborated a test by which "[c]onstitutionally recognized aboriginal rights fall along a spectrum with respect to their degree of connection with the land."[208] More recently, in the case of *Tsilhqot'in Nation v. British Columbia*,[209] which culminated in late 2007, the British Columbia Supreme Court applied this analysis and, for the first time, ruled in favor of the aboriginal claimants, finding again that "Aboriginal title land is not Crown land," and that "[t]he Province has no jurisdiction to extinguish Aboriginal title."[210]

b. Evidence of opinio juris

Though Canadian courts have distinguished Canadian understandings of aboriginal title and its requisite elements from that in other countries,[211] they

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foreign nations, with a distinct and unique relationship with the federal government).").

[204] *Calder* 34 D.L.R. at 193 (Hall, J., dissenting).

[205] [1997] 3 S.C.R. 1010 (Can.).

[206] *See generally id.*

[207] *Id.* at 1014.

[208] *Id.* at 1016.

[209] [2007] B.C.S.C. 1700.

[210] *Id.* at executive summary (internal quotation marks omitted).

[211] *See id.* at ¶¶ 995–96 ("In Australia the courts have concluded that Native title can be extinguished by inconsistent grant . . . . The Supreme Court of Canada has reached a different conclusion.").

have still looked to foreign conceptions of aboriginal title in crafting their own workable standard for properly granting aboriginal land rights. At a minimum, this reveals a basic Canadian acceptance of a greater, supranational understanding of indigenous property rights.

In *Delgamuukw*, although there existed some disagreement between the Justices over the substance of the matter at issue, the court looked at times to Australian jurisprudence for guidance: One dissenting Justice, in attempting to elaborate on Canadian understandings of aboriginal title, noted, "In *Mabo* . . . the High Court of Australia set down the requirement that there must be 'substantial maintenance of the connection' between the people and the land. In my view, this test should be equally applicable to proof of title in Canada."[212] The Justice also looked at United States Supreme Court decisions, including *United States v. Santa Fe Pacific Railroad Co.*,[213] in his analysis of the idea of joint title.[214] Although limited and not demonstrative of a strict international legal obligation, such references indicate not only that Canada is looking outside its own borders for guidance on this issue, but more importantly that it is receptive to international legal understandings of aboriginal title and additional legal protections for indigenous real property. As several commentators explain, the "source [of aboriginal title law] is the same in Canada and all other common law jurisdictions (including Australia)," and "the fundamental principles of native title law that arise from the Canadian (as well as the US) jurisprudence and experience are mirrored by judicial treatment and policy developments in New Zealand . . . [and] find support in Australian jurisprudence."[215]

8. United Kingdom

Unlike Australia and New Zealand, whose governments originally relied on *terra nullius* to justify their land grabs, British explorers and colonials outside of Australia and Africa actually demonstrated comparatively remarkable respect for native populations' property rights. James Cook, for example, was instructed *not* to claim crown title to inhabited land,[216] but instead to take land only "with the consent of the natives."[217] Likewise, British colonists in North

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[212] *Delgamuukw*, [1997] 3 S.C.R. at 153 (citations omitted).

[213] 314 U.S. 339 (1941).

[214] *See Delgamuukw*, [1997] 3 S.C.R. at 158.

[215] NETTHEIM, *supra* note 199, at 107–08.

[216] *See* BANNER, *supra* note 102, at 14.

[217] *Id.* Cook's instructions from the government read, in part:

> You are also, with the consent of the natives, to take possession, in the name of the King of Great Britain, of convenient situations in such countries as you may discover, that have not already been discovered or visited by any other European power; and to distribute

America generally purchased land from Native Americans, because during the middle of the eighteenth century it was widely accepted that *terra nullius* did not apply to North America.[218] Around the empire, Britain, unique among the European colonial powers, frequently purchased land instead of seizing it, although colonists at the same time frequently overexploited native's food supplies, thus driving them from their lands.[219] Land was then granted or sold to colonists, who derived rights to their newfound property through this system of crown grants.[220] This system generally remained in place until colonial independence, upon which each newly independent country (for example, Australia) or territory (for example, Hong Kong) dealt with property claims independently.

At present, however, the United Kingdom retains possession of fourteen overseas territories that have yet to secure their independence,[221] including the British Indian Overseas Territories (BIOT), in which the Chagos Archipelago, discussed in the introduction, is located. Of the fourteen territories, only three—Anguilla, Turks and Caicos Islands, and BIOT—were inhabited when the British took control (though this does not include Gibraltar, which was populated by Europeans when the British took it in 1713).[222] Since the deportation of the Chagossians, however, today Anguilla and Turks and Caicos remain the only Overseas Territories with indigenous descendants.

a. Evidence of state practice

Non-British citizen residents of the British Overseas Territories, including the descendants of the indigenous populations of Anguilla and Turks and Caicos, have what is known as "belonger" status, which "confers certain

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among the inhabitants such things as will remain as traces and testimonies of you having been there; but if you find the countries so discovered are uninhabited, you are to take possession of them for his Majesty, by setting up proper marks and inscriptions, as first discoverers and possessors.

COOK, *supra* note 120, at 204.

[218] BANNER, *supra* note 102, at 15.

[219] *See* S.L. MERSHON, ENGLISH CROWN GRANTS: THE FOUNDATION OF COLONIAL LAND TITLES UNDER ENGLISH COMMON LAW 75 (1918).

[220] *See id.* at 76–80.

[221] *See* U.K. Border Agency, http://ukba.homeoffice.gov.uk/britishcitizenship/other nationality /britishoverseasterritories/ (last visited Mar. 9, 2010). The full list of territories includes: Anguilla, Bermuda, British Antarctic Territory, British Indian Ocean Territory, Cayman Islands, Falkland Islands and Dependencies, Gibraltar, Montserrat, Pitcairn, Henderson, Ducie and Oeno Islands, St Helena and Dependencies, the Sovereign Base Areas of Akrotiri and Dhekelia, Turks and Caicos Islands, and the Virgin Islands. *Id.*

[222] The remaining inhabited territories, such as the Falkland Islands and Bermuda, were settled only after the Crown took possession.

privileges, particularly the right to reside in [British territories] without restriction," despite the absence of British citizenship; it also permits belongers the "ability to own real property without the need for an alien landholding license."[223] While this status does not relate to prior claims for land forcibly taken by British colonists, it recognizes these citizens' current property holdings, which stem from the relationship between the crown and its subjects.[224] Courts had, until *Bancoult*, found that belongers have the right not to be excluded from the territory to which they belong, and that such a right is a "fundamental principle" of British common law.[225]

The case law discussing belonger status is limited, although courts have referenced the term in regard to property ownership: for example, "a person has the right to land in Hong Kong if he is a Hong Kong belonger."[226] Moreover, lower courts formally held that the former inhabitants of the Chagos Islands were in fact belongers, and had property rights "derived from Magna Carta, and from common, constitutional and international law."[227] While this classification does not necessarily establish a direct right to property, it does place belongers in a unique dual-category classification, under which they have dormant ancestral rights to their lands to be vested upon independence as well as current property rights stemming from their status as British quasi-nationals.

b. Evidence of opinio juris

As mentioned, United Kingdom case law on indigenous property rights remains incredibly thin, with the *Bancoult* line of cases providing one of the only legal insights into courts' understanding of this issue. Moreover, unlike in Australia and New Zealand, there is significantly less direct evidence of extranational influence on courts' decision-making. But, prior to the Law

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[223] Alex Richardson, *Belonger Status*, THE ANGUILLIAN, May 21, 2007, *available at* http://www.anguillian.com/index.php/article/articleview/4716/1/210/.

[224] R (on the application of Bancoult) v. Sec'y of State for Foreign and Commonwealth Affairs (*Bancoult*), [2008] UKHL 61, [2008] All E.R. 1055, ¶ 70 (appeal taken from Eng.) (U.K.).

[225] *Id.* at ¶ 87. *See also* Campbell v. Hall, [1774] 1 Cowp. 204 (U.K.) (discussion British control over overseas possessions). Belonger status was only created in 1990, however, and thus does not legally apply to the native populations, such as the Chagossians, who were removed prior to the law's enactment.

[226] R v. Sec'y Of State For Foreign and Commonwealth Office ex parte Bancoult [2000] EWHC (Admin) 413, [2001] Q.B. 1067, ¶ 39(appeal taken from Eng.) (U.K.). Although *Bancoult III* later overruled the previous Bancoult decisions, it did so based on (highly debatable) issues unrelated to belonger status.

[227] Chagos Islanders v. Attorney General Her Majesty's British Indian Ocean Territory Comm'r [2003] EWHC 2222, ¶ 117 (Q.B.) (appeal taken from Eng.) (U.K.). The decisions was later overturned, although on separate grounds.

Lords' *Bancoult* ruling, the lower court opinions provided real evidence that Britain was obliged under international law to both return the Chagossians to their ancestral lands and accept their property interests in this territory.[228]

After the initial lower court opinion in 2000, then-Foreign Secretary Robin Cook agreed, as a matter of *domestic* legal obligation, to look into returning the Chagossians to BIOT.[229] But in the final 2008 decision, the court split three-two, with the dissenting Lords arguing heavily in favor of an *internationally* supported common law right not to be deported from one's own homeland, while the majority punted on the issue entirely and ruled instead on a separate issue. However, the majority opinion was highly criticized, and most legal commentators saw the decision as entirely misplaced. It was attacked by many members of the academy, arguing that the court clearly erred when it noted that "international law . . . does not form part of domestic law . . . ."[230] One former government lawyer noted the fact that the Chagossians had been deported decades before played an important role in the court's decision, and that the dissent's "approach would certainly prevail if the government were to try excluding the population from a territory like this today."[231]

Evidence of *opinio juris* in the United Kingdom is admittedly wanting. However, given the unique belonger status of indigenous peoples living within the United Kingdom—most are fully integrated into the societies of their respective territories—and the (mostly) recognized right of abode, there may be less of a clear need for specific property protections than in other parts of the

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[228] *See generally* R (on the application of Bancoult) v. Sec'y of State for Foreign and Commonwealth Affairs [2006] EWHC (Admin) 1038.

[229] Duncan Campbell, *A Sentence of Bitter Irony*, GUARDIAN, Oct. 22, 2008, http://www.guardian.co.uk/commentisfree/2008/oct/22/chagos-islands-law-lords.

[230] *Bancoult* [2008] UKHL 61, [2008] All E.R. at ¶ 66. There is no longer any real debate about the position towards international law taken by British Courts. Since 1977 and the case of *Trendtex Trading Corp. v. Central Bank of Nigeria*, the Law Lords firmly established that international law (the "law of nations") is part of the British common law tradition. *See* Trendtex Trading Corporation v. Central Bank of Nigeria, [1977] 1 Q.B. 529.

> That doctrine [of incorporation] was accepted, not only by Lord Mansfield himself, but also by Sir William Blackstone, and other great names, too numerous to mention. In 1853 Lord Lyndhurst in the House of Lords, with the concurrence of all his colleagues there, declared that . . . the law of nations, according to the decision of our greatest judges, is part of the law of England[.]

Id. (internal quotation marks omitted). Moreover, Britain's ascension to the European Union requires that it follow decisions of the European Court of Justice and the European Court of Human Rights, both of which are also bound by customary international law. *See* Tawhida Ahmed & Israel de Jesús Butler, *The European Union and Human Rights: An International Law Perspective*, 17 EUR. J. INT. L. 771, 776–81 (2006).

[231] Carl Gardner, *R (Bancoult) v. Foreign Secretary*, HEAD OF LEGAL: INDEPENDENT LEGAL COMMENT AND ANALYSIS, Nov. 18, 2008, http://headoflegal.blogspot.com/2008/11/r-bancoult-v-foreign-secretary.html (last visited Mar. 5, 2010).

world. The *Bancoult* decision, although near universally panned,[232] means that for now such a right may not be fully guaranteed.[233]

9. United States

Any discussion of Native American customary property rights in the United States must begin with *Johnson v. M'intosh*,[234] in which Chief Justice Marshall, writing in 1823, delimited the boundaries of Native Americans' property interests. For the United States to exist as a legally recognizable polity, he explained, it must unilaterally possess title to all lands under its dominion. He wrote:

> The existence of this power must negative the existence of any right which may conflict with, and control it. An absolute title to lands cannot exist, at the same time, in different persons, or in different governments. An absolute, must be an exclusive title, or at least a title which excludes all others not compatible with it. All our institutions recognise the absolute title of the crown, subject only to the Indian right of occupancy, and recognise the absolute title of the crown to extinguish that right. This is incompatible with an absolute and complete title in the Indians.[235]

The opinion also noted that, because of their ephemeral use of the land and because they had not demarcated their property in the European sense, Native Americans "could have acquired no proprietary interest in the vast tracts of territory which they wandered over [or] on which they hunted."[236] These assertions seem to preemptively overrule claims of aboriginal title, which require continuous use in order to establish legal title. (But Marshall then hedged this argument, and noted that, while the U.S. could extinguish indigenous land titles through its own sovereign authority, the conqueror did not entirely disregard indigenous groups' land rights, but rather impaired

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[232] *See, e.g., id.*; Matthew Paris, *Lets Resolve These Old Colonial Burdens Now*, THE TIMES (UK) (Nov. 1, 2008) (calling the decision a "stinking disgrace"); Comment, *Islanders Denied Justice*, THE TELEGRAPH (OCT. 22, 2008).

[233] *See* Peter H. Sand, *R (on the application of Bancoult) v. Secretary of State for Foreign and Commonwealth Affairs*, 103 AM. J. INT'L L. 317, 320–21 (2009) (discussing the valuation of royal prerogative over the various treaties). The ruling, which grants greater importance to an ambiguous domestic law rather than Britain's obligations under the European Convention on Human Rights, ICCPR, and other international agreements, does however seem to be on the wrong side of history. *Id.*

[234] 21 U.S. (8 Wheat.) 543 (1823).

[235] *Id.* at 588.

[236] *Id.* at 569.

them—natives still retained rights to their lands, just no longer as sovereign entities.[237])

Naturally, scholars have argued that this European mindset regarding continuous use denigrates seventeenth and eighteenth century Native American society, that many Native Americans did in fact have continuous use of their property, and that the Native American system of land tenure was, similar to the Maori system in New Zealand, not immediately compatible with western notions of property.[238] Yet the American government and courts have dodged this issue through the creation of the trust system of federally administered reservations, which the Supreme Court blessed in its 1831 decision in *Cherokee Nation v. Georgia*.[239]

a. Evidence of state practice

Though Native Americans living on reservations have won greater autonomy during the twentieth century, they still have not achieved legal ownership of any ancestral lands. Although the passage of the Indian Claims Commission Act[240] in 1946 waived sovereign immunity and allowed Native Americans to sue the government for compensation from the takings of their land, few cases have been successful, and most returned property has resulted, instead, from treaty or statute.[241] Moreover, despite the relative autonomy on reservations, Native Americans still reside on federal land, and thus lack basic property rights—they cannot buy or sell the property on which they live—at least in regard to land on the actual reservations.[242] Under federal law, the United States government owns all land comprising the reservations,[243] which is placed in trust on behalf of the different Native American groups. Although they can self-govern, they do not possess the land in fee simple.

Through much of the nineteenth and twentieth centuries, *Johnson v. M'intosh* remained the basis for all land disputes involving Native Americans.

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[237] *See id.* at 574.

[238] *See, e.g.*, THURMAN LEE HESTER, POLITICAL PRINCIPLES & INDIAN SOVEREIGNTY 107 (2001).

[239] 30 U.S. (5 Pet.) 1 (1831). This case, along with *Johnson v. M'Intosh*, U.S. (8 Wheat.) 543 (1823), and *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832), comprises the Marshall Trilogy, which in additional to upholding the trust system stripped most other rights from indigenous Americans. For a brief discussion and an explanation of how the Marshall Trilogy reveals the reality of Native American sovereignty and its present status in trust with the federal government, see Ennis, *supra* note 203, at 603.

[240] 25 U.S.C. § 70 (1946).

[241] *See* NELL JESSUP NEWTON ET AL. EDS., COHEN'S HANDBOOK OF FEDERAL INDIAN LAW: 2005 EDITION 15.9[1][d] (2005) [hereinafter COHEN'S HANDBOOK].

[242] *See id.* at 15.03, 15.06, 15.09.

[243] *See* 25 U.S.C. § 465 (2003) (allowing the federal government to acquire certain lands).

And Native Americans' reservation, land trust, and self-governing rights all stem entirely from federal law,[244] which remains derived from the United States' assumption by conquest of British crown land.[245] Although the Court in *M'intosh* used the discovery doctrine to establish federal authority over Indian land, it also implied the existence of something on par with aboriginal title,[246] although such rights were never expanded or codified.

Under the trust system, Congress retains plenary authority over Native American lands, and courts thus cannot recognize takings claims.[247] Still, courts have continued to acknowledge that aboriginal title does in fact exist, and consequently, that Native Americans' ancestral property claims remain in suspension until relinquished by Congress. For example, in 1985, *United States v. Dann*[248] involved the criminal prosecution of two sisters of the Western Shoshone tribe for grazing their livestock on federal land without a permit.[249] The Supreme Court noted "that *individual* [as opposed to tribal] aboriginal rights may exist in certain contexts."[250] Although a lower court ruled against the Danns on the grounds that they had already been compensated through trust-administered land grants, the case is notable for its contemporary reaffirmation that aboriginal titles can and do exist in American law.[251] What remains is an acceptance that Native Americans do retain original title, and, although suspended, do possess what is known as the "right of occupancy"—the right to retain aboriginal title to land until historical occupancy can be proven.[252] The Court has further held that Native Americans' "right of occupancy is considered as sacred as the fee-simple of the whites.'"[253]

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[244] *See* Sarah Krakoff & Kristen Carpenter, *Repairing Reparations in the American Indian Nation Context*, *in* REPARATIONS FOR INDIGENOUS PEOPLES: INTERNATIONAL AND COMPARATIVE PERSPECTIVES 256–64 (Federico Lenzerini ed., 2008). Statutes such as the Indian Claims Commission Act (1946), which established the Indian Claims Commission to demarcate tribal land for transfer into the trust, and the Indian Child Welfare Act (1978) are examples of federal regulation over Indian affairs. *See id.*

[245] *See* cases and discussion *supra* note 203.

[246] Johnson v. M'intosh, 21 U.S. 574 (1823) ("[T]he rights of the original inhabitants were, in no instance, entirely disregarded.... They were admitted to be the rightful occupants of the soil, with a legal as well as just claim to retain possession of it, and to use it according to their own discretion.").

[247] *See* Tee-Hit-Ton Indians v. United States, 348 U.S. 272, 290–91 (1955) (finding that Indians cannot be compensated for federal takings unless so authorized by Congress).

[248] 470 U.S. 39 (1985).

[249] *Id.*

[250] *Id.* at 50 (emphasis added).

[251] *See* United States v. Dann, 873 F.2d 1189, 1199–200 (9th Cir. 1989) (finding on remand that the Danns did not have continuous possession of the land in question and that aboriginal title did not apply given the facts of the case).

[252] *See generally* United States v. Santa Fe Pac. R.R. Co., 314 U.S. 339, 347 (1941) (recognizing tribal claims to land even if it has no basis in any treaty, statute, or formal

b. Evidence of opinio juris

As is the case in so many other areas of international law, in which the United States frequently serves as the exception to the greater rule or trend, there seems little evidence in United States Indian jurisprudence of *opinio juris*. There seemed at one point a brief opportunity, when the Dann sisters' case went to the Inter-American Commission, which found that the United States government "interfered with the Danns' use and occupation of their ancestral lands."[254] The Commission also reported that the trust system did not adequately compensate the Danns for the loss of their ancestral territory, and thus that their aboriginal title to the land had never been removed.[255] More importantly, the Commission indicated that there might exist an evolving international norm that recognizes indigenous "property and ownership rights with respect to lands, territories and resources they have historically occupied . . . ."[256] However, because the report was nonbinding, the United States government, unlike Belize, chose to ignore it, and thus declined to follow similar precedents followed by other states.[257] This is evidence that the United States does not feel obliged to follow international trends, and cuts against any argument of *opinio juris* in the United States, despite an acceptance, to some extent, of aboriginal title.

10. Bolivia, Ecuador, Guatemala, Mexico, and Peru

The five Latin American countries with the largest indigenous populations (both by number and percentage)—Bolivia, Ecuador, Guatemala, Mexico, and Peru[258]—are all signatories to the Convention Concerning Indigenous and

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government action).

[253] *Id.* at 345 (quoting Mitchel v. United States, 40 U.S. (9 Pet.) 711 (1835)) (internal quotation marks omitted).

[254] Mary & Carrie Dann v. United States, Case 11.140, Inter-Am. C.H.R., Report No. 75/02, OEA/Ser.L./V./II.117, doc. 5, rev. 1 ¶ 2 (2002).

[255] *Id.* at ¶¶ 144–45.

[256] *Id.* at ¶ 130.

[257] *See* Brian D. Tittemore, *Symposium: Lands, Liberties, and Legacies: Indigenous Peoples and International Law: Application of International Law to the Problems of Indigenous Peoples: The Dann Case: The Dann Litigation and International Human Rights Law: The Proceedings and Decision of the Inter-American Commission on Human Rights*, 31 AM. INDIAN L. REV. 593, 616 (2006–2007). There is also little evidence that the Commission's report has been considered by government officials or policymakers. *See id.*

[258] *See* Georgetown University, Political Database of the Americas, Indigenous Peoples, Democracy and Political Participation, http://pdba.georgetown.edu/IndigenousPeoples/demographics.html#guate (last visited Mar. 11, 2010).

Tribal Peoples in Independent Countries (ILO Convention 169).[259] The Convention, ratified by twenty countries, is a binding international instrument that holds: "The rights of ownership and possession of the peoples concerned over the lands which they traditionally occupy shall be recognised. In addition, measures shall be taken in appropriate cases to safeguard the right of the peoples concerned to use lands . . . ."[260] By submitting to the Convention's authority, and by agreeing to it principles, notably the required protections of indigenous ancestral land, all five of these countries have demonstrated their commitment to establish such protections (state practice), and their willingness to do so through international law (*opinio juris*). While treaty law is distinct from customary international law, as has been discussed, scholars, and even United States courts, accept that professed adherence to custom can be inferred from treaties.[261]

11. Non-Post-Colonial Regions: Scandinavia & Asia

a. Scandinavia

In several Scandinavian countries, various national courts have asserted that the longstanding use of ancestral territory can override governmental title. Several Norwegian court decisions have undercut the government's claim that it held title to territory traditionally used by the Sami people (and, while these decisions were based in domestic law, they drew as well on international instruments, including the ICCPR).[262] Similarly, in *Länsman v. Finland*,[263] the United Nations Human Rights Committee (a supranational court) found that Finland was obliged to recognize the rights of Sami reindeer herders to use land for grazing their herds, and that, pursuant to obligations under article 27 of the ICCPR, Finland cannot allow any development or resource extraction if it would infringe on these usage rights.[264] Similar to *Awas Tingni v. Nicaragua*, Finland's subsequent actions protecting Sami land rights were based on

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[259] Convention Concerning Indigenous and Tribal Peoples in Independent Countries, June 27, 1989, 28 I.L.M. 1382 (entered into force Sept. 5, 1991) [hereinafter ILO Convention 169]. For a list of parties to ILO Convention 169, see Parties to Convention No. C169, *supra* note 83. ILO Convention 169 is discussed further later in this article. *See infra* Part III.A.1.

[260] ILO Convention 169, *supra* note 259, at art. 14.

[261] *See generally* Filartiga v. Pena-Irala, 630 F.2d 876, 883 (2d Cir. 1980); *see also infra* notes 279–280 and accompanying text.

[262] *See, e.g.*, Supreme Court of Finland, No. 117 (1995) (protecting traditional Sami reindeer herding); Supreme Administrative Court of Finland, Nos. 692 and 693 (same). *See also* ANAYA, INDIGENOUS PEOPLES, *supra* note 11, at 210 n.60.

[263] Commc'n No. 511/1992, Human Rights Comm., 52d Sess., U.N. Doc. CCPR/C/52D/511/1992 (1994).

[264] *See generally id.*

international treaty obligations, not on customary international law. Still, Finland's acceptance that such protections were required under the ICCPR demonstrates cognizance of such land protections as an international legal issue and not merely a domestic affair.

b. Asia

Although most Asian nations lack a post-colonial relationship with their indigenous populations, many have begun to recognize similar property interests. In Malaysia, for example, a 1997 high court decision reaffirmed aboriginal title rights similar to those in Australia.[265] In *Adong bin Kuwau & Ors v. Kerajaan Negeri Johor & Anor*,[266] the Malaysian Supreme Court held that the plaintiffs, a group of natives living in an area purchased by the state for the construction of a dam, had common law rights "to live on their land as their forefathers had lived and this would mean that even future generations of the aboriginal people would be entitled to this right of their forefathers."[267] The court did not halt the construction of the dam; however, it did order that the indigenous people's ancestral attachment to the land be taken into account when determining compensation.[268]

Most importantly, the Malaysian high court spent a considerable part of its opinion discussing non-domestic sources of indigenous legal rights:

> I will now proceed to examine the legal rights—or generally what is known as native peoples' rights—has gained much recognition after the Second World War, with the establishment of the United Nations of which the UN Charter guarantees certain fundamental rights. Native rights have been greatly expounded on by courts in Canada, New Zealand and Australia restating the colonial laws imposed on native rights over their lands. It is worth noting that these native peoples' traditional land rights are now firmly entrenched in countries . . .—namely Canada, New Zealand and Australia—where special statutes have been enacted or tribunals set up in order for natives to claim a right over their traditional lands. In Malaysia, as we do not have special statutes or tribunals, the courts is the only forum whereby the natives can make their claim, and this case being the first of such a claim of an Aboriginal group in Malaysia. I will now set out the plaintiffs' right under the different headings of common law, statutory law and under the *Federal Constitution*.[269]

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[265] *See* Peter Crook, *After Adong: The Emerging Doctrine of Native Title in Malaysia*, 2005 J. MALAY. COMP. L. 3 (2005).

[266] [1997] 1 MLJ 418.

[267] *Id.* at 430.

[268] *Id.* at 425.

[269] *Id.* at 426 (internal quotation marks omitted).

In the court's discussion of common law, it further performed a survey of the important jurisprudence from several post-colonial countries. The Chief Justice expressly recognized the support of the *Calder* and *Mabo* cases, as well as "a common law right which the natives have and which the Canadian and Australian courts have described as native titles."[270] This is clear evidence of *opinio juris*.

There have been additional developments throughout the continent. In Taiwan, where over 430,000 indigenous Malayo-Polynesians still reside,[271] the government in 1999 signed an agreement with leaders of the indigenous communities that guaranteed the native population property rights over certain ancestral areas set aside by the government.[272] Although the government has not ceded territorial autonomy to these indigenous groups, it did grant them some degrees of title, including cultivation, land surface, and lease rights.[273]

As in many western countries in which legal protections for minorities preceded the establishment of derivative rights for indigenous peoples, a number of Asian countries, including Japan and China, are currently addressing issues concerning minority rights.[274] If these rights are granted, it may mean greater protections for indigenous peoples. In India, on the other hand, land reform dominates any discussion of minority property rights, despite some existing laws that protect certain tribal, or "Adivasi"[275] lands, including a 1954 law that protects the interests "of aboriginal tribes in their land by restricting land transfer from tribal to non-tribal."[276]

Such recognitions, however, are not universal, as courts in some Asian countries have refused to expand protections for indigenous groups. In Indonesia, for example, courts have rejected the lawsuits of several native tribes suing to prevent environmental degradation of their land.[277] Likewise,

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[270] *Id.* at 430.

[271] *Act Amended to Help Aborigines Reinstate Status*, TAIWAN NEWS, Nov. 15, 2008, at 4, *available at* http://www.etaiwannews.com/etn/news_content.php?id=788995.

[272] *See* Phutoli Shikhu Chingmak, *International Law and Reparations for Indigenous Peoples in Asia*, *in* REPARATIONS FOR INDIGENOUS PEOPLES: INTERNATIONAL AND COMPARATIVE PERSPECTIVES 561 (Federico Lenzerini ed., 2008).

[273] *See id.* at 462.

[274] *See id.* at 419–26.

[275] *See* Immigration & Refugee Bd. of Canada, *India: Information on the Treatment of Adivasis by the Government, Particularly in the state of Bihar*, Oct. 1, 1995, http://www.unhcr.org/refworld/topic,463af2212,488edf542,3ae6ac6650,0.html (last vistited Jan. 30, 2010). "Adavasi" is the generic Indian name for tribal people, and covers some "200 tribes speaking over 100 languages . . . constituting 7.5% of the Indian population." *Id.*

[276] MAHENDRA LAL PATEL, AGRARIAN TRANSFORMATION IN TRIBAL INDIA 98 (1998).

[277] *See generally* Aderito de Jesus Soares, *Reparations for Masyarakat Adat in Indonesia: A Sombre Tale*, *in* REPARATIONS FOR INDIGENOUS PEOPLES: INTERNATIONAL AND COMPARATIVE PERSPECTIVES (Federico Lenzerini ed., 2008).

indigenous peoples in Thailand and Cambodia, while often afforded relative autonomy in their isolated enclaves, do not maintain permanent property rights to their land.

Although there is certainly not an established progression of expanding indigenous property rights in Asia, the fact that lawsuits are now being brought, combined with the success of indigenous peoples in Taiwan and Malaysia (which accept the relevant international norms), demonstrate an emerging awareness of the issues throughout the continent. While this in no way categorically predicts the widespread recognition of these property rights, the emergence of a pattern is similar to that which began in the Western hemisphere and former British Empire.

C. In Totality: Accumulated State Practice and Opinio Juris

As discussed, evidence of combined state practice and *opinio juris* are needed to prove the existence of international custom.[278] Unlike the relatively unanimous blanket prohibitions on slavery or genocide that have led to the establishment of international custom and *jus cogens*, however, each of the aforementioned countries has taken a relatively unique approach in their treatment of indigenous nationals, and each has granted different types and levels of property recognition. Because of the varying degrees of recognition, and because of the different ways in which countries look to the international arena for explanation of the law, there is currently no unified understanding of aboriginal title, international obligations to protect indigenous real property, or how to accommodate indigenous populations. While extranational influences unquestionably pervade the various domestic legal dialogues, there does not appear a single set of uniformly followed standards—outside, perhaps, of *Mabo* as a basis for many countries' own understandings of aboriginal title.

What there is, however, is a set of common denominators, certain principles on which most of the aforementioned nations seem to agree. For example, the concept that indigenous peoples have some inherent right to live on their ancestral land may appear overly simple, yet such action is practiced almost uniformly, and many nations discussed herein have expressed validation of such a norm in both domestic law and in the international arena. And although the various countries manifest this understanding differently—through direct land grants, enhanced citizenship protections (such as the United Kingdom's belonger status), or by holding the land in trust—they all appear to share a belief in some basic indigenous land exception, or right. Moreover, while no international consensus exists regarding how such rights are manifested, there

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[278] *See supra* Parts I.B–C. *See also* MICHAEL AKEHURST, A MODERN INTRODUCTION TO INTERNATIONAL LAW 25–26 (1984).

is, at least, and as discussed through this Part, an emerging web of interrelated high court judicial decisions that courts are using as authority in this area. These decisions evince a belief that the laws pertaining to indigenous peoples do not stop at national borders. As more countries rely on (and add to) this growing body of case law and transnational jurisprudence, evidence of *opinio juris* will continue to emerge. Many of the international declarations, agreements, and background laws related to this issue, and discussed in the next Part, demonstrate this trend.

III. CONVENTIONS, DECLARATIONS, AND BACKGROUND PRINCIPLES: SECONDARY INDICATORS OF CUSTOMARY INTERNATIONAL LAW

As discussed in Parts I and II, customary international law is predominantly derived from the practices of individual states and from evidence of *opinio juris*. Outside of these two principal indicators, however, secondary evidence can be drawn from materials outside of state practice, domestic laws, and judicial decisions. While no definitive list of additional indicators of customary international law exists, jurists generally consider a variety of secondary sources. The *Restatement (Third) of Foreign Relations Law of the U.S.* explains that "the practice of States that builds customary law takes many forms and includes what States do in or through international organizations,"[279] and that international conventions "constitute practice of States and as such can contribute to the growth of customary law . . . ."[280] While treaties are not categorically informative of state practice nor codifications of customary law, they can provide clues as to state understanding or international legal obligations. As Mark Villager explains:

> For written rules to have any value in the formative process of customary law, further *instances of material practice*, in conjunction with the written rules, are required. It is not the written text which contributes towards customary law, but the instances whereby States apply these rules in a concrete case, or refer to them, or vote upon them, which do so. When the customary rule has eventually developed, the written text may *reflect, or provide evidence of, the customary rule*.[281]

The UN International Law Commission agrees, explaining that bilateral and multilateral agreements often, though not categorically, provide some evidence

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[279] RESTATEMENT OF FOREIGN RELATIONS, *supra* note 19, § 102. "The United Nations General Assembly in particular has adopted resolutions, declarations, and other statements of principles that in some circumstances contribute to the process of making customary law, insofar as statements and votes of governments are kinds of state practice." *Id.* at n.2.

[280] *Id.* at cmt. i.

[281] MARK E. VILLIGER, CUSTOMARY INTERNATIONAL LAW AND TREATIES: A MANUAL ON THE THEORY AND PRACTICE OF THE INTERRELATION OF SOURCES 26 (1997) (citations omitted).

of customary law.[282] Although state laws remain the primary foundational basis for customary international law, treaties (as well as declarations and other international instruments) relevant to an emerging custom must thus still be assessed, both for their normative value and potential codification of, or at least pronounced interest in, an established or emerging custom. This Part then examines the recent major international declarations and conventions that relate to indigenous property rights, and demonstrates the existence of additional supplemental evidence supporting an emerging customary aboriginal right to ancestral real property.

A. Treaties and Conventions

Treaties and conventions, unlike declarations, are binding legal instruments. They indicate their signatories' real intention to abide and be bound by the treaty provisions. While there is no universal treaty that binds all nations regarding the treatment of their indigenous populations, there are currently several limited treaties that address or have been held to apply to indigenous land rights. And while the treaties technically apply only to their state parties, court opinions such as the Belize Mayan Townships case demonstrate that such treaties have their own normative powers that extend beyond their signatories.[283]

1. International labor organization conventions

Of all UN agencies and international organizations, the International Labor Organization (ILO) seems an odd department to assume the task of expanding the rights of indigenous people. Founded with the Treaty of Versailles and tasked with "secur[ing] and maintain[ing] fair and humane conditions of labour of men, women and children,"[284] the ILO, in early meetings, issued proposed standards on labor issues such as maternity protection, working hours, and the employment of children.[285] However, per its constitution, the ILO also

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[282] Int'l Law Comm'n, *supra* note 16, at ¶ 29. ("For present purposes, therefore, the Commission deems it proper to take some account of the availability of the materials of conventional international law in connexion [sic] with its consideration of ways and means for making the evidence of customary international law more readily available.").

[283] The Belizean High Court relied on an International Labor Organization treaty to which Belize was not a party in its Mayan Township decision. *See supra* text accompanying note 172.

[284] LUIS RODRIGUEZ-PINERO, INDIGENOUS PEOPLES, POSTCOLONIALISM, AND INTERNATIONAL LAW: THE ILO REGIME (1919–1989) 8 (2005) (quoting Treaty of Peace between the Allied Powers and Germany art. 23(a), June 28, 1919).

[285] *See* Int'l Labor Org., Origins and History, http://www.ilo.org/global/About_the_ILO/Origins_and_history/lang--en/index.htm (last visited Mar. 11, 2010).

established competency over issues pertaining to "social justice,"[286] which enabled it in later years to expand its purview. Although it began investigating issues related to indigenous rights during the decolonization movement in the 1950s, states frequently chided the organization for stepping outside its core competencies.[287] Yet it persisted, and in 1957 the ILO issued the first international convention affirming the rights of indigenous peoples.[288] Although only eighteen countries ratified the convention,[289] and although it was later criticized for encouraging the integration (and resulting cultural homogenization) of indigenous peoples,[290] its passage established in the ILO a rightful competence in indigenous-related areas.

The ILO took center stage in the debate over indigenous rights when it convened a second treaty on indigenous rights nearly thirty years later: ILO Convention 169 concerning Indigenous and Tribal Peoples in Independent Countries, which has since been ratified by twenty countries.[291] Several other countries, notably Canada, were expected to ratify the convention but backed down under pressure from domestic indigenous groups upset with their inability to participate in the convention's drafting[292] and what they viewed as its lack of scope.[293] The treaty, considered by many to be the most authoritative

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[286] International Labour Organization Constitution pmbl., *available at* http://www.ilo.org/ilolex/english/constq.htm.

[287] *See* RODRIGUEZ-PINERO, *supra* note 284, at 129–30 ("The question of competence became most prominent during the project of drafting international labour standards capable of affecting—no matter how modestly—state practice in relation to indigenous groups, a realm traditionally considered as belonging to the sphere of state sovereignty . . . . Concern over the ILO's lack of competence was particularly strong in relation to . . . the definition of the indigenous land property regime and cross-boundary contact between indigenous groups . . . .").

[288] *See* Indigenous and Tribal Populations Convention, June 26, 1957.

[289] *See* Int'l Labour Org., Parties to Convention No. C107, http://www. ilo.org/ilolex/cgi-lex/ratifce.pl?C107 (last visited Mar. 8, 2010) (listing States that ratified ILO Convention 107).

[290] *See* RODRIGUEZ-PINERO, *supra* note 284, at 141; ALEXANDRA XANTHAKI, INDIGENOUS RIGHTS AND UNITED NATIONS STANDARDS: SELF-DETERMINATION, CULTURE AND LAND 280 (2007) ("Notwithstanding its integrationist and paternalistic character, ILO Convention No. 107 recognized basic indigenous rights whose violations were pertinent at the time of its adoption and forced states parties to take systematic and coordinated action for the protection of indigenous peoples.").

[291] *See* Parties to Convention No. C169, *supra* note 83. As of 2008, the following countries are party to the Convention: Argentina, Bolivia, Brazil, Chile, Colombia, Costa Rica, Denmark, Dominica, Ecuador, Fiji, Guatemala, Honduras, Mexico, Nepal, Netherlands, Norway, Paraguay, Peru, Spain, and Venezuela. *See id.*

[292] *See* VENNE, *supra* note 89, at 92.

[293] Particularly frustrating was the first article of the convention, which reads: "The use of the term 'peoples' in this Convention shall not be construed as having any implications as regards the rights which may attach to the term under international law." ILO Convention 169, *supra* note 259, at art. 1(3). This provision was one of the most contentious points in the treaty's adoption, but was eventually inserted to prevent indigenous groups from exercising self-

international convention on indigenous rights,[294] highlights the "special importance for the cultures and spiritual values of the peoples concerned of their relationship with the lands or territories,"[295] and requires governments to "take steps as necessary to identify the lands which the peoples concerned traditionally occupy, and to guarantee effective protection of their rights of ownership and possession."[296] The treaty also provides that indigenous peoples shall not be removed from their lands except when "considered necessary as an exceptional measure," and then that they be allowed to return to their land as soon as possible, or else compensated "with lands of quality and legal status at least equal to that of the lands previously occupied by them, suitable to provide for their present needs and future development."[297]

Signatories to Convention No. 169 must "ensure that agencies or other appropriate mechanisms exist to administer the programmes affecting the peoples concerned."[298] In Norway, for example, the ratification of the treaty directly led the creation of domestic laws expanding rights for the Sami, an indigenous people numbering around 60,000 and residing in the north of the country.[299] Relying on these new laws, Norwegian courts established in a number of cases[300] the existence of customary property rights based on longstanding use, and have even overridden the government's title to traditional Sami land.[301] Similarly, the Colombian Supreme Court, relying in large part on

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determination rights that are afforded to 'peoples' in international law. *See* VENNE, *supra* note 89, at 91–92; Federico Lenzerini, *The Trail of Broken Dreams: The Status of Indigenous Peoples in International Law*, *in* REPARATIONS FOR INDIGENOUS PEOPLES: INTERNATIONAL AND COMPARATIVE PERSPECTIVES 84–85 (Federico Lenzerini ed. 2008).

[294] *See, e.g.*, Peter Manus, *Sovereignty, Self-Determination, and Environment-Based Cultures: The Emerging Voice of Indigenous Peoples in International Law*, 23 WIS. INT'L L.J. 553, 592 (2005) (characterizing the convention as "[p]erhaps the strongest contemporary statement of international responsiveness to indigenous peoples' demands"); ANAYA, INDIGENOUS PEOPLES, *supra* note 11, at 58 ("Convention No. 169 of 1989[ ] is a central feature of international law's contemporary treatment of indigenous people's demands."); MARÍA ELENA GARCÍA, MAKING INDIGENOUS CITIZENS: IDENTITIES, EDUCATION, AND MULTICULTURAL DEVELOPMENT IN PERU 51 (2005) ("ILO 169 was recognized as occupying a privileged place in an emerging international regime of norms that legitimated indigenous demand.").

[295] ILO Convention 169, *supra* note 259, at art. 13(1).

[296] *Id.* at art. 14(2).

[297] *Id.* at art. 16(2), 16(4).

[298] *Id.* at art. 33(1).

[299] *See* Cent. Intelligence Agency, The World Factbook: Norway, https://www.cia.gov/library/publications/the-world-factbook/geos/no.html (last visited Mar. 9, 2010).

[300] *See* The Selbu Case (2001) (S.C.) (Nor.) (finding that reindeer herders' rights to land on which they had historically grazed their herds trumped official title to the land); The Svartskogen Case (2001) (S.C.) (Nor.) (holding that the Sami people's traditional use of an area for hunting and gathering preempted a governmental claim to the land based on purchased title).

[301] *See* Lawrence Watters, *Indigenous Peoples and the Environment: Convergence from a*

ILO Convention 169, to which Colombia is a signatory, recently struck down a 2006 environmental law because it infringed on the property and autonomous rights of "comunidades indígenas y afrocolombianas"—indigenous and afro-Colombian communities.[302]

ILO Convention 169 is binding only in the twenty signatory states, although many commentators (and, as mentioned, some courts) suggest that the convention has deeper implications in international law. Anaya explains:

> The convention is further meaningful as part of a larger body of developments that can be understood as giving rise to a new customary international law with the same normative thrust. Since the 1970s, the demands of indigenous peoples have been addressed continuously in one way or another within the United Nations and other international venues of authoritative normative discourse . . . . It is now evident that States and other relevant actors have reached a certain new common ground about minimum standards that should govern behavior towards indigenous peoples, and it is already evident that the *standards are already in fact guiding behavior.*[303]

Other courts are also recognizing the convention as a source of law. In the previously discussed Awas Tingni case, the Inter-American Court of Human Rights referenced in their opinion several witnesses who included Convention No. 169 as evidence of a growing body of customary international indigenous rights. And, as discussed, in the Mayan case in Belize, the country's supreme court concluded that "although Belize has yet to ratify Convention No. 169 . . . it is not in doubt that Article 14 of this instrument contains provisions concerning indigenous peoples right to land that resonate with the general principles of international law regarding indigenous peoples."[304] Again, this reference is particularly foretelling, as the high court of a non-party state to ILO Convention 169 has still affirmed the convention's influence in the development of international custom.

2. Relevant UN conventions and treaties

The major UN-sponsored multilateral human rights conventions of the past fifty years—the UN Charter, Genocide Convention, International Covenant on Civil and Political Rights (ICCPR),[305] and the International Covenant of

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Nordic Perspective, 20 UCLA J. ENVTL. L. & POL'Y 237, 288–89 (2001).

[302] *See* Demanda de inconstitucionalidad contra la Ley 1021 de 2006 "Por la cual se expide la Ley General Forestal," Sentencia C-030/08.

[303] ANAYA, INDIGENOUS PEOPLES, *supra* note 11, at 61 (emphasis added).

[304] Aurelio Cal v. Attorney General of Belize, Claim Nos. 171 & 172, ¶ 130 (Sup. Ct. Oct. 18, 2007) (Belize), *available at* http://www.law.arizona.edu/Depts/iplp/advocacy/maya_belize/documents/ClaimsNos171and172of2007.pdf.

[305] International Covenant on Civil and Political Rights, *adopted and opened for signature*

Economic, Social and Cultural Rights—have conspicuously avoided a discussion of indigenous rights. Instead, these agreements, notably the 1976 ICCPR, ratified by 163 countries,[306] addressed the need for the protection of minority rights.[307] The ICCPR also created the Human Rights Committee, an investigative body (similar in nature to the aforementioned Inter-American Commission) tasked with reviewing potential violations of the covenant.[308] And the Committee, in a number of cases, pronounced that indigenous groups did constitute minorities,[309] and in one case found that the Canadian government had hastened the cultural destruction of an indigenous minority group by expropriating its land.[310] In another case, this time involving the Sami people in Finland,[311] the Human Rights Committee implied that major encroachments into native peoples' lands that threatened the destruction of their livelihoods might in fact violate the ICCPR.[312]

Despite these interpretations, the absence of treaty language specifically addressing indigenous peoples persisted until the near-global ratification of, interestingly, the 1989 Convention on the Rights of the Child,[313] which for the

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and ratification Dec. 16, 1966, 999 U.N.T.S. 171 [hereinafter Civil & Political Rights].

[306] UN Treaty Collection, Status of the Int'l Covenant on Civil and Political Rights, http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&lang=en (last visited Mar. 12, 2010) (listing all parties to the ICCPR).

[307] *See, e.g.*, International Convention on the Elimination of All Forms of Racial Discrimination art. 2, *adopted and opened for signature and ratification* Dec. 21, 1965, 660 U.N.T.S. 195, http://www2.ohchr.org/English/law/pdf/cerd.pdf ("States Parties shall, when the circumstances so warrant, take, in the social, economic, cultural and other fields, special and concrete measures to ensure the adequate development and protection of certain racial groups or individuals belonging to them, for the purpose of guaranteeing them the full and equal enjoyment of human rights and fundamental freedoms."); Civil & Political Rights, *supra* note 305, at art. 27 ("In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language.").

[308] Civil & Political Rights, *supra* note 305, at art. 41 ("A State Party to the present covenant may at any time declare under this article that it recognizes the competence of the Committee to receive and consider communications to the effect that a State Party claims that another State Party is not fulfilling its obligations under the present Covenant.").

[309] *See, e.g.*, Länsman et al. v. Finland, Commc'n No. 671/1995, Human Rights Comm., 58th Sess., U.N. Doc. CCPR/C/58/D/671/1995 (1996); Lovelace v. Canada, Commc'n No. 24/1977, Human Rights Comm., 36th Sess., Supp. No. 40, U.N. Doc. A/36/40 (1981).

[310] *See* Lubicon Lake Band v. Canada, Commc'n No. 167/1984, Human Rights Comm., 38th Sess., U.N. Doc. CCPR/C/38/D/167/1984 (1990). The Canadian government later responded to the committee's opinion by establishing a land reserve for the group.

[311] *See supra* Part II.B.11.a.

[312] *See* Länsman et al. v. Finland, Commc'n No. 511/1992, Human Rights Comm., 52d Sess., U.N. Doc. CCPR/C/52D/511/1992 (1994).

[313] Amnesty International USA, Convention on the Rights of the Child Frequently Asked

first time included in a major multilateral treaty the term "indigenous" alongside "ethnic, religious [and] linguistic minorities."[314]

3. Regional treaties

Several conventions also exist at the regional level. The American Convention on Human Rights, ratified by twenty-five American nations,[315] has been interpreted to apply protections to indigenous peoples, including their rights to ancestral property.[316] In Africa, the African [Banjul] Charter on Human and Peoples' Rights includes language interpreted to apply to indigenous peoples,[317] which courts and the African Commission on Human and People's Rights have relied on to establish native groups' collective right to land and, if violated, due compensation and resettlement.[318] The EU also has its own human rights convention,[319] which has even been ratified by a number of non-EU member states, though it has yet to be interpreted to imply additional protections for indigenous peoples or lands. This could change with the appearance of the Chagossian case before the European Court of Human Rights, which was heard after the British Government again refused to settle the case in the summer of 2009.[320]

Questions, http://www.amnestyusa.org/children/crn_faq.html (last visited Mar. 12, 2010). Only Somalia and the United States have not ratified the Convention. *Id.* Opposition in the United States stems predominantly from religious conservatives concerned with issues relating to "national sovereignty, States' rights, and the parent-child relationship." *Id. See also* David M. Smolin, *Overcoming Religious Objections to the Convention on the Rights of the Child*, 20 EMORY INT'L L. REV. 81 (2006).

[314] Convention on the Rights of the Child art. 30, *adopted and opened for signature, ratification, and accession* Nov. 20, 1989, 1577 U.N.T.S. 3.

[315] *See* Organization of American States, American Convention on Human Rights "Pact of San Jose, Costa Rica," http://www.oas.org/juridico/English/sigs/b-32.html (last visited Mar. 12, 2010) (listing party States).

[316] *See* Mayagna (Sumo) Awas Tingni Cmty. v. Nicaragua, 2001 Inter-Am. Ct. H.R. (ser. C) No. 79, at ¶ 2 (Aug., 31, 2001).

[317] Federico Lenzerini, *The Trail of Broken Dreams: The Status of Indigenous Peoples in International Law*, *in* REPARATIONS FOR INDIGENOUS PEOPLES: INTERNATIONAL AND COMPARATIVE PERSPECTIVES 90 (Federico Lenzerini ed. 2008).

[318] *See* The Social and Economic Rights Action Ctr. and the Ctr. for Econ. & Social Rights v. Nigeria, African Comm. on Human and Peoples' Rights, Comm. No. 155/96 (2001). *See also* Lenzerini, *supra* note 317, at 91; discussion *supra* Part II.B.6.

[319] European Convention on Human Rights, Nov. 4, 1950, 213 U.N.T.S. 222.

[320] *See* David Snoxell, Letter to the Editor, *Chagossians, Injustice and the Foreign Office*, THE TIMES (UK), Aug. 5, 2009. The court should reach its decision by autumn 2010. Catherine Philip, *Conservationists Thrilled by Ruling on Chagos Islands? Not really . . .*, THE TIMES (UK), Apr. 2, 2010.

B. Soft Law: Declaration on the Rights of Indigenous Peoples

Though lacking any binding authority, international declarations, such as those conceived by the UN General Assembly, provide additional evidence of international understandings of particular issues or laws. In fact, traditionally, resolutions and declarations *are* cited as a source of customary international law.[321] The U.S. Second Circuit, in one of the most cited cases on the application of international law in U.S. courts, explained in *Filartiga v. Pena-Irala* that "a U.N. Declaration is, according to one authoritative definition, a formal and solemn instrument, suitable for rare occasions when principles of great and lasting importance are being enunciated."[322] Although nonbinding, declarations can be seen as indicative of national and international opinion, and thus, of customary, though not treaty-based, international law.[323] Again, because of the inherent vagueness of custom, no declaration is itself dispositive; rather, such declarations merely add to a totality of evidence needed to prove a custom's emerging existence.

In September 2007, the UN General Assembly (UNGA) overwhelming passed the Declaration on the Rights of Indigenous Peoples, the first major UNGA declaration specifically addressing indigenous issues. The declaration sought to protect indigenous cultures and peoples by enshrining basic religious, cultural, civil and property rights into international law.[324] It also specifically addressed an indigenous right to ancestral territory, finding that:

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[321] *See* Jack L. Goldsmith & Eric A. Posner, *A Theory of Customary International Law*, 66 U. CHI. L. REV. 1113, 1117 (1999) ("United Nations General Assembly Resolutions and other nonbinding statements and resolutions by multilateral bodies are often viewed as evidence of [customary international law]."). This is also discussed in Jonathan I. Charney, *Universal International Law*, 87 AM. J. INT'L L. 529, 543–44 (1993):

> [M]ultilateral forums often play a central role in the creation and shaping of contemporary international law. Those forums include the United Nations General Assembly and Security Council, regional organizations, and standing and ad hoc multilateral diplomatic conferences, as well as international organizations devoted to specialized subjects. Today, major developments in international law often get their start or substantial support from proposals, reports, resolutions, treaties or protocols debated in such forums . . . . [This] process draws attention to the rule and helps to shape and crystallize it.

[322] Filartiga v. Pena-Irala, 630 F.2d 876, 883 (2d Cir. 1980) (citing Memorandum of the Office of Legal Affairs, U.N. Secretariat, 34 U.N. ESCOR, Supp. (No. 8) 15, U.N. Doc. E/cn.4/1/610 (1962) (internal quotation marks omitted)).

[323] *See generally* LOUIS B. SOHN & THOMAS BUERGENTHAL, INTERNATIONAL PROTECTION OF HUMAN RIGHTS (1973) (arguing amongst other contentions that UNGA resolutions are an important part of international law).

[324] *See* United Nations Declaration on the Rights of Indigenous Peoples, G.A. Res. 61/295, Annex, at art. 1, U.N. Doc A/Res/61/295 (Sept. 13, 2007) ("Indigenous peoples have the right to the full enjoyment, as a collective or as individuals, of all human rights and fundamental freedoms as recognized in the Charter of the United Nations, the Universal Declaration of

> 1. Indigenous peoples have the right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired.
> 2. Indigenous peoples have the right to own, use, develop and control the lands, territories and resources that they possess by reason of traditional ownership or other traditional occupation or use, as well as those which they have otherwise acquired.
> 3. States shall give legal recognition and protection to these lands, territories and resources. Such recognition shall be conducted with due respect to the customs, traditions and land tenure systems of the indigenous peoples concerned.[325]

The declaration also called for states to create mechanisms for vesting indigenous groups with legal title to their lands,[326] and advocated for "compensation, for the lands, territories and resources which they have traditionally owned . . . and which have been confiscated, taken, occupied, used or damaged."[327]

Unfortunately, the only four countries that initially voted against the declaration—the United States, Canada, Australia,[328] and New Zealand—have significant indigenous populations. These countries objected mostly to the declaration's lack of clarity regarding redress and its vague statements on self-determination and autonomy.[329] At the time, Australia was unhappy with what it saw "as encouraging action that would impair, even in part, the territorial and political integrity of a state with a system of democratic representative Government" (though Australia has since changed tune and signed on to the declaration). Canada saw the declaration as overly broad and possibly in conflict with parts of the Canadian Constitution as well as treaties it had already signed with Native Americans. The United States explained that the declaration conflicted with its federal law, which affords Native Americans their own legal status and creates a "government-to-government relationship with Indian tribes."[330] President Obama however had expressed willingness to

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Human Rights and international human rights law.").

[325] *Id.* at art. 26.

[326] *Id.* at art. 27.

[327] *Id.* at art. 28.

[328] *See* Emma Rodgers, *Aust Adopts UN Indigenous Declaration*, ABC NEWS, Apr. 3, 2004, *available at* http://www.abc.net.au/news/stories/2009/04/03/2534210.htm (Australia has since reversed its decision and, as of April 2009, signed onto the Declaration).

[329] *See* Wiessner, *supra* note 94, at 1160. *See also* U.N. Dep't of Pub. Info., *General Assembly Adopts Declaration on Rights of Indigenous Peoples: 'Major Step Forward' Towards Human Rights for All, Says President*, Sept. 13, 2007, http://www.un.org/News/Press/docs/2007/ga10612.doc.htm (last visited Feb. 20, 2010).

[330] Wiessner, *supra* note 94, at 1160. For a discussion of the government-to-government relationships, see Janet Reno, U.S. Department of Justice, Department Of Justice Policy On Indian Sovereignty and Government-To-Government Relations with Indian Tribes, http://www.justice.gov/ag/readingroom/sovereignty.htm (last visited Apr. 24, 2010):

sign the declaration,[331] though no action has been taken at the time of writing. New Zealand, on the other hand, specifically objected to the land provisions, explaining that their "entire country was potentially caught within the scope of the [declaration]."[332] While these four nations all have large indigenous populations, and thus carry more weight than their number would indicate, many of the 143 countries that voted in favor of the declaration too have large numbers of native inhabitants. Moreover, the objections are not indicative of a categorical refusal to confer property rights to native groups, but are instead real concerns by countries whose territorial integrity[333] might be threatened by a particular item in the declaration.[334] The Canadian government expressly noted as such, and that despite some concerns, it was "generally supportive of the aims of the Declaration."[335]

Although nonbinding, the declaration serves as a starting point for future establishment of conventions bringing its concepts into force. Upon its signing, former UN Secretary General Kofi Annan called upon all countries to integrate "the rights of indigenous peoples into international human rights and development agendas . . . so as to ensure that the vision behind [the] Declaration becomes a reality."[336] UN Special Rapporteur José Martinez Cobo suggested that the declaration is merely a "stepping stone to a Convention on

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> In accord with the status of Indian tribes as domestic dependent nations, the Department is committed to operating on the basis of government-to-government relations with Indian tribes.
>
> Consistent with federal law and other Departmental duties, the Department will consult with tribal leaders in its decisions that relate to or affect the sovereignty, rights, resources or lands of Indian tribes. Each component will conduct such consultation in light of its mission.

For further discussion of this role, see generally COHEN'S HANDBOOK, *supra* note 240.

[331] *See* USA: Obama Might Back UN Indigenous Declaration, GÁLDU, http://www.galdu.org/web/index.php?odas=3592&giella1=eng (last visited Mar. 30, 2010).

[332] *General Assembly Adopts Declaration*, *supra* note 329.

[333] *See, e.g.*, Reference re Secession of Quebec, [1998] 2 S.C.R. 217 (Can.). The Canadian high court established that Canada had a legal right under international law to territorial integrity. While the declaration does not on its face threaten such territorial integrity, one possible interpretation might suggest otherwise.

[334] *See* Indian and Northern Affairs Canada, Canada's Position: United Nations Draft Declaration on the Rights of Indigenous Peoples, http://www.ainc-inac.gc.ca/ap/ia/pubs/ddr/ddr-eng.asp (last visited Feb. 20, 2010). Australia, New Zealand, and the United States were also concerned with issues of self-determination and succession. *See id.* The three countries released a statement explaining that the Declaration "could be misrepresented as conferring a unilateral right of self-determination and possible secession . . . thus threatening the political unity, territorial integrity and the stability of existing UN Member States." *Id.*

[335] *Id.*

[336] U.N. Office of the Spokesperson for the Secretary-General, Statement attributable to the Spokesperson for the Secretary-General on the adoption of the Declaration on the Rights of Indigenous Peoples (Sept. 13, 2007), http://www.un.org/apps/sg/sgstats.asp?nid=2733.

the Rights of Indigenous Peoples,"[337] just as the nonbinding 1948 Declaration of Human Rights later spawned the ICCPR and other human rights conventions.

In aggregate, the various treaties and conventions—namely ILO 169, the ICCPR, the Declaration on the Rights of Indigenous Peoples, and the several regional treaties—point in multiple directions. On one hand, almost all countries have engaged in some pronouncement of some indigenous rights to their ancestral lands, though the majority of these countries have refrained from signing a binding commitment. And on that same hand, a number of states have gone even farther, signed the ILO convention, and used that as a vehicle to codify an internationally agreed-upon right into domestic law. On the other hand, however, many countries have expressed willingness to sign the nonbinding declaration, but have not gone further and given a binding commitment in a more formal treaty. As such, and like the evidence of state practice and *opinio juris* provided in Part II, the aggregate secondary evidence remains convincing, but similarly nondispositive.

IV. APPLICATION OF ACCUMULATED EVIDENCE TO CONTEMPORARY UNDERSTANDINGS OF CUSTOM

In the preceding Parts, this article laid out a series of relevant developments—in domestic laws and judicial opinion, multilateral conventions, and international declarations—relating to the issue of indigenous peoples' property rights. Relying on these factual developments, it now seeks to apply them to our contemporary understanding of customary international law, and demonstrate that such an international custom may in fact exist, or at minimum may be said to be emerging.

As discussed, although the ICJ and most countries recognize custom as a principal source of international law,[338] several ICJ opinions have blurred its definition,[339] resulting in an unsatisfactory explanation of how to determine custom. The ALI's Restatement attempts to clarify this confusion, and explains that in addition to looking to the actual "practice of States,"[340] observers must

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[337] ANNA MEIJKNECHT, TOWARDS INTERNATIONAL PERSONALITY: THE POSITION OF MINORITIES AND INDIGENOUS PEOPLES IN INTERNATIONAL LAW 153 (2001).

[338] *See* Statute of the ICJ, *supra* note 18, at art 38 (mentioning "international custom, as evidence of a general practice accepted as law").

[339] *See, e.g.*, Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226 (July 8) (finding the right of self-defense to be customary but finding no customary prohibitions on the use of nuclear weapons); North Sea Continental Shelf Cases, 1969 I.C.J. 3 (Feb. 20) (finding that Germany, having taken no part in the creation of a custom, exempted it from having to follow that custom).

[340] RESTATEMENT OF FOREIGN RELATIONS, *supra* note 19, at § 102 ("Practice of States . . . includes diplomatic acts and instructions as well as public measures and other governmental acts

also give "substantial weight" to "judgments and opinions of international judicial and arbitral tribunals; judgments and opinions of national judicial tribunals; the writings of scholars; [and] pronouncements by states that undertake to state a rule of international law, when such pronouncements are not seriously challenged by other states."[341] Following this more concrete restatement, this Part applies the developments in indigenous property protections discussed in the preceding Parts through these four customary international law factors: (1) state practice, including state involvement in international agreements; (2) *opinio juris*; (3) judgments of international and national tribunals; and (4) the writings of scholars.

A. State Practice

In all of the previously discussed countries, there exists a clear recognition of aboriginal natives as a distinct minority group deserving of additional real property protections—although each state carves out their own mechanism or legal regime in creating these protections. Even prior to the rulings in *Mabo* or *Ngati Apa*, Australia and New Zealand recognized—out of guilt, shame, or perhaps political necessity—the need to afford the Aborigine and Maori populations heightened protections to ensure legal equality.[342] Canada and South Africa, like the Antipodes, have more or less incorporated aboriginal title into their common laws; their high courts have also provided rulings that indicate a shift toward guaranteeing additional real property protections. In Nicaragua, the government's conciliatory acceptance of the Awas Tingni's rights to control and possess their ancestral lands in response to an Inter-American Court of Human Rights ruling affirms the obligatory nature of the state's action. In Belize, after the Supreme Court verified in the Mayan Villages case the existence of a customary international right to native title, the ongoing implementation process affirmed the government's commitment to abide by this evolving norm (though it has yet to be seen how that case is applied more generally to the other indigenous tribes not party to the original suit).

In the United States, the system of land trusts and the extensive legislation on Indian tribal sovereignty, for example the 1982 Indian Mineral Development Act,[343] which allows tribes to negotiate the sale of minerals or resources located on their lands, affords Native Americans certain sovereign rights beyond those of average Americans (though some might rightly argue that these "additional"

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and official statements of policy, whether they are unilateral or undertaken in cooperation with other States.")

[341] *Id.* at § 103.

[342] *See supra* Parts II.B.1–2. *See also* BANNER, *supra* note 102, *passim*.

[343] 25 U.S.C. §§ 2101–2108 (2004).

rights pale in comparison to those that Native Americans have lost). In Scandinavia and parts of Asia, courts have led the way in prompting national governments to provide recognitions of native lands. Conversely, in the Latin American (and other) countries that have signed on to ILO Convention 169, the political branches of government have taken the lead in creating protective regimes. All of these developments, as well as others discussed herein, indicate an increased level of protection for—and more importantly national desires to protect—indigenous groups.

States also demonstrate their intentions in conventions and declarations; thus, "for evidence of the practices of States we must therefore look, at least sometimes, beyond actions done to the intentions expressed."[344] The *Restatement (Third) of Foreign Relations Law of the U.S.* too reminds us that even "[i]nternational agreements that do not purport to codify customary international law may in fact do so" and that "[i]nternational agreements may also help create customary law of general applicability."[345] As such, we can infer and discover additional state practice directly from relevant treaties and declarations.

ILO Convention 169, then, in addition to binding the twenty signatory states, expresses at least some (albeit limited) international consensus on the need to create additional protections for indigenous peoples. More recently, the near unanimous passage of the Declaration on the Rights of Indigenous Peoples also seems to convey international ideals, and, similar to the 1948 Universal Declaration of Human Rights, could easily lead to future binding agreements. While the objections of Canada, New Zealand, and the United States to the declaration may indicate that they do not support it, their reservations, as expressed by the countries themselves, were predicated more on the general vagueness of the language and a few more discrete points, not its overall

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[344] PARRY, *supra* note 23, at 66.

[345] RESTATEMENT OF FOREIGN RELATIONS, *supra* note 19, § 102, n.5. The Restatement further explains that:

> States often pronounce their views on points of international law, sometimes jointly through resolutions of international organizations that undertake to declare what the law is on a particular question, usually as a matter of general customary law. International organizations generally have no authority to make law, and their determinations of law ordinarily have no special weight, but their declaratory pronouncements provide some evidence of what the States voting for it regard the law to be. The evidentiary value of such resolutions is variable. Resolutions of universal international organizations, if not controversial and if adopted by consensus or virtual unanimity, are given substantial weight. Such declaratory resolutions of international organizations are to be distinguished from those special "law-making resolutions" that, under the constitution of an organization, are legally binding on its members.

Id. at § 103, cmt. g.

message.[346] Conversely, many of the nations that supported the declaration have since made further statements affirming the need to move towards a global recognition of indigenous rights and to make sure those rights are implemented domestically. For example, the Swedish Ambassador to the UN said that "Sweden looked forward to discussing the implementation of the Declaration with Sami representatives," and noted that "the Sami's relationship to the land was at the heart of the matter."[347] Likewise, the Brazilian delegation "underscore[d] that the exercise of the rights of indigenous peoples was consistent with the sovereignty and territorial integrity of the states in which they resided."[348]

While the norm-spreading values of the declaration have yet to be manifested, state reactions will likely be varied. Yet, as discussed, a lack of consistency in measures taken to confer land rights does not preclude the establishment of custom. States will likely respond to the declaration differently, perhaps by signing on to an eventual successor treaty, or alternatively by simply creating domestic protections (through the legislative process or judicial order). And as Anaya explains, "a lack of perfect uniformity in the relevant practice and opinion does not negate [a] norm's existence."[349]

B. International Evidence of Opinio Juris

The *opinio juris* element provides the most difficult hurdle in attempting to prove the existence of a customary international law protecting indigenous peoples' lands. Although there is real evidence that various state high courts are looking to other countries and to an emerging international consensus in crafting their own domestic laws,[350] there is not yet a single, agreed-upon definition of what states owe to their own indigenous populations. What can be said, however, and what is argued herein, is that the development of this consensus has begun and will continue to occur in the international legal arena. As discussed throughout Part II, many states with large indigenous populations

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[346] *See supra* Part III.B. On the other hand, the statements of these four countries may in fact be pretextual, and they may not agree at all with the principles of the declaration. Most likely, given the relative size of the indigenous populations, the four countries in fact want to create their own unique solutions for their own indigenous communities. Although the objecting countries have, to different extents, established aboriginal title in their respective common laws, each has so far created unique mechanisms to further the property interests of indigenous peoples. Australia and New Zealand created special courts to oversee the issue, Canada relies predominantly on a system of treaties with native groups, while the United States maintains the trust system.

[347] U.N. Dep't of Pub. Info., *supra* note 329.

[348] *Id.*

[349] ANAYA, INDIGENOUS PEOPLES, *supra* note 11, at 72.

[350] *See generally supra* Part II.

are looking to each other for explication of their own legal obligations to their indigenous inhabitants. As high courts continue to cite to one another, an international consensus on aboriginal title, the relationships between native customary law and modern law, and negative and positive international legal obligations all continue to develop. However, until courts begin to make the leap and cite to an international norm instead of various domestic rulings, the *opinio juris* element in our case may not fully be satisfied. Put another way, until one court is willing to take a leap of faith (the immaculate conception moment), an international custom will likely remain undefined.

There might exist, however, at least among the states discussed herein, the psychological element of *opinio juris*.[351] States as diverse as Australia, New Zealand, Malaysia, Nicaragua, and Belize indicate a belief not just that other nations may need to protect indigenous property rights, but also that they are part of a greater movement towards establishing permanent international custom. Such a movement is best captured in Australia's recent decision to support the UN Declaration on Indigenous Peoples, in which the government explicitly recognized "'the legitimate entitlement of Indigenous peoples to all human rights'" (including possession of property), thus repudiating the previous government's concerns about "the Declaration [being] divisive and elevat[ing] customary law above national law."[352] And like Australia, more countries are starting to accept that there is a place for the supremacy of international law—by treaty and custom—with respect to this issue.

C. Judicial Decisions

1. Judgments of international judicial bodies

Although the Statute of the ICJ notes that "[t]he decision of the Court has no binding force except between the parties and in respect of that particular case,"[353] the *Restatement (Third) of Foreign Relations Law of the United States* explains that, "[i]n any event, to the extent that decisions of international tribunals adjudicate questions of international law, they are persuasive evidence of what the law is."[354] The International Committee on the Red Cross has held similarly.[355] Courts such as the Inter-American Court of Human Rights, the

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[351] *See supra* text accompanying notes 71–75.

[352] Amy McQuire, *Rudd Government Endorses UN Declaration on the Rights of Indigenous Peoples*, NATIONAL INDIGENOUS TIMES, Apr. 3, 2009, *available at* http://www.nit.com.au/story.aspx?id=17427.

[353] Statute of the ICJ, *supra* note 18, at art. 59.

[354] RESTATEMENT OF FOREIGN RELATIONS, *supra* note 19, at § 103, cmt. b.

[355] *See* CUSTOMARY INTERNATIONAL HUMANITARIAN LAW, *supra* note 25, at xxxiv ("[International courts'] decisions have nonetheless been included because a finding by an

European Court of Human Rights, and the Human Rights Committee all fall within this category. As one commentator explains, "[p]articularly with respect to the domestic legal systems of the Western settler States, the emerging international legal discourse of indigenous human rights holds significant transformative potential."[356]

In the Awas Tingni Case, the Inter-American Court of Human Rights found that although the human rights treaties to which Nicaragua was party did not include any language specifically protecting indigenous peoples, Nicaragua was required per its general human rights obligations and its obligation under the American Convention on Human Rights to "adopt in its domestic law . . . the legislative, administrative, and any other measures necessary to create an effective mechanism for delimitation, demarcation, and titling of the property of indigenous communities, in accordance with their customary law, values, customs and mores."[357] The Inter-American Commission found similarly in the Dann Sisters case,[358] though its findings were only investigatory in nature and nonbinding.

The UN Human Rights Committee, in interpreting and enforcing the ICCPR, has arrived at similar conclusions. Commenting on Australia in 2000, the Committee noted "positive developments towards recognizing the land rights of the Aboriginals and Torres Strait Islanders through judicial decisions," but held that Australia still needed to "take the necessary steps in order to secure for the indigenous inhabitants a stronger role in decision-making over their traditional lands and natural resources."[359] More recently, the Committee issued a similar opinion with regard to Panama, which already recognizes indigenous ancestral property rights and, like many countries in the Americas, allows indigenous groups a high degree of autonomy on their *comarcas*, or reservations.[360] The Committee instructed Panama to go even further, by "recogniz[ing] the rights

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international court that a rule of customary international law exists constitutes persuasive evidence to that effect. In addition, because of the precedential value of their decisions, international courts can also contribute to the emergence of a rule of customary international law by influencing the subsequent practice of States and international organizations.")

[356] Robert A. Williams, Jr., *Encounters on the Frontiers of International Human Rights Law: Redefining the Terms of Indigenous Peoples' Survival in the World*, 1990 DUKE L. J. 660, 670 (1990).

[357] Mayagna (Sumo) Awas Tingni Cmty. v. Nicaragua, 2001 Inter-Am. Ct. H.R. (ser. C) No. 79, at ¶ 173 (Aug. 31, 2001).

[358] *See supra* notes 251–256 and accompanying text.

[359] U.N. Human Rights Comm., *Concluding observations of the Human Rights Committee: Australia* (July 24, 2000), ¶¶ 498–528, *available at* http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/A.55.40,paras.498-528.En (internal citations omitted).

[360] *See, e.g.*, MANAGING PROTECTED AREAS: A GLOBAL GUIDE 568 (Michael Lockwood et al. eds., 2006).

of indigenous communities that live outside the *comarcas*, including the right to collective use of their ancestral lands."[361]

The recent African Commission on Human and Peoples' Rights regarding the Endorois people in Kenya[362] provides further evidence that courts are finding protections of indigenous lands to be part of the more generalized right to property. And as discussed, the commission (and then the court) there found that Kenyan state encroachment onto Endorois land was "not proportionate to any public need and is not in accordance with national and *international* law."[363]

Though the European Court of Human Rights has yet to rule on any cases involving the issue or produce any rulings on the matter, its ruling in the Chagossian case, expected in late 2010, may however change this.

2. Judgments of domestic courts

Opinions such a *Mabo* in Australia[364] and *Ngati Apa* in New Zealand[365] indicate domestic belief that aboriginal possession and title transcends the legal regimes of colonial rulers, and that such rights remain extant today. Courts in Canada and South Africa have similarly ruled that aboriginal title is part of domestic common law, and even though such title can be extinguished, it persists if indigenous groups can demonstrate continuous usage or occupation at the time the land was annexed by the Crown.

The Belizean High Court in the Mayan Villages Case went even further, explaining "that both customary international law and general principles of international law would require that Belize respect the rights of its indigenous people to their lands and resources."[366] Recent cases in Argentina[367] and

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[361] UN Human Rights Committee: Concluding observations of the Human Rights Committee: Panama. 24/07/2000 at 5.

[362] *See supra* Part II.B.6.

[363] *Endorois Welfare Council v. Kenya*, *supra* note 190, at 63 (emphasis added).

[364] Mabo v. Queensland II (*Mabo II*) (1992) 175 C.L.R. 1, at ¶ 95 (Austl.) (holding that Australia "is not entitled to extinguish the title of the [Aboriginal] people").

[365] *Attorney-General v. Ngati Apa* [2003] 3 N.Z.L.R. 643, at ¶ 184 (C.A.) (N.Z.) (holding that "the concept of title, as used in the expression Maori customary title, should not necessarily be equated with the concepts and incidents of title as known to the common law of England," as the "concepts of Maori customary title depend on the customs and usages").

[366] Aurelio Cal v. Attorney General of Belize, Claim Nos. 171 & 172, ¶ 127 (Sup. Ct. Oct. 18, 2007) (Belize), *available at* http://www.law.arizona.edu/Depts/iplp/advocacy/ maya_belize/ documents/ClaimsNos171and172of2007.pdf. The court also specifically noted the existence of this issue in customary international law, and explained that "both customary international law and the general principles of international law are separate and apart from treaty obligations, binding on States as well." *Id.*

[367] *See* Church World Service-USA, *Argentine Chaco Guarani People Win Titles to their Own Lands*, REUTERS ALERTNET, Oct. 8, 2008, http://mobile.alertnet.org/thenews/ fromthefield/

Brazil[368] have reached similar, albeit less far-reaching conclusions. The United States Supreme Court has not recently addressed aboriginal title, although the Ninth Circuit in *Dann Sisters* affirmed the existence of aboriginal title, so long as the claimant was in possession of the land at the time the federal government sought to extinguish title.[369] While not all domestic courts have fully accepted complete aboriginal title or retroactive grants of title to native inhabitants, a significant number of post-colonial states have made significant headway in demonstrating their support for some sort of title establishment, even if such titles remain pending or in trust.

Admittedly, no domestic court has admitted to the specific existence of a customary norm protecting indigenous ancestral land. But as the previous sections suggest, in lieu of this leap of faith moment, the current body of evidence may at least suffice to indicate a near-acceptance of such international law.

D. Writings of Scholars

The *Restatement* and the Statute of the ICJ both point to the writing of scholars as a meaningful, though subsidiary, means for determining customary international law.[370] Also, the *Restatement* in particular notes the importance of "writings of authors of standing" and "resolutions of scholarly bodies" such as the International Law Commission and International Law Association (ILA).[371]

S. James Anaya, one of the foremost experts on the relationship between indigenous peoples and international law,[372] and recently appointed as the UN

284081/122347076637.htm. The Argentina High Court in September 2008 granted collective title over 16 square miles to an indigenous group. *See id.*

[368] In December 2008, the Brazilian Constitutional Court ruled that farmers had no rights to farm on land set aside for indigenous Brazilians, and that the Constitutional grant of territory was both legal and obligatory. *See* Adriana Brasileiro, *Brazil Supreme Court Rejects Challenge to Indian Land*, BLOOMBERG.COM, Dec. 10, 2008, http://www.bloomberg.com/apps/news?pid=20601086&sid=abGX9atDaa9M&refer=latin_america; *Brazilian Indians 'Win Land Case'*, BBC NEWS, Dec. 11, 2008, http://news.bbc.co.uk/1/hi/world/americas/7774895.stm.

[369] *See generally* United States v. Dann, 873 F.2d 1189 (9th Cir. 1989). The Supreme Court noted in *U.S. v. Dann*, 470 U.S. 39 (1985), only that it has "recognized that individual aboriginal rights may exist in certain contexts, [but that] this contention has not been addressed by the lower courts and, if open, should first be addressed below. We express no opinion as to its merits." *Dann*, 470 U.S. at 50.

[370] *See* RESTATEMENT OF FOREIGN RELATIONS, *supra* note 19, at § 103, reporters' n.1 ("Such writings include treatises and other writings of authors of standing; resolutions of scholarly bodies such as the Institute of International Law (Institut de droit international) and the International Law Association; draft texts and reports of the International Law Commission, and systematic scholarly presentations of international law such as this Restatement.").

[371] *Id.*

[372] Anaya chairs the International Law Association forum on Indigenous Peoples.

Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous Peoples, has argued that that customary norms regarding the treatment of indigenous peoples do in fact exist, and flow predominantly from the now accepted *jus cogen* norm of self-determination.[373] He argues that, at least within the Americas, the aggregate of international conventions and domestic laws and court rulings "constitutes customary international law, which should inform any assessment of indigenous peoples' rights over lands and natural resources."[374] Similarly, others contend that that the UN Declaration on the Rights of Indigenous Peoples is in fact a restatement of current customary international law.[375] However, given the objections of the several states and the confusion surrounding the definition of "peoples," such analysis may extend too far. The International Law Association (ILA) says as much, and as of 2008 was unsure whether the declaration had yet "crystallised into customary law."[376] However, the ILA noted "the importance of lands, territories and resources to indigenous peoples," and announced that a top upcoming priority was to "overview pertinent state practice and *opinio juris* in order to ascertain to what extent, if any, the Declaration's articles on land rights reflect pre-existing customary international law."[377]

E. Totality: Does Custom Exist?

Customary international law exists when states feel obligated to follow what they accept as a fundamental international norm. Moreover, not all states have to agree in order for custom to be established.[378]

As explained in the preceding sections, the practice of many states seem to indicate an understanding that indigenous peoples (1) are afforded protections beyond those given to normal citizens; (2) that those protections in some way

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[373] ANAYA, INDIGENOUS PEOPLES, *supra* note 11, at 289–90.

[374] S. James Anaya & Robert A. Williams, Jr., *The Protection of Indigenous Peoples' Rights Over Lands and Natural Resources Under the Inter-American Human Rights System*, 14 HARV. HUM. RTS. J. 33, 36 (2001).

[375] *See* Wiessner, *supra* note 94, at 1176.

[376] Int'l Law Ass'n, Rio de Janeiro Conference (2008), Rights of Indigenous Peoples: First Report (Draft), at 3, *available at* http://www.ila-hq.org/en/committees /index.cfm/cid/1024 (follow "Conference Report Rio 2008" hyperlink).

[377] *Id.* at 9.

[378] *See* RESTATEMENT OF FOREIGN RELATIONS, *supra* note 19, at § 103, cmt. E ("The practice of States in a regional or other special grouping may create 'regional,' 'special,' or 'particular' customary law for those States inter se. It must be shown that the state alleged to be bound has accepted or acquiesced in the custom as a matter of legal obligation, 'not merely for reasons of political expediency.' Asylum Case (Colom. v. Peru), 1950 I.C.J. 266, 277 (Nov. 20). Such special customary law may be seen as essentially the result of tacit agreement among the parties.").

relate to aboriginal lands; and (3) that a not insignificant part of domestic decision-making is driven from the international arena. The decisions of adjudicatory bodies such as the UN Human Rights Committee and the Inter-American Court of Human Rights, as well as the opinions of various domestic courts in post-colonial and other countries, seem to affirm the underpinnings of the state practice—and perhaps this too is evidence of *opinio juris*—and indicate that states favor movement towards some basic right of indigenous peoples to have property interests in their ancestral territories. Moreover, the overwhelming international support of the UN Declaration on the Rights of Indigenous Peoples and the voices of various courts and scholars also provide support for this cause.

On one hand, there exists this body of evidence indicating that many countries are looking to each other (and to international courts) for help on what the law should be, while at the same time declaring in the UN the ideal of legal protection for indigenous ancestral property. On the other, there is the lack of explicit statements indicating the existence of this customary norm (although given the chicken-or-egg nature of emerging custom, this is not necessarily surprising), as well as the American, and to a lesser extent Canadian and New Zealand, resistance to accepting influence from the international area. Another saving grace might be that many domestic high courts throughout world have yet to rule on the issue, but that trends indicate that courts are supportive of recognizing indigenous property claims; such additional state practice will no doubt help expand the custom.

At the moment, however, the current body of evidence seems to imply only a generally recognized principle that states must create some protections for indigenous ancestral land. But can this in itself be considered custom? While it lacks the specificity of some established customary laws (such as, for example, the norm providing for diplomatic immunities), it may share certain features with, say, the more generalized (and real) customary international legal protections for prisoners of war.[379] In both cases, a base concept—that prisoners of war have a right to certain treatment, and the indigenous peoples have certain rights to their traditional lands—serves (or might serve) as the basis for international custom. And in the murky world of customary international law, such vagueness and generality is frequently sufficient.

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[379] Most commentators see the provisions of the Geneva Convention as having achieved customary international law status. *See, e.g.*, Michael L. Kramer & Michael N. Schmitt, *Lawyers On Horseback? Thoughts on Judge Advocates and Civil-Military Relations*, 55 UCLA L. REV. 1407, 1425 n.92 (2008) (noting that even the United States "considers much of the Protocol as reflective of customary international law").

CONCLUSION

This article examines evidence of an emerging customary international norm recognizing indigenous peoples' rights to their ancestral lands. The article also attempts to gauge whether the available evidence is sufficient to pronounce the existence of custom. Given the variety of evidence, it concludes that such a custom appears to be emerging, at least in a general sense; time may thus reveal further development, as nations with indigenous populations feel out the waters of international opinion and jurisprudence and work on crafting domestic laws and court decisions in line with those of other nations (and possibly also in line with what they imagine an international norm to be). By outlining the factors needed to prove the existence of custom, and by reviewing contemporary practices of states with large indigenous populations, the article shows that evidence of such a custom is both real and accumulating. However, certain delays, such as U.S., Canadian, and New Zealand objections to the UN Declaration, the lack of evidence that the United States looks at all to international law in determining how to treat indigenous property, or the simple lack of jurisprudence on the issue in many states, prevent this accumulation of evidence from reaching a dispositive tipping point. What is left instead is a consensus that natives' ancestral lands must be protected—though the specifics remain undefined and left to individual states.

Future legal decisions, and more importantly other nations' responses to those decisions, may provide further clarity. However, at present, the body of evidence appears sufficient to suggest some consensus that certain protections should be guaranteed. While these are likely insufficient for those advocating for the granting of fee simple property title to all indigenous lands, the current emerging custom should provide reassurance that indigenous rights and land protection remain on the international agenda, and that a customary international norm protecting indigenous lands may in fact still emerge.

Caught in the Backdraft: The Implications of *Ricci v. DeStefano* on Voluntary Compliance and Title VII

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I. INTRODUCTION

Municipal fire departments across the nation had long discriminated against minorities when Congress extended Title VII of the Civil Rights Act of 1964 (Title VII) to public employment.[1] Only after decades of litigation and diligent efforts have doors opened for minorities in these departments.[2] But in 2009's *Ricci v. DeStefano*,[3] the U.S. Supreme Court delivered a blow to the spirit and purpose of Title VII—equality in employment opportunities and the removal of barriers that have favored an identifiable group of employees.[4] The Court, split five to four along ideological lines, held that the City of New Haven's effort to remedy perceived discrimination against minority firefighters in a promotion examination actually discriminated against white firefighters.[5]

This divisive case generated a swarm of publicity in connection with the nomination of then-Second Circuit appellate judge Sonia Sotomayor to the U.S. Supreme Court.[6] Before *Ricci* reached the Supreme Court, Justice Sotomayor

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[1] *See* Ruth Colker, *Rank-Order Physical Abilities Selection Devices for Traditionally Male Occupations as Gender-Based Employment Discrimination*, 19 U.C. DAVIS L. REV. 761, 762 (1986); Ricci v. DeStefano, ___ U.S. ___, 129 S. Ct. 2658, 2690 (2009) (Ginsburg, J., dissenting).

[2] *See* MICHAEL K. BROWN ET AL., WHITE-WASHING RACE: THE MYTH OF A COLOR-BLIND SOCIETY 187 (2003) ("[W]hen Title VII was applied to state and local governments in 1972, it pried open police and fire departments across the country—among the most notorious public bastions of white privilege—for working-class African Americans." (cited in Michael Z. Green, *Finding Lawyers for Employees in Discrimination Disputes as a Critical Prescription for Unions to Embrace Racial Justice*, 7 U. PA. J. LAB. & EMP. L. 55, 88 (2004))); *Ricci*, ___ U.S. at ___, 129 S. Ct. at 2690.

[3] *Ricci*, ___ U.S. ___, 129 S. Ct. 2658.

[4] *See* Title VII of the Civil Rights Act, 42 U.S.C. §§ 2000e-2000e-17 (2006).

[5] *Ricci*, ___ U.S. at ___, 129 S. Ct. at 2664.

[6] Greg Stohr, *Sotomayor Firefighter Ruling Fuels Debate Over Court Nomination*,

served on the Second Circuit's three-judge panel that reviewed *Ricci* on appeal. In a per curiam opinion, the panel held that the City of New Haven did not violate Title VII when it discarded firefighter promotion examination results to avoid discriminating against minority candidates.[7]

One month after Sotomayor's nomination, in a highly publicized decision, the Supreme Court reversed the Second Circuit's per curiam opinion.[8] The extensive publicity surrounding the decision "pumped fuel into the fight" over her confirmation,[9] with critics arguing that her decision in *Ricci* was evidence of a racial bias.[10] *Ricci*, however, was a case of first impression with no guiding Supreme Court precedent.

In 2004, the City of New Haven Civil Service Board ("City") refused to validate the results of two firefighter promotion exams in which white candidates disproportionately out-performed minorities.[11] The City explained that it threw out the results to avoid a disparate impact[12] against minorities in violation of Title VII.[13] Certain firefighters whom the City likely would have promoted based on their test results, however, sued the City of New Haven, alleging that discarding the results of the promotion examination constituted disparate treatment[14] in violation of Title VII.[15] Faced with an unprecedented conflict between two Title VII doctrines—disparate impact and disparate treatment—the Court established a new standard to reconcile the two principles: the "strong-basis-in-evidence" standard.[16] The Court held that "race-based action like the City's in this case is impermissible under Title VII unless the employer can demonstrate a *strong basis in evidence* that, had it not taken the action, it would have been liable under the disparate-impact statute."[17]

This note argues that the Court's strong-basis-in-evidence standard is misguided because it discourages employers from voluntarily correcting selection procedures that adversely affect a group of applicants. And it contravenes established precedent and Congressional intent. The Court's strong-basis-in-evidence standard also departs from its own precedent regarding

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BLOOMBERG.COM, June 30, 2009, *available at* http://www.bloomberg.com/apps/news?pid=20601070 &sid=a.1toKnBz8lw.

[7] Ricci v. DeStefano, 530 F.3d 87, 87 (2008).

[8] *Ricci*, ___ U.S. ___, 129 S. Ct. 2658.

[9] Stohr, *supra* note 6.

[10] Chris Good, *Ricci Takes the Stand*, THE ATLANTIC, July 16, 2009, *available at* http://www.theatlantic.com/politics/archive/2009/07/ricci-takes-the-stand/21461/.

[11] Ricci v. DStefano, 554 F. Supp. 2d 142, 144-45 (D. Conn. 2006).

[12] *See infra* section III for further explanation of Title VII and disparate impact.

[13] *Ricci*, 554 F. Supp. 2d at 151.

[14] *See infra* section III for further explanation of Title VII and disparate treatment.

[15] *Ricci*, ___ U.S. at ___, 129 S. Ct. at 2664.

[16] *Id.* at ___, 129 S. Ct. at 2674, 2676.

[17] *Id.* at ___, 129 S. Ct. at 2664 (emphasis added).

analogous challenges against race-conscious affirmative action measures. This note proposes an alternative standard applicable when an employment examination produces a significant statistical disparity: An employer that discards employment examination results because of a statistical disparity between groups should not be liable for disparate treatment if the disparity is substantial enough to establish a prima facie case of disparate impact.[18]

Part II of this note provides an overview of *Ricci v. DeStefano*. Part III briefly explains disparate treatment and disparate impact to provide a conceptual grounding of the seeming conflict between the two Title VII doctrines. Part IV presents Supreme Court precedent that establishes voluntary compliance as the preferred means of accomplishing Title VII's goals. This note also discusses social science theories that highlight the role voluntary compliance plays in furthering these goals. Finally, Part V examines the Court's strong-basis-in-evidence standard and demonstrates how it hinders voluntary compliance and contradicts precedent regarding race-conscious remedial employment action. Part V then proposes an alternative standard: An employer that invalidates statistically disparate test results is not liable for disparate treatment so long as the employer shows that the disparity constitutes a prima facie case of disparate impact.

II. AN OVERVIEW OF *RICCI V. DESTEFANO*

In 2003, 118 New Haven firefighters took a "merit-based" employment examination to qualify for promotions to lieutenant or captain positions.[19] The stakes were high; the test results would determine which firefighters the City would consider for a promotion in the next two years, as well as the order in which the City would award their promotions.[20] To the City's surprise, white firefighters overall significantly outperformed minority candidates on both the lieutenant and captain exams.[21] As a result, the City could not consider any minority candidates for immediate promotion to lieutenant and could only immediately consider two minority candidates for captain.[22]

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[18] *See* 1 BARBARA T. LINDERMANN & PAUL GROSSMAN, EMPLOYMENT DISCRIMINATION LAW 122 (C. Geoffrey Weirich ed., 4th ed. 2007). A plaintiff establishes a prima facie case of disparate impact liability upon presenting evidence that an employment policy causes statistically significant adverse impact on a protected class. *Id.* See *infra* section III B, for further explanation.

[19] *Ricci*, ___ U.S. at ___, 129 S. Ct. at 2664.

[20] *Id.*

[21] *Id.*

[22] *Id.* at ___, 129 S. Ct. at 2666.

Vying for eight vacant lieutenant positions, forty-three whites, nineteen blacks, and fifteen Hispanics completed the lieutenant exam.[23] Thirty-four candidates passed; of those, there were six blacks and three Hispanics.[24] In accordance with the city charter that governed the selection process, only the top ten candidates were eligible for immediate promotion to lieutenant.[25] All ten eligible candidates were white.[26]

Forty-one applicants completed the captain exam: twenty-five whites, eight blacks, and eight Hispanics.[27] The twenty-two captain candidates who passed included sixteen whites, three blacks, and three Hispanics.[28] Nine candidates were then eligible for an immediate promotion to captain. Seven were white.[29]

City officials, concerned about the significant statistical racial disparity, considered discarding the results, prompting a heated public debate.[30] Some argued that the examination results showed that the test discriminated against minorities and threatened a discrimination lawsuit if the city promoted candidates based on those results.[31] Other firefighters argued that the test was fair and neutral and threatened a reverse discrimination lawsuit if the City discarded the results and denied promotions to firefighters who were eligible based on the examination results.[32] Ultimately, the City discarded the disparate results.[33]

Seventeen white firefighters and one Hispanic firefighter who were eligible for promotion ("petitioners") sued the City, the mayor, and other officials, alleging racial discrimination in violation of Title VII of the Civil Rights Act of 1964, and the Equal Protection Clause of the Fourteenth Amendment.[34] The City, in response, asserted that it discarded the test results to comply with Title VII's disparate impact provision.[35] The petitioners characterized the City's rationale as pretextual and argued that the City would not have been liable for disparate impact.[36]

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[23] *Id.*

[24] *Id.*

[25] Ricci v. DeStefano, ___ U.S. ___, 129 S. Ct. 2658, 2666 (2009).

[26] *Id.*

[27] *Id.*

[28] *Id.*

[29] *Id.*

[30] *Id.* at ___, 129 S. Ct. at 2664.

[31] Ricci v. DeStefano, ___ U.S. ___, 129 S. Ct. 2658, 2664 (2009).

[32] *Id.*

[33] *Id.*

[34] *Id.* The Court did not reach the Equal Protection claim because it decided the case on statutory grounds. *Id.* at ___, 129 S. Ct. at 2672.

[35] *Id.*

[36] *Id.* at ___, 129 S. Ct. at 2695.

The United States District Court for the District of Connecticut granted the City summary judgment, explaining that the "intent to remedy the disparate impact of the prior exams is not equivalent to an intent to discriminate against non-minority applicants."[37] The United States Court of Appeals for the Second Circuit in a per curiam opinion affirmed the district court decision, stating that the petitioners had no viable Title VII claim.[38] The Second Circuit explained that because the board was "simply trying to fulfill its obligations under Title VII when confronted with test results that had a disproportionate racial impact, its [refusal to validate the exams was] protected."[39]

However, in a five to four opinion,[40] the Supreme Court reversed the Second Circuit's judgment.[41] Pitting the disparate treatment and disparate impact doctrines of Title VII against each other, the Court concluded that even if an employer's ultimate motive in changing an employment practice is to comply with Title VII's disparate-impact provision, the decision is a "race-based action" that normally constitutes prohibited disparate-treatment discrimination.[42]

To reconcile the seeming conflict between the two doctrines, the Court created a new standard: Race-based actions violate Title VII unless the employer can demonstrate a "strong basis in evidence that, had it not taken the action, it would have been liable under the disparate-impact statute."[43] The Court, while failing to further explain what constitutes a "strong basis in evidence," held that the City did not meet this standard. Thus, according to the Court, the City's rejection of the promotion exams violated Title VII.[44]

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[37] *Ricci*, 554 F. Supp. 2d at 158-59 (quoting Hayden v. County of Nassau, 180 F.3d 42, 51 (2nd Cir. 1999)) (internal quotation marks omitted), *aff'd per curiam*, 530 F.3d 87 (2nd Cir. 2008), *rev'd* ___ U.S. ___, 129 S. Ct. 2658 (2009).

[38] Ricci v. DeStefano, 530 F.3d 87, 87 (2nd Cir. 2008), *rev'd* ___ U.S. ___, 129 S. Ct. 2658 (2009).

[39] *Id.*

[40] Justice Kennedy authored the majority opinion, joined by Chief Justice Roberts and Justices Scalia, Thomas, and Alito. Ricci v. DeStefano, ___ U.S. ___, 129 S. Ct. 2658, 2663 (2009). Justice Scalia filed a concurring opinion, and Justice Alito filed a concurring opinion in which Justices Scalia and Thomas joined. *Id.* Justice Ginsburg wrote a dissenting opinion, joined by Justices Stevens, Souter and Breyer. *Id.*

[41] *Id. at* ___, 129 S. Ct. at 2681.

[42] *Id.* at ___, 129 S. Ct. at 2674.

[43] *Id.* at ___, 129 S. Ct. at 2664 (internal quotation marks omitted). The Court adopted the strong-basis-in-evidence standard from its Equal Protection analysis of government action to remedy past racial discrimination, rationalizing that the "same interests are at [play]." *Id.* at 2675. The Court first articulated the strong-basis-in-evidence standard in *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 277 (1985), and reaffirmed and applied the standard in *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 500 (1989).

[44] Ricci, ___ U.S. at ___, 120 S. Ct. at 2664.

In a dissenting opinion, Justice Ginsburg argued that the majority's strong-basis-in-evidence standard, which the Court "barely described in general, and cavalierly applied in this case, makes voluntary compliance [with Title VII] a hazardous venture."[45] The majority's opinion, she proclaimed, sends a message to employers that if they throw out a questionable selection process, they "can anticipate costly disparate-treatment litigation in which its chances for success—even for surviving a summary-judgment motion—are highly problematic."[46]

Justice Ginsburg also argued that it is difficult to distinguish the majority's strong-basis-in-evidence standard from a requirement that an employer "establish a provable, actual violation *against itself*."[47] Such a conflict, she said, thwarts efforts for voluntary compliance.[48] Ginsburg further asserted that the majority disregards Congressional intent, citing the Equal Employment Opportunity Commission's interpretive guidelines stating that "Congress did not intend to expose those who comply with the Act to charges that they are violating the very statute they are seeking to implement."[49]

Recognizing that disparate treatment and disparate impact are "twin pillars" of Title VII,[50] Justice Ginsburg stated that the two doctrines "must be read as complementary."[51] She asserted that the majority's interpretation that the City's effort to avoid an adverse impact against minorities constituted a "race-based action" virtually ignores the design and intent of Title VII as well as the "line of [disparate impact] cases Congress recognized as pathmarking."[52]

Perhaps most important, Justice Ginsburg predicted that the majority's opinion "will not have staying power."[53] Upon the Court's order in *Ricci*, she stated that the city of New Haven, in which African Americans and Hispanics make up nearly 60 percent of the population, "must today be served—as it was in the days of undisguised discrimination—by a fire department in which members of racial and ethnic minorities are rarely seen in command positions."[54]

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[45] *Id.* at ___, 129 S. Ct. at 2701 (Ginsburg, J., dissenting).

[46] *Id.*

[47] Ricci v. DeStefano, ___ U.S. ___, 129 S. Ct. 2658, 2701 (2009) (Ginsburg, J., dissenting) (emphasis in original) (internal quotation marks omitted).

[48] *See id.* at ___, 129 S. Ct. at 2701-02.

[49] *Id.* at ___, 129 S. Ct. at 2699 (Ginsburg, J., dissenting) (quoting 29 CFR § 1608.1(a) (2008)).

[50] For an explanation of disparate treatment and disparate impact, see *infra* Part III.

[51] *Ricci*, ___ U.S. at ___, 129 S. Ct. at 2699 (Ginsburg, J., dissenting).

[52] *Id.*

[53] *Id.* at ___, 129 S. Ct. at 2690 (Ginsburg, J., dissenting).

[54] *Id.*

III. TITLE VII AND THE ROAD TO DISPARATE IMPACT

A. The Evolution of Disparate Treatment and Disparate Impact Theory

The road to recognizing disparate impact as a method of recovery has been a long one, marked by diverging Supreme Court cases and culminating in Congressional statutory action.

Congress enacted Title VII of the Civil Rights Act of 1964 to "achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group of white employees over other employees."[55] The 1964 Act's primary nondiscrimination provision, Title VII, explicitly bars disparate treatment; the provision makes it unlawful for an employer to "fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin."[56] In other words, disparate treatment has occurred when an employer has "treated [a] particular person less favorably than others because of the [person's] race, color, religion, sex, or national origin."[57] This disparate treatment provision remains in effect today.[58] The 1964 Act, however, did not expressly prohibit neutral policies or practices that have an adverse impact on a protected class.[59]

To comply with Title VII, employers discarded job rules and hiring practices that overtly discriminated against racial minorities.[60] These actions, however, did not engender complete equal opportunity. Many employers replaced these overt practices with "subtle—and sometimes unconscious—forms of discrimination," such as facially neutral rules that in effect disadvantaged a group of people.[61]

Recognizing this reality, in the 1971 landmark case *Griggs v. Duke Power Co.*,[62] the Supreme Court interpreted Title VII to prohibit "not only overt discrimination but also practices that are fair in form, but discriminatory in

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[55] Griggs v. Duke Power Co., 401 U.S. 424, 429-30 (1971).

[56] 42 U.S.C. § 2000e-2(a) (2006).

[57] Watson v. Fort Worth Bank & Trust, 487 U.S. 977, 985-86 (1988).

[58] In *McDonnell Douglas Corp. v. Green*, the Court established the method of analysis for disparate treatment litigation. 411 U.S. 792 (1972). The court refined and reaffirmed its analysis in *Tex. Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248 (1981); *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502 (1993); *Reeves v. Sanderson Plumbing Product, Inc.*, 530 U.S. 133 (2000); and *Raytheon Co. v. Hernandez*, 540 U.S. 44 (2003). *See also* LINDERMANN & GROSSMAN, *supra* note 18, at 11.

[59] *Ricci*, ___ U.S. at ___, 129 S. Ct. at 2672.

[60] *Id.* at ___, 129 S. Ct. at 2696 (Ginsburg, J., dissenting).

[61] *Id.*

[62] 401 U.S. 424 (1971).

operation."[63] The Court embraced a new, progressive theory of discrimination: disparate impact theory.[64] Disparate impact theory "holds that practices and procedures that are facially neutral in their treatment of different groups, but in fact fall more harshly on one group . . . and cannot be justified by business necessity, are unlawful employment practices under Title VII."[65] In *Griggs*, the Court stated that under the Act, "practices, procedures, or tests neutral on their face, and even neutral in terms of intent, cannot be maintained if they operate to 'freeze' the status quo of prior discriminatory employment practices."[66] Most noteworthy, disparate impact does not require discriminatory intent, which is required in disparate treatment theory.[67] By establishing that disparate impact liability does not depend on discriminatory intent, the Court addressed at least some concerns from advocates and scholars that discrimination is often subconscious and occurs absent discriminatory motive.[68]

In *Griggs*, the Court held that defendant-employer Duke Power Company's policy that applicants for certain positions have a high school diploma and pass two professionally-designed aptitude tests violated Title VII because the defendant did not show that either requirement bore a relationship to successful job performance.[69] The Court held that "good intent or absence of discriminatory intent does not redeem employment procedures or testing mechanisms that operate as 'built-in headwinds' for minority groups and are unrelated to measuring job capability . . . . Congress directed the thrust of the Act to the *consequences* of employment practices, not simply the motivation."[70]

Nearly twenty years later, in *Wards Cove Packing Co. v. Atonio*,[71] the Court dismantled disparate impact theory as articulated in *Griggs*. The *Wards Cove* Court held that the employer only has a burden of production—not persuasion—to present evidence of a business justification for the challenged

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[63] *Id.* at 431.

[64] Robert Belton, *Title VII at Forty: A Brief Look at the Birth, Death, and Resurrection of the Disparate Impact Theory of Discrimination*, 22 HOFSTRA LAB. & EMP. L.J. 431, 434 (2005).

[65] *Id.*

[66] *Griggs*, 401 U.S. at 430.

[67] *See, e.g.*, Teamsters v. United States, 431 U.S. 324, 335 n.15 (1977) (explaining that "[p]roof of discriminatory motive is critical" to establish disparate treatment liability, but "is not required under a disparate-impact theory").

[68] *See, e.g.*, Linda Hamilton Krieger & Susan T. Fiske, *Behavioral Realism in Employment Discrimination Law: Implicit Bias and Disparate Treatment*, 94 CAL. L. REV. 997 (2006); Linda Hamilton Krieger, *The Content of our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 STAN. L. REV. 1161 (1995) [hereinafter *Content of our Categories*]; Charles R. Lawrence III, *The Id, The Ego, and Equal Protection: Reckoning With Unconscious Racism*, 39 STAN. L. REV. 317 (1987).

[69] *Griggs*, 401 U.S. at 431-36.

[70] *Id.* at 432 (emphasis in original).

[71] 490 U.S. 642 (1989).

employment practice. Employers may implement a discriminatory employment practice if it merely "serves, in a significant way, the legitimate employment goals of the employer."[72] The discriminatory practice need not reach the level of "essential or indispensable to the employer's business."[73]

In response to *Wards Cove*, which "weakened the scope and effectiveness of Federal civil rights protections,"[74] Congress enacted the Civil Rights Act of 1991. The Act, *inter alia*, formally codified disparate impact theory and the concepts of "business necessity" and "job related" as articulated in *Griggs* and other pre-*Wards Cove* Court decisions.[75] Congress reinstated the employer's burden of persuasion—not merely production—to prove job-relatedness and business necessity.[76] Title VII now mandates that if a complaining party shows that the challenged employment practice causes a disparate impact, the burden falls on the employer to "demonstrate that the challenged practice is job related for the position in question and consistent with business necessity."[77] Title VII also mandates that the complaining party may also demonstrate unlawful disparate impact by identifying an "alternative employment practice" which the employer "refuses to adopt."[78]

B. Disparate Impact Theory Application

In practice, courts employ a burden-shifting analysis to establish disparate impact liability.[79] The use of statistics is ubiquitous by both employers seeking to avoid disparate impact liability and employees seeking to establish an unlawful disparate impact.[80] Each burden shift in the disparate impact analysis

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[72] *Id.* at 659.

[73] *Id.* (internal quotations omitted).

[74] Civil Rights Act of 1991 Pub. L. No. 102-166, § 2, 105 Stat 1071, 1071 (1991).

[75] *Id.* at 1071, 1074.

[76] 42 U.S.C. § 2000e-2(k)(1)(A)(i) (2006).

[77] *Id.*

[78] *Id.*

[79] *See* LINDERMANN & GROSSMAN, *supra* note 18, at 122-57.

[80] *See, e.g.*, Marcel C. Garaud, *Legal Standards and Statistical Proof in Title VII Litigation: In Search of a Coherent Disparate Impact Model*, 139 U. PA. L. REV. 455, 456 (1990):

> Through the years, statistical analysis has been the method of choice to show disparate impact, mainly because it is the only proof available in many cases of employment discrimination, but also because it makes [i]nequality between blacks and whites, men and women, young and old . . . stand out like figures carved in a mountainside.

(quoting Richard Delgado, *On Take Back Our Civil Rights Promises: When Equality Doesn't Compute*, 1989 WIS. L. REV. 579, 579-80 (1989)) (internal quotation marks omitted); *see also* DAN BIDDLE, ADVERSE IMPACT AND TEST VALIDATION: A PRACTITIONERS GUIDE TO VALID AND DEFENSIBLE EMPLOYMENT TESTING (2nd ed. 2006).

requires the burdened party to adduce statistical data acquired through costly statistical tests.[81]

First, a plaintiff must prove a prima facie case of adverse impact, "that a specific employment policy or practice of the employer causes a significant adverse impact on a protected group of which the plaintiff is a member."[82] The plaintiff must present a "sufficiently substantial" statistical disparity that raises an inference of causation,[83] most often shown through statistical tests.[84] Federal enforcement agencies generally consider a selection rate that is less than four-fifths (eighty percent) of the most well represented group's selection rate as evidence of an adverse impact.[85] Smaller differences in selection rates may, however, constitute an adverse impact when they are both statistically and practically significant or where an employer's actions have discouraged applicants disproportionately on grounds of race, sex, or ethnic group.[86] The employer can rebut the plaintiff's prima facie case by introducing evidence that the plaintiff's data or analyses are flawed and do not support an inference of discrimination.[87]

Once a plaintiff establishes a prima facie case of disparate impact, the burden shifts to the employer to prove that the discriminatory practice is "job-related" and is "consistent with business necessity."[88] When the employment practice at issue is a scored employment test, such as the test administered in *Ricci*, employers must prove that it is "job related" and "consistent with business necessity" by validating the exam.[89] Validation requires employers to hire costly private consultants to administer extensive statistical tests and determine whether the employment examination actually measures job performance or traits (for instance, "intelligence" or "leadership") that are required to perform the job.[90]

The final burden then shifts back to the plaintiff. If an employer establishes job relatedness and business necessity, the plaintiff may still prevail by showing

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[81] *See* LINDERMANN & GROSSMAN, *supra* note 18, at 122-57; *see also* D. BALDUN & J. COLE, STATISTICAL PROOF OF DISCRIMINATION 44 (1980) ("[U]nder a disparate impact theory, statistical evidence is not merely circumstantial (as it is under disparate treatment theory), but it is direct evidence of the results which trigger the demand for additional justification.") (*as quoted in* Marcel C. Garaud *supra* note 80, at 456).

[82] LINDERMANN & GROSSMAN, *supra* note 18, at 122.

[83] Watson v. Fort Worth Bank & Trust, 487 U.S. 977, 995 (1988), *partially superseded by statute*, Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1074.

[84] LINDERMANN & GROSSMAN, *supra* note 18, at 125.

[85] Uniform Guidelines on Employee Selection Procedures, 29 C.F.R. § 1607.4 (2009).

[86] *Id.*

[87] *Watson*, 487 U.S. at 996 (citing Dothard v. Rawlinson, 433 U.S. 321, 331 (1977)).

[88] LINDERMANN & GROSSMAN, *supra* note 18, at 148.

[89] *Id.* at 185.

[90] *Id.* at 188-89.

"that other tests or selection devices, without a similarly undesirable racial effect, would also serve the employer's legitimate interest in efficient and trustworthy workmanship."[91] The plaintiff must often provide further statistical tests to show that the alternative is at least as valid as the employer's selection device.[92]

IV. VOLUNTARY COMPLIANCE: THE PREFERRED MEANS

In codifying Title VII, Congress "strongly encouraged" employers to voluntarily modify employment practices and selection procedures that barred equal employment opportunity.[93] The Supreme Court has not only approved of such voluntary measures to comply with Title VII, but "recognized that Congress intended voluntary compliance to be the *preferred means* of achieving the objectives of Title VII."[94] For example, the Court has stated that one of Congress' primary purposes in allowing for Title VII sanctions was to encourage employers "to self-examine and to self-evaluate their employment practices and to endeavor to eliminate, so far as possible, the last vestiges of an unfortunate and ignominious page in this country's history."[95]

The Supreme Court has also emphasized that "[d]issuading employers from implementing programs or policies to prevent discrimination in the workplace is directly contrary to the purposes underlying Title VII"[96] and that the statute's "primary objective" is "a prophylactic one."[97] Indeed, the Supreme Court has recognized that "voluntary employer action can play a crucial role in furthering Title VII's purpose of eliminating the effects of discrimination in the workplace, and that Title VII should not be read to thwart such efforts."[98]

The Court has specifically addressed the importance of voluntary compliance as applied to "race-based" action among city firefighters. In *Local Number 93 v. City of Cleveland*,[99] the Court reiterated that "voluntary action available to employers and unions seeking to eradicate race discrimination may include reasonable race-conscious relief that benefits individuals who were not actual victims of discrimination."[100] In *Local Number 93*, a union representing a

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[91] Albemarle Paper Co. v. Moody, 422 U.S. 405, 425 (1975) (internal quotation marks omitted).

[92] LINDERMANN & GROSSMAN, *supra* note 18, at 155.

[93] 29 C.F.R. § 1608.1(b) (2009).

[94] Local No. 93 v. City of Cleveland, 478 U.S. 501, 515 (1986) (emphasis added).

[95] *Albemarle*, 422 U.S. at 417-18 (quoting United States v. N.L. Indus., 479 F.2d 354, 379 (8th Cir. 1973)).

[96] Kolstad v. Am. Dental Ass'n, 527 U.S. 526, 545 (1999).

[97] *Albemarle*, 422 U.S. at 417.

[98] Johnson v. Transp. Agency, 480 U.S. 616, 630 (1987).

[99] 478 U.S. 501 (1986).

[100] *Id.* at 516 (citing Steelworkers v. Weber, 443 U.S. 193 (1979)).

majority of Cleveland firefighters alleged that a consent decree between an organization of black and Hispanic firefighters and the City was an impermissible remedy under Title VII.[101] The consent decree required the City to, *inter alia*, immediately make dozens of promotions based on a previously administered examination, with the City evenly splitting lieutenant promotions between minority and nonminority firefighters.[102] The union, Local Number 93 of the International Association of Firefighters, objected to the "use of racial quotas"[103] and argued that the consent decree violated Title VII.[104] The Court, however, concluded that "voluntary adoption in a consent decree of race-conscious relief that may benefit nonvictims [of discrimination] does not violate the congressional objectives" of Title VII.[105]

A. System Justification Theory and Voluntary Compliance

Voluntary compliance plays a "crucial role in furthering Title VII's purpose,"[106] particularly because those who are disadvantaged generally tend to refrain from filing discrimination claims.[107] System justification theory explores the motive to defend the social status quo, even among those seemingly disadvantaged by the system, this theory[108] supports the assertion that those aggrieved may not necessarily seek redress. According to Professors Gary Blasi and John Jost, system justification theory suggests that those who are disadvantaged are "likely to have internalized a depressed sense of entitlement,"[109] leading them to suppress system-implicating discrimination claims that question the social system.[110] People disadvantaged by a system may rationalize and defend the status quo in part because it provides a "sense of

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[101] *Id.* at 513-14.

[102] *Id.* at 510. The consent decree resulted from a lawsuit by the organization of black and Hispanic Cleveland firefighters alleging, among other things, that a written examination used for making promotions was discriminatory. *Id.* at 504-05. The organization also alleged that city and municipal officials used seniority points and manipulated retirement dates so minority firefighters would not be near the top of promotion lists when positions became open and that officials limited minority advancement by refusing to administer a new promotion exam. *Id.* at 505.

[103] *Id.* at 511.

[104] *Id.* at 514.

[105] *Id.* at 525.

[106] Johnson v. Transp. Agency, 480 U.S. 616, 630 (1987).

[107] *See* Gary Blasi & John T. Jost, *System Justification Theory and Research: Implications for Law, Legal Advocacy, and Social Justice*, 94 CAL. L. REV. 1119, 1157-59 (2006).

[108] *Id.* at 1120.

[109] *Id.* at 1157; *see also* Michelle A. Travis, *Recapturing the Transformative Potential of Employment Discrimination Law*, 62 WASH. & LEE L. REV. 3, 20 (2004).

[110] Blasi & Jost, *supra* note 107, at 1157.

certainty, predictability, and control" over one's environment, while challenging the status quo may appear risky and potentially disappointing.[111]

To illustrate this phenomenon, Blasi and Jost point to a 2001 survey of 439 terminated employees applying for unemployment benefits.[112] According to the survey, terminated white employees were significantly more likely than minority employees to file discrimination claims.[113] While Blasi and Jost acknowledge other possible causes for the difference in discrimination claim rates,[114] they assert that system justification theory suggests that "we ought not to assume that every injured party will act as if he or she is aggrieved," especially regarding claims that challenge a presumed social order.[115]

The *process* of pursuing a discrimination claim also discourages some victims from filing complaints because it may lead to another bout of victimization.[116] Members of disadvantaged groups are usually reluctant to publicly claim that they have suffered discrimination because they fear retaliation and are afraid that supervisors and fellow employees will label them troublemakers.[117]

Such reluctance to file discrimination claims among those who are disadvantaged underscores the importance of encouraging employers to voluntarily take measures to comply with Title VII. In other words, relying primarily on plaintiff-initiated discrimination claims to fulfill the goals of Title VII is inadequate. Employer-initiated voluntary compliance is a more effective means of reducing workplace discrimination.

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[111] Avital Mentovich & John T. Jost, *The Ideological "Id"? System Justification and the Unconscious Perpetuation of Inequality*, 40 CONN. L. REV. 1095, 1108 (2008).

[112] Blasi & Jost, *supra* note 107, at 1159 (citing Barry M. Goldman, *Toward an Understanding of Employment Discrimination Claiming: An Integration of Organizational Justice and Social Information Processing Theories*, 54 PERSONNEL PSYCHOL. 361, 370-72 (2001)).

[113] *Id.*

[114] Other possible causes include a potential disparity in legal knowledge and access to legal advice. *Id.*

[115] *Id.* at 1159.

[116] KRISTIN BUMILLER, THE CIVIL RIGHTS SOCIETY: THE SOCIAL CONSTRUCTION OF VICTIMS 2-4 (1988).

[117] Cheryl Kaiser & Carol T. Miller, *Derogating the Victim: The Interpersonal Consequences of Blaming Events on Discrimination*, 6 GROUP PROCESSES & INTERGROUP RELATIONS 227, 227-28 (2003); *see also* Avital Mentovich & John T. Jost, *supra* note 111, at 1108 ("[T]here is social pressure to conform to the mainstream, and people are ostracized for complaining about discrimination and critiquing the way things are.").

B. The Fallacy of "Merit"

1. Bias inherent in merit-based exams

Social science has also shown that bias is inherent in so-called "merit-based" exams, further illustrating why employers should have the flexibility to voluntarily discard statistically disparate results.[118] Because a statistical disparity can indicate this bias,[119] encouraging employers to discard statistically disparate test results can further contribute to eradicating discrimination. Professor Linda Hamilton Krieger asserts that it is a fiction that merit-based selection processes are free and unaffected by intergroup bias.[120] She suggests that "subtle forms of intergroup bias affect the definition of merit and the selection of those principles and tools by which it will be measured."[121] Even when officials grade tests without knowing the identity of the candidates, it does not follow that the examination system is completely objective.[122]

Merit-based "approaches to employment . . . selection call upon decision makers to identify a set of criteria that are expected to predict success in the relevant enterprise."[123] As such, the concept of merit allows for biases in the "conceptualization of merit [and] in the selection and use of particular tools for measuring merit."[124] This is especially a concern because the use of standardized tests is increasingly widespread, even among professions

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[118] Mark Kelman, *Concepts of Discrimination in "General Ability" Job Testing*, 104 HARV. L. REV. 1158, 1158-1227 (1991). *See generally* GREGORY CAMILLI & LORRIE A. SHEPARD, METHODS FOR IDENTIFYING BIASED TEST ITEMS (1994); CHRISTOPHER JENCKS, *Racial Bias in Testing*, *in* THE BLACK-WHITE TEST SCORE GAP 55, 55-84 (Christopher Jencks & Meredith Phillips eds., 1998) (discussing types of bias that arise in psychometric tests, and tests used to predict academic and job performance).

[119] *See, e.g.*, Kelman, *supra* note 118, at 1223 (noting that the "definition of bias that psychometricians generally use, and which both the American Psychological Association and the EEOC endorse, declares a test unbiased so long as it predicts minority performance on the job as well as it predicts nonminority performance") (citing AM. EDUC. RESEARCH ASS'N, AM. PSYCHOLOGICAL ASS'N & NAT'L COUNCIL ON MEASUREMENT IN EDUC., STANDARDS FOR EDUCATIONAL AND PSYCHOLOGICAL TESTING 12-13 (1985)); EEOC, Uniform Guidelines on Employee Selection Procedures, 29 C.F.R. § 16.07.16(V) (2009); T. Anne Cleary, *Test Bias: Prediction of Grades for Negro and White Students in Integrated Colleges*, 5 J. EDUC. MEASUREMENT 115 (1968).

[120] Linda Hamilton Krieger, *Civil Rights Perestroika: Intergroup Relations After Affirmative Action*, 86 CAL. L. REV. 1251 (1998).

[121] *Id.* at 1297.

[122] *See id.* at 1293-94.

[123] *Id.* at 1293.

[124] *Id.*

involving skills traditionally considered immeasurable with paper-and-pencil tests.[125]

Calling selection exams further into question, Professors Jerry Kang and Mahzarin R. Banaji suggest that even when merit-based exams measure skills required for job performance, the exams are often still fraught with bias.[126] Kang and Banaji explain that "implicit cognitive processes within the test-taker can produce differences in test performance, as a function of arbitrary environmental cues."[127] Implicit cognitive processes can alter how test-takers perceive themselves and "substantially hamper (and sometimes improve) performance."[128]

For example, when examiners gave black and white students a difficult verbal exam, black students "greatly underperformed [compared to]equally skilled white students" when the examiners told the students the examination measured "how smart they were."[129] Yet, when told that the examination was simply a laboratory exercise, the white and black students performed equally.[130] The researchers attribute this disparity in performance to telling the students that the examination measured intelligence, which reminded students of their group status and, for black students, cued negative stereotypes about blacks' intellectual ability.[131]

Such findings illustrate that "what we thought to be fair assessments of merit can turn out to be mismeasurements."[132] These mismeasurements "are not randomly dispersed and hence likely to wash out over time."[133]

2. New Haven's potentially biased promotion exam

In *Ricci*, the City of New Haven's firefighter promotion exams most likely contained at least some bias. Industrial/Organizational Solutions, Inc. (IOS), hired by the City to develop and administer the firefighter examinations, developed the exams based in part on a job analysis which included

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[125] *See* Theodore M. Shaw, *SCOTUS' Blow to Title VII*, FORBES, June 30, 2009, http://www.forbes.com/2009/06/30/ricci-destefano-supreme-court-opinions-contributors-post-racial-obama.html ("Standardized tests are more and more prevalent as measuring devices, even in jobs that traditionally were not assessed with paper-and-pencil tests and are not thought to involve skills lending themselves to such examination.").

[126] Jerry Kang & Mahzatin R. Banaji, *Fair Measures: A Behavioral Realist Revision of "Affirmative Action,"* 94 CAL. L. REV. 1063, 1086-87 (2006).

[127] *Id.* at 1087.

[128] *Id.*

[129] *Id.*

[130] *Id.*

[131] *Id.*

[132] Kang & Banaji, *supra* note 126, at 1089 (internal quotation marks omitted).

[133] *Id.* at 1090.

interviewing and observing incumbent captains, lieutenants and their supervisors.[134]

Test experts later informed city officials of certain questionable aspects of the exam, including a possible bias.[135] Dr. Janet Helms, an expert in the area of "how race and culture influence test performance," suggested that the examination questions were "skewed toward [white firefighters'] job knowledge."[136] She observed that two-thirds of the incumbent fire officers who submitted job analyses to IOS during the examination design stage were white and that this heavy reliance on job analyses from white firefighters may have introduced bias into the exam.[137] Because studies have shown that "different [racial and gender] groups perform the job differently," this skew would have adversely affected the minorities' performance on the exam.[138]

Another expert, Vincent Lewis, a specialist with the Department of Homeland Security and former Michigan fire officer, told the City to consider whether test takers had equal access to study materials.[139] At least two test takers who opposed certifying the examination results complained of unequal access to study materials.[140] They asserted that some firefighters had the materials even before the City released the syllabus, while others had to wait more than a month for books that were on back-order.[141] Moreover, many white candidates could obtain materials and help from relatives in the fire department, while the "overwhelming majority of minority applicants were first-generation firefighters without such support networks."[142]

Christopher Hornick, an industrial/organizational psychology consultant with experience in developing police and firefighter exams, questioned the City's written/oral examination ratio. The written examination made up sixty percent and the oral examination made up forty percent of the applicant's total score.[143] Hornick opined that there were different types of testing procedures that would better identify "the best potential supervisors in [the] fire department."[144]

While Hornick, as a test developer, may have had some self-interest in questioning IOS' test, his and other experts' concerns illustrate Professor Krieger's point about merit-based examinations: "Defining success is a

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[134] Ricci v. DeStefano, ___ U.S. ___, 129 S. Ct. 2658, 2665 (2009).

[135] *Id.* at ___, 129 S. Ct. at 2693-95.

[136] Ricci v. DeStefano, 554 F. Supp. 2d 142, 149 (D. Conn. 2006), *aff'd per curiam*, 530 F.3d 87 (2nd Cir. 2008), *rev'd* ___ U.S. ___, 129 S. Ct. 2658 (2009).

[137] *Ricci*, ___ U.S. at ___, 129 S. Ct. at 2694-95 (Ginsburg, J., dissenting).

[138] *Ricci*, 554 F. Supp. 2d at 149.

[139] *Ricci*, ___ U.S. at ___, 129 S. Ct. at 2694 (Ginsburg, J., dissenting).

[140] *Id.* at ___, 129 S. Ct. at 2693 (Ginsburg, J., dissenting).

[141] *Id.*

[142] *Id.*

[143] *Id.* at 2665, 2694 (internal quotation marks omitted).

[144] *Id.* at 2693.

subjective process subject to subtle forms of intergroup bias with which existing civil rights law has little capacity to reckon."[145]

This potential flaw in testing underscores the need for employers to be wary of bias in exams and to have adequate ability to take voluntary measures to correct it.

V. REPLACING STRONG-BASIS-IN-EVIDENCE WITH STATISTICAL-DISPARITY

Despite the significant role of voluntary compliance in furthering Title VII's goals, the *Ricci* Court's strong-basis-in-evidence standard in effect discourages employers from correcting policies that result in a disparate impact on minorities. This section illustrates this conflict and proposes an alternative "statistical-disparity" standard. As discussed later in this section, the proposed statistical-disparity standard would afford employers more flexibility to voluntarily remedy discriminatory employment policies.

A. The Court's Problematic Strong-Basis-in-Evidence Standard

1. A hindrance to voluntary compliance

In *Ricci*, the Court provided little guidance about what amount of evidence would constitute a strong basis in evidence, leaving employers and lower courts with an ambiguous standard. To assure compliance with Title VII, the strong-basis-in-evidence standard ultimately places an onerous burden on employers to "engage in a complete and accurate disparate impact analysis" before discarding test results.[146]

The *Ricci* Court held that when an employer takes race-based action to avoid disparate impact liability, and the action disparately affects other employees based on race, the employer will be liable for disparate treatment *unless* the employer demonstrates a strong basis in evidence that, absent the action, it would have been liable for disparate impact.[147] Yet, the Court did not specify what would constitute a strong basis in evidence. The Court merely stated that establishing a prima facie case of disparate impact is "far from" this standard.[148] An employer must adduce a strong basis in evidence that the employment action that resulted in a disparate impact was: (1) neither job-related nor

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[145] *See* Krieger, *supra* note 120, at 1294.

[146] Edward G. Phillips, *Ricci v. DeStefano Holds Statistical Disparities Cannot Justify Race-Based Employment Decisions Where There's Smoke But No Fire*, 45-OCT. TENN. B.J. 31, 33 (2009).

[147] *Ricci*, ___ U.S. at ___, 129 S. Ct. at 2664.

[148] *Id.* at ___, 129 S. Ct. at 2678.

consistent with business necessity, or (2) that the employer refused to use "an equally valid, less-discriminatory alternative."[149]

In practice, the likely effect of the Court's standard is that employers and their lawyers must retain qualified experts and complete the full disparate impact analysis to ensure compliance with Title VII.[150] A full disparate impact analysis requires (1) identifying a statistically significant disparity caused by a neutral policy; (2) validating the examination to determine if it is job-related and consistent with business necessity; and (3) determining whether the employee can show that an alternative policy would have a smaller impact.[151]

Engaging in a complete disparate impact analysis, however, is extremely costly.[152] A complete disparate impact analysis requires hiring costly private consultants to acquire statistical data *and* perform complicated validation tests. Rather than voluntarily proceeding through this costly process, employers may instead choose the easier route and retain the employment exam.[153] The likely effect of the Court's strong-basis-in-evidence standard will be a chilling effect on voluntary compliance, creating a result that directly contradicts the Court's stated preference and Congress' intent.[154]

In addition, the Court's strong-basis-in-evidence standard will deter employers from voluntary compliance because it in effect requires an employer to build a strong case of discrimination "*against itself*."[155] Indeed, Justice

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[149] *Id.* at ___, 129 S. Ct. at 2701 (Ginsburg, J., dissenting).

[150] *See* Phillips, *supra* note 146, at 32.

[151] *Id.*

[152] *See, e.g.*, Daniel Gyebi, *The Civil Rights Act of 1991: Favoring Women and Minorities in Disparate Impact Discrimination Cases Involving High-Level Jobs*, 36 HOW. L.J. 97, 125 (1993) ("Some arguments against validation in general are that it is too difficult, too costly, and perhaps, in the case of subjective criteria at the higher levels, impossible to perform."); *Content of our Categories*, *supra* note 68, at 1228 (noting the high cost of validation studies).

[153] This is also problematic because as discussed in section IV.A, those who are disadvantaged are less likely to file a claim than their more advantaged counterparts, increasing the likelihood that the discriminatory policy will continue. *See* notes 107-15 and accompanying text; Blasi & Jost, *supra* note 107, at 1157.

[154] *Local No. 93 v. City of Cleveland*, 478 U.S. 501, 515 (1986) ("Congress intended voluntary compliance to be the preferred means of achieving the objectives of Title VII").

[155] Ricci v. DeStefano, ___ U.S. ___, 129 S. Ct. 2658, 2701 (2009) (Ginsburg, J., dissenting) (internal quotation marks omitted). The majority in *Ricci* objected to petitioners' suggestion that an employer must have in fact violated the disparate impact provision before using compliance as a defense. *Id.* at ___, 129 S. Ct. at 2674. The majority explained that "[f]orbidding employers to act unless they know, with certainty, that a practice violates the disparate-impact provision would bring compliance efforts to a near standstill." *Id.* at ___, 129 S. Ct. at 2674. We assert, however, as does the dissent, that the majority's ambiguous standard in effect imposes this burden on employers. *See id.* at ___, 129 S. Ct. at 2701 (Ginsburg, J., dissenting) ("It is hard to see how these requirements differ from demanding that an employer establish a 'provable, actual violation' *against itself*.") (emphasis in original).

O'Connor has rejected the requirement that employers prove past discrimination to justify race-conscious remedial employment actions.[156] Requiring "that an employer actually prove it had discriminated in the past would also unduly discourage voluntary efforts to remedy apparent discrimination."[157] Furthermore, the standard ultimately shifts employers' focus from doing the right thing—correcting actions that may unnecessarily bar particular groups from certain employment positions—to fear of litigation.

2. A departure from affirmative action precedent

The strong-basis-in-evidence standard also departs from Supreme Court precedent regarding Title VII claims challenging race-conscious affirmative action measures. Although *Ricci* is not an affirmative action case, it is analogous because it involves a race-conscious employment decision.

In *United Steelworkers v. Weber*,[158] a majority of the Court concluded that affirmative action plans by private employers are permissible under Title VII so long as (1) there is a "factual predicate" for the affirmative action plan,[159] (2) the "plan does not unnecessarily trammel the interests of the white employees,"[160] and (3) the plan is a "temporary measure."[161]

The Court employs a broad standard for employers to establish a factual predicate. An employer may provide (1) evidence of their actual past discrimination toward the protected class, (2) a statistical disparity to establish a prima facie Title VII case, or (3) a "manifest imbalance" in "traditionally segregated" job categories.[162]

This standard is far more permissible than the *Ricci* strong-basis-in-evidence standard. In *Ricci*, the Court held that a prima facie showing of disparate impact is "far from [the] strong basis in evidence" the Court requires for employers to make a race-conscious decision to discard statistically disparate promotion examination results.[163] As discussed above, the likely effect of the *Ricci* standard is that an employer must prove that it discriminated against its minority employees.

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[156] Johnson v. Transp. Agency, 480 U.S. 616, 652-53 (1987) (O'Connor, J., concurring).

[157] *Id.* at 652.

[158] 443 U.S. 193 (1979).

[159] 2 BARBARA T. LINDERMANN & PAUL GROSSMAN, EMPLOYMENT DISCRIMINATION LAW 2520 (C. Geoffrey Weirich ed., 4th ed. 2007) [hereinafter LINDERMANN & GROSSMAN VOL. 2].

[160] United Steelworkers v. Weber, 443 U.S. 193, 208 (1979).

[161] *Id.*

[162] LINDERMANN & GROSSMAN VOL. 2, *supra* note 159, at 2525.

[163] Ricci v. DeStefano, ___ U.S. ___, ___, 129 S. Ct. 2658, 2678 (2009).

When adjudicating race-conscious affirmative action the Court does not require employers to admit prior discrimination[164] *or* even establish a prima facie case of discrimination—these are merely two of three ways to establish a factual predicate.[165] In *Johnson v. Transportation Agency* and again in *Weber*, the Court explained its reason for establishing this permissible standard:

> It would be ironic indeed if a law triggered by a Nation's concern over centuries of racial injustice and intended to improve the lot of those who had been excluded from the American dream for so long constituted the first legislative prohibition of all voluntary, private, race-conscious efforts to abolish traditional patterns of racial segregation and hierarchy.[166]

Ricci's strong-basis-in-evidence standard, however, embodies such irony: Its restrictive criteria, adopted in the name of eradicating racial injustice, perpetuates inequalities in the workplace by discouraging voluntary compliance with Title VII's disparate impact provision.

B. Statistical-Disparity Standard as an Alternative

This note proposes an alternative standard to apply when applicants or employees challenge an employer's decision to discard disparate examination results: Employers that discard examination results with a statistically significant disparate impact on a protected class are immune from disparate treatment liability so long as the employer establishes a prima facie case of disparate impact.[167] Unlike the Court's strong-basis-in-evidence standard, this statistical-disparity standard encourages employers to voluntarily remedy disparate impact in employment selection processes and furthers Congress's Title VII goals of "achiev[ing] equality of employment opportunities and remov[ing] barriers that . . . favor an identifiable group of white employees over other employees."[168]

The proposed statistical-disparity standard relieves employers of the burden of undertaking costly validation processes to determine whether the employment examination is job-related and a business necessity. This less burdensome standard thus encourages employers to voluntarily remedy

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[164] LINDERMANN & GROSSMAN VOL. 2, *supra* note 159, at 2524.

[165] Johnson v. Transp. Agency, 480 U.S. 616, 632 (1987).

[166] *Id.* at 628-29 (quoting United Steelworkers v. Weber, 443 U.S. 193, 204 (1979)) (internal quotation marks omitted).

[167] This statistical-disparity standard is consistent with Justice O'Connor's proposed approach to remedial affirmative action plans. Justice O'Connor proposed that employers must establish a "firm basis for believing that remedial action is required, and that a statistical imbalance sufficient for a Title VII prima facie case against the employer would satisfy this firm basis requirement." *Johnson*, 480 U.S. at 650-51 (O'Connor, J., concurring).

[168] Griggs v. Duke Power Co., 401 U.S. 424, 429-30 (1971).

disparate outcomes and eliminate inherently biased exams that unfairly disadvantage certain groups of candidates.

The proposed statistical-disparity standard also provides employers with a practical basis and guideline when determining whether to discard disparate test results. Statistically significant disparate results provide a clear indication to employers that they may remedy the adverse impact.

VI. CONCLUSION

The majority's decision in *Ricci* frustrates the purpose of Title VII by discouraging employers from voluntarily taking certain measures to eradicate discrimination, a key goal of Title VII. The decision also departs from the Court's own precedent on race-conscious remedial employment action.[169] The Court's strong-basis-in-evidence standard is ambiguous and potentially imposes an impractical, onerous burden on employers that discard selection procedures with a substantial disparate impact on a group of candidates. These employers must now virtually prove a disparate impact case against themselves to avoid disparate treatment liability. As a result, few employers will remedy employment procedures that appear to have a disparate impact and may instead turn a blind eye to facially neutral yet potentially unlawful discriminatory employment policies. *Ricci*'s legacy may well be continued barriers in the workplace and a serious setback in the progress achieved from decades of Title VII litigation.

Our proposed statistical-disparity standard, however, would eliminate potential hurdles for employers who seek to remove barriers in the workplace. Employers would not be liable for disparate treatment when they discard disparate test results so long as there is a statistically significant disparate impact. This provides employers with a practical guideline indicating when they may discard statistically disparate test results, yet it is not too onerous that it will discourage employers from doing so. By encouraging employers to voluntarily eliminate biased exams that impede minorities' success in the workplace, the proposed statistical-disparity standard will strengthen Title VII and move the workplace another step closer to ensuring equal opportunity for all.

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[169] *See* Local No. 93 v. City of Cleveland, 478 U.S. 501, 515 (1986) ("We have on numerous occasions recognized that Congress intended voluntary compliance to be the preferred means of achieving the objectives of Title VII.") (internal citations omitted).

Plausibility of Notice Pleading: Hawaii's Pleading Standards in the Wake of *Ashcroft v. Iqbal*

Alison Kato* and Nicolette Rowe**

"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."[1]

I. INTRODUCTION

For fifty years, Hawai'i and approximately thirty five other states administered their pleading rule under the liberal notice pleading standard articulated in the seminal United States Supreme Court case, *Conley v. Gibson*.[2] The federal system allowed wronged plaintiffs with little access to information a chance to get their foot in the doors of the courtroom. However, two recent Supreme Court cases, *Bell Atlantic v. Twombly*[3] and *Ashcroft v. Iqbal*,[4] significantly raised the standard required to survive a motion to dismiss at the pleading stage under the Federal Rules of Civil Procedure. If the Hawai'i Supreme Court chooses to adopt the heightened federal pleading standard, courts will likely dismiss some meritorious claims at the pleading stage.

This paper illustrates how a higher pleading standard has emerged as a result of *Twombly* and *Iqbal*, and discusses why the Supreme Court's interpretation of Rule 8's pleading standard should not be accepted by Hawai'i State courts. Part II provides a brief overview of the history of the pleading standard in federal court. Part III discusses the *Twombly* decision and the confusion over pleading standards that the case engendered. Part IV examines *Iqbal* and the heightened pleading standard that emerged.

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[1] Marbury v. Madison, 5 U.S. 137, 163 (1803).

[2] 355 U.S. 41 (1957); THOMAS R. VAN DERVORT, AMERICAN LAW AND THE LEGAL SYSTEM: EQUAL JUSTICE UNDER THE LAW 135-36 (2d ed. 2000).

[3] 550 U.S. 544 (2007).

[4] ___ U.S. ___, 129 S. Ct. 1937 (2009).

Part V summarizes the pleading standard in Hawai'i State courts. Part VI analyzes the economic and social arguments for and against a heightened pleading standard in Hawai'i and concludes that Hawai'i should continue to use its current version of liberal notice pleading.

II. OVERVIEW AND HISTORY OF THE FEDERAL PLEADING STANDARD

A. Procedural Reform

Promulgated in 1848, New York's Field Code was an attempt to simplify the civil procedure inherited from England's complex litigation system.[5] After an amendment in 1851, the Field Code provided that complaints need only contain "[a] plain and concise statement of the facts constituting a cause of action without unnecessary repetition."[6] The Field Code's distinctions between types of factual matter, however, proved to be largely unworkable in practice and led to inconsistent results. In determining the amount of factual specificity required under the Field Code, the common law jurisprudence of using pleadings to narrow disputes continued, and plaintiffs were burdened with pleading specific details.[7] Later, the Federal Rules of Civil Procedure (FRCP), which took little from the Field Code other than the premise of simplified procedural reform, were created as an attempt to avoid the Field Code's complicated and inadequate fact intensive requirements.[8]

Civil procedure reform in the mid-1930s led to passage of the Rules Enabling Act in 1934, which gave the Supreme Court the power to create civil procedural rules to govern the federal courts.[9] Congress passed the FRCP in 1938 under the guidance of Charles E. Clark, the principal draftsman of the rules.[10] Unlike the Field Code, whose strict rules were based largely around the theme of control, Clark drafted rules based on the theme of broad judicial discretion, which included relaxed pleading standards.[11] Rule 8 of the FRCP requires a pleading to contain "a short and plain statement of the claim showing that the pleader is entitled to

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[5] LAWRENCE M. FRIEDMAN, AMERICAN LAW IN THE 20TH CENTURY 251 (2002).

[6] STEPHEN N. SUBRIN & MARGARET Y.K. WOO, LITIGATING IN AMERICA: CIVIL PROCEDURE IN CONTEXT 109 (2006) (citing N.Y. Laws c. 438 (1848); N.Y. Laws c. 479, § 142(2) (1851)).

[7] *Id.* at 108.

[8] FRIEDMAN, *supra* note 5, at 252.

[9] 28 U.S.C. § 2072 (2006).

[10] SUBRIN & WOO, *supra* note 6, at 54.

[11] *Id.*

relief[.]"[12] Rule 8 also provides that "[e]ach allegation must be simple, concise, and direct. No technical form is required."[13] This new rule was a clear rejection of the complicated technical pleading rules of the Field Code that are now commonly known as "fact" or "Code" pleading. The rules began a move toward a more flexible standard that would "require little of pleading and [instead] rely on the advantages of liberal discovery provisions."[14] The following two sections discuss two important Supreme Court cases interpreting Rule 8.

B. Conley *Established Liberal Interpretation of Notice Pleading*

1. Facts

In 1957, the United States Supreme Court articulated a "notice pleading" standard under Rule 8 that solidified the new liberal pleading system and "[t]he proposition that pleadings should ordinarily not be the battleground for finding the details of each side's position[.]"[15] The case arose out of a mass layoff of forty-five African-American railway employees, who were either replaced by white employees or were rehired with a loss of seniority.[16] The discharged employees brought a class action suit against their union, alleging that the union failed to give them the same protection afforded to white employees and failed to protect them from discriminatory discharge.[17]

2. Holding and the notice pleading standard

The Court unanimously held that the allegations in the complaint were sufficient to state a claim upon which relief could be granted.[18] This landmark decision established the oft-quoted standard that "a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief."[19] The Court rejected the idea that under the FRCP a plaintiff must plead in detail the facts on which his claim is

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[12] FED. R. CIV. P. 8(a)(2).
[13] FED. R. CIV. P. 8(d)(1).
[14] SUBRIN & WOO, *supra* note 6, at 109.
[15] *Id.*; *see* Conley v. Gibson, 355 U.S. 41 (1957).
[16] *Conley*, 355 U.S. at 43.
[17] *Id.*
[18] *Id.* at 45.
[19] *Id.* at 45-46.

based.[20] Instead, the Court declared that the Rules require only that pleadings "give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests."[21] This notice pleading standard is often contrasted with Code pleading, which requires more factual specificity.[22]

This decision was consistent with the systemic purpose of the FRCP—pleading should "facilitate a proper decision on the merits[,]" and should not be "a game of skill in which one misstep by counsel may be decisive to the outcome[.]"[23] Many states, including Hawai'i, adopted these core principles, which remained the pleading standard in federal courts for the next fifty years.[24] During that time, the Supreme Court repeatedly reaffirmed the notice pleading standard and rebuffed attacks against it.[25]

III. *TWOMBLY* MOVED TOWARD A HEIGHTENED PLEADING STANDARD

A. Facts

In 2007, the *Conley* "no set of facts" standard was put to rest by the Supreme Court's seven-to-two decision in *Bell Atlantic Corp. v. Twombly*.[26] *Twombly* arose out of an antitrust conspiracy lawsuit brought by consumers of local telephone and internet services alleging an antitrust conspiracy among Incumbent Local Exchange Carriers (ILEC), in violation of section 1 of the Sherman Act.[27] The plaintiffs alleged that the ILECs conspired to inflate charges for local telephone and internet services in two ways: (1) engaging in "parallel conduct," thereby preventing competitive entry of Competitive Local Exchange Carriers into local telephone and internet service markets, and; (2) agreeing not to compete with each other.[28]

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[20] *Id.* at 47 ("[T]he Federal Rules of Civil Procedure do not require a claimant to set out in detail the facts upon which he bases his claim."); *see also* Erickson v. Pardus, 551 U.S. 89, 93 (2007) ("Specific facts are not necessary").

[21] *Conley*, 355 U.S. at 47.

[22] Emily Sherwin, *The Jurisprudence of Pleading: Rights, Rules, and* Conley v. Gibson, 52 How. L.J. 73, 85-86 (2008).

[23] *Conley*, 355 U.S. at 48.

[24] Van Dervort, *supra* note 2, at 136.

[25] *See* Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit, 507 U.S. 163, 168 (1992) ("[I]t is impossible to square the 'heightened pleading standard' applied by the Fifth Circuit in this case with the liberal system of 'notice pleading' set up by the Federal Rules."); Hishon v. King & Spaulding, 467 U.S. 69, 73 (1984) ("A court may dismiss a complaint only if it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations.").

[26] 550 U.S. 544 (2007).

[27] *Id.* at 549.

[28] *Id.* at 550-51.

B. Holding

Under the *Conley* notice pleading standard, these allegations, taken as true, may arguably have survived a motion to dismiss for failure to state a claim upon which relief can be granted; yet Justice Souter, writing for the Court, dismissed the complaint as insufficient. The Court began by laying out the general standards for pleading: a complaint does not need "detailed factual allegations," but it "requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do[.]"[29] Applying these standards to a section 1 claim, the Court required "enough fact[s] to raise a reasonable expectation that discovery will reveal evidence of illegal agreement. . . . Without more, parallel conduct does not suggest conspiracy, and a conclusory allegation of agreement at some unidentified point does not supply facts adequate to show illegality."[30]

Next, the Court addressed the plaintiffs' main argument that the new plausibility standard conflicted with the "no set of facts" language in *Conley*. The Court admitted that under the current understanding of that phrase, a claim would survive a motion to dismiss so long as there is some set of facts that could possibly support it.[31] Justice Souter, however, opined that the phrase was taken out of context and "is best forgotten as an incomplete, negative gloss on an accepted pleading standard: once a claim has been stated adequately, it may be supported by showing any set of facts consistent with the allegations in the complaint."[32] According to Justice Souter and the majority, a claim must first be sufficiently stated as in *Conley*, and only then can any set of facts be used to support it. The Court expressly overruled *Conley*'s "no set of facts" standard[33] and replaced notice pleading with a new "plausibility" standard.[34]

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[29] *Id.* at 555.

[30] *Id.* at 556-57.

[31] *Id.* at 561.

[32] Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 563 (2007).

[33] *Id.*

> *Conley*'s "no set of facts" language has been questioned, criticized, and explained away long enough. . . . [T]he passage so often quoted fails to mention this understanding on the part of the Court, and after puzzling the profession for 50 years, this famous observation has earned its retirement. The phrase is best forgotten as an incomplete, negative gloss on an accepted pleading standard[.]

Id. at 562.

[34] *Id.* at 570.

C. The Plausibility Standard

The plausibility standard requires a pleading to have "enough facts to state a claim to relief that is plausible on its face."[35] The Court dismissed the complaint because the plaintiffs did not "nudge[] their claims across the line from conceivable to plausible."[36] Per this holding, the Court failed to identify a bright line, and thus the lower courts' application of the plausibility standard has since been highly unpredictable.[37] While the Court's opinion explicitly stated that this plausibility standard was not heightened and did not require fact pleading of specifics,[38] it is clear that the standard was something more than what *Conley* required.

The Court identified two reasons for departing from *Conley*'s established pleading standard. First, the Court expressed a concern that plaintiffs would run wild with litigiousness and drive up the cost of litigation, both in terms of time and money.[39] The Court predicted that:

> the threat of discovery expense will push cost-conscious defendants to settle even anemic cases . . . . [I]t is only by taking care to require allegations that reach the level suggesting conspiracy that we can hope to avoid the potentially enormous expense of discovery in cases with no "reasonably founded hope that the [discovery] process will reveal relevant evidence" to support a § 1 claim.[40]

The majority dismissed the idea that careful case management would be sufficient to weed out unmeritorious claims early in the discovery process.[41]

Second, the Court expressed concern that "if alleging parallel decisions to resist competition were enough to imply an antitrust conspiracy, pleading a § 1 violation against almost any group of competing businesses would be a sure thing."[42] The Court stressed that while parallel conduct is "consistent with conspiracy, [it is] just as much in line with a wide swath of rational and competitive business strategy unilaterally prompted by common

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[35] *Id.*

[36] *Id.*

[37] *See* cases cited and discussion *infra* note 53 and accompanying text.

[38] *Twombly*, 550 U.S. at 570.

[39] *Id.* at 559.

[40] *Id.* (alteration in original) (citation omitted).

[41] *Id.*

> It is no answer to say that a claim just shy of a plausible entitlement to relief can, if groundless, be weeded out early in the discovery process through 'careful case management,' . . . given the common lament that the success of judicial supervision in checking discovery abuse has been on the modest side.

Id.

[42] *Id.* at 566.

perceptions of the market."[43] The majority reasoned that when normal business decisions are facially indistinguishable from illegal agreements not to compete, false inferences based simply on that behavior would be highly prejudicial to the defendant.[44] The dissent argued that "there is a risk that jurors may mistakenly conclude that evidence of parallel conduct has proved that the parties acted pursuant to an agreement when they in fact merely made similar independent decisions."[45]

D. Dissent

In a lengthy dissent, Justice Stevens, joined by Justice Ginsburg, criticized the majority's plausibility standard and retirement of *Conley*'s "no set of facts" standard. Justice Stevens viewed the majority's plausibility standard as an evidentiary standard, which contradicts the pleading standard the FRCP intended to codify.[46]

Justice Stevens first described the Field Code and how its distinctions between evidentiary facts, ultimate facts, and conclusions were unworkable in practice, resulting in a complete rejection of those distinctions in Rule 8 of the FRCP.[47] He explained: "Under the relaxed pleading standards of the Federal Rules, the idea was not to keep litigants out of court but rather to keep them in. The merits of a claim would be sorted out during a flexible pretrial process and, as appropriate, through the crucible of trial."[48]

Justice Stevens then went on to discuss *Conley*'s notice pleading standard and noted its heavy usage in and influence on both federal and state courts. The dissent repeatedly asserted that notice pleading is well established in federal and state courts.[49] In support of *Conley*'s broad view, he discussed three appellate cases that stand for the policy that a plaintiff is entitled an opportunity to prove his or her case, regardless of how unlikely his or her ability to do so may be.[50] The pleading stage is not the place to weed out

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[43] *Id.* at 554.

[44] *Id.*

[45] *Id.* at 573 (Stevens, J., dissenting).

[46] *Id.* at 580.

[47] *Id.* at 574-75.

[48] *Id.* at 575.

[49] *E.g.*, *id.* at 578.

[50] *Id.* at 580-83; Leimer v. State Mut. Life Assurance Co. of Worcester, Mass., 108 F.2d 302, 306 (8th Cir. 1940).

> [T]here is no justification for dismissing a complaint for insufficiency of statement, except where it appears to a certainty that the plaintiff would be entitled to no relief under any state of facts which could be proved in support of the claim. . . . No matter how improbable it may be that she can prove her claim, she is entitled to an opportunity to make the attempt, and is not required to accept as final a determination

unmeritorious claims—that is what discovery and summary judgment are for.[51]

E. Aftermath and Inconsistencies

Twombly required a plaintiff to plead something more than *Conley*, but the question of how much more plagued lower courts for the next two years.[52] The vague plausibility standard that *Twombly* introduced left important questions unanswered, and mixed signals from the Court further aggravated this confusion. On one hand, the Court rejected *Conley*'s "no set of facts" standard as being too broad and required sufficient facts for a claim to be "plausible."[53] On the other hand, the Court simultaneously stated that it has not created a heightened pleading standard, and a mere two weeks later, upheld the sufficiency of a complaint on apparent standard notice pleading language in *Erickson v. Pardus*.[54]

In *Erickson*, the Court determined that a plaintiff's allegation that prison medical personnel withheld medication from him when he needed it was sufficient to meet the requirements of Rule 8.[55] Adding to the confusion surrounding the new plausibility standard, the Court's decision in *Erickson* cited the liberal language of *Conley*, then vacated and remanded "the Court of Appeals' departure from the liberal pleading standards set forth by Rule 8(a)(2)."[56]

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of her rights based upon inferences drawn in favor of the defendant from her amended complaint.

Id.; Cont'l Collieries v. Shober, 130 F.2d 631, 635 (3d Cir. 1942) ("No matter how likely it may seem that the pleader will be unable to prove his case, he is entitled, upon averring a claim, to an opportunity to try to prove it."); Dioguardi v. Durning, 139 F.2d 774, 775 (2d Cir. 1944) ("[W]e do not see how the plaintiff may properly be deprived of his day in court to show what he obviously so firmly believes and what for present purposes defendant must be taken as admitting.").

[51] *Twombly*, 550 U.S. at 585.

[52] *See, e.g.*, Anderson v. Sara Lee Corp., 508 F.3d 181, 188 n.7 (4th Cir. 2007) (noting that "[i]n the wake of *Twombly*, courts and commentators have been grappling with the decision's meaning and reach."); *see also* Iqbal v. Hasty, 490 F.3d 143, 155 (2d Cir. 2007) (recognizing that "[c]onsiderable uncertainty concerning the standard for assessing the adequacy of pleadings has recently been created by . . . *Twombly*.").

[53] *Twombly*, 550 U.S. at 556.

[54] 551 U.S. 89, 93-94 (2007) (citing language from *Conley* regarding notice pleading and emphasizing the court's "liberal pleading standard").

[55] *Id.* at 94.

[56] *Id.* at 93 ("Specific facts are not necessary; the statement need only give the defendant fair notice of what the . . . claim is and the grounds upon which it rests.") (citation omitted) (internal quotation marks omitted).

Thus, two unanswered questions emerged from the *Twombly* decision that led to inconsistent application of the plausibility standard: (1) is the plausibility standard a heightened pleading standard?; and (2) does this plausibility standard apply outside of the antitrust setting? Many courts read this decision as leaving the notice pleading standard of Rule 8(a)(2) "intact," while interpreting its scope broadly as applicable to all civil litigation cases.[57] Two years and over 2718 case citations later, *Ashcroft v. Iqbal* answered these questions in the affirmative and hammered the last nail in the coffin of notice pleading.[58]

IV. ASHCROFT V. IQBAL

A. Facts

The plaintiff, Javaid Iqbal, is a Muslim citizen of Pakistan who was arrested in the wake of September 11 on charges of fraud in relation to identification documents and conspiracy to defraud the United States.[59] Along with 183 others, Iqbal was deemed to be of "high interest" to the September 11 investigation, and was held in a maximum security prison under highly restrictive conditions designed to prevent him from communicating with the outside world.[60] After pleading guilty to the criminal charges and being removed to his native Pakistan, he filed a *Bivens* action[61] in federal district court against former and current federal officials and federal corrections officers.[62]

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[57] *See, e.g.*, Phillips v. County of Allegheny, 515 F.3d 224, 233 (3d Cir. 2008) (declining to limit the holding of *Twombly* to antitrust cases, but retaining the liberal notice pleading standard); *see also* Boykin v. KeyCorp, 521 F.3d 202, 213 (2d Cir. 2008):

> Although much of the [*Twombly*] Court's language addressed the pleading standard for a section 1 claim and the burdens of antitrust litigation specifically. . . the Court's reasoning suggested that it intended to make some alteration in the regime of pure notice pleading. . . . Yet the Court also affirmed the vitality of [Swierkiewicz v. Sorema N.A., 534 U.S. 506 (2002)], which applied a notice pleading standard, and explained that its decision did not require heightened fact pleading of specifics.

(citing *Iqbal*, 490 F.3d at 155; and *Twombly*, ___ U.S. at ___, 129 S. Ct. at 1937) (internal quotation marks omitted).

[58] ___ U.S. ___, 129 S. Ct. 1937 (2009).

[59] *Id.* at ___, 129 S. Ct. at 1942-43. The complaint was originally filed by two plaintiffs. Plaintiff Ehad Elmaghraby, an Egyptian Muslim, settled his claims with the government for $300,000 before the Second Circuit Court of Appeals' decision. *See* Ben Winograd, *Conference Call: DOJ Seeks Immunity for Ashcroft, Mueller* (June 9, 2008), *available at* http://www.scotusblog.com/2008/06/conference-call-doj-seeks-immunity-for-ashcroft-mueller/.

[60] *See Iqbal*, ___ U.S. at ___,129 S. Ct. at 1943.

[61] *See* Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388

B. Allegations

Iqbal's complaint alleged that jailors "'kicked him in the stomach, punched him in the face, and dragged him across' his cell without justification, subjected him to serial strip and body-cavity searches . . . , and refused to let him . . . pray because there would be '[n]o prayers for terrorists.'"[63] However, the only allegations in the complaint that the majority deemed relevant to the action against the defendants, former Attorney General John Ashcroft and Federal Bureau of Investigation Director Robert Mueller, were that the defendants designated Iqbal as a person of high interest on account of his race, religion, or national origin, in contravention of the First and Fifth Amendments to the Constitution.[64]

C. Holding

The five member majority, led by Justice Kennedy, concluded that the plaintiff's complaint did not satisfy federal pleading standards because it did not cross the Court's *Twombly* line between the "conceivable" and the "plausible."[65] Among other things, Iqbal's complaint alleged that Ashcroft was the principal architect of the discriminatory policy, and that Mueller was instrumental in adopting it.[66] The majority reasoned that even if all facts alleged in the complaint were taken as true, discrimination on behalf of the defendants was not a plausible conclusion because of the "obvious alternative explanation" for the arrest:[67] "a legitimate policy directing law enforcement to arrest and detain individuals because of their suspected link to the attacks would produce a disparate, incidental impact on Arab Muslims, even though the policy's purpose was to target neither Arabs nor Muslims."[68]

The majority concluded that even if the complaint gave rise to a plausible inference that the arrest was the result of unconstitutional discrimination,

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(1971), (establishing a cause of action for Constitutional violations committed by a federal officer and the right to recover damages against the officer in federal court regardless of whether statutory relief exists).

[62] *Iqbal*, ___ U.S. at ___, 129 S. Ct. at 1943.

[63] *Id.* at ___, 129 S. Ct. at 1944 (citing First Amended Complaint at ¶¶ 113, 143-45, 154, Ashcroft v. Iqbal, ___ U.S. ___, 129 S. Ct. 1937 (2009) (No. 04-CV-1809 (JG)(JA)), 2004 WL 3756442) (internal citations omitted).

[64] *Id.* at ___, 129 S. Ct. at 1944.

[65] *Id.* at ___, 129 S. Ct. at 1950-51.

[66] *See id.* at ___, 129 S. Ct. at 1951.

[67] *Id.* at ___, 129 S. Ct. at 1951 (quoting Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 567 (2007)).

[68] *Id.* at ___, 129 S. Ct. at 1952.

Iqbal's complaint would still not entitle him to relief because there were no facts alleged that bore on the defendants' discriminatory state of mind, and the doctrine of respondeat superior could not hold the defendants liable for the discriminatory behavior of those under them.[69] As discussed below, such findings of discriminatory intent are best fleshed out in court.

D. Iqbal *Heightened the Pleading Standard for All Civil Cases*

Building upon the plausibility standard of *Twombly*, *Iqbal* solidified and further articulated a heightened pleading standard for all federal civil cases. First, the majority interpreted *Twombly* as governing all civil cases in federal courts.[70] The majority reasoned that because *Twombly* interpreted Rule 8, which governs all civil cases, the standards set forth in that decision must govern the same.[71]

Second, the majority reaffirmed the "plausibility" interpretation of the FRCP 8(a)(2) pleading standard set forth in *Twombly*: "[t]o survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face."[72] The Court also expanded upon *Twombly* by creating a new test for analyzing pleadings. The Court identified the two principles supposedly underlying the *Twombly* decision: first, the concept that "a court must accept as true all allegations contained in a complaint is inapplicable to legal conclusions;" and second, "only a complaint that states a plausible claim for relief survives a motion to dismiss."[73]

Expanding on these two principles, the majority set forth a two-pronged test that a court must follow when considering a motion to dismiss: first, a court must identify "pleadings that, because they are no more than conclusions, are not entitled to the assumption of truth;" and second, "[w]hen there are well-pleaded factual allegations, a court should assume their veracity and then determine whether they plausibly give rise to an entitlement to relief."[74] Therefore, any matter a court deems to be conclusory will not satisfy the federal notice pleading standards.[75] Although this test seems to heighten the existing pleading standards, the Court's majority opinion leaves room for some flexibility. This flexibility

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[69] *See id.*

[70] *Id.* at ___, 129 S. Ct. at 1953.

[71] *See id.*

[72] *Id.* at ___, 129 S. Ct. at 1949 (quoting *Twombly*, 550 U.S. at 570) (internal quotation marks omitted).

[73] *Id.* at ___, 129 S. Ct. at 1949-50.

[74] *Id.* at ___, 129 S. Ct. at 1950.

[75] *See id.* at ___, 129 S. Ct. at 1954.

results in a relatively subjective test: determining whether a complaint states a plausible claim for relief is a "context-specific task that requires the reviewing court to draw on its judicial experience and common sense."[76]

Third, the majority rejected the "careful-case-management" approach, whereby Rule 8 is broadly interpreted and the court controls discovery scope and costs.[77] The Court instead found that no amount of case management can save a claim that is "just shy of a plausible entitlement to relief,"[78] especially when government officials are entitled to assert qualified immunity.[79]

E. Rationale Behind the Iqbal *Decision*

The majority in *Iqbal* was concerned primarily with the high rank of defendants Ashcroft and Mueller, the sensitive nature of their duties, and the possibility that discovery would interfere with their official duties and possibly expose confidential information to the public.[80] The *Iqbal* decision, however, stretches to all civil decisions, regardless of whether they implicate immunity of government officials; therefore, several other philosophical underpinnings must be mentioned.

One rationale for the *Iqbal* decision is efficiency. One commentator has gone so far as to say that *Iqbal* is a "balance between the notice pleading standard and the desire to quickly weed out frivolous lawsuits, particularly given the rapidly increasing cost of discovery."[81] The outcry following *Iqbal* makes "balance" a peculiar word to use for the decision. Another rationale is the benefit and protection it affords businesses. It is undisputed that proponents of *Iqbal* believe that it is good for business: "[n]ow, more than ever, when companies are struggling to survive and courts are inundated with lawsuits, the policy justifications for *Twombly*'s plausibility standard ring truer than ever."[82] Such proponents believe that *Conley* failed to protect defendants against frivolous claims and point out that discovery costs have skyrocketed since *Conley* due to the proliferation of e-

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[76] *See id.* at ___, 129 S. Ct. at 1950.

[77] *See id.* at ___, 129 S. Ct. at 1953.

[78] *See id.* (quoting *Twombly*, 550 U.S. at 559).

[79] *See id.* at ___, 129 S. Ct. at 1953.

[80] *See* Michelle Spiegal, *Ashcroft v. Iqbal: The Question of a Heightened Standard of Pleading in Qualified Immunity Cases*, 4 DUKE J. CONST. L. & PUB. POL'Y SIDEBAR 375, 389 (2009).

[81] Neal R. Stoll & Shepard Goldfein, *Defense for 'Twombly': Plausibility Standard Was Never More Plausible*, 241 N.Y.L.J. 1, 1 (Aug. 18, 2009).

[82] *Id.*

discovery.[83] Under the new *Iqbal* standard, proponents claim that fewer cases will be decided on the in terrorem value of lawsuits.[84]

F. Dissent

Justice Souter, who wrote the *Twombly* opinion, dissented as to the majority's constructions of *Bivens* liability and of Rule 8(a)(2) of the FRCP, and was joined by Justices Stevens, Ginsburg, and Breyer.[85] First, the dissent argued that the majority ignored the defendants' concession that the defendants would be subject to liability if the plaintiff could prove that the defendants had actual knowledge of the alleged discriminatory nature of the "high interest" designation and that they were deliberately indifferent to that discrimination.[86] Instead, the dissent argued that the majority wrongly concluded that the plaintiff could not raise a *Bivens* claim on theories of supervisory liability other than constructive notice.[87]

Given this concession, Iqbal would have been able to satisfy Rule 8(a)(2) if he had put forth facts to support the theory of actual knowledge or deliberate indifference of discrimination.[88] According to the dissent, the complaint not only alleged that Ashcroft and Mueller knew of and condoned the discriminatory policy that their subordinates carried out, but also that the defendants affirmatively acted to create the discriminatory detention policy.[89] According to Justice Souter, the majority failed to heed settled pleading standards because the majority failed to proceed on the assumption that the allegations in the complaint were true.[90] Instead, the majority labeled the allegations conclusory, and thus found that Iqbal failed to satisfy the plausibility standard.[91] By singling out a few phrases in the complaint and determining they were bare legal assertions not entitled to the assumption of truth, the majority ignored the numerous other allegations in the complaint that linked Ashcroft and Mueller to the discriminatory practices of their subordinates.[92] In other words, "Iqbal does not say merely that Ashcroft was the architect of some amorphous discrimination, or that Mueller was instrumental in an ill-defined constitutional violation; he

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[83] *Id.*
[84] *Id.*
[85] *See Iqbal*, ___ U.S. at ___, 129 S. Ct. at 1954-55.
[86] *See id.* at ___, 129 S. Ct. at 1956.
[87] *See id.*
[88] *See id.* at ___, 129 S. Ct. at 1958-59.
[89] *See id.* at ___, 129 S. Ct. at 1959.
[90] *See id.* at ___, 129 S. Ct. at 1959-60.
[91] *See id.*
[92] *See id.* at ___, 129 S. Ct. at 1961.

alleges that they helped to create the discriminatory policy he has described."[93]

The majority in *Iqbal* purported to be consistent with and expand upon the premises set forth in *Twombly*. However, it is notable that Justice Souter dissented from the *Iqbal* decision, and in essence said that the majority had interpreted the *Twombly* decision, which he authored, incorrectly. The crux of Justice Souter's argument rested upon the majority ignoring the mandate in *Twombly* to take the plaintiffs allegations as true in all circumstances except where the allegations "are sufficiently fantastic to defy reality as we know it: claims about little green men, or the plaintiff's recent trip to Pluto, or experiences in time travel."[94] In addition to joining Justice Souter's dissent, Justice Breyer concluded that, contrary to the assertion of the majority, the law provides trial courts with a host of means other than dismissal for failure to state a claim, with which to prevent unwarranted litigation from interfering with the "the proper execution of the work of the Government."[95]

G. Federal Pleading After Iqbal

The Wall Street Journal predicted that *Iqbal* will make it more difficult for plaintiffs to file suit without specific factual evidence, which will have the effect of raising the threshold for moving a case into expensive discovery and further litigation.[96] The Journal also noted that this might save companies millions of dollars in legal fees.[97] Some are of the view that notice pleading has always been a myth because federal courts in every circuit impose heightened pleading under the guise of notice pleading, in which case *Iqbal* simply brings the Court's rhetoric in line with pleading standard realities.[98]

Most scholars, however, view *Twombly* and *Iqbal* as radically departing from the previous notice pleading jurisprudence.[99] Decisions after *Iqbal* have confirmed that conclusory complaints that are unable to identify

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[93] *Id.*

[94] *Id.* at 1959.

[95] *See id.* at 1961-62 (Breyer, J., dissenting).

[96] *See* Kristina Peterson, *Business Capitalizes on Ruling in Political Case*, WALL ST. J., June 27, 2009, at A2.

[97] *See id.*

[98] *See* Christopher M. Fairman, *The Myth of Notice Pleading*, 45 ARIZ. L. REV. 987, 988 (2003).

[99] *See, e.g.*, Lawrence Marquess & Jeff Timmerman, *Tightened Federal Pleading Rules Take Effect: Three Months After the U.S. Supreme Court's Iqbal Decision*, MONDAQ, Aug. 19, 2009, 2009 WLNR 16158226.

specific factual allegations on each of the elements of each claim are likely to be dismissed.[100] During the three months following *Iqbal*, the case was cited over 500 times. Given the heightened pleading standards, defendants will more readily file FRCP Rule 12(b)(6) motions to dismiss for failure to state a claim, and courts will more readily grant these motions, even though these complaints would probably not have been dismissed prior to *Iqbal*.[101] The decision is so divisive that Congress is considering a bill that would effectively overrule *Twombly* and *Iqbal*, and return federal courts to the previous notice pleading standards.[102]

H. Distinguishing and Tempering Iqbal

While many courts have used *Iqbal* as an opportunity to dismiss claims the judge deems short of plausible, there are many others that have refused to dismiss plaintiffs' claims by distinguishing or minimizing the impact of *Iqbal*. For example, in *al-Kidd v. Ashcroft*,[103] plaintiff Abdullah al-Kidd alleged in his complaint that then-Attorney General John Ashcroft developed and promulgated a policy whereby the Federal Bureau of Investigation and Department of Justice used the federal material witness statute as a pretext to arrest and detain terrorist suspects whom they wished to preventatively detain without sufficient evidence to arrest on criminal charges.[104] The Ninth Circuit Court of Appeals distinguished *Iqbal* by finding that unlike the complaint in *Iqbal*, al-Kidd's complaint contained specific statements that Ashcroft and Mueller made regarding the post-September 11 use of the material witness statute.[105] Such facts suggested that the defendants purposefully used the material witness statute to detain suspects whom they wished to investigate and detain preventatively, and that al-Kidd was a victim of this policy.[106] Al-Kidd's claim based on the material witness statute was sufficient to pass *Twombly*'s plausibility standard.[107] While many judges use *Iqbal* as an opportunity to dismiss a

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[100] *Id.*; *see, e.g.*, Mohr v. Targeted Genetics, Inc., No. 09-3170, 2009 WL 4021153 (C.D. Ill. Nov. 18, 2009); Brocato v. Dep't of Corr., No. CV 06-00575 CJC (JEM), 2009 WL 3489367 (C.D. Cal. Oct. 26, 2009); Sinaltrainal v. Coca-Cola Co., 578 F.3d 1252 (11th Cir. 2009).

[101] *See* Marquess & Timmerman, *supra* note 99.

[102] *See* Notice Pleading Restoration Act, S. 1504, 111th Cong. (2009), *available at* http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=111_cong_bills&docid=f:s1504is.txt.pdf.

[103] 580 F.3d 949 (9th Cir. 2009).

[104] *Id.* at 953-54.

[105] *Id.* at 975.

[106] *See id.*

[107] *See id.* at 977.

case before discovery, the *al-Kidd* decision suggests that judges are not always inclined to do so, and that plaintiffs such as al-Kidd deserve their day in court.

In *Padilla v. Yoo*,[108] plaintiff Jose Padilla, a U.S. citizen, was designated an enemy combatant and detained for three years and eight months in a military brig in South Carolina.[109] Padilla alleged various constitutional violations during his detention due to his being imprisoned without charge, without the ability to defend himself, and without the ability to challenge the conditions of his confinement.[110] Padilla alleged that defendant John Yoo abused his position as Deputy Attorney General in the Office of Legal Counsel by "formulating unlawful practices and policies for the designation, detention and interrogation of suspected enemy combatants, and by drafting memoranda designed to evade legal restraints and to immunize those who implemented them."[111] Over Yoo's claims of absolute immunity, the District Court for Northern California denied the defendant's motion to dismiss as to all claims except for Padilla's claim concerning his right against self-incrimination,[112] because "Padilla allege[d] with specificity that Yoo was involved in the decision to detain him and created a legal construct designed to justify the use of interrogation methods that Padilla allege[d] were unlawful."[113] This decision suggests that judges have the ability, even when faced with fact patterns similar to the fact pattern in *Iqbal*, to refuse to dismiss the claim if they feel the case has merit.

In *Chao v. Ballista*,[114] the federal district court in Massachusetts considered a claim by an incarcerated plaintiff alleging that supervisory officials at the prison failed to protect her from sexual abuse.[115] Utilizing *Iqbal*, the defendant argued that the plaintiff failed to plead the defendant's personal involvement, and thus the allegations were no more than conclusory allegations not entitled to the truth.[116] The court found this argument unpersuasive and noted that notice pleading is still the federal pleading standard, and *Iqbal* confirms that plausibility is highly contextual and is dependent on all of the facts in the complaint.[117] While acknowledging *Iqbal* as the prevailing pleading standard, the court

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[108] 633 F. Supp. 2d 1005 (N.D. Cal. 2009).
[109] *Id.* at 1012.
[110] *Id.*
[111] *Id.* at 1015.
[112] *Id.* at 1034.
[113] *Id.*
[114] 630 F. Supp. 2d 170 (D. Mass. 2009).
[115] *Id.* at 173.
[116] *Id.* at 177.
[117] *Id.*

minimized its impact: "in keeping with Rule 8(a), a complaint should only be dismissed at the pleading stage where the allegations are so broad, and the alternative explanations so overwhelming, that the claims no longer appear plausible."[118] The case indicates that *Iqbal* does not translate to most civil contexts, and that in order to prevent potentially valid discrimination claims from being dismissed, *Iqbal* should be narrowly construed and limited to its facts.

In *Smith v. Duffey*,[119] a plaintiff alleged fraud in connection with the cancellation of his stock options in his employer's Chapter 11 reorganization.[120] Judge Posner, writing for the Seventh Circuit, noted in dicta that it is possible that neither *Twombly* nor *Iqbal* govern the case:

> Iqbal is special in its own way, because the defendants had pleaded a defense of official immunity and the Court said that the promise of minimally intrusive discovery "provides especially cold comfort in this pleading context, where we are impelled to give real content to the concept of qualified immunity for high-level officials who must be neither deterred nor detracted from the vigorous performance of their duties."[121]

In light of the numerous cases that have been dismissed under *Iqbal*, these four cases should not be considered a trend towards distinguishing or minimizing *Iqbal*. Rather, they illustrate that not all judges consider *Iqbal* an opportunity to dismiss cases that would not have been dismissed pre-*Iqbal*.

V. HAWAI'I PLEADING STANDARDS

A. The Hawai'i and Federal Rule Governing Pleading Standards Have Identical Language

After *Iqbal*, state courts must decide whether *Iqbal* should apply to claims pled therein, especially those that have adopted rules of procedure based on the FRCP.[122] Approximately thirty five states, including Hawai'i, adopted the FRCP, with the fifteen other states influenced by the FRCP to some extent.[123] Rule 8(a) of the Hawai'i Rules of Civil Procedure (HRCP) provides:

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[118] *Id.* at 176 (citing Thomas v. Rhode Island, 542 F.3d 944, 948 (1st Cir. 2008)).

[119] 576 F.3d 336 (7th Cir. 2009).

[120] *Id.* at 337.

[121] *Id.* at 340 (quoting Ashcroft v. Iqbal, ___ U.S. ___, at ___, 129 S. Ct. 1937, 1954 (2009)).

[122] Marquess & Timmerman, *supra* note 99, at 18.

[123] VAN DERVORT, *supra* note 2, at 136.

> [a] pleading which sets forth a claim for relief, whether an original claim, counterclaim, cross-claim, or third-party claim, shall contain (1) a short and plain statement of the claim showing that the pleader is entitled to relief, and (2) a demand for judgment for the relief the pleader seeks. Relief in the alternative or of several different types may be demanded.[124]

HRCP 8(a) is modeled after FRCP 8(a), and the language is identical for all practical purposes.[125] Prior to the 2007 stylistic amendments to the FRCP, the parts of FRCP 8 and HRCP 8 regarding the level of specificity in a pleading were identical.[126] In addition to the general pleading standard under Hawai'i and Federal Rules 8(a), neither the Hawai'i nor the Federal rules require technical forms of pleading.[127] In addition, both the Federal and Hawai'i rules require that pleadings be construed so as to do justice.[128] However, Hawaii's pleading standards are currently governed by the "no set of facts" interpretation of the rule, and Hawai'i circuit courts lack the power to adopt the *Twombly* standard as modified by *Iqbal* without a formal adoption by the Hawai'i Supreme Court.[129] There is currently no indication that the Hawai'i Supreme Court intends to expressly adopt or reject *Iqbal*.

B. Hawai'i Pleading Jurisprudence is Not Fully Developed

Hawai'i pleading jurisprudence is not fully developed; there is a lack of cases discussing current or even past pleading standards in the state. In the few Hawai'i cases that discussed pleading standards, however, courts have adopted a very broad version of notice pleading—pleadings must be construed liberally.[130] Hawai'i courts generally follow the notice pleading standards set forth in *Conley*, whereby a complaint is not dismissed under Rule 12(b)(6) "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief."[131]

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[124] HAW. R. CIV. P. 8(a).

[125] *See* FED. R. CIV. P. 8(a).

[126] FED. R. CIV. P. 8 advisory committee's note ("The language of Rule 8 has been amended as part of the general restyling of the Civil Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.").

[127] HAW. R. CIV. P. 8 (e)(1); FED. R. CIV. P. 8(d)(1).

[128] HAW. R. CIV. P. 8(f); FED. R. CIV. P. 8(e).

[129] *See* Holleman v. Aiken, 668 S.E.2d 579, 584 (N.C. App. 2008) (holding that the North Carolina Court of Appeals was without the power to adopt *Twombly*'s 'plausibility standard' without direction from the North Carolina Supreme Court).

[130] *See, e.g.*, In re Genesys Data Techs., Inc. v. Genesys Pacific Techs., Inc., 95 Haw. 33, 41, 18 P.3d 895, 903 (2001) (citing HAW. R. CIV. P. 8(a) (1999)); Au v. Au, 63 Haw. 210, 221, 626 P.2d 173, 181, *reconsideration denied*, 63 Haw. 263, 626 P.2d 173 (1981).

[131] Midkiff v. Castle & Cooke, Inc., 45 Haw. 409, 414, 368 P.2d 887, 890-91 (1962)

When making this determination, Hawai'i courts take all well-pled allegations of fact as true.[132] While federal courts are seeing a marked rise in motions to dismiss for failure to state a claim after *Iqbal*, in Hawai'i state courts, "[t]he motion to dismiss for failure to state a claim is viewed with disfavor and is rarely granted."[133]

C. Notice is Central to the Hawai'i Pleading Standard

The main requirement implicit in the Hawai'i pleading standard is notice to the defendant of the charges against him. The Hawai'i Supreme Court has found that even though a plaintiff's complaint failed to allege specific violations of the pertinent Hawai'i laws and personnel rules and regulations, such a failure is not fatal to the plaintiff's claim because the defendant was reasonably informed of the charges against him, and it was obvious that the action arose from conduct alleged to violate the Securities Act of 1933.[134]

Unlike the Federal rule's plausibility standard, the Hawai'i rule is satisfied if the statement gives the defendant fair notice of the claim and the grounds upon which it rests; therefore it is not even necessary to plead under the particular law that recovery is sought.[135] Such relaxed pleading standards can extend to defendants as well as plaintiffs. For example, First Hawaiian Bank filed an action against a customer to recover funds that were withdrawn from an account held by a person with the same name as customer's mother and deposited into a joint account held by the customer and mother.[136] The defendant customer failed to plead change of position, good faith, or any other affirmative defenses in her answer.[137] The Hawai'i Court of Appeals concluded that under Hawaii's "notice pleading" approach, it is "no longer necessary to plead legal theories with ... precision."[138] The court held that the defendant should be able to plead her

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(quoting Conley v. Gibson, 355 U.S. 41, 45-46 (1957)).

[132] *See id.* at 414, 368 P.2d at 891.

[133] Marsland v. Pang, 5 Haw. App. 463, 474, 701 P.2d 175, 186 (1985) (quoting Giuliani v. Chuck, 1 Haw. App. 379, 385, 620 P.2d 733, 737 (1980)); *see also* Tseu ex rel. Hobbs v. Jeyte, 88 Haw. 85, 90, 962 P.2d 344, 349 (1998) (quoting Mendes v. Hawai'i Ins. Guar. Ass'n, 87 Haw. 14, 17, 950 P.2d 1214, 1217 (1998)).

[134] Hall v. Kim, 53 Haw. 215, 219-20, 491 P.2d 541, 544-45 (1971).

[135] *Id.* at 221, 491 P.2d at 545 (citing United States v. Missouri-Kansas-Texas R.R., 273 F.2d 474, 476 (1959)).

[136] First Hawaiian Bank v. Lau, No. 26704, 2007 Haw. App. LEXIS 528, at *1-3 (Haw. Ct. App. Sept. 11, 2007).

[137] *Id.*

[138] *Id.* at *35 (quoting Leslie v. Estate of Tavares, 93 Haw. 1, 4, 994 P.2d 1047, 1050 (2000)).

affirmative defenses because the plaintiff changed the theory of its cause of action, and failed to object to the defendant's affirmative defenses early on in the proceedings.[139]

Yet another example of notice as a central component of Hawai'i pleading jurisprudence is the Hawai'i Court of Appeals' decision *Suzuki v. State*.[140] In an employee's action against the State alleging discrimination, the court held that even though the plaintiff failed to allege a specific enumerated claim for relief for race discrimination in the context of the State's motion for summary judgment, the court decided to construe the complaint as including this claim because the State was aware of the plaintiff's claim.[141]

D. Hawaii's Pleading Standard Does Not Require Pleading of Facts

The *Iqbal* standard and the Hawai'i notice pleading standard also differ as to the facts that must be pled. While the court in *Iqbal* required well-pled facts that cross the line into plausibility, Hawai'i courts do not require the pleading of facts whatsoever.[142] HRCP Rule 8(a)(1) only requires a complaint to set forth a short and plain statement of the claim showing that the pleader is entitled to relief—a threshold that can be met by stating evidence, facts, or conclusions of law.[143] Hawai'i courts have adopted the *Conley* maxim that a court should reject "the approach that pleading is a game of skill in which one misstep by counsel may be decisive to the outcome" and accept "the principle that the purpose of pleading is to facilitate a proper decision on the merits."[144]

Unlike federal courts, Hawai'i courts voice a preference for a motion for a more definite statement before any complaint is dismissed for failure to state a claim. In *Zanakis-Pico v. Cutter Dodge, Inc.*,[145] the Supreme Court of Hawai'i reinforced an extremely broad notion of pleading.[146] The court found that while the plaintiffs' third amended complaint, standing alone, was deficient, the complaint must be reviewed in conjunction with the plaintiffs' more definite statement, which is sufficient to state a claim.[147]

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[139] *Id.* at *40, *41.

[140] 119 Haw. 288, 196 P.3d 290 (Ct. App. 2008).

[141] *Id.* at 296, 196 P.3d at 298.

[142] *Hall*, 53 Haw. at 220, 491 P.2d at 545.

[143] *Id.* (citing, *inter alia*, Bowles v. Cabot, 153 F.2d 258, 260 (2d Cir. 1946)).

[144] *Hall*, 53 Haw. at 221, 491 P.2d at 545 (quoting Conley v. Gibson, 355 U.S. 41, 48 (1957)).

[145] 98 Haw. 309, 47 P.3d 1222 (2002).

[146] *Id.* at 322, 47 P.3d at 1235.

[147] *Id.* at 323, 47 P.3d at 1236.

The court noted that a motion for a more definite statement is generally the appropriate manner in which to resolve any ambiguity in the pleadings.[148]

VI. HAWAI'I COURTS SHOULD CONTINUE IMPLEMENTING *CONLEY* NOTICE STANDARDS

A. Federal Pleading Standards are Persuasive, but not Binding, on Hawai'i State Courts

As stated above, HRCP 8 is the functional equivalent of FRCP 8.[149] Because federal civil procedure jurisprudence is highly developed, Hawai'i State courts often look to federal case law interpreting federal rules that Hawai'i has adopted.[150] This is particularly true where Hawai'i jurisprudence is not well developed in the area, as is the case with HRCP 8. So although *Iqbal* is not mandatory authority under stare decisis, it is strongly persuasive, and defendants will argue that *Iqbal*'s new standard should be adopted.

Despite Hawaii's current practice of following liberal notice pleading, Hawai'i courts have used the FRCP 8(a) for guidance in the past, and the Hawai'i Supreme Court is free to adopt the *Iqbal* standard if it wishes. For example, prior to the 2007 amendment, the Hawai'i Intermediate Court of Appeals noted that the wording in HRCP 8(a)(1) and FRCP 8(a)(2) were identical, and therefore the federal requirement that a court is not required

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[148] *Id.* (citing, *inter alia*, Seligson v. Plum Tree, Inc., 361 F. Supp. 748, 756 (E.D. Pa. 1973), *overruled on other grounds by* Seville Indus. Machinery Corp. v. Southmost Machinery Corp., 742 F.2d 786, 791 (3d Cir. 1984)).

[149] HAW. R. CIV. P. 8(a):

> A pleading which sets forth a claim for relief . . . shall contain (1) a short and plain statement of the claim showing that the pleader is entitled to relief . . . . Each averment of a pleading shall be simple, concise, and direct. No technical forms of pleading or motions are required . . . . All pleadings shall be so construed as to do substantial justice.

Id.; *accord* FED. R. CIV. P. 8(a):

> (a) A pleading that states a claim for relief must contain: . . . (2) a short and plain statement of the claim showing that the pleader is entitled to relief . . .
>
> . . .
>
> (d) Each allegation must be simple, concise, and direct. No technical form is required.
>
> (e) Pleadings must be construed so as to do justice.

Id.

[150] *See, e.g.*, County of Hawaii v. C & J Coupe Family Ltd. P'ship, 119 Haw. 352, 371, 198 P.3d 615, 634 (2008) (citing Professors Wright and Miller's interpretation of FRCP 42 because HRCP 42 is identical); *see also* Wilson v. Freitas, 121 Haw. 120, 127, 214 P.3d 1110, 1117 (Haw. Ct. App. 2009) (citing a Supreme Court case construing FRCP 56(c) because HRCP 56(c) was modeled upon it).

to accept conclusory allegations as legally significant also applies to Hawai'i courts.[151]

While *Twombly* and *Iqbal* may be the most recent interpretations of FRCP 8, they blatantly ignore the original purpose behind the FRCP that its draftsman, Charles E. Clark, envisioned. Justice Stevens quoted Clark's statements regarding pleading in his dissent in *Twombly*:

> I fear that every age must learn its lesson that special pleading cannot be made to do the service of trial and that live issues between active litigants are not to be disposed of or evaded on the paper pleadings, i.e., the formalistic claims of the parties. Experience has found no quick and easy short cut for trials in cases generally and antitrust cases in particular.[152]

Because *Iqbal* is not binding on Hawaii's state courts and is an aberration of what has long been a generally accepted notice pleading standard, Hawai'i state courts should reject *Iqbal*'s heightened pleading standard.

B. Litigation Considerations in the Face of Hawaii's Recession

The current financial crisis makes litigation particularly unattractive, and will likely give rise to strident concern over the expense and time required to litigate unmeritorious claims that might currently survive the broad pleading standard in Hawai'i courts. According to the University of Hawai'i Economic Research Organization's (UHERO) September 25th Economic Forecast, although things are beginning to look better for the United States and global economies, "[i]t is harder to find evidence of a turnaround in the Hawai'i economy[.]"[153] Although UHERO expects recovery to begin in early 2010, a full recovery of the local economy is still years away, due in part to "the drag from continuing State fiscal problems[.]"[154] In UHERO's more recent December 18, 2009 forecast, they say that Hawai'i will likely see a return to growth in early 2010, but:

> [w]hile there are now clearer signs of an imminent recovery, risks abound, including possible additional fallout from state and local government fiscal crises and a possible stall in the global upturn. The beginning of local recovery will not quickly yield tangible benefits for many local households. Jobs will still be hard to find for several years, social welfare needs will abate

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[151] Marsland v. Pang, 5 Haw. App. 463, 474, 701 P.2d 175, 186 (1985).

[152] Bell Atlantic v. Twombly, 550 U.S. 544, 587 (1955) (Stevens, J., dissenting) (quoting Special Pleading in the "Big Case," 21 F.R.D. 45, 46 (1957)).

[153] Univ. of Hawai'i Econ. Research Org., *UHERO Quarterly Hawaii Forecast Update: Recovery Still Around the Corner* i (2009), http://www.uhero.hawaii.edu/forecasts/09Q3_hioutlook.pdf (last visited Dec. 25, 2009).

[154] *Id.*

> only slowly, and income losses for public and private sector workers will persist for some time.[155]

Proponents of a lowered pleading standard may raise the issue that a recession is harmful to the government. The state and local governments are sued over issues ranging from class action suits over workforce policy decisions to individual suits over street potholes.[156] A lower pleading standard would leave the state and local governments vulnerable to even more attacks, which may be an important consideration given the current financial situation of the State of Hawai'i. Also, government is not the only entity in need of protection. Hawai'i judges may be mindful of the risk of losing Hawaii's businesses to bankruptcy, and may feel that businesses need protection from costly litigation during the economic recession.[157] The risk is not only to local businesses; an increasingly hostile legal environment may also force national corporations to pull out of Hawai'i, to the detriment of the state's residents. This concern is unsubstantiated, however, without statistics that show that a recession has any tangible, practical effect on litigation. It should therefore be disregarded when considering whether to raise the pleading standard.

C. Addressing Arguments Against Notice Pleading in Context

In addition to economic concerns, there are also arguments to be made that litigation in Hawai'i is increasing exponentially. It could be argued that a heightened pleading standard is necessary to curb the excessive litigation caused by the many unmeritorious and costly lawsuits that are currently filed.

A brief look at Hawaii's annual caseload statistics from Hawaii's state courts may give some illumination to the basis of this fear. The total civil action caseload of the Hawai'i circuit courts in fiscal year 2006-2007 was 9,566 cases, with 3,582 new cases filed and 3,179 cases terminated and an overall increase of 403 cases.[158] Compare this to the total civil action

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[155] Univ. of Hawai'i Econ. Research Org., *UHERO Quarterly Hawaii Forecast Update: Weak Growth Expected in New Year* ii (2009), http://www.uhero.hawaii.edu/forecasts/09Q4_hioutlook.pdf (last visited Dec. 25, 2009).

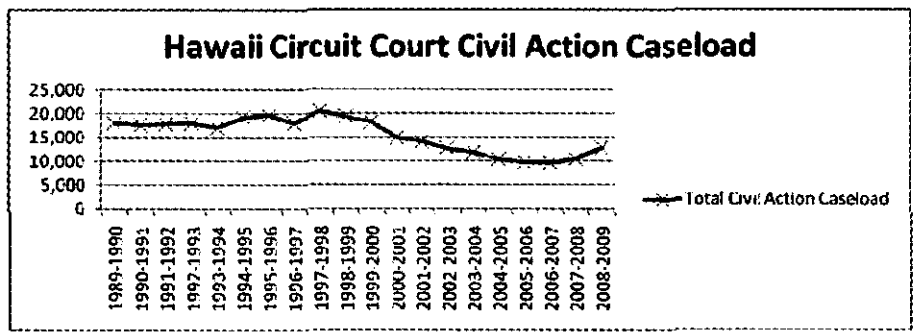
[156] *See, e.g.*, Sierra Club v. Dep't of Transp., 120 Haw. 181, 202 P.3d 1226 (2009) (suing the Department of Transportation of the State of Hawai'i for an environmental assessment regarding harbor improvements to facilitate an inter-island ferry); *see also* Silva v. City and County of Honolulu, 115 Haw. 1, 165 P.3d 247 (2007) (suing the City and County of Honolulu for recovery for a wrongful death, brought against the Honolulu Police Department).

[157] *See* Fairman, *supra* note 98.

[158] Hawai'i State Judiciary, *2007 Annual Report Statistical Supplement* tbl.7 (2009).

caseload in fiscal year 2007-2008, which was 10,585 cases, with 4,198 new cases filed and 3,558 cases terminated and an overall increase of 640, and the total civil action caseload in fiscal year 2008-2009, which was 12,843 cases, with 4,972 new cases filed and 3,706 cases terminated and an increase of 1,266 cases.[159]

These numbers seem to indicate that, at least in recent years, civil litigation in Hawaii's State circuit courts has been steadily increasing. A closer look at litigation in previous years, however, reveals that in the previous two decades, the total caseload of the circuit courts in Hawai'i actually decreased in many years and significantly decreased overall in the years prior to 2006.[160] The circuit court civil action caseload has not substantially increased over the last two decades, which is readily apparent after viewing the statistics on a line chart, displayed below. In fact, the recent rise in the circuit court caseload still has not reached the level it was in the 1990s. This suggests that civil litigation is not increasing nearly as much as proponents of a heightened pleading standard would have us believe. Rather, the overall long-term trend has been a decrease in civil litigation. Also, while there is currently no available statistics on the effects of a heightened pleading standard on Hawaii's caseload, it is far too uncertain to assume that notice pleading equates to rampant litigation.



It is too soon to gauge the effect of *Iqbal* on Hawaii's federal courts' caseload, but judging by the number of citations to the case by district courts, the *Iqbal* case has not gone unnoticed. Hawaii's federal district court has been actively dismissing cases pursuant to *Iqbal*'s heightened pleading standard.[161]

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[159] Hawai'i State Judiciary, *2008 Annual Report Statistical Supplement* tbl.7 (2009); Hawai'i State Judiciary, 2009 Annual Report Statistical Supplement tbl.7 (2009).

[160] *See infra* Chart 1; Hawai'i State Judiciary, *1990-2006 Annual Report Statistical Supplement* tbl.7 (2009).

[161] *See, e.g.*, Young v. Bishop Estate, No. 09-00403, 2009 WL 3763029 (D. Haw. Nov. 6, 2009) (dismissing a claim that Kamehameha Schools and its trustees along with organized

Another concern is the effect that the high cost of discovery will have on the fair adjudication of cases and on defendants. The Court in *Twombly* feared that a low pleading standard would drive defendants to settle unmeritorious cases in order to avoid the high cost of adjudication.[162] However, liberal discovery rules allow the court significant discretion in shaping and limiting discovery. The FRCP was based on the overall premise of increased judicial discretion and expansive litigation.[163] Opponents of this view, including the *Twombly* Court, believe that judicial supervision is insufficient to weed out unmeritorious claims.[164]

D. A Heightened Pleading Standard Should Not Preclude Access to Justice

Despite the concerns and arguments for greater control of open access to the courts, a denial of justice to the meritorious claims cannot be justified. Over time, the legal system has slowly evolved against litigants with limited resources.[165] Trials have become longer and the costs and complexity of litigation have increased.[166] The problem with a heightened pleading standard often arises in litigation with complex facts that are not easily accessible to plaintiffs. Such complexity requires skilled attorneys, additional discovery costs and additional court fees. Thus, raising the pleading standard would serve to create an additional barrier to the courts and aggravate the already limited access to justice by further increasing the costs of litigation.

The current recession has hit lower income litigants disproportionately, making it more unlikely that they will have an opportunity to utilize the court system. According to a 2007 report by the Access to Justice Hui, the

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crime, had a corrupting influence on the Hawai'i judiciary system); *see also* Hawaii Motorsports Inv., Inc. v. Clayton Group Servs., No. 09-304, 2009 WL 3109941 (D. Haw. Sept. 25, 2009) (dismissing tort and contract claims under *Iqbal*'s heightened pleading standard); Larson v. Ching, No. 08-537, 2009 WL 3172633 (D. Haw. Oct. 5, 2009) (dismissing a plaintiff's Section 1983 and ADA claims and citing *Iqbal*).

[162] *See* Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 559 (2007) ("[T]he threat of discovery expense will push cost-conscious defendants to settle even anemic cases[.]").

[163] *See* SUBRIN & WOO, *supra* note 6, at 54.

[164] *See Twombly*, 550 U.S. at 559

> It is no answer to say that a claim just shy of a plausible entitlement to relief can, if groundless, be weeded out early in the discovery process through 'careful case management,' . . . given the common lament that the success of judicial supervision in checking discovery abuse has been on the modest side.

Id.

[165] *See* Richard Turbin, *What Happened to Justice for the Little Guy?: The Average American Can no Longer Afford his Day in Court*, HONOLULU STAR-BULLETIN, July 15, 2000, *available at* http://archives.starbulletin.com/2000/07/15/editorial/special.html.

[166] *Id.*

primary barrier to getting legal help for most people is their inability to afford civil legal services.[167] Of low to moderate income people in Hawai'i, 77.1% were not able to afford legal assistance when they needed it.[168] Litigants in these lower income brackets are not likely to have the necessary means to gather information sufficient to meet a heightened pleading standard, particularly in cases with complex facts such as the cases discussed above. Consequently, even if meritorious claims of lower income litigants make it to filing, these claims will likely never make it past the first pleading barrier of Rule 8.

Not only are the resources of low income people shrinking, but the resources of organizations that seek to assist those in need of legal services are decreasing. Many of the nonprofit legal service organizations must compete for scarce funds at the legislature and from donations. The 2007 Access to Justice Hui report showed that a lack of funding for operations was one of the two major factors affecting the ability to provide legal services.[169] The financial crisis in Hawai'i has led to a significant decrease in grant-in-aid funding to nonprofit and charitable organizations in recent years.[170] However, decreased funding from the State and from private donations are not the only economic woes facing nonprofits. The Hawai'i Justice Foundation, for example, has seen a decrease in the monthly net interest received from IOLTA[171] accounts, used to fund various programs "designed to provide low-income legal services, offer educational programs, and improve the administration of justice."[172] The decrease in avenues for plaintiffs to seek redress for wrongs against them is a strong reason not to raise the pleading standard, because many will be barred from the courts.

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[167] Access to Justice Hui, *Achieving Access to Justice for Hawaii's People* II-31 (2007), http://www.legalaidhawaii.org/HUI_Access_to_Justice.pdf (last visited Jan. 17, 2010).

[168] *Id.* at II-31.

[169] *Id.* at II-43.

[170] *See* Susan Essoyan, *Justice for All?*, HONOLULU STAR-BULLETIN, Apr. 20, 2008; Legal Aid Society of Hawai'i, http://www.legalaidhawaii.org/ABOUT_US.htm (last visited Dec. 25, 2009) ("Over the last five years, the Legal Aid Society of Hawaii has faced substantial reductions in government funding and a significant increase in requests for services as the State economy continues to struggle.").

[171] IOLTA.org, What is IOLTA?, http://www.iolta.org/grants/ (last visited Mar. 21, 2010). When lawyers receive client funds that are nominal and short-term, the Interest on Lawyer Trust Accounts (IOLTA) program requires that these funds be pooled to provide the IOLTA program with interest to fund civil legal aid to the poor and support justice system improvements. Today, all U.S. states operate IOLTA programs.

[172] James A. Kawachika & Robert J. Leclair, *The Impact of the Financial Crisis Upon the Hawaii Justice Foundation, Your IOLTA Account, and the Provision of Legal Services* 22 (2009), http://www.hsba.org/resources/1/Access%20to%20Justice/Jan%202009%20-%20final%20-%20financial%20crisis%20iolta.pdf (last visited Jan. 17, 2010).

E. Less Harsh Alternatives Exist for Addressing Litigation Concerns

There are other, less harsh alternatives available to address litigation concerns than to raise the barriers to court access across the board. Such a universal measure would, in practical effect, preclude legitimate claims along with those that are not. The concerns of timeliness, volume, and efficiency can be addressed through other means such as streamlining the legal system.[173] Streamlining the process may be accomplished through various means, including increased controls over the system, greater judicial oversight, or stricter punishment for abusers of the legal system. Simplifying the costs of time and litigation should be a goal for all actors involved in the judicial process. Behavior in conformance to these goals would better assist the proper functioning and goals of the justice system, thereby lessening litigation concerns without hindering access to justice.

VII. CONCLUSION

The United States Supreme Court's decision in *Iqbal* continued the federal trend away from notice pleading, toward heightened pleading. While the concerns of efficiency, frivolous litigation, and overcrowded dockets are legitimate, there are other means to achieve such goals without compromising legitimate claims. Especially concerning are those claims in the areas of complex litigation and civil rights and discrimination where the plaintiff is not initially equipped with all of the relevant information, such as facts that would suggest a discriminatory state of mind. Hawai'i state courts have not yet followed the *Twombly* decision, and there has been no express adoption or rejection of the *Iqbal* pleading standard. Hawai'i should expressly reject *Iqbal* and continue to implement a liberal pleading standard that is consistent with access to the courts. A rejection of *Iqbal* and a continuation of the current *Conley* notice pleading standard would help preserve Hawaii's citizens' chance at accessing the courts without compromising the integrity of the legal system.

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[173] *See* Turbin, *supra* note 165.

Crying Over Spilt Milk: Recognizing Hawaii's Unique State Characteristics in the Context of the Dormant Commerce Clause

Chad Kumagai* and H. Maxwell Kopper**

I. INTRODUCTION

In *Safeway Stores, Inc. v. Board of Agriculture*, the Assistant Milk Commissioner of Hawai'i predicted that allowing milk to be imported from the continental United States could lead to the demise of the dairy industry in Hawai'i.[1] Twenty-five years later, the Assistant Milk Commissioner's forecast appears to have come to full fruition. On February 15, 2008, Pacific Dairy, the last dairy on the island of O'ahu, shut its spigots for the last time.[2] Currently there are only two local dairies in operation in the state, both on the Big Island of Hawai'i; leaving the remaining six islands completely dependent on imported milk.[3] The State's dependence on imported milk stands in stark contrast to the early 1980s when Hawai'i had approximately two dozen dairies and was completely self-sufficient in milk production.[4] Hawaii's reliance on out of state milk sources leaves the State in a precarious position in which a disruption in milk imports due to a natural disaster or shipping strike could cripple local milk supplies by as much as eighty percent.[5] As the tugboat strike of 2004 demonstrated, a shipping strike is a very real possibility and would be devastating to Hawaii's food supply.[6]

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[1] 590 F. Supp. 778, 784 (D. Haw. 1984).

[2] Sean Hao, *No Local Milk as Last Oahu Dairy Closing*, HONOLULU ADVERTISER, Jan. 24, 2008, at A1.

[3] *Id.*

[4] *Id.*

[5] Sean Hao, *State's Largest Dairy May Close*, HONOLULU ADVERTISER, Mar. 20, 2005, at F1.

[6] Mike Gordon & Dan Nakaso, *Tug Workers Strike*, HONOLULU ADVERTISER, July 1, 2004, at A1.

This dramatic increase in Hawaii's dependence on imported milk is a direct result of the District Court of Hawaii's decision in *Safeway*, where the court held that a state law banning imported milk violated the dormant Commerce Clause of the United States Constitution.[7] The court's ruling in *Safeway* and its consequences is but one example of the harm that can occur when courts fail to fully consider Hawaii's unique circumstances in the context of a dormant Commerce Clause analysis. Federal courts should instead place a greater emphasis on the unique conditions of the State of Hawai'i when faced with a dormant Commerce Clause issue.

Although the *Safeway* decision was issued some two and one half decades ago, its impact continues to be significant. Due to the "negative" nature of the dormant Commerce Clause, the specter of this clause lurks at every corner for state legislatures. At any time, state laws that a federal court deems to improperly burden interstate commerce may be invalidated because of the dormant Commerce Clause, and therefore, the *Safeway* decision continues to be as pertinent today as it was in 1984.

Section II of this note provides a brief overview of the current standard for determining the constitutionality of state and local laws under the dormant Commerce Clause. Section III examines *Safeway Stores, Inc. v. Board of Agriculture* in depth, and highlights the District Court of Hawaii's decision to ignore Hawaii's unique geography as an island state, and instead, expose the State to possible food shortages caused by mainland dependence on milk. Section IV provides examples of both a facially discriminatory and a nondiscriminatory law in which federal courts have acknowledged unique state characteristics in the context of the dormant Commerce Clause. Section V proposes that courts place a greater emphasis on Hawaii's special characteristics, and explains why such emphasis is appropriate in dormant Commerce Clause proceedings by analyzing two laws that may be challenged under the Clause. Finally, Section VI concludes that federal courts should acknowledge Hawaii's unique state characteristics.

II. THE DORMANT COMMERCE CLAUSE

Article I, Section 8 of the United States Constitution gives Congress the power "[t]o regulate Commerce . . . among the several States."[8] Although this constitutional clause does not expressly limit the power of the states to regulate interstate commerce, a negative implication of the Commerce Clause has been imposed for the past 150 years.[9] This negative implication is what is now

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[7] *See* Safeway Stores, Inc. v. Bd. of Agric., 590 F. Supp. 778 (D. Haw. 1984).

[8] U.S. CONST. art. I, § 8, cl. 3.

[9] Dep't. of Revenue of Ky. v. Davis, 553 U.S. 328, 337 (2008) (citing Cooley v. Bd. of

known as the dormant Commerce Clause.[10] The purpose of the dormant Commerce Clause is to guard against protectionist policies by the states and prevent the economic Balkanization that results when state governments favor the interests of their own citizens over the interests of citizens of other states.[11]

A. The Facially Discriminatory and Nondiscriminatory Dormant Commerce Clause Tests

Under a dormant Commerce Clause analysis, the first step is to determine whether a state or local law discriminates against interstate commerce.[12] If a state or local law is found to be discriminatory in either purpose or effect, the burden falls on the state or local government to show that the law serves a legitimate local purpose and that this purpose cannot be adequately served by reasonable nondiscriminatory alternatives.[13] When determining whether a state law is discriminatory, "[s]hielding in-state industries from out-of-state competition is almost never a legitimate local purpose."[14]

When a court finds that a state law is not discriminatory against out of state commerce for the purposes of a dormant Commerce Clause analysis, the court then proceeds to the balancing test first introduced in *Pike v. Bruce Church, Inc.*[15] In *Pike*, the Supreme Court articulated the balancing test that remains in use today:

> [w]here the statute regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits.[16]

Therefore, when a state or local law does not discriminate against out-of-state commerce, courts look to the *Pike* test to balance the state or local interest protected against the law's burden on interstate commerce to determine whether the law violates the dormant Commerce Clause.

Wardens of Port of Phila. *ex rel.* Soc. for Relief of Distressed Pilots, 53 U.S. 299 (1852); Gibbons v. Ogden, 22 U.S. 1 (1824) (Marshall, C.J.) (dictum)).

[10] *Davis*, 553 U.S. at 337-38 (citing New Energy Co. of Ind. v. Limbach, 486 U.S. 269, 273-74 (1988)).

[11] Or. Waste Sys., Inc. v. Dep't. of Envtl. Quality of the State of Or., 511 U.S. 93, 98 (1994) (citing Hughes v. Oklahoma, 441 U.S. 322, 325-26 (1979)).

[12] *Davis*, 553 U.S. at 338 (citing *Or. Waste Sys., Inc.*, 511 U.S. at 99).

[13] *See* Maine v. Taylor, 477 U.S. 131, 138 (1986); *Hughes*, 441 U.S. 322.

[14] *Taylor*, 477 U.S. at 148.

[15] 397 U.S. 137 (1970).

[16] *Id.* at 142 (citing Huron Portland Cement Co. v. City of Detroit, 362 U.S. 440, 443 (1960)).

Under the *Pike* test, the state or local interest protected under the challenged legislation must be legitimate, and the benefits to the state must be real and not illusory.[17] An example of a law with illusory benefits can be found in *Raymond Motor Transportation, Inc. v. Rice*,[18] and an example of a law with real, legitimate benefits can be found in *Northwest Central Pipeline v. State Corp. Commission of Kansas*.[19]

B. Hawaii's Unique State Characteristics

Being the only island state in the country, the State of Hawai'i has many unique characteristics that should be recognized under both the discriminatory and nondiscriminatory dormant Commerce Clause approaches. First, Hawai'i is the "Endangered Species Capital of the World,"[20] with 330 endangered plant and animal species.[21] Hawai'i is also home to one of the largest populations of indigenous people in the United States,[22] and is one of the most diverse states in the union.[23] Perhaps the State's most distinct characteristic is its extreme geographical isolation. The State's capital, Honolulu, sits 2,397 miles away from San Francisco and 5,293 miles from Manila.[24] Because of Hawaii's extraordinary isolation, the state is heavily reliant on the shipping industry, which is vulnerable to hurricanes, tsunamis, and shipping strikes, as well as maritime terrorism in our post-9/11 world.[25]

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[17] Alaska Airlines, Inc. v. City of Long Beach, 951 F.2d 977, 983 (9th Cir. 1991).

[18] 434 U.S. 429 (1978) (holding that a Wisconsin statute regulating the length and configuration of trucks burdened interstate commerce without making any real or legitimate benefit to safety).

[19] 489 U.S. 493 (1989) (holding that a regulation permanently canceling a natural gas producers' entitlements to certain quantities of gas served a valid purpose related to the state's legitimate interest in conservation if production was delayed for too long).

[20] Bishop Museum, Hawaii's Endangered and Threatened Species Web Site, http://hbs.bishopmuseum.org/endangered/ (last visited Mar. 10, 2010).

[21] U.S. FISH AND WILDLIFE SERVICE, SPECIES REPORT, (Feb. 5, 2010), http://ecos.fws.gov/tess_public/StateListing.do?state=all.

[22] U.S. CENSUS BUREAU, HAWAII ACS DEMOGRAPHIC AND HOUSING ESTIMATES, http://factfinder.census.gov/servlet/ADPTable?_bm=y&-geo_id=04000US15&-qr_name=ACS_2008_3YR_G00_DP3YR5&-ds_name=ACS_2008_3YR_G00_&-_lang=en&-redoLog=false&-_sse=on (last visited on Mar. 10, 2010).

[23] RALPH LEWIS & GOLDY LEWIS, CENTER FOR REGIONAL POLICY STUDIES, CENSUS 2000 FACT SHEET (Mar. 29, 2001), http://lewis.sppsr.ucla.edu/special/metroamerica/factsheets/Census_FACTSHEET6.pdf.

[24] THE NEW ENCYCLOPEDIA BRITANNICA, Vol. 29 at 441 (Encyclopedia Britannica, Inc., ed. 2002).

[25] *See* Max Blenkin, *Study Warns of Maritime Terrorism Threat* (April 19, 2005), *available at* http://www.theage.com.au/news/War-on-Terror/Study-warns-of-maritime-terror-threat/2005/04/19/1113854188759.html.

For one example of how Hawaii's unique characteristics create dangers to public health and safety, one need only look to the Hawai'i dock strike of 1949. During this strike, which lasted 159 days,[26] many basic food items became sparse, including rice, canned milk, potatoes, citrus fruits, and eggs.[27] Such food scarcity affected all levels of the State's population, from kindergarteners whose milk was rationed,[28] to an anti-strike group of housewives dubbed the "broom brigade."[29] The extreme disruption of food supplies during the 1949 dock strike is one example of the type of harm that is unique to Hawai'i, and because of this, it is of utmost importance that the state's unique characteristics be recognized in a dormant Commerce Clause analysis.

III. THE DORMANT COMMERCE CLAUSE AS APPLIED IN *SAFEWAY STORES, INC. V. BOARD OF AGRICULTURE*

Only a few cases have applied the dormant Commerce Clause to Hawai'i laws. In these cases, courts failed to place appropriate emphasis on Hawaii's unique geographic[30] and environmental[31] characteristics. This section analyzes *Safeway Stores, Inc. v. Board of Agriculture* and how the District Court of Hawai'i erred in its review of Hawaii's state characteristics.

A. Safeway Stores, Inc. v. Board of Agriculture: *Application of the Discriminatory Purpose or Effect Test and the Pike Standard*

On March 30, 1983, the Hawai'i Board of Agriculture denied Safeway, a national supermarket chain with locations in the State of Hawai'i, a license to sell milk from its mainland dairies pursuant to Hawaii's Milk Control Act.[32] The Board of Agriculture's reasons for the denial were that "granting the license would tend to promote destructive or demoralizing competition in a market already adequately served, and that granting the license would not be in

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[26] *Chronology of Strike; It Lasted for 159 Days*, HONOLULU STAR-BULLETIN, Oct. 6, 1949, at 4.

[27] *Food Supplies Dwindling Because of Strike but There's Little Hoarding*, HONOLULU STAR-BULLETIN, Oct. 1, 1949, at 1.

[28] *Rationing Milk to Kindergarteners Still Probable*, HONOLULU STAR-BULLETIN, June 2, 1949, at 9.

[29] Mike Gordon, *Dock Strike of 1949*, HONOLULU ADVERTISER, July 2, 2006, at CC-16.

[30] *See* Safeway Stores, Inc. v. Bd. of Agric., 590 F. Supp. 778 (D. Haw. 1984).

[31] *See* Young v. Coloma-Agaran, No. Civ. 00-0077, 2001 WL 1677259 (D. Haw. Dec. 27, 2001), *aff'd on other grounds*, 340 F.3d 1053 (9th Cir. 2003) (holding that Hawai'i had legitimate state interests in: (1) preserving the Hanalei ecosystem, (2) alleviating use conflict and safety concerns, and (3) preserving the scenic beauty of Hanalei Bay, but that the benefits of restricting commercial use permits for tour boat operators were illusory).

[32] *Safeway*, 590 F. Supp. at 780.

the public interest."[33] Upon denial of a license to sell its imported milk in Hawai'i supermarkets, Safeway filed suit, alleging that the Hawai'i Milk Control Act and Article XI section 3 of the Hawai'i State Constitution[34] violated the dormant Commerce Clause of the United States Constitution.[35]

As mentioned, the first step in determining whether a state law violates the dormant Commerce Clause is to determine if the law discriminates against interstate commerce either in purpose or effect. In *Safeway*, the court held that the Hawai'i Milk Control Act and Article XI, section 3 of the Hawai'i State Constitution violated the dormant Commerce Clause for two reasons. First, the law discriminated against interstate commerce in purpose and effect by barring the local sale of imported milk.[36] Second, even if the statute and State Constitution did not discriminate against interstate commerce, the statute placed a heavy burden on interstate commerce and "[t]he legitimate benefit to the state is nonexistent."[37] Therefore, the statute and constitutional provision also failed under the *Pike* analysis.

In holding that the Hawai'i Milk Control Act and the self-sufficiency provision of the Hawai'i Constitution were discriminatory in purpose, the *Safeway* court first looked to the legislative history of the Act. The court found that "the Hawai'i Milk Control Act was originally passed to protect Hawaii's dairy farmers from economic difficulties they were experiencing as a result of oversupply."[38] The court used this language to reject the State's argument that the purpose of the bill was to serve "the interest of public health and welfare,"[39] stating that "the only real 'health' concern was for the economic health of the dairy industry."[40] Furthermore, the court also held that the Hawai'i law could not be used to "level" any competitive economic advantage that mainland milk may have over Hawai'i milk, whether it be from federal support programs, greater consumer demand, or lower production costs.[41]

After holding that the purpose of the Hawai'i Milk Control Act and the self-sufficiency clause of the Hawai'i State Constitution were discriminatory in

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[33] *Id.*

[34] HAW. CONST. art. XI, § 3. The "self-sufficiency" provision of this section provides that the State shall "increase agricultural self-sufficiency" and that "[t]he legislature shall provide standards and criteria to accomplish the foregoing."

[35] *Safeway*, 590 F. Supp. at 781.

[36] *Id.* at 785.

[37] *Id.* at 786 n.2.

[38] *Id.* at 784 (citing George Freitas Dairy v. United States, 407 F. Supp. 1395, 1397 (D. Haw. 1976), *aff'd*, 582 F.2d 500 (9th Cir. 1978); *see* S.B. 761, Act 260, § 2 (Haw. June 7, 1967); Standing Comm. Rep. No. 115 (Haw. Apr. 1, 1967)).

[39] *Id.*

[40] *Id.* at 785 (stating that "the official concern [of the Act] is not for the wholesomeness and adequate supply of milk, but rather for the continued profitability of Hawaii's milk producers").

[41] *Id.* at 786.

purpose, the court also held that the Act and constitutional provision was discriminatory in effect.[42] A discriminatory effect is found where a state or local law increases the market share of local goods in comparison to out-of-state goods.[43] Because the effect of the law was to exclude out-of-state milk producers, the State's laws banning imported milk were also discriminatory in effect.[44] Further, the court posited that even if the law did not discriminate, it would have failed the *Pike* balancing test because the law's "burden on interstate commerce far outweighs any legitimate benefit to the state . . . as there is no contention that mainland milk is not completely safe and wholesome."[45] The court also went so far as to say that "[t]he only interest served [by the law] is that of the dairy farmers, and their monetary interests are not a proper 'health and welfare' concern of the state's."[46]

B. The Safeway *Court Erred by Failing to Recognize the State's Legitimate Interest Based on Hawaii's Unique Geographic Circumstances*

The *Safeway* court's most egregious error was its failure to recognize Hawaii's interest in promoting self-sufficiency in the dairy market and that its agricultural self-sufficiency was a public health and welfare issue. The court should have found that Hawaii's unique state characteristics may sometimes convert what would normally be an economic issue in other states into a public health and welfare issue. Instead, the court regarded the State's efforts to support local dairy farmers as purely economic. The District Court of Hawai'i relied heavily on *H.P. Hood & Sons, Inc. v. Du Mond*[47] in its *Safeway* decision, stating that:

> Hawaii's Milk Control Act is strikingly similar to the New York law invalidated in *Hood*. Moreover, the way in which the Board of Agriculture is applying the law to Safeway is virtually identical to the way in which the New York officials applied their law to Hood.[48]

The Supreme Court in *Hood* overturned a state law effectively banning the sale of out-of-state milk because it determined that the purpose of the law was to guard purely economic interests.[49] The *Safeway* court's reliance on *Hood* highlights the court's failure to place appropriate emphasis on Hawaii's unique

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[42] *Id.* at 785.
[43] *Id.* at 784.
[44] *Id.* at 785.
[45] *Id.* at 786 n.2.
[46] *Id.*
[47] 336 U.S. 525 (1949).
[48] *Safeway*, 590 F. Supp. at 785.
[49] *H.P. Hood & Sons*, 336 U.S. at 530-31.

geographic isolation as an island state. The fact that the court did not acknowledge the geographic difference between Hawai'i and New York is one example of the federal court's failure to consider Hawaii's isolated condition in applying the dormant Commerce Clause. New York's milk supply is not subject to the same dangers that Hawai'i suffers from, where dependence on out-of-state milk means that the fate of the State's milk supply is at the whim of the local shipping industry.

Contrary to the ruling in *Safeway*, the State of Hawai'i has a strong health and public welfare interest in protecting its local dairies and promoting agricultural self-sufficiency. As mentioned, Hawai'i is extremely dependent on food imported from the continental United States. Currently, Hawai'i maintains less than a seven-day supply of many foods, with approximately 90 percent of the State's food imported.[50] Due to Hawaii's heavy dependence on imported goods and its limited supply of local perishable foods, the State is highly susceptible to shipping strikes, natural disasters such as tsunamis and hurricanes, and maritime terrorism, any of which would lead to extreme shortages of food.

C. The Safeway *Court Erred by Failing to Recognize the Lack of Reasonable Alternatives to Solve Hawaii's Lack of Self-Sufficiency*

The court in *Safeway* found the Hawai'i law[51] to be discriminatory in both purpose and effect.[52] However, a law found to be discriminatory in either purpose or effect may still be upheld if the law serves a legitimate purpose that cannot be served by reasonable nondiscriminatory alternatives.[53] As discussed, Hawaii's geographical isolation creates a legitimate need for agricultural self-sufficiency. In *Safeway*, the court erred by not applying the reasonable alternatives test after finding the Hawai'i law to be discriminatory in both purpose and effect.[54] If the court had properly applied the reasonable alternatives test, it would have found that Hawaii's unique geography as an island state creates a situation in which no reasonable alternatives are available to promote Hawaii's unique need for agricultural self-sufficiency.

In short, the years since the *Safeway* decision have shown that any alternatives to the Hawai'i Milk Law cannot adequately promote Hawaii's agricultural self-sufficiency. Hawai'i currently places price controls on locally

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[50] John Griffin, *State's Farming Industry is Changing*, HONOLULU ADVERTISER, Dec. 12, 2004, at B1.

[51] HAW. REV. STAT. § 147-24(a) (1976).

[52] *Safeway*, 590 F. Supp. at 786.

[53] Maine v. Taylor, 477 U.S. 131, 138 (1986); Hughes v. Oklahoma, 441 U.S. 322 (1979).

[54] *Safeway*, 590 F. Supp. at 786.

produced milk in an effort to increase the price paid to local milk producers.[55] The Hawai'i State Legislature has amended Hawaii's Milk Law several times since the decision in *Safeway* in an effort to promote agricultural independence.[56] As recently as 2008, the Hawai'i State Legislature passed a bill that would increase the price paid to local milk producers.[57] However, despite the State of Hawaii's attempts to use reasonable alternatives to promote agricultural self-sufficiency, Hawai'i has continued to see a dramatic decline in milk production.

O'ahu no longer has any dairies[58] to support its population of over 900,000.[59] Currently, there are only two local dairies in operation in the State, both on the Big Island of Hawai'i, leaving the remaining six islands completely dependent on imported milk.[60] Moreover, Hawai'i dairies produce only thirty percent of consumer demand for milk,[61] down from the nearly one hundred percent produced by Hawai'i dairies prior to the *Safeway* decision.[62]

Despite the State of Hawaii's persistent efforts to promote and encourage agricultural self-sufficiency, the twenty-five years since the *Safeway* decision has nearly brought an end to milk production in Hawai'i. Hawaii's geographic isolation creates a legitimate state interest in promoting agricultural self-sufficiency, and the failure of any legislation within the past twenty-five years to increase local milk production is evidence that no reasonable alternatives exist to achieve this end. If the *Safeway* court had properly applied the reasonable alternatives test, it would have found that no reasonable alternatives exist for promoting the self-sufficiency of local dairies, and the only way to protect Hawaii's capacity to produce its own milk is to uphold Hawaii's Milk Law.

Safeway highlights an important issue facing the state of Hawai'i—federal courts' failure to recognize Hawaii's need for self-sufficiency in the face of the State's special needs as an island state. With the *Safeway* ruling, the District Court of Hawai'i deprived the State of its ability to protect its citizens against milk shortages directly caused by the State's heavy dependence on imported milk. In contrast, the *Safeway* court should have recognized that the State of Hawai'i has a legitimate public interest in promoting agricultural self-

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[55] Hao, *No Local Milk*, *supra* note 2.

[56] *See* HAW. REV. STAT § 157-1 (West 2009); *e.g.*, 2008 Haw. Sess. Laws Act 46.

[57] 2008 Haw. Sess. Laws Act 46 § 2.

[58] Hao, *No Local Milk*, *supra* note 2.

[59] U.S. Census Bureau, http://quickfacts.census.gov/qfd/states/15/15003.html (last visited Jan. 10, 2010).

[60] Hao, *No Local Milk*, *supra* note 2.

[61] 2008 Haw. Sess. Laws Act 46 § 1.

[62] Hao, *No Local Milk*, *supra* note 2.

sufficiency and that no other reasonable alternatives are available to address this local concern.

IV. CASES CORRECTLY ANALYZING A STATE'S UNIQUE CIRCUMSTANCE WHEN APPLYING THE DORMANT COMMERCE CLAUSE

A state's unique characteristics are properly recognized in a number of decisions. This section highlights two cases in the context of a dormant Commerce Clause analysis where courts have properly recognized a state's unique characteristics. The purpose of this section is to emphasize that a state's unique characteristics have been recognized in the past, and to show that there is precedent for acknowledging a state interest that is unique to that particular state. *Maine v. Taylor*[63] and *UFO Chuting of Hawaii v. Smith*[64] are examples of both a discriminatory and a nondiscriminatory law that burdens interstate commerce, thus illustrating that federal courts have previously acknowledged a state's unique characteristics under both dormant Commerce Clause approaches.

A. Maine v. Taylor: *Preserving Maine's Baitfish Population Under a Dormant Commerce Clause Analysis*

In *Maine v. Taylor*, the Supreme Court determined whether a Maine state law that prohibited the importation of out-of-state baitfish was unconstitutional under the dormant Commerce Clause.[65] In deciding this question, the Court first found that the law discriminated against interstate commerce, and therefore was "subject to the strict requirements of *Hughes v. Oklahoma*,"[66] meaning that "the statute must serve a legitimate local purpose, and the purpose must be one that cannot be served as well by available nondiscriminatory means."[67] The Court then set aside the court of appeals' decision, which held that the two parts of the *Hughes* test were unsatisfied, and instead, adopted the district court's holding that the test was satisfied.[68]

In holding that Maine's ban on imported baitfish served a legitimate local purpose, the Court was persuaded by the evidentiary hearing that the district court relied on.[69] In this hearing, the court found that Maine's indigenous

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[63] 477 U.S. 131, 152 (1986).
[64] 508 F.3d 1189 (9th Cir. 2007).
[65] *Taylor*, 477 U.S. at 132-33.
[66] *Id.* at 138.
[67] *Id.* at 140.
[68] *Id.*
[69] *Id.*

baitfish would be at risk to parasites attached to out-of-state baitfish.[70] The court also found that the introduction of non-native baitfish into Maine's aquatic environment would have unforeseen negative effects on Maine's native golden shiner baitfish.[71]

The Supreme Court then examined the second prong of the *Hughes* test—whether the local purpose may be served by other available nondiscriminatory means. The Court agreed with the district court that Maine had no alternative nondiscriminatory means of preserving native baitfish because at the time, there was no satisfactory way to inspect shipments of live baitfish for parasites or commingled species.[72] By adopting the district court's determination that Maine was without a nondiscriminatory means of protecting its baitfish, the Court also explicitly rejected Taylor's argument that because there was a possibility that methods for inspecting baitfish for parasites could be developed, experts must research those abstract possibilities.[73] There was, however, no estimate as to the cost or time required to develop such techniques.[74] Therefore, the Court held that a nondiscriminatory alternative under the *Hughes* test must amount to more than an "abstract possibility" of acceptable alternatives, "particularly where there is no assurance as to their effectiveness."[75] Furthermore, the Court held that "[a] state must make reasonable efforts to avoid restraining the free flow of commerce across its borders, but it is not required to develop new and unproven means of protection at an uncertain cost."[76]

The Court's decision in *Taylor* illustrates how federal courts should deal with unique state interests. *Taylor* was decided differently from the *Safeway* decision, which failed to analyze whether Hawai'i had any reasonable alternative in promoting self-sufficiency. The *Safeway* court should have taken an approach similar to *Taylor* and recognized that, in the context of the discriminatory dormant Commerce Clause test, there was no reasonable alternative to Hawaii's milk law.

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[70] *Id.* at 141.

[71] *Id.*

[72] *Id.*

[73] *Id.* at 147.

> [T]he 'abstract possibility' . . . of developing acceptable testing procedures, particularly when there is no assurance as to their effectiveness, does not make those procedures an '[available] . . . nondiscriminatory [alternative]' . . . for the purposes of the Commerce Clause. A State must make reasonable efforts to avoid restraining the free flow of commerce across its borders, but it is not required to develop new and unproven means of protection at an uncertain cost.

Id.

[74] *Id.*

[75] *Id.*

[76] *Id.*

The *Safeway* court should have also used an approach similar to *Taylor* to recognize the Hawai'i law as more than mere economic protectionism. The *Taylor* Court could have held that the baitfish law was designed simply to protect the economic interest of fisheries or other local businesses that trade Maine baitfish. Instead, the Court rightfully acknowledged that the Maine law was designed to protect Maine's aquatic ecosystem, despite any incidental economic benefits to in-state business. In this same way, the *Safeway* court should have held that Hawaii's milk law was meant to protect the State's food supply despite incidental economic benefits that may follow.

B. UFO Chuting of Hawaii v. Smith: *The Ninth Circuit's Recognition of Hawaii's Unique Environmental Interests*

While *Maine v. Taylor* provides an example of a State's unique situation justifying a facially discriminatory law, the Ninth Circuit recently recognized how Hawaii's unique ecology can justify a law that places a substantial burden on interstate commerce. In *UFO Chuting of Hawaii v. Smith*, the Ninth Circuit examined whether a Hawai'i law banning parasailing in certain waters off of the coast of Maui violated the dormant Commerce Clause.[77] The Hawai'i law in question stated:

> Between December 15 and May 15 of each year, no person shall operate a thrill craft, or engage in parasailing, water sledding, or commercial high speed boating, or operate a motor vessel towing a person engaged in water sledding or parasailing on the west and south shore of Maui[.][78]

The parasailing ban was designed to protect humpback whales during mating season, as well as the young calves, from speeding boats and the noise and disturbance those crafts generate.[79] The ban was only operable for five months of the year during the crucial period when humpback whales are found in large numbers in the waters off of Maui.[80] The ban is an example of the type of state

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[77] 508 F.3d 1189 (9th Cir. 2007).

[78] HAW. REV. STAT. § 200-37(i) (West 2009).

[79] *UFO Chuting*, 508 F.3d at 1191.

[80] *See id.* at 1195; 1990 Haw. Sess. Laws 972:

> The legislature declares that the waters of the State should be safe from the dangers of thrill craft, parasailing vessels, and high-speed motorized vessels during the annual migration of humpback whales to Hawai'i especially in Maui waters identified as critical habitats for endangered humpback whales. Humpback whales are very acoustically oriented mammals. Continuous traffic and constant underwater noise created by thrill craft, parasailing vessels, and high-speed motorized vessels in near shore, shallow waters threaten humpback whale population recovery by displacing the whales from their favored habitat and further by disrupting the acoustic environment, creating an energetic cost to the whales in responses to these disturbances, disrupting the species' mating system, and

legislation this note supports, that is, a local law that protects interests *unique* to that location. Although the Ninth Circuit applied the dormant Commerce Clause correctly in this case by recognizing Hawaii's particular need to protect humpback whales, *UFO Chuting* does not provide clear precedent for a dormant Commerce Clause challenge in Hawai'i because the primary issue in this case was federal preemption.[81]

Before reaching the discussion of the dormant Commerce Clause, the court in *UFO Chuting* discussed the issue of federal preemption. The court ultimately found that the ban does not conflict with federal maritime laws and regulations because *UFO Chuting* did not show (1) that they "cannot 'comply with both federal and state law in order to ply [its] trade,'"[82] and (2) that the ban "'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of congress.'"[83]

The court began its dormant Commerce Clause analysis by examining whether the ban was facially discriminatory. The court found that the law does not "differentiate between residents and nonresidents, or residents and non-citizens."[84] Finding the ban to be facially neutral, the court moved on to apply the *Pike* analysis, stating that a facially neutral law could still violate the dormant Commerce Clause if the burdens of the law outweigh the putative benefits to the state.[85] The court further stated that a "statute is unreasonable or irrational when 'the asserted benefits of the statute are in fact illusory or relate to goals that evidence an impermissible favoritism of in-state industry over out-of-state industry.'"[86]

Applying the *Pike* balancing test, the court found that the benefits of the ban "are not illusory, nor do they indicate favoritism to in-state industries."[87] The court affirmed the legitimacy of the ban's purpose to protect human safety and

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threatening the survival of calves.

[81] *UFO Chuting* was decided primarily on federal preemption grounds, with President George W. Bush signing the Fiscal Year 2005 Omnibus Appropriations Bill into law. This allowed the State of Hawai'i to "enforce any State law or regulation with respect to the operation in State waters of recreational and commercial vessels, for the purpose of conservation and management of humpback whales, to the extent that such law or regulation is no less restrictive than Federal law." Fiscal Year 2005 Omnibus Appropriations Bill, Pub. L. No. 108-447, § 213, 118 Stat. 2809 (2004).

[82] *UFO Chuting*, 508 F.3d at 1194-95 (citing Young v. Coloma-Agaran 340 F.3d 1053, 1057 (9th Cir. 2003)).

[83] *Id.* (citing *Young*, 340 F.3d at 1055-56).

[84] *Id.* at 1196.

[85] *Id.* (citing Alaska Airlines, Inc. v. City of Long Beach, 951 F.2d 977, 983 (9th Cir. 1991)).

[86] *Id.* (citing *Alaska Airlines*, 951 F.2d at 983).

[87] *Id.*

the unique environment of Hawai'i.[88] The court specifically found that by "banning parasailing and thrill craft during the time of year in which humpback whales inhabit the waters off Maui, the legislature advanced its legitimate purpose of protecting the endangered species."[89] Ultimately, the court found that the ban did not violate the dormant Commerce Clause, and was a proper use of state legislative power because it was not discriminatory and advanced a legitimate purpose.[90]

Together, *Taylor* and *UFO Chuting* provide examples of cases that take into account the unique characteristics of a specific location. *Taylor*, like *Safeway*, analyzed a law that was facially discriminatory. However, unlike *Safeway*, the Court in *Taylor* correctly focused on the unique situation of that state and how that situation created a lack of reasonable alternatives. *Taylor* is an excellent model for application of the dormant Commerce Clause in Hawai'i. The unique characteristics of Hawai'i as an island state create a lack of reasonable alternatives that may be present in other states.

Although *UFO Chuting* dealt with a facially neutral law and was thus subject to less rigorous scrutiny than the laws in *Safeway* and *Taylor*, *UFO Chuting* correctly focused on how the unique ecology of Hawai'i creates a legitimate interest that is not present in other states. *UFO Chuting* affirmed the idea that Hawaii's unique state interests may, in certain circumstances, create legitimate exceptions to the dormant Commerce Clause analysis. Although the ban created a substantial burden to interstate commerce, the unique ecology of Hawai'i created a legitimate state interest that would not be present in states whose waters do not serve as breeding grounds for humpback whales. In short, *Taylor* articulated a standard for allowing facially discriminatory laws, and *UFO Chuting* displayed how Hawaii's unique situation as an island state can create exceptions to the dormant Commerce Clause analysis.

V. LOOKING TO THE FUTURE: DORMANT COMMERCE CLAUSE CLAIMS IN POTENTIAL HAWAI'I LITIGATION

As discussed, the repercussions of the *Safeway* decision, although decided two decades ago, remain pertinent today. All state laws that affect interstate commerce—directly or indirectly—may be subject to scrutiny under the dormant Commerce Clause. Consequently, it is important to understand the threat of potential future litigation under the dormant Commerce Clause in addition to reviewing past decisions, such as *Safeway*.

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[88] *Id.*
[89] *Id.*
[90] *Id.*

This section evaluates two current Hawai'i laws yet to be challenged under the dormant Commerce Clause, and suggests an approach that recognizes Hawaii's unique state interests as an island state. The first is Hawaii's law requiring the quarantine of any cats or dogs entering the State for a period up to one hundred and twenty days. The second is Hawaii's ban on the importation and possession of snakes in the State. The State's dog quarantine law provides an example of a law that is facially discriminatory; the snake ban is an example of a nondiscriminatory law that burdens interstate commerce. Despite the effect of these laws on interstate commerce, these laws should be and would be upheld if a dormant Commerce Clause challenge were analyzed correctly—because of the unique characteristics of Hawai'i as an island state.

A. Hawaii's Dogged Approach to Rabies and Possible Dormant Commerce Clause Challenges

Hawai'i currently has a mandatory quarantine requirement for all dogs and cats entering the State, with few exceptions.[91] The required quarantine period is one hundred and twenty days, but may be shortened to five days if certain requirements are met, such as vaccinations and a waiting period.[92] Because of these requirements any puppy or kitten transported into the state will be at least ten months of age by the time it is released from quarantine.[93] In addition, some breeds of non-domesticated cats and dogs are not allowed into the State, which include Wolf, Wolf Cross, Dingo, Bengal, and Savannah.[94]

These regulations clearly discriminate against interstate commerce. This quarantine requirement does not apply to inter-island transportation or any other transportation within the State of Hawai'i, and only applies to the transportation of dogs and cats into the State.[95] Furthermore, the length of time that is required to process and quarantine a puppy or kitten precludes the purchase of a dog or cat under the age of ten months from an out-of state breeder.[96] The preclusion of these out-of-state purchases grants Hawai'i breeders a monopoly on puppy and kitten sales in the State. Additionally, the ban on the transportation of non-domesticated breeds places a substantial burden on interstate commerce. Despite the facially discriminatory nature of Hawaii's quarantine requirement, this regulation would still pass a proper

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[91] *Id.*

[92] HAW. CODE R. § 4-29-16 (Weil 2009).

[93] Department of Agriculture: Animal Quarantine Information, http://hawaii.gov/hdoa/ai/aqs/info (last visited Mar. 10, 2010); *see also* HAW. CODE R. § 4-29 (Weil 2009).

[94] HAW. CODE R. § 4-29 (Weil 2009).

[95] *See id.*

[96] *Id.* § 4-29-16.

dormant Commerce Clause analysis because Hawaii's unique situation as an island state creates a unique governmental interest.

Hawai'i is rabies-free, and the regulations are intended to prevent rabies from entering the State of Hawai'i.[97] This situation is highly analogous to *Taylor*. In *Taylor*, Maine banned the importation of out-of-state baitfish to prevent the spread of parasites that could decimate the baitfish population.[98] Likewise, the Hawai'i quarantine is designed to prevent the spread of rabies in Hawai'i.[99] The geography of Hawai'i makes strict quarantine laws the only method of preventing rabies. Rabies would be devastating to a small, interconnected island state like Hawai'i. Hawai'i therefore satisfies the test established in *Taylor* because preventing the spread of rabies is a legitimate state interest. The quarantine may discriminate against interstate commerce, but as in *Taylor*, there are no reasonable alternatives to the quarantine that could guard against the spread of rabies. Hawaii's unique situation, which renders it free of rabies, likewise justifies the discriminatory quarantine law because no reasonable alternative exists.

B. Hawaii's (Boa) Constricting Snake Laws: Protecting Hawaii's Native Ecology

Hawai'i law currently bans the possession and importation of snakes into the State.[100] The law provides for two limited exceptions for sterile snakes to be used in zoos and for training dogs in snake detection.[101] Similar to the quarantine requirement, this ban appears to violate the dormant Commerce Clause at first glance, but should ultimately survive a dormant Commerce Clause challenge because of the benefits to the State. Although this law does not discriminate against interstate commerce, it poses a substantial burden on interstate commerce. The complete ban on snakes eliminates the sale of snakes as pets. Consequently, neither snake breeders from within the State nor snake breeders from out-of-state can legally sell snakes in the State of Hawai'i.

Because the ban does not discriminate against interstate commerce, it would be analyzed under the *Pike* balancing test.[102] In this test, the government's interest in banning snakes far outweighs the burden of interstate commerce

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[97] Department of Agriculture, *supra* note 93.

[98] *See Taylor*, 477 U.S. at 148.

[99] HAW. CODE R. § 4-29-1 (Weil 2009) ("The objective of this chapter is to prevent the introduction of rabies into the state [through quarantine of cats, dogs, and other carnivores entering the State.]").

[100] HAW. REV. STAT. § 150A-6(3) (2009).

[101] *Id.*

[102] Dep't. of Revenue of Ky. v. Davis, 553 U.S. 328, 338-39 (2008) (citing Pike v. Bruce Church, Inc., 397 U.S. 137 (1970)).

caused by the ban. Hawai'i is a virtually snake-free state, and the introduction of snakes into Hawai'i would be devastating to the environment, economy, health, and safety of Hawai'i and its residents. To find an example of the effect that snakes would have on Hawai'i, we need not look further than Guam, where in the latter half of the twentieth century, non-indigenous brown tree snakes eradicated Guam's native bird population, including thirteen native species, which "in turn has caused plant pollination and [insect control] to suffer."[103] "The snakes increasingly prey on poultry and pets, since they have" destroyed Guam's bird population.[104] Because of frequent travel between Hawai'i and Guam, officials from the U.S. Department of Interior have called the threat of snakes from Guam, "the most significant environmental threat to the Hawaiian archipelago, bar none, of this century."[105]

The severe consequences of a snake infestation in Hawai'i outweigh the burden on interstate commerce and the benefit of allowing the sale and possession of snakes. Although it may be argued that pet snakes would not harm the state, it would be virtually impossible to keep a snake population from establishing itself in Hawai'i by allowing pet snakes. The effect to the State as a whole would be devastating, as illustrated by the introduction of snakes to Guam. Because of the severe potential for harm caused by a wild snake population in Hawai'i, the snake ban should survive a correct dormant Commerce Clause analysis.

The significance of both the quarantine and the snake ban are unique to Hawai'i. Similar laws applied in the continental states would be properly defeated under the dormant Commerce Clause. Other states lack the geographic isolation that makes it possible to keep rabies and snakes out of their states. Other states also lack Hawaii's unique and fragile ecosystem, which would be devastated by a snake population; in contrast, snakes are an established and integral part of many mainland ecosystems.[106] Hawaii's geographic isolation and unique ecosystem create governmental interests unique to Hawai'i, and as such, a court should consider these factors when applying the dormant Commerce Clause to Hawai'i laws.

These two examples are intended to show the dangers of the *Safeway* decision. If the logic in *Safeway* were applied to a dormant Commerce Clause challenge to either of these laws, it is likely that a federal court would invalidate them. The court in *Safeway* failed to analyze the impact of the milk ban on the

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[103] Hugh Powell, *The Snake that Ate Guam*, SCIENCE SCOPE, Winter 2009, at 16, *available at* http://www.allaboutbirds.org/NetCommunity/page.aspx?pid=1196.

[104] Lori Tighe, *'Clock is Ticking' on Guam Snakes*, HONOLULU STAR-BULLETIN, Mar. 17, 1998, at A3.

[105] *Id.* (internal quotation marks omitted).

[106] *See* Whit Gibbons, *Snakes Are Signs of a Healthy Environment*, http://www.uga.edu/srelherp/ecoview/Eco29.htm.

State and its importance to Hawai'i. If a court were to similarly fail to analyze the importance of the two above laws to the State of Hawai'i, that court would likely find these laws in violation of the dormant Commerce Clause. The above analysis, however, shows that such a ruling would be improper. The quarantine requirement shows that even the harsh scrutiny afforded to a facially discriminatory law can be satisfied in certain, albeit rare, circumstances because of the unique needs of Hawai'i as an island state. Likewise, the snake ban illustrates that a facially neutral law that heavily burdens interstate commerce can be justified by the need to protect Hawaii's unique ecosystem. These two examples display the need to correct the precedent set by *Safeway* and the potential harm that will occur without its correction.

VI. CONCLUSION

Safeway represents a shocking failure by the United States District Court of Hawai'i to acknowledge that as an island state, Hawai'i is and should be considered unique. The State's current dependence on imported milk is a direct result of the *Safeway* decision. More importantly, *Safeway* established a dangerous precedent for future dormant Commerce Clause challenges—ignorance of Hawaii's unique characteristics, such as geographic distance and ecological uniqueness.

Thankfully, decisions such as *Maine v. Taylor* and *UFO Chuting of Hawaii v. Smith* have correctly contradicted the *Safeway* decision by recognizing a state's need to protect its unique interests. Despite these decisions, however, the precedent of *Safeway* remains. While *Taylor* correctly recognized Maine's need to protect the State's baitfish population instead of merely holding that the purpose of the law was economic in nature, the *Taylor* approach has not been applied to a Hawai'i law. Furthermore, although *UFO Chuting* properly acknowledged that a Hawai'i law protecting endangered whales was constitutional, that case was decided primarily on preemption grounds, leaving the authority of the *Safeway* decision in limbo.

Looking forward, it is important that courts follow the dormant Commerce Clause approach of *Taylor* and its progeny. As illustrated by the *Safeway* decision, failure to do so has the potential to cause great harm to the State. Moreover, in areas that require discrimination or a burden on interstate commerce, such as dog quarantine laws and a ban on snakes, the specter of the dormant Commerce Clause and the *Safeway* decision persists. In short, the precedent established by the *Safeway* decision must be corrected before we are all left crying over spilt milk.