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Kūlia mākou e kilo i nā nīnau i pili iā Hawai‘i me ke kuana‘ike laulā. Ho‘okomo mākou i nā ‘atikala e ulu ai i ka hoi e pili ana i nā nīnau kū kānāwai o kēia wā a me nā ‘atikala waiwai e ho‘ololi ana i nā mea kū kānāwai ma Hawai‘i a ma nā ‘āina ‘ē, me ke kālele ‘ana i nā kumuhana like ‘ole e like me nā kānāwai pū‘ali koa, ka mālama ‘āina, nā kānāwai ona ‘āina, a nā pono o nā po‘e ‘ōiwi.

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Labor, Law Enforcement, and "Normal Times": The Origins of Immigration's Home within the Department of Justice and the Evolution of Attorney General Control over Immigration Adjudications

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INTRODUCTION

In the extensive scholarship documenting the evolution of immigration politics and policy in the United States, there is surprisingly little attention paid to a fundamental feature of the nation's system of immigration adjudication: its location within the Department of Justice. Immigration adjudication—actually, all of immigration administration—was once located within the Department of Labor. Though it may seem a curious location for immigration given the thoroughly securitized and criminalized contemporary framing of immigration policy, there is nothing ontologically inappropriate about housing immigration within the Department of Labor. It is instead a political choice that reflects a different understanding of the primary purpose of immigration policy. An immigration system run by a Department of Labor understands immigration as fundamentally an economic and labor issue, rather than primarily a matter of managing foreign affairs or threats to national security or domestic law enforcement. The fact that the United States committed immigration enforcement and adjudication to the Department of Labor (and before that, the joint Department of Commerce and Labor, and before that—very briefly—the Department of the Treasury) for many decades before moving immigration to the Department of Justice makes clear that immigration's contemporary framing as a national security issue is less a fundamental truth about sovereignty than a political question that has been answered differently at different moments in history.[1]

This article aims to contribute a new perspective to the extensive scholarship historicizing the evolution of immigration law and policy in the United States. It does so by training its lens on the 1940 move of the immigration agencies out of the Department of Labor and into the Department of Justice. That move initiated a fundamental reorganization of

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[1] Courts have a particularly strong tendency to characterize anything to do with immigration as an issue regarding fundamental, transhistorical truths about sovereignty rather than political choices made at particular moments in time. For some of the most heavily quoted examples of this type of language, *see, e.g.*, Harisiades v. Shaughnessy, 342 U.S. 580, 587–89 (1952) (on removal) ("That aliens remain vulnerable to expulsion after long residence is a practice that bristles with severities. But it is a weapon of defense and reprisal confirmed by international law as a power inherent in every sovereign state. Such is the traditional power of the Nation over the alien and we leave the law on the subject as we find it. . . . [A]ny policy toward aliens is vitally and intricately interwoven with contemporaneous policies in regard to the conduct of foreign relations, the war power, and the maintenance of a republican form of government."); U.S. *ex rel.* Knauff v. Shaughnessy, 338 U.S. 537, 542 (1950) (on exclusion) ("The exclusion of aliens is a fundamental act of sovereignty. The right to do so stems not alone from legislative power but is inherent in the executive power to control the foreign affairs of the nation.").

the administrative state surrounding immigration, by moving immigration enforcement and adjudication out of a civilian agency focused on labor standards and other humanitarian concerns into an agency tasked with criminal law enforcement (and notably, into an agency that also housed J. Edgar Hoover's FBI). As we will see, the decision to move immigration was one suffused with the threat of looming war, worries about foreign subversives within the United States, and criticisms of the liberal administration of the immigration laws under Secretary of Labor Frances Perkins. The debate over the move also featured eloquent voices of both opposition and resigned support, which expressed fears regarding civil liberties violations and concerns that the Department of Justice was a bad fit for immigration. It was, in other words, a decision that reflected new and conflicted understandings of immigration in the context of war and rising criticism of the liberal policies of the New Deal state. Though the reasons for the move were highly context-specific—both President Roosevelt and many speakers in Congress expressed the view that the move would be a temporary one necessitated only by the global war—it has wrought a lasting and profound change to our immigration system. Additional administrative and organizational changes followed the attacks of September 11—most notably the creation of the Department of Homeland Security, explicitly securitizing the enforcement arm of the immigration administrative state—but the Department of Justice has retained its central role in our system of immigration adjudication.

That role has lately come under fire, in no small part because of a series of immigration decisions issued by the Attorneys General of President Donald Trump. The second part of this article turns to an examination of the Attorney General's power to review immigration adjudications. That power is vast and highly discretionary—one court described it as "unfettered"—and thus poses particular challenges to the system of immigration adjudication.[2] Through an extensive analysis of all published Attorney General decisions since the move into the Department of Justice, this article identifies the Attorneys General of President George W. Bush as working a profound transformation in the norms and actual use of this power. Specifically, Attorney General review is now accomplished solely via self-referral, a previously rare use of the power that has now become the exclusive means of Attorney General review.

The power of the Attorney General to review cases is, of course, a function of the control over immigration adjudication wielded by the Department of Justice. Studying these two issues in tandem—the original

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[2] Xian Tong Dong v. Holder, 696 F.3d 121, 124 (1st Cir. 2012).

decision to give the Department of Justice control over the nation's immigration system and the changing nature of one feature of that power, Attorney General review—reveals an administrative system designed in crisis to respond to the threat of war (and buttressed by distrust of the liberal Perkins' control over the system) yet stubbornly persistent in its growth and entrenchment over the years. Though enforcement is now handled by the Department of Homeland Security, the Department of Justice and the Attorney General have retained profoundly significant roles in our immigration system. The historical analysis of this article foregrounds the question of whether these roles are appropriate or whether a reorientation of the purpose and goals of our immigration system around the issues of labor and humanitarian concerns would better serve the individuals within the system and the nation as a whole.

I. IMMIGRATION AGENCIES: THE MOVE FROM LABOR TO JUSTICE

In 2003, immigration enforcement operations were moved out of the Department of Justice ("DOJ") into the newly created Department of Homeland Security ("DHS"). The enforcement agencies remain in DHS today, reflecting the contemporary security orientation of immigration enforcement. But the move from DOJ to DHS was not the first move for the immigration bureaucracy. Full-fledged federal immigration enforcement began in 1882, with federal legislation that charged the Secretary of the Treasury with enforcing the new federal immigration laws.[3] The immigration agencies remained in the Department of the Treasury until 1903, when Congress moved them into the Department of Commerce and Labor. The two Departments were separated from one another in 1913 when Congress created a distinct Department of Labor with a new mission "to foster, promote, and develop the welfare of the wage earners of the United States, to improve their working conditions, and to advance their opportunities for profitable employment."[4] The various immigration agencies—along with the Department of Commerce and Labor's offices related to labor and children—were transferred to the new Department of

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[3] This historical overview of immigration enforcement relies on the account in 1 CHARLES GORDON, STANLEY MAILMAN, STEPHEN YALE-LOEHR & RONALD WADA, IMMIGRATION LAW AND PROCEDURE § 3.01[2] (2018) [hereinafter IMMIGRATION LAW AND PROCEDURE]. Other scholars may start the clock earlier by looking to antecedents to the formal immigration bureaucracy, but this timeline is sufficient for the purposes of the present study.

[4] Act of Mar. 4, 1913, Pub. L. No. 62-425, ch. 141, 37 Stat. 736 (1913) (creating the Department of Labor).

Labor.[5] Immigration agencies were thus located within the Department of Labor between 1913 and 1940 (or, between 1903 and 1940, if we include the ten years it spent in the joint Department of Commerce and Labor). Throughout these moves, immigration was couched within statutes and agencies that were primarily concerned with the economy and labor. The chief function of immigration enforcement was to ensure that the labor market was properly regulated.

That perspective fundamentally changed when the immigration agencies were moved into the Department of Justice in 1940. This section of the article will discuss how and why that move occurred, beginning with a focus on President Franklin D. Roosevelt. This move was directed by Roosevelt as part of his congressionally granted powers to reorganize agencies within the executive branch. As we will see, this move was the final piece in a series of reorganization plans, each of which met with congressional approval. The decision to strip the Secretary of Labor of her control over immigration and hand it to the Attorney General reflected Roosevelt's growing preoccupation with war in Europe and worries about subversives and saboteurs at home. Harassed by a House committee focused on undermining the New Deal through investigations into alleged communist elements within the New Deal agencies and naturally inclined toward domestic surveillance and away from concerns about civil liberties, Roosevelt's decision to move immigration reflected his larger perspective on the role of immigration and law enforcement in a wartime atmosphere. It was, in other words, a move that reflected a vision of a strong executive branch and law enforcement with a diminished role for civil liberties.

Despite Roosevelt's immense popularity and influence, Congress remained the center of political power during the interwar period.[6] The debates in each chamber reflected that power, as well as growing preoccupation with the threat of imminent war. The House debate centered on the Secretary of Labor herself, with whom House members had already established a rocky relationship. As we will see, the House debate over the move focused on the alleged failures of the Department of Labor to properly police radicals and exclude dangerous elements from the United States. The Senate debate proceeded quite differently, with a focus on J. Edgar Hoover, the head of the Federal Bureau of Investigation ("FBI"), and worries that moving immigration into the Department of Justice (which also housed the FBI) was an invitation for a repeat of the worst excesses of the civil liberty abuses of the World War I era.

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[5] *Id.* at 737.

[6] IRA KATZNELSON, FEAR ITSELF: THE NEW DEAL AND THE ORIGINS OF OUR TIME 20 (2013).

The final votes in each chamber reflected overwhelming support for Roosevelt's decision to move immigration out of the Department of Labor and into the Department of Justice. But all of these matters—Roosevelt's rationale for the move and approach to his worries of foreign subversives, the House criticism of Perkins, and the Senate fears of Hoover—presaged issues that would recur in our immigration politics and policies in the coming decades. Understanding how and why we got to this place—a place where immigration cases are adjudicated by a law enforcement agency and our top law enforcement officer has immense personal power over individual immigration adjudications—suggests that the securitization of immigration is the product of a political crisis that is specific to a certain time in history. The passing of the crisis should, then, enable us to consider alternative approaches.

A. Reorganization Plans

The move of the immigration agencies out of the Department of Labor and into the Department of Justice was accomplished through a "reorganization plan" prepared by President Roosevelt and approved by Congress. The Reorganization Act of 1939 directed the President to "investigate the organization of all agencies of the Government" and was expressly motivated by the "continued national deficits beginning in 1931" with the goal of "reduc[ing] substantially Government expenditures."[7] With that context in mind, Congress directed the President to identify agencies that could operate more efficiently with structural changes, prepare a reorganization plan outlining the proposed changes, and transmit the plan to Congress.[8] Once a reorganization plan arrived in Congress, it would take effect automatically 60 days after its transmittal, provided both chambers did not pass a concurrent resolution disapproving of the plan.[9]

A prior reorganization act passed in 1933 had directed the President to enact changes via Executive Order and placed a two-year limit on the power, but otherwise contained no limits on the President's authority to reshape the agencies of the executive branch.[10] When that Act expired, Congress immediately took up a new bill to continue Roosevelt's administrative powers, but the 1939 Act was different than its predecessor, insofar as it directed Roosevelt to act via plans transmitted to Congress (rather than Executive Orders)[11] and placed more limits on his powers to

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[7] Reorganization Act of 1939, Pub. L. No. 76-19, 53 Stat. 561 (1939).

[8] *Id.*

[9] *Id.* at 562–63.

[10] *Reorganization of the Executive Branch*, 48 COLUM. L. REV. 1211, 1217–18 (1948).

[11] This change seems to have been driven by concerns regarding the constitutionality of

reorganize.[12] The 1939 Act, for example, forbade Roosevelt from abolishing agencies altogether and completely exempted some agencies from his reach.[13]

Those new limits reflected the fraught politics underlying passage of the 1939 reorganization bill. A mere twenty-four days after Roosevelt requested a renewal of his power to reorganize the executive branch—a somewhat regular request from presidents[14]—Roosevelt sent another message to Congress asking for a different reorganization power, namely, for the power to reorganize the judiciary.[15] Roosevelt opened his "court packing plan" by characterizing it as a mere extension of the reorganization request from a few weeks earlier.[16] While perhaps designed to normalize the judicial reorganization as simply one more type of government reorganization, one outcome of the close proximity of the requests was that the backlash to the court packing plan spilled over into the executive branch reorganization plan.[17] In the context of growing pushback to Roosevelt's

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the President acting by Executive Order to enact the legislation. Specifically, there were concerns that this structure represented an unconstitutional delegation of legislative power. DONALD G. MORGAN, CONGRESS AND THE CONSTITUTION 186–87 (1966). Removing the requirement that the President act via Executive Order seems to have been driven by a desire to avoid the potential constitutional problem. *See, e.g.*, H.R. REP. NO. 76-120, at 5 (1939) ("Since the power exercised by the President is legislative in character, it seems inaccurate to provide that his action take the form of an Executive order [sic] as it did in the 1933 act.").

[12] *Reorganization of the Executive Branch*, *supra* note 10, at 1217–18.

[13] *Id. See also* Reorganization Act of 1939, Pub. L. No. 76-19, 53 Stat. 561, 561 (1939).

[14] H.R. REP. NO. 76-120, at 1 (1939). The history of efforts at reorganization of the executive departments and agencies is recounted in *Reorganization of the Executive Branch*, *supra* note 10, at 1211–19.

[15] Franklin D. Roosevelt, Message from the President of the United States Transmitting a Recommendation to Reorganize the Judicial Branch of the Federal Government, H.R. Doc. No. 75-142 (1937).

[16] "I have recently called the attention of the Congress to the clear need for a comprehensive program to reorganize the administrative machinery of the executive branch of our Government. I now make a similar recommendation to the Congress in regard to the judicial branch of the Government, in order that it also may function in accord with modern necessities." *Id.* at 1.

[17] *See, e.g.*, *M'Carl Sees Trend to Fascist Power*, N.Y. TIMES, Apr. 2, 1937, at 13 ("When considered in connection with its companion piece—the Executive's request for authority to revamp the personnel of the Supreme Court as to secure overturning of age-old interpretations of our Constitution, and decisions adopting in lieu thereof his present views on the manner in which the provisions of that venerable document should have been construed and interpreted—is there not forced upon us reason to believe that there exists a planned movement within the Executive branch of our government for the building of a central authority therein, so equipped and empowered and entrenched as to be able to and free to govern either in accordance with its conception of popular will, or what it may consider good for us?").

New Deal agenda from business conservatives and the growing threat of fascism and dictatorships abroad, Congress was wary of giving away too much too fast when it came to Roosevelt's powers over the executive branch.[18] The plan was voted down by Congress and it would be nearly two years before the "controversial" reorganization bill was finally passed with the many modifications previously discussed, which were designed to limit the powers of the President and enhance the powers of Congress.[19] After the Reorganization Act was passed by Congress, Roosevelt quickly sent over the first two Reorganization Plans, both of which were just as quickly passed by Congress.[20] Two more reorganization plans were proposed in April 1940 and accepted by Congress later that year.[21]

B. President Roosevelt: Immigration and National Security

On May 22, 1940, shortly after passage of Reorganization Plan No. IV, Roosevelt sent the fifth and final reorganization plan to Congress.[22] This plan called for "the transfer of the immigration and naturalization functions from the Department of Labor to the Department of Justice."[23] Roosevelt explained that the transfer was needed because of "the startling sequence of international events" that "necessitated a review of the measures required for the Nation's safety."[24] That review led the President to conclude that "under existing conditions the immigration and naturalization activities can best contribute to the national well-being only if they are closely integrated

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[18] Ted Morgan attributes the public pushback against the "Dictator Bill" in part to an "alarmist radio broadcast by Father Charles E. Coughlin," a right-wing populist of the time. TED MORGAN, REDS: MCCARTHYISM IN TWENTIETH CENTURY AMERICA 185, 192 (2003).

[19] Felix Belair Jr., *Roosevelt Signs Reorganizing Bill*, N.Y. TIMES, Apr. 4, 1939, at 14. Historian Alan Brinkley described the 1939 bill as "so emasculated that it moved quickly and easily through Congress." ALAN BRINKLEY, THE END OF REFORM 23 (1995).

[20] Reorganization Plan No. I was sent to Congress on April 25, 1939 and Reorganization Plan No. II followed two weeks later on May 9, 1939. *See* S.J. Res. 138, 76th Cong., 53 Stat. 813 (1939).

[21] Reorganization Plan No. III was sent to Congress on April 2, 1940 and Reorganization Plan No. IV followed nine days later on April 11, 1940. Reorganization Plan No. IV sparked the most controversy of the reorganization plans. The House, in fact, voted it down, 232-153 (with 45 not casting a vote one way or another). 86 CONG. REC. 5,755 (1940). The Reorganization Act of 1939, however, required disapproval from both chambers to prevent the plan from taking effect and the Senate supported the plan. The controversy over Reorganization Plan No. IV centered on its proposal to transfer the Civil Aeronautics Authority to the Department of Commerce. 86 CONG. REC. 6069 (1940).

[22] FRANKLIN D. ROOSEVELT, MESSAGE FROM THE PRESIDENT OF THE UNITED STATES TRANSMITTING REORGANIZATION PLAN NO. V, H.R. DOC. NO. 76-784 (1940).

[23] *Id.* at 1.

[24] *Id.*

with the activities of the Department of Justice."[25] Though the Reorganization Act authorizing the plan was ostensibly driven by a desire to produce economic savings in the administration of the federal government, Roosevelt acknowledged that "[n]o monetary savings are anticipated" with this particular transfer of functions.[26] The message to Congress also noted: "While it is designed to afford more effective control over aliens, this proposal does not reflect any intention to deprive them of their civil liberties or otherwise to impair their legal status. This reorganization will enable the Government to deal quickly with those aliens who conduct themselves in a manner that conflicts with the public interest."[27]

"Aliens who conduct themselves in a manner that conflicts with the public interest"[28] referred at least in part to Roosevelt's growing fears of internal "spies, saboteurs and traitors" within the United States.[29] In a Fireside Chat broadcast four days after he sent this plan to Congress, Roosevelt warned the nation of "[t]he Trojan Horse. The Fifth Column that betrays a nation unprepared for treachery."[30] He spoke of "foreign agents" who would sow discord in order to undermine "[s]ingleness of national purpose."[31] With these actors, Roosevelt promised, "we must and will deal vigorously."[32] This attention to internal threats and Roosevelt's characterization of dissent as a threat to American unity and security reflected what one scholar has described as Roosevelt's "enlarged conception of national security."[33]

The perception of internal threat had grown increasingly urgent with the official outbreak of war in Europe in September 1939. In the early months of 1940, Nazi Germany had taken Denmark, Norway, and the Netherlands; France would surrender to Germany only twenty-seven days after

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[25] *Id.*

[26] *Id.* at 2. The Reorganization Act of 1939 began with the congressional declaration that the Act was designed to address "continued national deficits beginning in 1931" with the goal of "reduc[ing] substantially Government expenditures." Reorganization Act of 1939, § 1(a).

[27] ROOSEVELT, *supra* note 22, at 2.

[28] *Id.*

[29] President Franklin Delano Roosevelt, Fireside Chat: On National Defense (May 26, 1940). *Text of President Roosevelt's Radio Talk on the State of Our Defenses*, N.Y. TIMES, May 27, 1940, at 12.

[30] *Id.* "The term 'fifth column' was coined by a Fascist general who boasted of his strength: General Mola, when he was closing in on Madrid with four columns of his army, declared that he had a fifth one within the gates of the city." KATZNELSON, *supra* note 6, at 322 n.19 (quoting Hans Speier, *Treachery in War*, 7 SOC. RES. 258 (1940)).

[31] Roosevelt, *supra* note 29.

[32] *Id.*

[33] KATZNELSON, *supra* note 6, at 322.

Roosevelt's "Fifth Column" Fireside Chat recounted above. One historian has described these months as producing a sudden shift in national mood, so that "[s]uddenly the country felt naked and vulnerable."[34] This sense of panic resulted in a renewed focus on a hunt for "fifth-columnists within," as reflected in Roosevelt's Fireside Chat.[35]

Yet Roosevelt had been concerned about internal security threats for several years prior to the outbreak of war in Europe. Indeed, since at least 1934, Roosevelt had authorized the FBI—specifically, J. Edgar Hoover—to engage in internal surveillance programs designed to counter the threat of internal subversion. The authorizations began with a focus on Nazi groups in 1934, but that slowly grew into presidential authorizations for surveillance of communists and fascists by 1936.[36] After the dramatic international events of September 1939, Roosevelt directed the FBI to take over all intelligence programs regarding sabotage and other matters, again expanding the power and prominence of this agency housed within the Department of Justice.[37] Roosevelt further directed local "police jurisdictions to promptly provide the FBI with information about potential subversives, spies, and saboteurs."[38] Two days before he sent the Reorganization Plan to Congress, Roosevelt asked the Attorney General whether it might be possible for the government to read mail directed to or coming from select foreign nations regarding "'fifth column' activities—sabotage, anti-government propaganda, military secrets, etc."[39] The FBI's mail-opening program appears to have begun shortly after this inquiry in response to Roosevelt's request.[40]

Roosevelt's focus on internal threats to national security and his lack of concern about civil liberties were key components of his approach to managing the looming threat of war.[41] Viewed in this light, Roosevelt's

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[34] WILLIAM E. LEUCHTENBURG, FRANKLIN D. ROOSEVELT AND THE NEW DEAL 299 (1963).

[35] *Id.* at 300. William Wiecek has similarly observed that "[d]uring periods of heightened social tension . . . latent anxiety became linked to the image of an internal enemy, invariably The Other as defined by racial, ethnic, or religious characteristics, which was allied to hostile alien external forces." William M. Wiecek, *The Legal Foundations of Domestic Anticommunism: The Background of* Dennis v. United States, 2001 SUP. CT. REV. 375, 381 (2001). Though Wiecek is concerned with anticommunism outside of a wartime context, the observation holds true, though doubtless with even more intensity, regarding foreign nationals during war.

[36] REGIN SCHMIDT, RED SCARE: FBI AND THE ORIGINS OF ANTICOMMUNISM IN THE UNITED STATES, 1919-1943 341 (2000).

[37] *Id.* at 356.

[38] KATZNELSON, *supra* note 6, at 327.

[39] SCHMIDT, *supra* note 36, at 358–59.

[40] *Id.* at 359.

[41] *See* KATZNELSON, *supra* note 6, at 324 ("The president's calls for collective

decision to move immigration out of the Department of Labor and into the Department of Justice can be understood most clearly as a decision to sweep the immigration agencies into the fold of the growing national security apparatus being constructed for the war effort.[42] More specifically, it was consonant with Roosevelt's view of foreign nationals as both particularly prone to subversion and more vulnerable to surveillance and other police activities than citizens.[43] The move to the Department of Justice was less a benign bit of executive reordering than a significant rethinking of the best way to administer our nation's immigration system. Roosevelt's vision, implemented by the move to the Department of Justice, was one in which foreign nationals were, at least for the present moment, more a threat to be managed by the nation's law enforcement agency than members of the nation's labor pool.

This significant shift in administrative orientation was sent along to Congress for its approval, or more precisely, its lack of disapproval, on May 22, 1940. Congress was tasked with debating the plan and either failing to act (in which case it would take effect in 60 days), passing a joint resolution disapproving of the plan, or approving the plan and changing the implementation date via joint resolution.[44] The debates in each chamber

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mobilization often were accompanied by an undercurrent of concern for internal security and appeals for watchfulness."). *See also* GEOFFREY R. STONE, PERILOUS TIMES: FREE SPEECH IN WARTIME: FROM THE SEDITION ACT OF 1798 TO THE WAR ON TERRORISM (2004) ("In general, [Roosevelt] supported [civil liberties] in the abstract, but not when they got in his way.").

[42] Katznelson observes that the New Deal agencies provided a "fail-safe model" for "a slew of new national security agencies [that] were fashioned in the run-up to the war." KATZNELSON, *supra* note 6, at 323.

[43] It may also have reflected Roosevelt's gendered views on Perkins' capacities during wartime. Roosevelt was a staunch defender and sincere admirer of Perkins, but her biographer reports on comments during Cabinet meetings that suggest his admiration may not have encompassed a belief in her ability to manage a wartime emergency: "Often [Roosevelt] would look down the table [during Cabinet meetings in 1941] and say, 'Frances, you know a little battleship is not the worst thing in the world.' After two or three such occasions she spoke up. 'Mr. President, I'm not a pacifist. Please get that into your mind. I'm not a pacifist at all. . . .' But he continued to do it, at first to her amusement and then to her annoyance. She resented it as a piece of stereotyped thinking about women." GEORGE MARTIN, MADAM SECRETARY: FRANCES PERKINS 441 (1976).

[44] To be clear, the plan did not require any debate at all. Recall that the Reorganization Act of 1939 was structured such that the plan proposed by the President would automatically become law within 60 days unless Congress passed a joint resolution opposing the measure. *See supra* text accompanying notes 7-9. In this case, however, Congress took up the plan in order to propose a faster implementation. Indeed, congressional consideration was so speedy that the House Select Committee on Government Organization was reporting favorably (and unanimously) on the bill on May 23, the day after Roosevelt sent the plan to Congress. H.R. REP. NO. 76-2269, at 1 (1940). Four days later, the full House took up the plan for consideration. 86 CONG. REC. 6915 (1940).

captured the poles of opinion regarding immigration, the war, and how to respond to perceived internal threats. Perhaps surprisingly, the debate was driven as much by domestic politics as anything else.

C. The House of Representatives: Immigrants, Communists, and Frances Perkins

The Plan arrived in the House during a tumultuous moment in Congress. Congressional support for Roosevelt's New Deal programs was waning. Democrats had lost seats in both the House and Senate in the 1938 election and the remaining Democratic majority was often uncomfortably reliant upon southern Democrats who were prone to make common cause with Republicans in efforts to "frustrate what remained of the President's domestic agenda and even to dismantle earlier achievements."[45] Reorganization Plan No. V was an opportunity for opponents of the New Deal to weigh in on another of Roosevelt's executive plans.

But the Reorganization Plan was not just another piece of New Deal legislation. Importantly, it was also a plan squarely focused on foreign nationals, which carried its own potent political resonance at this moment in congressional history. As David Cole has colorfully explained:

> By the middle of 1939, Congress had over 100 anti-immigrant proposals under consideration. As one congressman reported, "the mood of this House is such that if you brought in the Ten Commandments today and asked for their repeal and attached to that request an alien law, you could get it."[46]

One of those percolating bills was the Alien Registration Act, popularly referred to as the Smith Act.[47] Initially introduced on March 20, 1939, the Senate committee reported favorably on the bill on May 29, 1940 (three days after the Reorganization Plan was sent over by Roosevelt) and the bill easily sailed through both chambers in June. The Smith Act and Reorganization Plan No. V were very much complementary pieces of legislation, sharing the stage with one another in late May and June 1940. The Smith Act was "the first federal peacetime sedition statute," criminalizing "advocacy of overthrow of government by force and violence, organization of groups to advocate such overthrow, membership in such

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[45] BRINKLEY, *supra* note 19, at 140–41.

[46] DAVID COLE, ENEMY ALIENS: DOUBLE STANDARDS AND CONSTITUTIONAL FREEDOMS IN THE WAR ON TERRORISM 130–31 (2003).

[47] Alien Registration Act of 1940, Pub. L. No. 76-670, 54 Stat. 670 (1940). The law was authored by Rep. Howard Smith (D-VA) who V.O. Key described as "extreme . . . in his dislike of the New Deal." V.O. KEY, JR., SOUTHERN POLITICS IN STATE AND NATION 24 (1949).

groups, and conspiracy to do any of the forbidden acts."[48] Its immigration components were even more extensive, amending the immigration statutes by mandating the registration and fingerprinting of all foreign nationals in the United States and expanding the list of deportable offenses to include certain forbidden political activity, namely actions that "knowingly or willfully advocate, abet, advise, or teach the duty, necessity, desirability, or propriety of overthrowing or destroying any government in the United States by force or violence, or by the assassination of any officer of any such government."[49] Though appearing on its face to provide for a relatively limited sphere of applicability, Senator Tom T. Connally (D-TX), who introduced the bill for a vote in the Senate, explained that the "provision refers to membership in communistic or other societies which advocate the overthrow of government by force or violence."[50] David Cole has described the Smith Act as "the centerpiece of federal anti-Communist legislation."[51] The Smith Act was, in other words, a multipurpose bill. It achieved both anti-immigrant and anti-communist goals through the lens of national security and wartime preparedness and met with nearly unanimous approval in the House and Senate.[52]

Those same themes were also drivers behind another ongoing effort in the House: the House Special Committee to Investigate Un-American Activities, chaired by Rep. Martin Dies (D-TX).[53] The committee was created in 1938 to investigate "the extent, character, and objects of un-American propaganda activities in the United States" and "the diffusion within the United States of subversive and un-American propaganda that is instigated from foreign countries or of a domestic origin and attacks the principle of the form of government as guaranteed by our Constitution."[54] The committee's creation reflected "the increasing attention paid by Congress to matters of internal security" and foreshadowed the "early version of a southern Democratic-Republic alliance," driven both by "their

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[48] Wiecek, *supra* note 35, at 424 n.2.

[49] Alien Registration Act, Title I, § 2(a), Title II, § 20.

[50] 86 CONG. REC. 8343 (1940) (statement of Sen. Connally).

[51] COLE, *supra* note 46, at 131.

[52] The Senate passed the bill on a voice vote without a single senator speaking in opposition. *See* 86 CONG. REC. 8347 (1940). The House debate included one voice of hesitation (Rep. Emanuel Celler (D-NY)) and a single voice of opposition in the person of Rep. Vito Marcantonio, a member of the American Labor Party. His "nay" vote was joined by three others. The Smith Act passed the House 382-4 (with 45 not voting). *See* 86 CONG. REC. 9034–37 (1940).

[53] BRINKLEY, *supra* note 19, at 141. This committee would be reconstituted in 1945 as the infamous House Un-American Activities Committee ("HUAC").

[54] H.R. Res. 282, 76th Cong. (1938).

anathema of Communism" and their "shared concern about the growing power of organized labor."[55]

No subject of the committee's activities better exemplified the many intertwined threads of the politics of early 1940—anti-immigration, anti-communism, expanding views on national security, and growing hostility to organized labor—than Harry Bridges. Bridges was a longshoreman in California who rose to national prominence as a leader of the 1934 general strike in San Francisco.[56] He was also an Australian national. Bridges' twenty-year odyssey through the immigration system and federal courts has been ably and compellingly documented elsewhere.[57] For our purposes, we need only observe that he was a favorite target of conservatives, including proponents of the Smith Act and members of the Dies committee, who demanded that Perkins initiate deportation proceedings against Bridges.[58] Dies alleged that Bridges was a communist and that "[t]he responsibility for this breakdown in the enforcement of our deportation laws must be laid at the door of Secretary Perkins. The conclusion is inescapable that Secretary Perkins and those around her are not in sympathy with the deportation of radical aliens."[59] Bridges was a particularly useful target for the

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[55] KATZNELSON, *supra* note 6, at 330.

[56] Bridges was himself a longshoreman and a member of the independent International Longshoremen's Association, but the strike included "sailors, firemen, cooks, and stewards" in addition to longshoremen and truckers. MARTIN, *supra* note 43, at 315. Bridges was elected chair of the joint strike committee. *Id.*

[57] Kanstroom offers a particularly useful account that provides helpful context regarding the working conditions and labor organizing at the time. DANIEL KANSTROOM, DEPORTATION NATION: OUTSIDERS IN AMERICAN HISTORY 186–200 (2007). Martin also provides a thorough account from the perspective of Secretary of Labor Frances Perkins. *See* MARTIN, *supra* note 43, at 313–22. *See also* COLE, *supra* note 46, at 132–36; Peter Afrasiabi, *Immigration's Collision with Labor in the Legal Arena: How the Legal System Failed Labor Leader Harry Bridges and Why It Matters Today*, LAB. L. J. 135, 135–38 (2016).

[58] The debate on the Smith Act featured comments from Rep. Samuel Francis Hobbs (D-AL), who exclaimed: "It is my joy to announce that this bill will do, in a perfectly legal and constitutional manner, what the bill specifically aimed at the deportation of Harry Bridges seeks to accomplish." 86 CONG. REC. 9031 (1940). More discreetly, Connally explained that the bill contained a "clause which will probably operate automatically to deport some of the persons who have been causing trouble out on the Pacific coast." 86 CONG. REC. 8343 (1940). There could be no mistaking the fact that Bridges was one of "the persons" to whom Connally referred. For a discussion of Dies committee demands regarding Bridges' deportation, *see* KANSTROOM, *supra* note 57, at 191.

[59] MARTIN, *supra* note 43, at 409. To be clear, Perkins did not deport Bridges because there was not a sound legal basis for her to do so. She intervened to halt his deportation proceeding—along with deportation proceedings of eleven other individuals—when the Supreme Court agreed to hear the appeal of a separate deportation case whose holding would determine whether there was a legal basis to deport Bridges. *Id.* at 407–08. Kanstroom observes that "[i]n the end, Bridges achieved iconic and symbolic status," his legal positions

investigations of "un-Americanism" by the committee in no small part because his case enabled the committee to link Perkins to this foreign national leftist labor leader.[60] As historian Alan Brinkley has explained, the committee focused its work on "a series of investigations of liberals and reformers in an effort to discredit the New Deal by tying it to radical and communists."[61] Dies counted Perkins among the "left-wingers and radicals who do not believe in our system of private enterprise."[62]

Indeed, Perkins' relationship with the House of Representatives had been a rocky one in the years preceding the vote on the Reorganization Plan. The House had previously voted to remove the Wage and Hour Division from her direct supervision and placed that job instead in the hands of one of her subordinates.[63] The *New York Times* report on the vote, which ran on the front page of the paper with the headline, "House Takes a Task from Miss Perkins," described the Democratic leadership as acknowledging that the vote would be "construed as a vote of lack of confidence in Miss Perkins."[64] Less than a year later, Rep. John Parnell Thomas (R-NJ), a member of the Dies committee, introduced a resolution to impeach Perkins, along with Immigration and Naturalization Service Commissioner James L. Houghteling, and the Solicitor of the Department of Labor Gerard D. Reilly.[65] Perkins believed that Dies was the actual initiator of the impeachment resolution, given the fact that he was "obsessed" with immigrants and communism.[66] The charges of impeachment were dismissed by the House Judiciary Committee on March 24, 1939, but they are indicative of an undercurrent of distrust of Perkins and her handling of immigration by at least some prominent members of the House.[67] The

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vindicated by the Supreme Court on multiple occasions. KANSTROOM, *supra* note 57, at 199.

[60] Note that the Dies committee investigated "un-Americanism" very broadly construed. Among other extreme positions, the committee famously accused child star Shirley Temple of being a communist. KANSTROOM, *supra* note 57, at 190.

[61] BRINKLEY, *supra* note 19, at 141.

[62] *Id.* Another of the administration figures targeted by Dies was Secretary of the Interior Harold Ickes, who called Dies "the outstanding zany in all our political history" at a November 1938 press conference. KANSTROOM, *supra* note 57, at 190.

[63] *House Takes a Task from Miss Perkins*, N.Y. TIMES, Mar. 2, 1939, at 1.

[64] *Id.*

[65] H.R. Res. 76, 76th Cong. (1939). *See also* MORGAN, *supra* note 18, at 185 (listing Dies committee members). The impeachment resolution accused Perkins and the other named officials of "high crimes and misdemeanors" for "failing, neglecting, and refusing to enforce the immigration laws of the United States" and specifically listed the failure to deport Bridges as an example. 86 CONG. REC. 702–11, 732–35 (Jan. 24, 1939) (including reading of resolution and statement of Rep. Dickstein).

[66] MARTIN, *supra* note 43, at 411–12.

[67] Perkins appeared before the House Judiciary Committee on February 8, 1939, defending her record on immigration enforcement and expressing her disagreement with

political winds were shifting in Congress. One prominent account of the period described the new Congress as launching an "assault" on Roosevelt's domestic agenda, and Perkins was one of the targets.[68]

All of these turbulent political currents came together in the unremarkably titled "Reorganization Plan No. V."

D. The House of Representatives: Debating the Plan

Reorganization Plan No. V was introduced in the House by Rep. John Cochran (D-MO), who framed the plan as an entirely uncontroversial move justified by the fact that "[t]he principal duty of the Immigration and Naturalization Service [("INS")] is law enforcement."[69] Accordingly, the INS "properly belongs" in the Department of Justice, rather than Labor.[70] "By placing this organization in the Department of Justice, it will make for better enforcement of our immigration and naturalization laws, which we certainly need in these critical times."[71] Having noted the need for increased enforcement, Cochran cautioned that the move was "not a reflection upon the Secretary of Labor," who had "to a certain extent, been handicapped by lack of sufficient personnel."[72] In short, he could "conceive of no sound argument that can be advanced against this proposal."[73]

The debate that followed suggests that Cochran was correct in anticipating limited opposition to the plan (it was ultimately approved by a voice vote described as "unanimous" by the *New York Times*), but his House colleagues who spoke and the press covering the move did not share his view that the change was unrelated to Perkins' tenure supervising immigration. Indeed, the first person to speak after Cochran was Rep. John Taber (R-NY), who framed the move as one entirely about Perkins:

> Taking this activity away from the Secretary of Labor, Madam Perkins, is something that should have been done many years ago. As to the kind of set-up that we are going to have afterward I have this to say:

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communism. *Defends Record as Supporting Democracy, Assails Reds for Curbing Individual Liberty as Committee Weighs Impeachment*, WASH. POST, Feb. 9, 1939, at 2. On March 24, 1939, the Judiciary Committee published its conclusions regarding the impeachment charges. In short, the committee determined that there was "no competent evidence" to support any of the charges leveled against Perkins, Houghteling, or Reilly. H.R. Rep. No. 76-311, at 5 (1939).

[68] BRINKLEY, *supra* note 19, at 140.

[69] 86 CONG. REC. 6915 (1940) (statement of Rep. Cochran).

[70] *Id.*

[71] *Id.*

[72] *Id.*

[73] *Id.* at 6916.

> Many of us are going to vote for this resolution today, not because we believe it is the right thing to do from the standpoint of a logical set-up of the Government, because it manifestly is not. The Immigration Service is an administrative agency and should be kept so. The Department of Justice is a law enforcement agency and should be kept so, but we are going to vote for this reorganization plan because the President has not the patriotism or the courage to remove the Secretary of Labor, a notorious incompetent and one who for the last 7 years has steadily and steadfastly railed and refused to enforce the immigration law and continuously admitted and kept here those who were not entitled to stay.
>
> It is the hope of those who are voting for the resolution that Mr. Jackson, the Attorney General, will do a better job; that he will either force Mr. Houghteling, the Commissioner of Immigration, to about-face on the position that he has followed under Mme. Perkins or will substitute him for an aggressive American.[74]

Rep. Taber's remarks were forceful, but his view was not an outlier among those representatives who spoke during the hearings. Rep. Noah Mason (R-IL), for example, characterized the proposal in strikingly similar manner, arguing that the plan:

> . . . has for its sole purpose the separation of Mme. Perkins from that Bureau. Nine out of every ten Members of this House will vote for this resolution in order to remove the Bureau from under the influence and mismanagement of Mme. Perkins, not because they feel the Bureau should be placed in the Department of Justice.[75]

Rep. Mason was among those members of Congress who believed that immigration "naturally and normally belongs in the Department of Labor," but that Perkins' peculiar deficiencies warranted the extreme step of moving the Bureau to the Department of Justice since Roosevelt would not remove her from the post.[76] There are some predictable elements to this discussion. It was, for example, primarily—though not exclusively—Republicans who stood up to attack Secretary Perkins (and often used the opportunity to take shots at Roosevelt) and it was exclusively Democrats who expressly defended her record on immigration.[77] These comments, in

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[74] *Id.* Taber was not shy of using extreme language in his criticism of the Roosevelt administration. He had previously decried the National Recovery Administration as "a powerful appeal to Herr Hitler and Comrade Stalin." KATZNELSON, *supra* note 6, at 236.

[75] 86 CONG. REC. 6917 (1940). Mason and Thomas have been described as "two Republicans of the distant right-wing." KATZNELSON, *supra* note 6, at 330 (quoting other historical sources).

[76] 86 CONG. REC. 6917 (1940).

[77] Rep. John Rankin (D-MS) was the lone Democrat to attack Perkins in this debate. Rankin was a New Dealer who co-authored the legislation creating the Tennessee Valley

other words, certainly should be read with their partisan gloss in mind.[78] But they should also be read in the larger context of Congress' ongoing relationship with Perkins and the public perception (viewed through the lens of press accounts) of her work on immigration.[79]

When she first entered the office of Secretary of Labor in 1933, Perkins discovered both that immigration constituted the single largest portion of the Department's budget and that some units of the agency were accused of rampant corruption.[80] Accordingly, one of her very first acts in office was to effectively disband a corrupt unit of the Bureau that was widely known for shaking down immigrants in lieu of enforcing deportation orders.[81] She then appointed a highly regarded businessman, Daniel W. MacCormack, to

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Authority. He was also "highly in favor" of the move of immigration out of the Department of Labor, for reasons related to his troubling concerns about Perkins and political radicalism that will be discussed *infra*. Perkins was defended by several Democrats, including Rep. Caroline O'Day (D-NY), one of the few women in the House of Representatives during the 76th Congress. *See id.* at 6917–18.

[78] The partisanship was no doubt enhanced by the fact that 1940 was a presidential election year, with the Democratic National Convention less than two months away.

[79] Though much more temperate than the debate in the House, the Senate debate also reflected the view that Perkins had not done enough to enforce the nation's immigration laws. Senator Rufus Holman (R-OR), for example, expressed the view that "[t]he resolution was prompted by a conviction on my part, approved unanimously by the Committee on Immigration, that the Bureau of Immigration, under the present Secretary of Labor, is not functioning as the law intends it should function." 86 CONG. REC. 7287 (1940). Similarly, Senator William King (D-UT) explained that though he had "sometimes thought some of the proceedings for deportation were rather harsh or cruel; and yet the American people demand the enforcement of the law. It is believed by some that there has been too great laxity in enforcing the law, and that many aliens have been permitted to come into the United States illegally, and to remain in, through technicality or otherwise in violation of the provisions of the statute." *Id.* at 7263. This view is also reflected in some press accounts. *See, e.g.*, Felix Belair Jr., *President Offers Alien Control Plan*, N.Y. TIMES, May 23, 1940, at 15 ("The White House has been working with the Department of Justice for months to obtain a more effective control over aliens. The Department of Labor has been accused of laxness in its enforcement of the various immigration laws."). One senator even remarked that "from the newspapers" he had "gathered the general idea that for quite a number of years, through all the time we have had a deportation law, there has been virtually no deportation of aliens; certainly not for a number of years." 86 CONG. REC. 7201 (1940). As discussed *infra*, the Senate debate was dominated by Senators George Norris (R-NE) and Burton Wheeler (D-MT). While Wheeler seemed to share the view that immigration should be moved out of Labor, Norris believed that the immigration law was "being enforced probably as well as any other law. So far as I know, it is." *Id.* at 7202.

[80] MARTIN, *supra* note 43, at 25.

[81] The "Section 24" group was responsible for investigating and deporting people in the country without lawful authority. This group was "constantly in the news" for raids, many of which indiscriminately rounded up American citizens in the search for people to deport. *Id.* at 25–29.

lead the Bureau and institute a series of wide-ranging reforms within it. In addition to efforts at increasing the professionalization of the Bureau's employees and improving due process protections, Perkins and MacCormack also made greater use of their ability to discretionarily grant relief from deportation or readmission to immigrants who would otherwise not be admissible.[82] The latter procedure involved reliance upon the Seventh Proviso to Section 3 of the Immigration Act of 1917, a formerly obscure clause that Perkins now used on behalf of immigrants whose removal she believed warranted relief that was not forthcoming from Congress. The reforming impulse continued into 1938 when, after the death of MacCormack, Perkins convened a panel of highly regarded academics to identify problems with the current immigration regime and suggest reforms.[83] As we have seen, however, when Congress debated Perkins' effectiveness at the helm of immigration, a common refrain was that she was not enforcing immigration laws. Her increased use of discretionary relief via the Seventh Proviso was particularly irksome to members of Congress, who had in the past described her use of this discretionary authority as a "flagrant misinterpretation of the intent of Congress" that was essentially simply the "evasion of immigration laws."[84] In sum, her record of reform and discretion was not one that earned plaudits from certain members in Congress.

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[82] MAE M. NGAI, IMPOSSIBLE SUBJECTS: ILLEGAL ALIENS AND THE MAKING OF MODERN AMERICA 84 (2004). *See also* Reed Abrahamson, *"The Ideal of Administrative Justice": Reforming Deportation at the Department of Labor, 1938-1940*, 29 GEO. IMMIGR. L.J. 321, 326 (2015).

[83] Abrahamson, *supra* note 82, at 322. Abrahamson's article recounts prior reform efforts (including the dismissal of the Section 24 group) and commissions tasked with suggesting reforms (e.g., the Wickersham Commission recommendations from 1931 and the 1932 study). The report of the 1938 committee was printed five days before Reorganization Plan No. V was submitted to Congress, thus curtailing direct implementation of the report's recommendations. *Id.* at 347.

[84] 86 CONG. REC. 678–79 (1940). Reynolds was particularly agitated about the use of Seventh Proviso and was still talking about Perkins' failure to adequately enforce immigration laws weeks after the Reorganization Plan had been passed and she was no longer responsible for immigration enforcement. *Id.* at 9276–77 (discussing the "seventh proviso evil" that was essentially a "loophole" permitting the "discretionary power" that had been used to ill-effect by the Department of Labor. Reynolds argued it was important to discuss the "seventh proviso evil" so that the "Department of Justice may escape the pitfalls that await them" by knowing "what was done by the Labor Department under the seventh proviso"). Note that the later incarnation of the Seventh Proviso—INA 212(c)—remained a focus of Attorney General action even after Perkins. Former Attorney General Alberto Gonzales and Patrick Glen discuss Attorney General review of these cases. *See* Alberto R. Gonzales and Patrick Glen, *Advancing Executive Branch Immigration Policy through the Attorney General's Review Authority*, 101 IOWA L. REV. 841, 870–74 (2016).

As head of both labor and immigration, and as both an ardent New Dealer and close Roosevelt ally and friend, Perkins was a useful political target for those overlapping areas of criticism. Representative Taber, for example, spoke of Perkins as a "notorious incompetent" regarding immigration in the same breath that he challenged Roosevelt to "take the first step" toward national unity by "getting rid of the vicious laws that hamper industry."[85] Similarly, Representative Mason was as critical of Perkins' handling of our nation's labor laws ("Why not divorce Mme. Perkins from the entire Labor Department as an essential defense preparation measure?") as he was of her handling of immigration.[86] One congressman, Rep. John Rankin (D-MS), was "highly in favor" of the move of immigration out of the Department Labor and into the Department of Justice because of his worries about the influence of foreign elements within the United States. Rankin understood the foreign influence to be directly responsible for both the labor and race activism he deplored:

> I believe the most dangerous influences we have in this country today are what are known as the "fifth columns." They have been operating here for a long time. They began with the sit-down strikes. I have never doubted that that policy was dictated from Moscow. . . .
>
> I want to call attention to the fact that one of the most cruel and inhuman activities of these "fifth columns" has been with reference to the Negroes of this country. For years the Communists, and probably the Nazis and the Fascists, have been working among the colored people of this Nation trying to stir them up against the white people of the country, and particularly in the South. . . .
>
> These so-called Afro-Americans are being used by the Communists—this "fifth column" element that is trying to stir up trouble between the Negroes and the white people, especially in the Southern States. They are simply making trouble for the law-abiding Negroes as well as the whites in the Southern States.
>
> I am in favor of this measure, and I believe the Attorney General will enforce this law. I am tired of hearing Americanism preached to me by somebody who cannot even speak the English language and whose logic nobody can understand. [Applause.][87]

Though Rep. Rankin was alone in his explicit linkage of Perkins, communists, race politics, and the Reorganization Plan—no easy conceptual feat—he was not alone in using the Reorganization Plan to criticize Perkins' handling of both labor and immigration and as a way to

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[85] 86 CONG. REC. 6916 (1940).
[86] *Id.* at 6917.
[87] 86 CONG. REC. 6922–23 (1940).

reduce her power and influence in national politics.[88] The personal lines of attack were criticized by some speakers, who varied between defending Perkins' performance and imploring their fellow members to make a decision based on the institutional shift alone, rather than the particular personalities involved in specific agencies.[89]

But as it turned out, the challenge of debating the Reorganization Plan without attention to personalities was not peculiar to the House, as the Senate debate also became consumed with discussion of a particular person. Unlike the House, however, where the debate had been driven by conservative Republicans opposed to Roosevelt's labor agenda and his chief implementer of that agenda, the Senate debate was dominated by two liberal New Dealers. Their personality-based concerns were not directed at Perkins, but instead were trained on J. Edgar Hoover, the Director of the FBI.

E. The Senate: Debating the Plan, Civil Liberties, and the FBI

Even more explicitly than in the House, the Senate consideration of the Reorganization Plan was introduced with the express hope that consideration would be essentially perfunctory and approval would be swift.[90] The first senator to speak substantively on the plan, however, was

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[88] Key described Rankin as "a close second to the late Senator [Bilbo (an infamous segregationist)] in extremeness of declamation on the black." KEY, *supra* note 47, at 253 n.45.

[89] Rep. Caroline O'Day (D-NY), for example, chastised Rep. Mason for his lack of knowledge regarding the improvements achieved by Perkins at the Department of Labor and said his attack on Perkins was "utterly without basis." O'Day argued that Mason has been "overcome by the hysteria which now seems to be sweeping over the country." 86 CONG. REC. 6918 (1940). Support for Perkins' performance was also expressed by Rep. Samuel Dickstein (D-NY) ("[T]he criticism leveled against Secretary Perkins was wholly unjustified. She has made an excellent Secretary of Labor. . . .") and Rep. Horace Voorhis (D-CA). *Id.* at 6916, 6920. Rep. Edward Rees (R-KS), on the other hand, simply urged his fellow representatives to vote without regard to personality and without directly expressing a view on the performance of Perkins ("I regret . . . that a good many of our Members are going to vote for the transfer of the Bureau of Immigration and Naturalization to the Department of Justice because of a feeling that the Cabinet member having charge of this Bureau does not, in their opinion, handle the situation satisfactorily. In other words, a good many of our Members will not vote so much upon the merits of this bill but because they feel that this particular Bureau should not remain under the present head of the Department of Labor. . . . I am going to vote for this bill, because—like other Members of the House—I am anxious that the immigration and naturalization laws are properly administered and carried out. This is absolutely necessary under our present times and conditions; and I hope that through the office of the Attorney General this Bureau will be properly and fairly administered."). *Id.* at 6920.

[90] Consideration of House Joint Resolution 551 was introduced by Senator James

Senator Lewis Schwellenbach (D-WA), who did not share the view that the Joint Resolution presented nothing that warranted discussion. His comments prefigured the rest of the debate in the Senate. Specifically, Schwellenbach—though not opposed to the actual transfer—worried that the plan indicated a creeping "danger of this country simply going wild upon the question of aliens."[91] He urged his colleagues to consider the Reorganization Plan "with full realization that this is not a time to become panicky" and to remember that "it will not do any good to defend the United States against a 'fifth column' if by so doing we destroy the very institution of democracy itself in the United States."[92] Schwellenbach's focus on the threat to civil liberties posed by war and wartime hysteria would come to define the Senate consideration of the Reorganization Plan, though Schwellenbach himself would not speak again. Instead, debate in the chamber was dominated by Senators George Norris (I-NE) and Burton Wheeler (D-MT), who repeatedly raised concerns regarding the threats posed by wartime hysteria to civil liberties and directly linked those concerns to the worrying record of civil liberties violations by the FBI. The FBI was a bureau within the Department of Justice and Norris and Wheeler argued that the inability of the Department of Justice to control the FBI portended problems for immigration enforcement under its supervision, particularly during a war. Norris and Wheeler spoke for hours on the Senate floor during the two days of discussion on the joint resolution.[93]

The Reorganization Bill arrived on the floor of the Senate just a few months after Norris requested an investigation into a raid conducted by the FBI in Detroit on February 5, 1940.[94] That raid resulted in the arrests of sixteen people on charges they had induced others to enlist in the Spanish Loyalist army.[95] All sixteen indictments ended up being dismissed by Attorney General Jackson, but that did little to quell the public uproar over

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Byrnes (D-SC) who hoped to "limit debate." That suggestion was seconded by Senator Patrick McCarran (D-NV), who "hoped the discussion might be limited to a very few minutes." 86 CONG. REC. 7197 (1940).

[91] 86 CONG. REC. 7198 (1940). Schwellenbach was an "ardent New Dealer" who would later serve as Secretary of Labor under Truman. BRINKLEY, *supra* note 19, at 132.

[92] 86 CONG. REC. 7198 (1940).

[93] To be clear, the discussion did not consume two *full* days. Instead, as noted, House Joint Resolution 551 had been introduced with the thought that Senate consideration would be very speedy. 86 CONG. REC. 7197 (1940). When it was clear that would not be the case, debate was continued to the next day so the Senate could complete the other business on the agenda for May 30.

[94] *Inquiry Into F.B.I. Activities Proposed by Senator Norris*, L.A. TIMES, Feb. 27, 1940, at 4.

[95] *FBI Treatment of Prisoners Investigated*, WASH. POST, Mar. 15, 1940, at 5.

the FBI's tactics in executing the arrests.[96] Namely, the FBI was alleged to have stormed into homes in the pre-dawn hours, conducted searches without warrants, and held the arrestees incommunicado for hours without access to their attorneys or families.[97] On March 14, Norris' request for an investigation was heeded by Jackson, who ordered an internal review of the arrests led by Henry Schweinhaut, head of the civil liberties unit within the Department of Justice.[98]

While Norris was pressuring Jackson to conduct a full investigation into the Detroit raids, Wheeler was asking the full Senate for permission for the Committee on Interstate Commerce (which he chaired) to investigate the use of wire-tapping by public agencies.[99] Though the FBI was not identified in the official request to the Senate, Wheeler mentioned disturbing actions by the FBI—including the Detroit raids—when discussing the request with reporters.[100] The intuition that the investigation was aimed at least partly at the FBI was driven by the identity of the committee chair, Wheeler, who was a persistent and well-known critic of the Bureau. The criticism stemmed in no small part from his harassment at the hands of the Department of Justice and the FBI as retribution for his exposure of corrupt practices within the Department of Justice.[101] The combined efforts of Norris and Wheeler—both of whom were well-known, highly-regarded, and independent-minded Senators[102]—prompted the *New York Times*

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[96] *16 are Freed for Recruiting in Spanish War*, WASH. POST, Feb. 16, 1940, at 3.

[97] Warren B. Francis, *F.B.I. Inquiry Ordered by Attorney General*, L.A. TIMES, Mar. 15, 1940, at 4.

[98] *FBI Treatment of Prisoners Investigated, supra* note 95; Frederick R. Barkley, *Jackson Orders New FBI Inquiry*, N.Y. TIMES, Mar. 15, 1940, at 12.

[99] *F.B.I. Warned about Spying*, L.A. TIMES, Mar. 13, 1940, at 6.

[100] *Id.*

[101] Richard L. Neuberger, *Wheeler of Montana*, HARPER'S MAGAZINE, Dec. 1, 1939, at 612. Neuberger's profile of Wheeler recounts in brief his harassment at the hands of the FBI, which culminated in a "frameup" bribery charge for which Wheeler was acquitted after 10 minutes of jury deliberation. *Id.* The incident, however, had a profound impact on Wheeler, who returned to it repeatedly in his remarks on the Reorganization Plan and throughout his career. Wheeler was also smeared early in his career for his refusal to roundup people of German and Irish descent while he was serving as U.S. Attorney in Montana. Neuberger reports that the hostility he earned in refusing to cave to war hysteria followed him into a 1920 campaign for governor, in which he was accused of "fealty to both the Kaiser and Lenin." *Id.* at 615. That campaign was additionally saddled with rumors that he "favored free love and marriage between races, and that if he won the election no man's woman would henceforth be his own," rumors spurred in no doubt by the fact that he was "running on a Non-Partisan League ticket" which included two non-white candidates. *Id.* He was elected to the Senate two years later. *Id.*

[102] The Neuberger profile is framed by Wheeler's role in opposing Roosevelt's court-packing plan, which earned him the enmity of the President. *Id.* at 609. Neuberger argues that Wheeler was the leading candidate for the Democratic nomination if Roosevelt chose

headline, "Critics Open Fire on Hoover's G-Men," with an accompanying article describing the ways in which Hoover and the FBI had lately "come under a concentrated drumfire of criticism from half a dozen directions."[103] Indeed, a week after that headline ran, Attorney General Jackson announced a change in policy at the Department of Justice, describing wiretapping as "unethical" and "not . . . tolerated by the bureau."[104]

The Department of Justice report on the Detroit raids released in early May did little to satisfy Norris, who said he found it "painful" to read that Jackson—whose nomination to the office of Attorney General Norris had "argued eloquently" on behalf of just two years prior—approved of the FBI's methods in the raids.[105] Norris held court on the Senate floor for over three hours decrying the tactics of the FBI and particularly those of its director, Hoover.[106] Norris called Hoover "the greatest publicity hound on the American Continent" and criticized the immense public relations machine Hoover commanded at the Bureau, which relentlessly portrayed Hoover and the Bureau with a "furor of adulation."[107] Instead, Norris believed the tactics of the FBI tended toward "the destruction of human liberty in the United States" and described the Department of Justice report as a "whitewashing" of the Detroit arrests.[108]

With this background in mind, it is no surprise that Norris believed that moving immigration into the Department of Justice would be a "very serious mistake."[109] He made this argument to his colleagues with the express realization that "the Senate is anxious to approve the plan" and predicted that it would be approved "by a practically unanimous vote."[110] But Norris said he felt compelled to speak anyway, even with the realization that what he said would "probably not have any effect upon the result" or "change a single vote in the body" because he believed the move would "result in depriving many American citizens of their constitutional rights, as well as preventing compliance with the orderly method provided

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not to run and noted that his candidacy would have been backed by Norris. *Id.* at 616–18.

[103] Frederick R. Barkley, *Critics Open Fire on Hoover's G-Men*, N.Y. TIMES, Mar. 17, 1940, at 76.

[104] Delbert Clark, *Wiretapping Ban Upsets '31 Ruling*, N.Y. TIMES, Mar. 24, 1940, at 59. Wheeler is described as a "vigorous defender of civil liberties" in the story. *Id.* Roosevelt rescinded this order a few months later, apparently in response to a request from Hoover. SCHMIDT, *supra* note 36, at 357–58.

[105] *FBI Practices Peril Liberty, Norris Says*, WASH. POST, May 8, 1940, at 13.

[106] *Id.*; *Norris Denounces Tactics of the F.B.I.*, N.Y. TIMES, May 8, 1940, at 18. Articles covering Norris' speech pegged the length at either three-and-a-half or four hours.

[107] *Id.*

[108] *FBI Practices Peril Liberty, Norris Says*, *supra* note 105.

[109] 86 CONG. REC. 7199 (1940).

[110] *Id.*

by our laws and our Constitution for the trial of offenses alleged to have been committed by aliens who are in our midst."[111] Over the course of his several hours of remarks on the proposed transfer, Norris dwelt heavily on the sordid record of the FBI, both in Detroit and elsewhere.[112] Though Norris acknowledged that the Attorney General "did not intend to turn [immigration] over to the F.B.I.," he remained convinced that moving immigration into the Department of Justice would result in:

> [T]he same men, with the same plan which is now in force, [who] will operate upon thousands and thousands of poor, ignorant, helpless people, with the result that they will be treated . . . as those in Detroit and New York [in the Palmer Raids] were treated. They will be captured, chained, and handcuffed, in violation of ordinary morals and in plain violation of the Constitution of the United States.[113]

This dim view of the FBI was shared by Wheeler, who similarly lamented the move of immigration into the Department of Justice for the fear that it would turn immigration enforcement "over to those who have been seeing things around the corner all these years, who have attacked every liberal Senator and gone through his office . . . They tried to besmirch the character of everybody who in the slightest degree disagreed with them."[114] In short,

> [T]hose of us who have been familiar with the activities of the Department of Justice in the past, and particularly during periods of hysteria, cannot help being fearful lest the same Bureau of Investigation resort to the same tactics which it has used on previous occasions, particularly when one of the same men is in charge of those activities.[115]

Both Norris and Wheeler believed that the chance that immigration would come to be enforced using the same tactics of the FBI was particularly dangerous at this moment in history. Norris warned that if Hoover were to have any control over immigration,

> . . . the result will be, to my mind, to bring about in the hearts of millions of our people a distrust of the Federal Government. . . . The little children who have suffered because their parents have been torn away from their firesides are not to blame. They are not to blame for being here. They were not asked. They are here, and they ought to be cared for just as we care for our children. They ought to grow up to be patriotic and loyal citizens; but if they are going to commence their careers in life by looking upon such outrageous things as

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[111] *Id.*

[112] *Id.* at 7199–203, 7259–73, 7287–89.

[113] *Id.* at 7200.

[114] *Id.* at 7201.

[115] *Id.* at 7275 (referring to Hoover's involvement in the Palmer Raids).

> have occurred in the Palmer raids and the F.B.I. raids, they are going to look upon their Government with suspicion; and when hardship and distress and privation come, as they have come to us, there are going to be places in those hearts where the seeds of bolshevism, of communism, of Hitlerism can grow and thrive and bring forth fruit.
>
> That is our danger . . . I do not see how we can deny it.[116]

This view was echoed by Wheeler:

> There is another reason why neither civil rights nor the fruits of progress can be sacrificed. The curtailment of either would lead to the possibility of dissension and would surely turn group against group at a time when national unity is most to be desired. The singling out of minorities for special controls or repressive action cannot fail to arouse resentment among large numbers of our people, whether they are citizens or noncitizens.
>
> If action against minorities should include repressions that, through zeal or misguidance, result in needless severity or brutality, or in violations of the constitutional rights of aliens, such steps would be resented by the millions of Americans whose parents or grandparents were foreign-born and who fled to this country to escape the blight of oppression and injustice that has from time to time fallen upon other parts of the world. There can be no question but that the deprivation of democratic values would make for serious discord. Some of those who are now loyal might become less loyal. Some of those who have loyally closed their ears to the whisperings of the disloyal might, in the face of cruelty and the raids of secret police, take refuge in the ranks of the very "fifth columns" whose threat we are engaged in combating. Such methods would gain an attentive audience for the crackpots and the foreign agents around us.
>
> This tragedy, which is entirely possible of accomplishment, as events of the past prove, must be prevented at all costs. And the best preventative may be found in the orderly application of the processes of democracy.[117]

From the perspectives of Norris and Wheeler, the rising threat of war and fascism abroad necessitated fierce protection against the violations of civil liberties and the continued commitment to American democratic principles in the execution of the rule of law. To slip into oppressive police tactics was, to their mind, a threat to national security and a prime reason to oppose the move of immigration into the Department of Justice.

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[116] *Id.* at 7270.
[117] *Id.* at 7278.

F. Wartime Exigencies and Normal Time

Senators Norris and Wheeler expressed a distinctly minority view on the Senate floor. The Reorganization Plan was approved with only four senators voting no.[118] But their focus on the looming threat of war and the dangers of dissension within the United States were expressed across the board. Press coverage of the proposed transfer characterized it as a move designed to better address the rising threat of "subversive alien influences" and "fifth column[ists]" within the nation.[119] The *Washington Post* characterized the plan as "primarily motivated by defense considerations."[120] As discussed above, in his message to Congress proposing the transfer, Roosevelt explained that he was surprised to be sending yet another reorganization plan to Congress, but that "the startling sequence of international events . . . has necessitated a review of the measures required for the Nation's safety."[121] That review, Roosevelt explained, "revealed a pressing need for the transfer of the immigration and naturalization functions from the Department of Labor to the Department of Justice." Roosevelt continued:

> I had considered such an interdepartmental transfer for some time but did not include it in the previous reorganization plans since *much can be said for the retention of these functions in the Department of Labor during normal times*. I am convinced, however, that *under existing conditions* the immigration and naturalization activities can best contribute to the national well-being only if they are closely integrated with the activities of the Department of Justice.[122]

Concerns about subversive elements within the United States were front and center in American politics while Congress debated the Plan. As noted previously, just four days after Congress received the Plan from the President, Roosevelt used one of his Fireside Chats to warn the nation of the dangers of a "fifth column" of "spies, saboteurs, and traitors."[123] The focus on Fifth Columnists and subversives, in other words, was ubiquitous.

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[118] Norris and Wheeler were joined by Senators Ernest Lundeen (Farm Labor Party-MN) and James Murray (D-MT) in their "nay" votes. An additional thirty-six senators did not vote one way or the other. The final vote count was thus fifty-six yeas, four nays, and thirty-six abstains. *Id.* at 7289–90.

[119] Belair, *supra* note 79, at 15.

[120] Editorial, *Aliens and Justice*, WASH. POST, May 23, 1940, at 10 (cautioning against "indiscriminate anti-alien activity similar to that which disgraced the Nation during and immediately after the last war" and warning that such behavior would cause "no good, and an irreparable amount of harm").

[121] ROOSEVELT, *supra* note 22.

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

[123] Roosevelt, Fireside Chat: On National Defense, *supra* note 29.

Another important recurring theme in the congressional debate was a sense among some speakers that this move would be temporary. The message from Roosevelt seemed to suggest as much, with his references to "normal times" and "existing conditions."[124] Senator Arthur Stewart (D-TN), for example, suggested that "since the times are somewhat unusual," the move seemed to make sense to him, though he did not want to see "a round-up of aliens" or "abusive treatment" of anyone. "It might be that after a time the agency could be moved to some other department, but it seems to me that at present it would be well to have some information ascertained by this group of trained men, who are able to handle that matter."[125] Wheeler shared the view widely expressed in the House of Representatives that immigration should be moved out of the Department of Labor, but disagreed that the Department of Justice was the better location.[126] In his view, "the Department to which it more properly belongs is the Department of State."[127]

The view that the move was driven by international exigencies and was likely to be temporary was expressed even by an ardent supporter of the FBI and Hoover. Senator Alexander Wiley (R-WI) passionately rose to defend Hoover and the FBI and to mock Norris for dwelling so long upon those topics.[128] He used his time on the floor to identify "a few more 'fifth columns' that have helped to demoralize this America of ours," including "aliens or citizens who live in this country and who are not devoting themselves 100 percent loyally to America," "pseudo intellectuals who have been guilty of causing a patriotic erosion in our youth," and

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[124] ROOSEVELT, *supra* note 22.

[125] 86 CONG. REC. 7202 (1940).

[126] *Id.* at 7276. *See also id.* at 7201–02 ("I think probably there has been a good deal of justification for the criticism which has been made in newspapers and elsewhere [regarding the Department of Labor's handling of immigration]. Regardless of that, however—and I am not trying to uphold that in the slightest degree—I think it is a very serious mistake to turn over this subject to the Department of Justice, and particularly to have the F.B.I. have charge of it. If it were desired to turn it over to the Department of Commerce, I should say 'Fine!' Turn it over to the Department of Commerce; turn it over to any other department; but do not turn it over to the Department of Justice, because, in my judgment, it does not belong there.").

[127] *Id.* In reality, Wheeler did not seem to have strong feelings about where immigration should be located, but he was adamant that the Department of Justice was an inappropriate place for immigration for reasons apart from his views on the FBI. "If I were the Attorney General of the United States you could not turn over the Bureau of Immigration to me. It ought not to be in the Department of Justice. The Attorney General should not want it in the Department of Justice, and the Solicitor General should not have it. The Solicitor General of the United States is the last man who ought to be the head of a bureau of that kind, because his work is of an entirely different character." *Id.* at 7201.

[128] *Id.* at 7284.

"Government agencies which . . . have hamstrung business and harassed business with unnecessary rules and regulations, have sabotaged industry, initiative, and invention."[129] Wiley was not an unconditional supporter of the move to the Department of Justice, however, for he expressed the view that the move was both dictated by the present crisis and temporary. "[W]hen the Commander in Chief of the Army and Navy tells me that he would like to switch the Immigration Bureau—*apparently for the period of the crisis*—he knowing what he knows because he is President and Commander in Chief, I believe I should vote to grant his request unless someone can show a valid reason why it should not be done."[130] Wiley additionally observed that Roosevelt believed "that in the preparedness program the Department of Justice, *during this period of conflict abroad*, should take over this matter."[131]

It was, in short, a "time of great crisis" and Congress reacted as expected by acting quickly—indeed, complaints about the proposal moving too fast for proper consideration were expressed—to approve the move requested by their Commander in Chief during a time that was increasingly perceived as preparation for war.[132] Moving immigration from the Department of Labor to the Department of Justice was depicted by Roosevelt and discussed by Congress as a wartime exigency. The move was also portrayed this way in the press, which approvingly reported on congressional approval of the plan "designed to deal quickly with 'fifth columns.'"[133] The Congressional debate reflected this wartime atmosphere, in the speeches of both supporters and detractors of the bill.

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[129] *Id.* Included in his list of "fifth columnists" were "certain public officials whose laxity has permitted disciples of communism, nazi-ism [sic], and fascism to come to America and teach their doctrines, not only in various labor and social groups but in our colleges." *Id.* It is hard to imagine he did not have Perkins in mind as one of those officials.

[130] *Id.* at 7285 (emphasis added).

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

[132] *Id.* at 7287 ("time of great crisis"). Complaints about the speed with which the plan was being moved through Congress were expressed, for example, by Rep. Edward Rees (R-KS): "I think it is unfortunate that this House should pass on this proposed legislation without giving it a little more deliberate consideration." *Id.* at 6920.

[133] *Senate Backs Plan to Deal Quickly with 'Columnists*,' L.A. TIMES, June 1, 1940, at 4. Other headlines on the newspaper page reporting the vote include "Trespass Ban Demanded; Law Sought to Curb 'Fifth Column' in Fight to Prevent Sabotage," "Strike Ties Up Six Warships; Cruiser and Destroyer Construction Halted by C.I.O. Union Walkout," "Storm Raised by Communists," and "Distributor of Nazi Leaflets Held on No-License Charge." *Id.*

G. Assessing Institutional Change

What, we may be wondering, did Secretary Perkins think about the Reorganization Plan that stripped her of authority over immigration? Rep. Cochran, upon introducing the resolution in the House, remarked that "The Secretary of Labor, Mme. Perkins, approves the transfer, going so far as to say it has been too long delayed."[134] This characterization of her view is correct, with an important asterisk. Perkins did support the removal of immigration from the Department of Labor and had been urging Roosevelt to make the change for several years.[135] But significantly, Perkins had been urging a move to the Department of the Interior, not the Department of Justice.[136] When Roosevelt called in May 1940 and asked her opinion on a move to the Department of Justice, she responded that "[u]nder ordinary circumstances" she believed Justice to be "a bad place" for immigration.[137] She did not believe immigration should be enforced by the same agency that enforced criminal laws, but should instead "be treated as one of the humanitarian functions of the government."[138] But Roosevelt was worried about "spies and saboteurs" and under the present circumstances, she was inclined to agree that the Department of Justice made sense as a wartime location for immigration.[139]

It did not, of course, prove to be merely a wartime location. Instead, the Department of Justice retained control over the INS until Congress

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[134] 86 CONG. REC. 6915 (1940).

[135] MARTIN, *supra* note 43, at 442.

[136] *Id.* While today's Department of the Interior is primarily associated with national parks and federal land management, at the time, the Department of the Interior was led by Ickes and encompassed the Public Works Administration. The Public Works Administration accomplished a breathtaking amount of work within its brief New Deal existence, including assistance in building the Lincoln Tunnel, the bridge connecting Key West with the Florida mainland, and "70 per cent of the country's new school buildings; 65 per cent of its courthouses, city halls, and sewage plants; 35 per cent of its hospitals and public health facilities." LEUCHTENBURG, *supra* note 34, at 133. Perkins described her view of the function of the Department of the Interior, by observing that it encompassed "the resources, the public parks, the activities and the people inside the country" and believed Ickes to be "a man of considerable administrative talent" with "a good social point of view." FRANCES PERKINS, THE ROOSEVELT I KNEW 275 (1946).

[137] MARTIN, *supra* note 43, at 442.

[138] *Id.*

[139] *Id.* Apart from the substance of the institutional change, she was aware of the tenor of the congressional assessment of her performance over the Bureau. Senator Alben Barkley (D-KY) entered into the Congressional Record a letter from Perkins to Rep. Taber defending her performance as head of the Bureau of Immigration and Naturalization Service. "The immigration law has been enforced faithfully and effectively during the last 7 years." 86 CONG. REC. 7290 (1940).

reorganized the immigration functions during another period of wartime policymaking in 2002. The Homeland Security Act of 2002 abolished the INS and moved many immigration functions into the newly created Department of Homeland Security.[140] The adjudication functions of the immigration judges remained within the Department of Justice, however, and the Attorney General retained the power to review decisions of the Board of Immigration Appeals ("BIA").

The Reorganization Plan worked a massive change to the administration of immigration laws in this nation, moving it out of an agency focused on labor laws and into one focused on criminal law enforcement. That shift was driven by the exigencies of war preparations, hostility toward the New Deal and Secretary Perkins, and fears of internal saboteurs. The congressional debate focused on concerns that reflected the fraught political moment in which the debate occurred. There was also a sense that the shift was a temporary one, designed to help the nation through war, but not necessarily beyond it. The structure stuck, however, and immigration has been administered largely by criminal law enforcement arms of the federal government since 1940.[141]

II. ATTORNEY GENERAL REVIEW IN PRACTICE: 1940-2019

Reorganization Plan No. V became effective on June 14, 1940, when the Attorney General formally took control of the INS.[142] The regulation that shifted core immigration administration functions to the Department of Justice also gave the Attorney General ultimate authority over executive branch interpretation of the immigration laws when other departments disagreed[143] and enabled the Attorney General to establish a Board of Immigration Appeals.[144] The BIA was designed to replicate the functions of

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[140] IMMIGRATION LAW AND PROCEDURE, *supra* note 3, at § 2.04[20][c].

[141] DHS and DOJ are not the only agencies involved in immigration administration and enforcement. *See, e.g.*, discussion *infra* at note 165.

[142] Reorganization Plan No. V, 5 Fed. Reg. 2223 (June 14, 1940) (ordering that the INS "and its functions are transferred to the Department of Justice and shall be administered under the direction and supervision of the Attorney General. All functions and powers of the Secretary of Labor relating to the administration of the [INS] and its functions or to the administration of the immigration and naturalization laws are transferred to the Attorney General").

[143] *Id.* ("In the event of disagreement between the head of any department or agency and the Attorney General concerning the interpretation or application of any law pertaining to immigration, naturalization, or nationality, final determination shall be made by the Attorney General.").

[144] IMMIGRATION LAW AND PROCEDURE, *supra* note 3, at § 3.05. The following description of the history of the BIA is derived largely from this overview.

the previous Board of Review at the Department of Labor, with one significant change.[145] The Board of Review functioned as an advisory body to the Secretary of Labor, making recommendations in immigration cases, but unable to render final decisions. Once key immigration functions moved into the Department of Justice, the Attorney General created the BIA by regulation and gave it the power to render final decisions in immigration adjudications.[146] The regulations created one exception to the administrative finality of BIA decisions by giving the Attorney General the power to review them.

This second part of the article examines the actual use of this review power by the Attorney General, paying particular attention to the power of self-referral, that is, the power of the Attorney General to take a case for his personal review and decision. All of these decisions, of course, were rendered after immigration adjudication became the sole province of the Department of Justice. In other words, this portion of the article does not aim to offer a comparative study of the substance of decisions issued before and after the move into the Department of Justice. The move into the Department of Justice is not portrayed here as an explanation for the changing use of the self-referral power. It is evident that such an explanation does not temporally align with the way the power evolved. Instead, the goal is simply to better understand how one often overlooked aspect of immigration adjudication developed under the new regime.

Because this power is "not exercised often," the scholarship on its use has not been extensive.[147] There was a small burst of attention to the power in 2016, when former Attorney General Alberto Gonzales co-authored an analysis of the review power with Patrick Glen in which they argued that Attorney General review "represents an additional avenue for the advancement of executive branch immigration policy that is already firmly

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[145] Regulations Governing Departmental Organization and Authority, 5 Fed. Reg. 3502, 3503 (Sept. 4, 1940) ("The Board of Review of the Immigration and Naturalization Service is transferred to the Office of the Attorney General. The Board shall hereafter be known as the Board of Immigration Appeals. In the exercise of the powers conferred upon it the Board of Immigration Appeals shall be responsible solely to the Attorney General.") (codified at 8 C.F.R. § 90.2 (1940)).

[146] *Id.* (listing powers of the BIA) (codified at 8 C.F.R. § 90.3 (1940)).

[147] Stephen Legomsky, *Learning to Live with Unequal Justice: Asylum and the Limits to Consistency*, 60 STAN. L. REV. 413, 458–62 (2007) (considering and ultimately rejecting Attorney General review as a method of improving asylum adjudications). Two prominent exceptions to the largely pro forma discussions of the review power in scholarship are Laura S. Trice, *Adjudication by Fiat: The Need for Procedural Safeguards in Attorney General Review of Board of Immigration Appeals Decisions*, 85 N.Y.U. L. REV. 1766 (2010) and Justin Chasco, *Judge Alberto Gonzales: The Attorney General's Power to Overturn Board of Immigration Appeals' Decisions*, 31 S. ILL. U. L. J. 363 (2007).

embodied in practice and regulations" and is "less controversial" than the direct orders from the President issued during the Obama administration.[148] The authors acknowledged criticisms of the mechanism, but ultimately concluded that these criticisms were "misplaced" and that future administrations would be well advised to use this "potent tool" of immigration policymaking.[149] Several responses to the Gonzales and Glen article soon appeared from prominent immigration law scholars, each of which addressed a particular aspect of the review power that scholars believed the authors had overlooked.[150]

Outside of immigration law scholarship, the review power is simply not discussed. There is a significant body of literature on the Office of the Attorney General and the different functions served by the office within the executive branch.[151] Some of this scholarship arose during or shortly after the administration of President George W. Bush.[152] But these articles do not specifically consider this particular review power in any great detail, perhaps reflecting a disciplinary tendency to limit immigration law scholarship to its own realm.

This part of the article aims to contribute to the scholarship on this important, but often neglected, administrative power. It begins by quickly establishing the legal framework for Attorney General review. It then turns to a historical review of Attorney General decisions rendered via self-referral. The article focuses on self-referred decisions because of the dramatic change in use of this aspect of the Attorney General's power since 2001.

Though there have been many changes in the use of Attorney General review since its creation in 1940, the single most significant and dramatic change has been the total shift to self-referral as the mechanism for review.

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[148] Gonzales and Glen, *supra* note 84, at 847.

[149] *Id.* at 898–912, 920.

[150] *See, e.g.*, David A. Martin, *Improving the Exercise of the Attorney General's Referral Power: Lessons from the Battle over the "Categorical Approach" to Classifying Crimes*, 102 IOWA L. REV. ONLINE 1 (2016); Margaret H. Taylor, *Midnight Agency Administration: Attorney General Review of Board of Immigration Appeals Decisions*, 102 IOWA L. REV. ONLINE 18 (2016); Bijal Shah, *The Attorney General's Disruptive Immigration Power*, 102 IOWA L. REV. ONLINE 129 (2017).

[151] *See, e.g.*, William R. Dailey, *Who is the Attorney General's Client?*, 87 NOTRE DAME L. REV. 1113 (2012); John O. McGinnis, *Models of the Opinion Function of the Attorney General: A Normative, Descriptive, and Historical Prolegomenon*, 15 CARDOZO L. REV. 375 (1993).

[152] *See, e.g.*, Norman W. Spaulding, *Professional Independence in the Office of the Attorney General*, 60 STAN. L. REV. 1931 (2008) (using the scandals that enveloped the Attorneys General of the administration of President George W. Bush—particularly those involving the "war on terror"—as a launching point for a critique of the call for "independence" in the office).

As we will see, the original regulation in 1940 mandated review under a few substance-based situations (i.e., the BIA was required to send the case to the Attorney General for cases involving certain subject matters), but a 1947 regulation shifted the system to rely only on the discretionary decisions of key actors—the Attorney General himself, the BIA, or the INS[153]—to determine whether Attorney General review was warranted. Between 1947 and 2001, self-referred cases constituted a small fraction of BIA decisions reviewed by the Attorney General. That pattern changed dramatically with the administration of President George W. Bush.

I have identified 230 published cases in which the Attorney General issued an opinion on review after the BIA certified a case to him or her, through any of the possible modes of referral, since the beginning of Attorney General review in 1940.[154] Of those 230 cases, 102 are summary decisions.[155]

This portion of the article, however, is most directly concerned with the method of referral. Accordingly, I have focused my attention on the cases decided since the referral regime changed to an actor-based system in 1947. One hundred and thirty-seven cases have been referred and decided under the actor-based referral regime instituted in 1947.[156] Between the 1947

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[153] When discussing the review power in this section, I often refer to the "INS" as a stand-in for the portion of the regulation that permits referral from the immigration enforcement agency. That agency is currently DHS, but for ease of narrative and graphical representation, I use the identifier "INS" throughout.

[154] I have included in this list two cases that have been self-referred, but a decision has not yet issued. *See infra* note 160. As previous researchers have observed, this set of cases is a particularly challenging one to compile. *See, e.g.*, Trice, *supra* note 147, at 1771 n.25 (observing that "Attorney General (AG) decisions are not collected separately in any publicly available location" and that the Executive Office of Immigration Review (EOIR) Virtual Law Library has mislabeled a number of the cases, making identification of all cases even more challenging"). In my attempt to construct as thorough a data set as possible, I have benefited from the generosity of Patrick Glen, who shared the list of cases he and Gonzales relied upon their 2016 article. Our sets largely overlapped, though there were some additions from each of us. Given the difficulty in compiling the data set, I have included the full set of cases on which I relied as an appendix to this article to hopefully lighten the load for future researchers working in this area. See the appendix for further discussion of the set of cases.

[155] There is no definition of "summary" decision within this particular legal universe for the period covered. I have counted a case as "summary" if the decision of the Attorney General added nothing to the analysis, relief from, or enforcement of the BIA decision. Most of the decisions counted in this group are simply one sentence decisions using language such as "I hereby approve," but some reiterate the reasoning of the BIA. My summary list is slightly different from the list compiled by Glen and Gonzales, who presumably employed a slightly different definition of summary. In both our lists, however, summary decisions date from the pre-Ashcroft era of Attorney General review.

[156] Thirty-nine of the cases decided since the change of referral mechanism were

regulatory change and the end of the Clinton administration, the Attorney General rendered a substantive decision via his or her review power in sixty-eight cases. Of those sixty-eight cases, only seven of those were self-referred. The arrival of the George W. Bush administration initiated a sea change in this power. Bush's first Attorney General John Ashcroft served in the position for approximately four years. During his four-year tenure, Ashcroft issued eight published decisions pursuant to this review power, three of which were self-referred. Ashcroft was succeeded by Gonzales and since that time, self-referral has become the *only* method of Attorney General review of BIA decisions. [157] Understanding the significance of this now total shift in referral mechanism—particularly given the ongoing efforts to expand its reach even farther—is the focus of the remainder of this article.[158]

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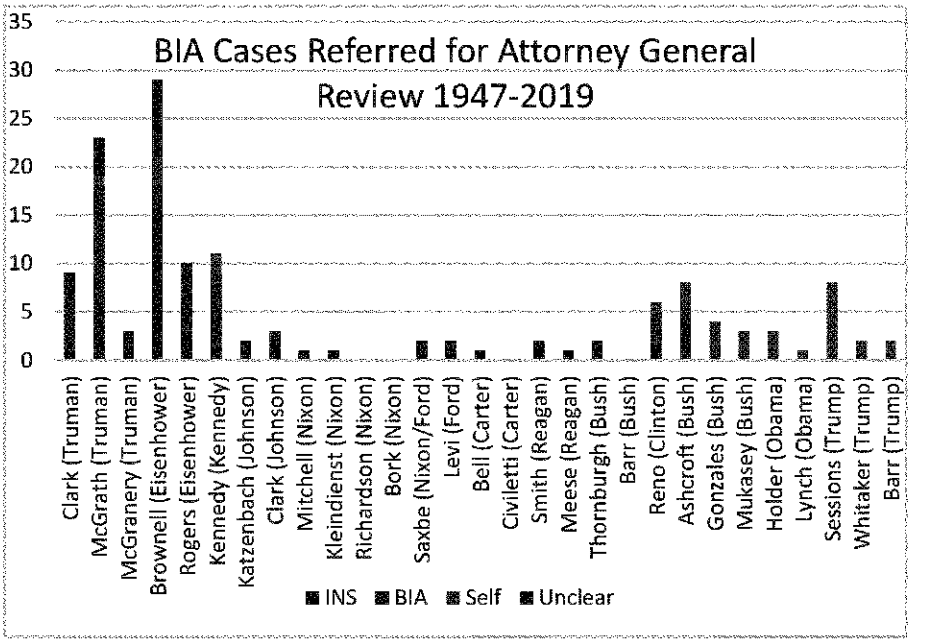
summary decisions, but the most recent summary decision was issued in 1966. Summary decisions, in other words, have become a thing of the past. Gonzales and Glen make this observation, as well. *See* Gonzales and Glen, *supra* note 84, at 858–59. Note also that I have chosen to include in this count two cases that have been self-referred, briefing has been completed, and the parties are simply awaiting a decision from the Attorney General: Matter of Negusie, 27 I&N Dec. 481 (Att'y Gen. 2018), and Matter of Reyes, 27 I&N Dec. 708 (Att'y Gen. 2019). I excluded one additional case that was self-referred by Sessions, because the case was mooted when the respondent was deported while review was pending. Matter of M-G-G-, 27 I&N Dec. 475 (Att'y Gen. 2018).

[157] In percentage terms, approximately ten percent of non-summary cases were self-referred in the 1947-2000 period, approximately thirty-eight percent of cases were self-referred during Ashcroft's tenure, and 100 percent of cases have been self-referred since Gonzales' tenure as Attorney General.

[158] The Department of Justice has placed on the Unified Agenda a proposed rule that would greatly expand the self-referral power. This proposed rule will be discussed *infra*. *See* Referral of Decisions in Immigration Matters to the Attorney General, RIN 1125-AA86 (2019) (https://www.reginfo.gov/public/do/eAgendaViewRule?pubId=201904&RIN=1125-AA86).



A. The Legal Framework for Attorney General Review

Since its creation in 1940, the one exception to the finality of BIA decisions has always been that they were subject to review by the Attorney General under specific circumstances.[159] The regulations creating and governing Attorney General review have been amended several times, fundamentally changing the circumstances that prompt review. At the time of its creation in 1940, the BIA was required to send cases to the Attorney General for review when:

> . . . a dissent has been recorded; in any case in which the Board shall certify that a question of difficulty is involved; in any case in which the Board orders the suspension of deportation pursuant to the provisions of section 19 (c) of the Immigration Act of 1917, as amended, or in any case in which the

[159] *Id.* (listing powers of the BIA, "subject to the provisions of § 90.12 of this part"). Like the creation of the BIA itself, the practice of Attorney General review was also established by regulation. In other words, there is no statutory requirement of Attorney General review though, as we shall see, the statute does speak to the Attorney General's authority regarding legal interpretation of the immigration laws.

> Attorney General so directs, the Board of Immigration Appeals shall refer the case to the Attorney General for review of the Board's decision.[160]

In other words, in its initial formulation, the BIA was directed to send for review to the Attorney General all cases meeting certain substantive criteria. The Attorney General was in turn required to provide a written opinion in any cases in which he reversed the BIA or ordered the suspension of a deportation.[161] The regulations were amended in 1945 so that the BIA was no longer required to send all suspension cases to the Attorney General for review, but the review requirements otherwise remained the same.[162] The regulations were substantially revised in 1947 to change the path of Attorney General review from substance-based to actor-based:

> The Board of Immigration Appeals shall refer to the Attorney General for review of the Board's decision all cases which:
>
> (a) The Attorney General directs the Board to refer to him.
>
> (b) The chairman or a majority of the Board believes should be referred to the Attorney General for review of its decision.
>
> (c) The Commissioner [of the INS] requests be referred to the Attorney General by the Board and it agrees.[163]

This referrer-based structure has remained in place with some amendments over the intervening years.[164]

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[160] *Id.* at 3504 (codified at 8 C.F.R. § 90.12 (1940)). "Suspension of deportation is a process to confer lawful permanent residence on certain deportable noncitizens with protracted residence. Application for this relief is made only in a deportation proceeding. In 1996, Congress eliminated suspension of deportation and replaced it with a somewhat similar kind of relief known as cancellation of removal." IMMIGRATION LAW AND PROCEDURE, *supra* note 3, at § 74.07.

[161] 5 Fed. Reg. at 3504 (codified at 8 C.F.R. § 90.12 (1940)).

[162] Miscellaneous Amendments, 10 Fed. Reg. 8096, 8096 (July 3, 1945) (codified at 8 C.F.R. § 90.12 (1945)). *See also* Bridges v. Wixon, 326 U.S. 135, 139 n.3 (1945) (explaining that cases were to be referred to the Attorney General cases "[w]here a member of the Board dissents, where the Board certifies that a question of difficulty is involved, or in any case in which the Attorney General directs").

[163] Miscellaneous Amendments to Chapter, 12 Fed. Reg. 4781, 4782 (July 18, 1947) (codified at 8 C.F.R. § 90.12 (1947)). No explanation for the change is given for the change, which the Department of Justice characterized as merely an "order pertain[ing] to organization, particularly to delegation of authority, and to procedure" and thus exempt from typical notice and comment requirements from the Administrative Procedure Act. *Id.* at 4785. The rule change took effect on July 28, 1947.

[164] The requirement that the BIA must agree with the INS referral was removed in 1952 and the referring agent was changed to the Assistant Commissioner, Inspections and Examination Division. *See* Immigration and Nationality Regulations, 17 Fed. Reg. 11,469,

Today, in the course of a typical immigration case, an initial decision will be rendered by an Immigration Judge ("IJ") and the applicant will have the right to appeal the decision to the BIA.[165] The decision of the BIA is final within the Department of Justice.[166] If the individual wants to appeal his or her decision beyond the Board, he or she must file a petition for review with the federal court of appeals with jurisdiction over the case. Yet Attorney General review always remains a possibility: "The decision of the Board shall be final except in those cases reviewed by the Attorney General in accordance with paragraph (h) in this section."[167] Under the current version of the regulations, cases may arrive at the Attorney General through three different paths:

> The Board shall refer to the Attorney General for review of its decision all cases that: (i) The Attorney General directs the Board to refer to him. (ii) The Chairman or a majority of the Board believes should be referred to the Attorney General for review. (iii) The Secretary of Homeland Security, or specific officials of the Department of Homeland Security designated by the Secretary with the concurrence of the Attorney General, refers to the Attorney General for review.[168]

In other words, decisions from the BIA can now be referred to the Attorney General by 1) him- or herself, 2) the BIA, or 3) the Department of Homeland Security ("DHS"). The final pieces of the current review structure were established in the 2003 regulations implementing the

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11,475 (December 19, 1952) (codified at 8 C.F.R. § 6.1(h) (1952)). A 1958 amendment granted that referral authority directly to the Commissioner of INS. *See* Miscellaneous Amendments to Chapter, 23 Fed. Reg. 9115, 9117–18 (November 26, 1958) (codified at 8 C.F.R. § 3.1(h) (1958)). *See also* Gonzales and Glen, *supra* note 84, at 849–52 (providing a brief overview of the history of regulatory changes to the referral system).

[165] To be clear, not all decisions appealed to the BIA originate from IJs. The BIA has jurisdiction to hear appeals from many different types of immigration decisions. While most of the BIA's jurisdictional grants involve appeals from decisions of IJs, the BIA may also hear appeals from decisions rendered by the United States Citizenship and Immigration Services ("USCIS") on, for example, petitions for immigrant status. 8 C.F.R. § 1003.1(b)(5). Not all administrative decisions regarding immigration-related benefits or relief are appealable to the BIA. Some administrative decisions must be appealed within a separate review structure. Decisions on whether an employer may be granted a permanent labor certification, for example, are appealed directly to the Board of Alien Labor Certification Appeals. In those cases, both the initial decision and appeal decision occur within the Department of Labor.

[166] 8 C.F.R. § 1003.1(d)(7). The one caveat to this general proposition (Attorney General review) is the subject of this part of the article.

[167] *Id.*

[168] 8 C.F.R. § 1003.1(h).

Homeland Security Act of 2002.[169] The review provision of the regulations has not been amended since 2003.[170]

Undergirding these many regulatory changes has been the reality that the BIA is a creature of the Attorney General with only the powers delegated to it by the Attorney General. Indeed, as many commentators have observed, the BIA has no separate statutory existence.[171] The other essential foundation of the review power is the Attorney General's authority regarding the interpretation of immigration law. The initial grant of authority to the Department of Justice in 1940 specified that the Attorney General's interpretation of the law controlled when other departments disagreed. That view was articulated more forcefully in the Immigration and Nationality Act of 1952 ("INA"), which declared that "determination and ruling by the Attorney General with respect to all questions of law shall be controlling."[172] That language persists in the present version of the statute, which grants broad authority in immigration matters to the Secretary of Homeland Security, "[p]rovided, however, [t]hat determination and ruling by the Attorney General with respect to all questions of law shall be controlling."[173]

B. Self-Referrals Before 2001

Only seven cases were self-referred between 1947 and 2001. The first of those cases, *Matter of C*, was decided by President Truman's Attorney General J. Howard McGrath in 1950.[174] Though the case formally arrived on McGrath's desk via the self-referral regulation, the decision reports that

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[169] Aliens and Nationality: Homeland Security: Reorganization of Regulations, 68 Fed. Reg. 9824, 9825–26 (Feb. 28, 2003) ("Moreover, it is necessary to clarify that the Secretary of Homeland Security may refer cases or questions of law to the Attorney General for decision at any time, both generally, and pursuant to the proviso of section 103(a)(1) of the Act, 8 U.S.C. 1103(a)(1), relating to the Attorney General's resolution of legal issues. At the same time, the Attorney General has specified the reservation of the parallel authority to refer cases to himself for decision at any time.").

[170] There have, of course, been other regulatory changes to immigration adjudication, most notably, the creation of the Executive Office of Immigration Review in 1983. Board of Immigration Appeals; Immigration Review Function; Editorial Amendments, 48 Fed. Reg. 8038 (Feb. 25, 1983). The regulatory history recounted herein is limited to changes regarding the review power.

[171] *See, e.g.*, Maurice A. Roberts, *Board of Immigration Appeals: A Critical Appraisal*, 15 SAN DIEGO L. REV. 29, 30 (1977) (observing that the BIA "has never been accorded statutory recognition, and its continued existence depends entirely on the regulations of the Attorney General who can curtail its powers or abolish it altogether by the stroke of a pen").

[172] Immigration and Nationality Act, 66 Stat. 173, Pub. L. 414 § 103(a) (June 27, 1952).

[173] 8 U.S.C. § 1103(a)(1); Immigration and Nationality Act § 103(a)(1).

[174] 4 I&N Dec. 130 (Att'y Gen. 1950).

"[t]he alien, through counsel . . . filed a petition with the Attorney General requesting the relief denied him."[175] There has never been a formal mechanism for a respondent to request Attorney General review of a BIA decision and this is the only case in which it appears the Attorney General acceded to the request for review.[176] The requested relief was, however, denied.[177]

The next three self-referrals were decided by President Eisenhower's Attorney General Herbert Brownell Jr.[178] In two of the cases Brownell reversed the decision of the BIA and in the third he vacated the BIA's decision.[179] Brownell did not explain why he self-referred any of these cases.

Attorney General Robert F. Kennedy was responsible for the next two self-referrals, both issued during the administration of President John F. Kennedy.[180] Kennedy did not offer a rationale for his self-referral of the precedential BIA decision *Matter of P*, but Kennedy's opinion purported to correct what he believed to be an erroneous interpretation of a portion of the Immigration and Nationality Act.[181] The second Kennedy opinion, *Matter of S- and B-C-*, was a thorough opinion that began by explaining why he self-referred the case: namely, the case addressed a particularly tricky issue that had produced "numerous decisions . . . by the Board of Immigration Appeals, the Attorney General and the courts," which were not "wholly clear or consistent." Kennedy decided that the state of general confusion and disagreement between the agency courts and the federal courts indicated that "a re-examination of the principles which should

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[175] *Id.* at 133.

[176] There are, on the other hand, a few cases in which the BIA notes that unavailability of respondent-referral to the Attorney General. *See, e.g.*, Matter of E-, 6 I&N Dec. 388 (B.I.A. 1954).

[177] Matter of C-, 4 I&N Dec. at 134.

[178] Matter of B-, 6 I&N Dec. 713 (Att'y Gen. 1955) (vacatur); Matter of R-S-, 7 I&N Dec. 271 (Att'y Gen. 1956) (reversal); Matter of L-R-, 7 I&N Dec. 318 (Att'y Gen. 1957) (reversal).

[179] *Id.* One of the cases, *Matter of B-*, regarded the possible deportation of "Jacob Burck, a Pulitzer prize-wining cartoonist" for the *Chicago Sun-Times*. Luther A. Huston, *Cartoonist Faces Deportation Test*, N.Y. TIMES, Dec. 8, 1955, at 19. Burck was facing possible deportation on the basis of his Communist party membership. *Id.* Brownell elected to suspend Burck's deportation and send the question of his removal to Congress. *Id.* On April 16, 1957, the Senate passed a resolution suspending his deportation and permitting him to naturalize. Luther A. Huston, *Cartoonist Wins Deportation Bar*, N.Y. TIMES, April 17, 1957, at 17.

[180] Matter of P-, 9 I&N Dec. 293 (Att'y Gen. 1961); Matter of S- and B-C-, 9 I&N Dec. 436 (Att'y Gen. 1961).

[181] The BIA had published its decision as a precedential opinion. Matter of P-, 8 I&N Dec. 689 (B.I.A. 1960).

govern the disposition of such cases by the Executive Branch is appropriate."[182]

After considering the legislative history, executive branch materials, various federal circuit court decisions, available Supreme Court guidance, and policy considerations, Kennedy established a clear test for materiality in the context of the immigration statute. Acknowledging the significance of the new articulation of the law, Kennedy remanded to the cases back to the BIA for further proceedings consistent with his opinion.[183]

Kennedy's rationale for Attorney General review was also articulated in a later case that came to him via the INS. In *Matter of R-E-*, Kennedy affirmed the BIA decision, primarily as an exercise in deferring to the BIA in the arena of discretionary decisions:

> The only issue for decision which I find in this case is whether, on its particular record, the majority or the dissenters are correct in their assessment of the facts leading to the conclusion that the alien had satisfied the burden imposed upon him. This is not ordinarily an issue appropriate for reference to me under the pertinent regulations. The record is one upon which reasonable men can differ and have differed. Further consideration of the question has established no general principle which could guide the disposition of other cases, or revealed any clear error on the part of the Board. In the circumstances, therefore, I affirm the decision in behalf of the applicant.[184]

In 1997, Attorney General Janet Reno ordered the only self-referral in her nearly eight-year tenure as Attorney General under President Clinton.[185] The case addressed notoriously complex areas of immigration law—the stop-time rule for cancellation of removal and the retroactivity of the recently passed Illegal Immigration Reform and Immigrant Responsibility Act of 1996—and had produced a highly fractured, *en banc* BIA opinion. In the end, however, Reno declined to issue a substantive decision on either of these issues and simply remanded the case back to the BIA for the respondent to pursue other relief unrelated to the complicated legal issues presented in the first BIA decision.[186]

In sum, in the earliest uses of self-referral, the rationale for the referral was either unclear, prompted by a request from the respondent, or in the case of Attorney General Kennedy, a deliberate attempt to harmonize disparate interpretations of new law. There was, in other words, no clearly consistent rationale for self-referral, nor were there clear patterns in the

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[182] *Id.* at 444.
[183] *Id.* at 451.
[184] 9 I&N Dec. 720, 741 (Att'y Gen. 1962).
[185] Matter of N-J-B-, 21 I&N Dec. 812 (Att'y Gen. 1997).
[186] Matter of N-J-B-, 21 I&N Dec. 1057 (Att'y Gen. 1999).

substance of the very few self-referred decisions. Self-referral was, in short, an outlier within the outlier world of Attorney General review.[187] Apart from this one decision by Reno that did not result in a substantive decision, *between 1961 and 2000, not a single additional case was self-referred for review.*

C. Use of the Review Power in the George W. Bush Administration: 2001-2009

The George W. Bush administration Attorneys General embraced a far different approach to their role in immigration adjudication. Namely, the Attorneys General of the George W. Bush administration did not confine themselves to typical rationales for administrative adjudicative review, such as statutory changes, new federal court opinions, or fractured BIA decisions. Instead, the Attorneys General of the George W. Bush administration made highly strategic use of the self-referral power in order to accomplish specific policy objectives.

While most of Attorney General Ashcroft's cases were, like Attorney General Reno's, referred to him by other agencies, one case stands out as an early example of the more aggressive use of the self-referral power. In his self-referral of three consolidated cases—*Matter of Y-L-*, *Matter of A-G-*, *Matter of R-S-R*—Ashcroft used three cases without much independent legal significance as an entry point to undo precedent established before he assumed office.[188] Specifically, he self-referred these three nonprecedential BIA decisions to declare drug trafficking a presumptively "particularly serious crime," which bars such individuals from receiving either asylum or withholding of removal.[189] In doing so, he overruled a 1999 precedential BIA decision, *Matter of S-S-*, issued by a unanimous *en banc* Board, which held that determining whether a conviction constitutes a particularly serious crime "requires an individual examination of the nature of the conviction, the sentence imposed, and the circumstances and underlying facts of the

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[187] One other interesting feature of the cases is that of the 107 cases decided between the 1947 regulatory change and the end of the Clinton administration, eighty-four of the decisions were issued during the Truman, Eisenhower, and Kennedy administrations. In other words, only twenty-three cases were decided during the seven succeeding presidential administrations (Johnson, Nixon, Ford, Carter, Reagan, George H.W. Bush, and Clinton). This may reflect the great upheaval wrought by the end of World War II and the passage of the Immigration and Nationality Act of 1952, as well as the understandable impulse of the agencies implementing the new law to seek review of questions of first impression from a higher authority, but this article does not attempt to explain this observation.

[188] 23 I&N Dec. 270 (Att'y Gen. 2002).

[189] *See* Immigration and Nationality Act § 241(b)(3)(B)(ii); 8 U.S.C. § 1231(3)(B)(ii).

conviction."[190] The Board was following a 1982 BIA decision, *Matter of Frentescu*, when it reached this decision.[191] In addressing the three unpublished cases at issue and overruling the Board precedent, Ashcroft reasoned that the individualized approach of *Matter of S-S-* had produced "inconsistent" and "illogical" results and required overruling.[192]

Ashcroft initiated a practice of articulating a strong vision of Attorney General power in the domain of immigration law. In a 2004 decision referred to him by DHS, for example, he wrote:

> Although authority to enforce and administer the INA and other laws related to the immigration and naturalization of aliens has recently been transferred to the Secretary of Homeland Security by the [Homeland Security Act of 2002], the Attorney General retains his authority to make controlling determinations with respect to questions of law arising under those statutes. This statutory framework is consistent with the Attorney General's traditional role as the primary interpreter of the law within the Executive Branch.[193]

These reminders of the Attorney General's statutory authority to settle questions of law are noteworthy not because of their content, but because with one notable exception these statements simply did not appear in earlier iterations of Attorney General decisions.[194]

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[190] 22 I&N Dec. 458 (B.I.A. 1999).

[191] 18 I&N Dec. 244 (B.I.A. 1982).

[192] Matter of Y-L-, 23 I&N Dec. 270, 273 (Att'y Gen. 2002).

[193] Matter of D-J-, 23 I&N Dec. 572, 572–73 (Att'y Gen. 2004) (citing Immigration and Nationality Act § 103(a)(1); 8 U.S.C. § 1103(a)(1)) (explaining roles of various officials involved in the newly organized immigration statutes, but noting that "determination and ruling by the Attorney General with respect to all questions of law shall be controlling.").

[194] The one notable exception is Attorney General Meese, who issued an opinion in only one referred case during his tenure as President Reagan's Attorney General. Deportation Proceedings of Joseph Patrick Thomas Doherty, 12 Op. O.L.C. 1 (June 9, 1988). This one case, however, was an extremely high profile one and produced a Supreme Court opinion. *See* INS v. Doherty, 502 U.S. 314 (1992). Joseph Patrick Doherty was a member of the Provisional Irish Republican Army and was involved in a car ambush that resulted in the death of a British soldier. *Id.* at 317–18. While he was awaiting the jury verdict, he escaped his maximum-security prison and fled, first to Ireland and then to the United States. *Id.* at 318. Two Attorneys General were involved in hearing BIA appeals regarding Doherty's case (Meese and Thornburgh) through its eight years of proceedings in the United States. The substantive issue turned on which country Doherty would be returned to Ireland or the United Kingdom. For present purposes, the salient feature of Attorney General Meese's opinion is his articulation of the Attorney General's powers of review over BIA decisions. Doherty had challenged the Attorney General's ability to hear new evidence. Attorney General Meese asserted that despite the delegations to the BIA and IJs, the Attorney General always retains "the power to receive evidence, make findings of fact, and decide issues of law." *Id.* at 3–4. This articulation of authority is different from the Bush-era decisions because it was directly responsive to a procedural challenge raised by the respondent in the context of an incredibly high-profile case with meaningful foreign affairs implications. As

The rate of self-referrals spiked significantly with the arrival of Attorney General Gonzales, who self-referred four cases during his relatively brief tenure as Attorney General.[195] In the first such case, Gonzales determined that the respondent was not eligible for relief under the Convention Against Torture.[196] Two elements of that decision are noteworthy. First, he chose a case requiring a highly fact-dependent analysis of the sort that reviewing courts are typically hesitant to overturn given the trial court's superior posture regarding credibility and other determinations. Instead of deferring to the trial court, Gonzales included extensive excerpts from the trial transcript and took the highly unusual step of ordering that the case be reassigned to a different IJ if the respondent requested that the case be reopened and the BIA granted that request. Indeed, given the highly fact-dependent nature of the analysis—in other words, no new law was made with this decision, nor did it require application of new law made elsewhere, it only decided this case for this respondent—the public chastisement of the IJ may have been the primary motivation for taking the case for review.[197]

Second, the decision is also noteworthy for its articulation of the power of the Attorney General to interpret immigration law. The first paragraph of the first section of the opinion is a striking echo of the language used by Ashcroft:

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noted, I am not aware of any other opinion that devotes such significant space to the discussion of the Attorney General's power to review BIA decisions.

[195] Gonzales was Attorney General for approximately 2.5 years.

[196] Matter of J-F-F-, 23 I&N Dec. 912 (Att'y Gen. 2006).

[197] Attorney General Gonzales observed that IJs "must not take on the role of advocate" and determined that this particular IJ's active involvement in questioning the respondent "went well beyond her obligations, even bearing in mind that respondent was proceeding pro se." *Id.* at 922. The INA requires IJs to take a much more active role in removal proceedings than federal court judges. *See, e.g.*, 8 U.S.C. 1229a(b)(1) ("The immigration judge shall administer oaths, receive evidence, and interrogate, examine, and cross-examine the alien and any witnesses."). The respondent was born in the Dominican Republic in 1961 and entered the United States as a lawful permanent resident in 1970. *Id.* at 914. He was convicted of forcible rape for a brutal assault he committed in 1986 and was sentenced to fifteen years of imprisonment. *Id.* He appeared pro se at his removal hearing, where the government determined he was fit to stand trial, but also observed that he had "schizoaffective and bipolar disorders" and had been hospitalized several times for his mental illnesses. *Id.* at 915. The respondent also noted that he had "nobody" in the Dominican Republic because all of his family lived in the United States. *Id.* This case is an example of the increasing use of "immigration detention and removal . . . [as] tools for achieving domestic crime control ends" that Jennifer M. Chacón has so persuasively documented. Jennifer M. Chacón, *The Security Myth: Punishing Immigrants in the Name of National Security, in* IMMIGRATION, INTEGRATION AND SECURITY: EUROPE AND AMERICA IN COMPARATIVE PERSPECTIVE 145, 150 (Ariane Chebel d'Appollonia and Simon Reich, eds. 2008).

> I review de novo all aspects of the Board's and Immigration Judge's decisions in this case. The law vests in the Attorney General much of the authority to make individual immigration determinations. The Executive Office for Immigration Review, which includes the Board and Immigration Judges, is subject to the direction and regulation of the Attorney General. While Attorneys General have delegated their authority to the Board and Immigration Judges in the first instance, I retain the power to exercise full decisionmaking upon review.[198]

Recall that decisions of previous Attorneys General under this regulatory provision had not articulated their power in this manner. Indeed, most Attorney General decisions simply stated why they were reviewing the case—typically because it had been referred by another agency—and then proceeded to dispose of it. These forceful articulations of the authority of the Attorney General by Attorneys General Ashcroft and Gonzales foreground the power of the office in a subtle, but nearly unprecedented rhetorical push.

Gonzales self-referred three more cases, but the final two would be decided by his successor, Attorney General Michael Mukasey. In all, Mukasey would decide five cases that had been self-referred by the Attorney General (two by Gonzales, three by himself). Mukasey followed the patterns established by his predecessors in the Bush administration in issuing these decisions.

Mukasey's two most controversial decisions were issued in the interregnum between the election and inauguration of President Obama. The first opinion issued during this brief window reversed a BIA decision to establish a new framework for determining whether a particular crime was a "crime involving moral turpitude."[199] The previously established framework had not been challenged below, and the framework established by Mukasey's opinion did not reflect the approach of either the BIA or federal courts of appeal in making this determination.[200] The decision created out of whole cloth a new procedure for determining a significant concept in immigration law, without the benefit of briefing or other essential components of a standard adjudicatory proceeding.[201] This decision was followed by Mukasey's last decision, issued thirteen days before President Obama was inaugurated.[202] This last decision overruled

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[198] *Id.* at 913 (internal citations omitted).

[199] Matter of Silva-Trevino, 24 I&N Dec. 687 (Att'y Gen. 2008).

[200] The alarming nature of the procedural approach to the decision, and the decision itself, are thoroughly and compellingly documented in Trice, *supra* note 147, at 1776–80.

[201] *See id.*

[202] These two decisions have been described as "midnight agency adjudications" by one scholar, who argues that "timing is a central part of the story of Attorney General review of

longstanding BIA precedent regarding the standards for ineffective assistance of counsel claims that had been established in 1988 and reaffirmed in 2003.[203]

In sum, the Bush administration fundamentally altered the role of the Attorney General in reviewing the decisions of the BIA. Ashcroft initiated a strong shift toward self-referral that was enthusiastically embraced by Attorneys General Gonzales and Mukasey. Frequent self-referral was joltingly out of step with the practice of Attorney General review before the Bush administration. Similarly, Attorneys General in the Bush administration used strident language regarding the power of the Attorney General in a way that was uncharacteristic of previous Attorneys General. Finally, these Attorneys General made highly strategic use of the self-referral power by reaching back for insignificant cases that were not issued by fractured Board decisions or in the wake of major legal changes. Instead, the Bush administration Attorneys General used the review power to proactively remake immigration law in a manner different from administrations before them. As we will see, these patterns were not continued by the Attorneys General of the Obama administration.

D. Use of the Review Power in the Barack Obama Administration: 2009-2017

Attorney General Eric Holder self-referred three cases in his six-year tenure, but two of those simply vacated the last two decisions issued by Mukasey.[204] Effectively, Holder used the power of self-referral to return the agency to the status quo ante. The one substantive self-referral from Holder during his six-year tenure regarded the availability of family preference benefits to same sex partners.[205] Rather than deciding the issue himself, however, Holder remanded the case to the BIA to consider the constitutionality of the Defense of Marriage Act and its application to immigration law in the first instance. Attorney General Loretta Lynch self-

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BIA decisions." Taylor, *supra* note 150, at 20.

[203] Matter of Lozada, 19 I&N Dec 637 (B.I.A. 1988); Matter of Assaad, 23 I&N Dec. 553 (B.I.A. 2003).

[204] Matter of Compean, Bangaly, and J-E-C-, 25 I&N Dec. 1 (Att'y Gen. 2009); Matter of Silva-Trevino, 26 I&N Dec. 550 (Att'y Gen. 2015). Attorney General Mukasey's decision in *Matter of Compean* was simply not on the books long enough to generate legal opinions regarding its quality (it was vacated approximately five months after it had been decided), but *Matter of Silva-Trevino* generated significant case law rejecting its framework before it was vacated. The Third, Fourth, Fifth, Ninth, and Eleventh Circuits each rejected its analytical approach to the question of crimes involving moral turpitude. *See* Shah, *supra* note 150, at 163.

[205] Matter of Dorman, 25 I&N Dec. 485 (Att'y Gen. 2011).

referred one case. She remanded the case to the BIA for reconsideration in light of intervening Supreme Court precedent.[206] None of the orders issued by Attorneys General Holder or Lynch expounds upon the expansive powers of the Attorney General to interpret immigration laws. None of them established new immigration law.

The numerical differences between the two administrations are compelling. Nine cases were self-referred by Attorneys General during the two-term George W. Bush presidency, compared to four self-referrals in the two-term Obama administration. The numbers are even more striking when the substance of the decisions is examined. Though four cases were self-referred during the Obama administration, two simply vacated the "midnight" self-referrals of Mukasey, and the other two simply remanded the cases to the BIA without deciding the underlying legal issue.[207] In other words, Attorneys General during the Obama era did not create any new, substantive law via the power of self-referral.

Before turning to the use of the review power during the administration of President Trump, it is worth pausing for a moment to highlight the ways in which the dominant account of the self-referral power put forward by former Attorney General Gonzalez and his co-author Patrick Glen is lacking. The authors summarize the history of the referral power (including its use in the administrations of Presidents George W. Bush and Barack Obama) in the following manner:

> [T]his brief review makes quite clear that the exercise of the referral authority has shifted quite dramatically from 1940 to 2015, along every possible metric of analysis—it is used less frequently at present than at any other time in the past, the nature of the decisions issued has increasingly tended towards non-summary judgment and higher quality opinions, and the Board has largely been marginalized as a referring agent as the Attorney General and the enforcement agencies have been dominant in referring cases for review.[208]

My review, however, offers a different assessment of the way the review power has changed over time. Gonzales and Glen are correct, for example, that the referral authority is used less frequently than it was at some points in the past, but it was not at its nadir during the Obama administration, as the authors state.[209] Most importantly, the dominant source in referring

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[206] Matter of Chairez and Sama, 26 I&N Dec. 686 (Att'y Gen. 2015) (self-referring the case and ordering briefing); Matter of Chairez and Sama, 26 I&N Dec. 796 (Att'y Gen. 2016) (remanding to the BIA for consideration in the first instance of intervening Supreme Court precedent).

[207] Taylor, *supra* note 150, at 20.

[208] Gonzales and Glen, *supra* note 84, at 860.

[209] *Id.* at 920. ("On the whole . . . utilization of the authority has tracked sharply downward since its creation in 1940, with its lowest ebb occurring in the Obama

cases has undoubtedly become the Attorney General himself, rather than a shared leadership role by the Attorney General and the enforcement agencies.

Additionally, the substantive use of the Attorney General referral mechanism by the Bush administration significantly differed from than that of predecessor administrations. The Bush administration Attorneys General initiated practices that were different from their predecessors and rejected (or at least, not used) by the Obama administration, but have resumed with vigor in the Trump administration. Specifically, the Bush administration Attorneys General significantly increased the use of self-referral, articulated robust visions of executive power in the self-referred opinions, and aggressively pursued the power of self-referral to decide cases that would normally not be strong candidates for review, but that provided useful vehicles for unsettling established precedent and reshaping immigration law to reflect the policy goals of the sitting administration.

Despite recounting the many ways in which the referral power has changed over time, Gonzales and Glen also argue that their historical review paints a picture of "a clear and unbroken line of practice regarding how the Attorney General makes decisions."[210] Yet it seems evident from both of our accounts that this statement greatly exaggerates the stability of this adjudicatory tool in practice. Instead, the Attorneys General of the Bush administration—including Gonzales—instituted sweeping changes in its use that have produced a new vision of Attorney General power in the realm of immigration adjudication.

E. Use of the Review Power in the Donald Trump Administration: 2017-2019

Though the practices of the George W. Bush Attorneys General were not continued into the Obama administration, they established useful precedent for Attorneys General who would follow. And indeed, the aggressive use of the review authority by Attorney Generals under Trump both builds upon the practices established by the Bush administration and moves beyond them. This evolution is evident regarding the distinguishing characteristics identified in the previous section: the increased use of self-referral, the self-conscious articulation of the Attorney General's executive power, and the decision to cherry pick unremarkable cases as vehicles for reaching back to overrule significant agency precedent. Yet the Trump Attorneys General

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Administration."). As the chart earlier in the article depicts, there were zero published decisions issued by the Attorney General during several administrations.

[210] *Id.* at 848.

have also transformed the power. The Trump administration has greatly expanded the review power by pursuing a deliberate strategy of focusing on procedural issues in immigration law to reconfigure the practice and outcomes of immigration adjudications.[211]

Regarding the increased use of self-referral, Attorney General Jefferson Sessions referred eight cases to himself for review in less than 21 months on the job, a significantly higher number than any of his predecessors.[212] Just as notably, he released substantive decisions in five of those cases. Acting Attorney General Matthew Whitaker was only Attorney General for ninety-nine days, but managed to self-refer two cases during that time.[213] Attorney General William Barr has decided three cases self-referred by his predecessors and has thus far self-referred two during his relatively brief tenure in office.[214] This rate of review under one presidential administration is unprecedented.

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[211] Note that the Trump administration's aggressive use of the referral power (discussed in this section) seems to enact the vision put forward by Gonzales and Glen, namely, that the referral authority should be "revitalized" and advising that "[f]uture Attorneys General would benefit by utilizing the authority and the vast potential it holds for advancing legal and policy-based interpretations of the immigration laws." Gonzales and Glen, *supra* note 84, at 920.

[212] Sessions issued a decision in five of those cases. One was mooted because the respondent was deported while the review was pending. Matter of M-G-G-, 27 I&N Dec. 475 (Att'y Gen. 2018). Attorney General Barr issued a decision in another case. Matter of M-S-, 27 I&N Dec. 509 (Att'y Gen. 2019). The final case referred by Sessions has not yet been decided. Matter of Negusie, 27 I&N Dec. 481 (Att'y Gen. 2018). Briefing was due November 30, 2018.

[213] Matter of Castillo-Perez, 27 I&N Dec. 495 (Att'y Gen. 2018) and Matter of L-E-A-, 27 I&N Dec. 494 (Att'y Gen. 2018). Attorney General Barr has issued opinions in both cases. *See* Matter of L-E-A-, 27 I&N Dec. 581 (Att'y Gen. 2019), and Matter of Castillo-Perez, 27 I&N Dec. 664 (Att'y Gen. 2019).

[214] Barr has decided one of his self-referred cases. Matter of Thomas and Thompson, 27 I&N Dec. 556 (Att'y Gen. 2019). He has self-referred a second case, for which briefing is complete and the parties are merely awaiting a decision from Barr. Matter of Reyes, 27 I&N Dec. 708 (Att'y Gen. 2019). The use of self-referral by Barr is particularly striking because as the graphs demonstrate, he issued zero opinions in review of BIA decisions (self-referred or otherwise) during his previous seventeen month tenure as Attorney General under President George H.W. Bush. Barr's self-referral emphasizes what is often implicit in discussions about what a given Attorney General does or does not do in office. Namely, the "Attorney General" is an office, not just an individual. While individual Attorneys General certainly pursue certain policy priorities over others, it is inconceivable, for example, that Jefferson Sessions himself drafted the opinion in *Matter of A-B-*. Similarly, it was undoubtedly staff attorneys or other bureaucrats who identified *Matter of A-B-* as a case to self-refer, given the strange procedural posture of that case, discussed *infra*. Barr's use of self-referral now compared to his non-review of BIA decisions in his first tenure, thus suggests that the changes described in this article are truly institutional changes that have much to do with executive policies regarding immigration, of course, but also with the

Regarding the second trait, statements of broad Attorney General power are prominent features of several of Sessions' opinions, most notably *Matter of Castro-Tum* and *Matter of A-B-*. In *Matter of Castro-Tum*, Attorney General Sessions limited the ability of immigration judges to administratively close cases on their dockets, working a seismic shift in docket management and judicial autonomy that has contributed to the current crisis facing the immigration courts.[215] The opinion dedicates three paragraphs to articulating the regulatory authority of the Attorney General to self-refer cases for review.[216] Notably, Sessions also addresses his choice of this unusual procedural mechanism to change such fundamental practices of the immigration courts:

> When exercising my authority to oversee immigration law, I may choose between rulemaking or adjudication. . . . Some previous Attorneys General have preferred to resolve questions of immigration law through rulemaking. Others have resolved significant questions by certifying immigration decisions. I have concluded that adjudication presents a more efficient, but equally thorough, means of considering the legal basis for the practice of administrative closure.[217]

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perceived powers and appropriate actions of the office of the Attorney General. Thanks to William H. Page for flagging the important distinction between person and office.

[215] Matter of Castro-Tum, 27 I&N Dec. 271, 281–82 (Att'y Gen. 2018). Administrative closure was a frequently used method of docket management that allowed IJs and the BIA to suspend cases, often to allow the foreign nationals to pursue relief from removal in another context (e.g., by a family-based petition filed on their behalf through USCIS). The two cases overruled by Attorney General Sessions in *Matter of Castro-Tum* are the two most recent cases articulating the framework for the use of administrative closure by IJs and the BIA. *See* Matter of Avetisyan, 25 I&N Dec. 688 (B.I.A. 2012); Matter of W-Y-U-, 27 I&N Dec. 17 (B.I.A. 2017). *Matter of Avetisyan* was particularly significant because it lifted the requirement that both parties must agree to administrative closure and gave IJs and the BIA more discretion in granting it when circumstances warranted. Attorney General Sessions acknowledges that "immigration judges and the Board have used administrative closure in a wide array of cases since the 1980s," but determined this observation was inapposite to the question of whether the power existed at all. *Id.* at 292 (IJs and the BIA "cannot arrogate power to themselves by seizing it and relying on the Attorney General's lack of express disapproval").

[216] *Id.* at 281–82.

[217] *Id.* at 282 (relying upon *SEC v. Chenery Corp.*, 332 U.S. 194, 203 (1947) and *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 294 (1974) as authorities for the power to choose between rulemaking and adjudication). In *Matter of Thomas and Thompson*, Barr puts forward a similar argument regarding his ability to choose between rulemaking and adjudication, also relying on *Bell Aerospace*. 27 I&N Dec. 674, 688–89 (Att'y Gen. 2019). Citing to *Bell Aerospace*, of course, does not distinguish between the exceptional act of Attorney General review and standard agency adjudication.

In addition to this assertion of Attorney General control over procedure, *Matter of Castro-Tum* is fundamentally premised upon a muscular assertion of Attorney General control over IJs and the BIA. Sessions rejected the view that administrative closure was a component of the inherent powers of IJs or the BIA, akin to the powers of Article III judges: "[I]mmigration judges and the Board have no such inherent authority. They act on behalf of the Attorney General in adjudicating immigration cases, and can exercise only the specific powers that statutes or the Attorney General delegate."[218] *Matter of Castro-Tum* asserted Attorney General control over docket management by IJs and the BIA and in doing so solidified the powers of the Attorney General to decide major procedural issues in a manner that significantly affected the nitty gritty details of immigration court.[219]

Matter of A-B- raised the issue of the scope of Attorney General review authority in a different manner, but in a way that similarly permitted Sessions to articulate an expansive view of the power. First, though on its face it does not appear to be all that different from the other cases seized upon by Attorneys General, the particular posture of this case made it a poor choice for such a significant rewriting of asylum law. The case had been remanded by the BIA to the IJ for the sole purpose of approving the application after DHS confirmed that the applicant passed her background check. The IJ, however, refused to comply with that directive and instead purported to send the case back to the BIA, which is, simply put, impossible.[220] Accordingly, the BIA never regained jurisdiction of the case,

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[218] *Id.* at 292. *See also id.* at 283–84 (citing regulations articulating the nature of the powers of IJs and the BIA as delegated by the Attorney General).

[219] This aspect of *Matter of Castro-Tum*—that is, its focus on the procedures employed by immigration courts—will be discussed in greater detail below. Note that in this case, control over agency actions was exerted regarding a docket management tool that circuit courts had been tacitly (and sometimes explicitly) approving for years. *See id.* at 287 (listing cases). Attorney General Sessions addresses this apparent conflict between his view and those of the circuit courts by relying on the regulations granting the Attorney General the power to interpret the law and the Supreme Court's decision in *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 980 (2005).

[220] The IJ in this case was V. Stuart Couch in the Charlotte Immigration Court. Both the specific IJ and the specific Court are notoriously hostile to asylum claims. Judge Couch denied 85.7 percent of all asylum claims (compared to a national average of 52.8 percent) as an IJ and the Charlotte Immigration Court has a denial rate of 82.2 percent. TRAC Immigration, *Judge V. Stuart Crouch*, TRAC REPORTS, http://trac.syr.edu/immigration/reports/judgereports/00394CHL/index.html. Further, results of a FOIA request revealed at least ten occasions on which Judge Crouch was reversed by the BIA for failing to grant asylum to victims of domestic violence, despite clear instructions from the BIA that he was to do so. *See* Tal Kopan, *Judge in case Sessions picked for immigrant domestic violence asylum review issued 'clearly erroneous' decisions, says appellate court*, CNN.COM (April 28, 2018), https://www.cnn.com/2018/04/28/politics/jeff-sessions-immigration-courts-domestic-

which means the case was not in a proper posture for Attorney General review under the regulation.[221] DHS raised this very issue in its interlocutory appeal to the Attorney General, when the agency requested a stay of proceedings so the BIA could issue a decision that could then be reviewed by the Attorney General.[222]

The Attorney General's response to these procedural defects implicates two of the three categories institutionalized by Bush administration Attorneys General. Namely, the procedural excesses of reaching for cases not well suited for review and premising those excesses on a far-reaching view of the powers of the Attorney General. In the interlocutory order granting extensions of the briefing schedule but denying DHS's request to stay the proceedings to allow the BIA to issue a reviewable decision, Sessions acknowledged that the IJ's attempted "recertification" was "procedurally defective," that the IJ "did not act within his authority," and that he had been "obliged to issue a decision granting or denying the relief sought."[223] Sessions then went on to deny the request to stay the proceedings without offering a legal rationale for the denial.

The Attorney General eventually offered his rationale in the substantive decision issued several months later. In that decision, Sessions forcefully rejected the arguments of A.B. that he did not possess jurisdiction to hear the case:

> The respondent argues that I lack the authority to certify the Board's decision because it did not reacquire jurisdiction following its remand to the immigration judge. In the respondent's view, the Attorney General's authority

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violence-asylum/index.html. The frequent and vociferous reversals from the BIA in combination with Judge Couch's flagrant disregard for procedural rules—essentially directing his reviewing court to "try again"—paint a picture of an IJ who felt unconstrained by agency rules. The selection of a nonprecedential case from this particular IJ suggests that Attorney General Sessions may have been sending a message to IJs regarding their compliance with BIA orders. This view is undoubtedly buttressed by Barr's decision to elevate Couch to the BIA. Press Release, Executive Office for Immigration Review, Executive Office for Immigration Review Swears in Six New Board Members (Aug. 23, 2019), https://www.justice.gov/eoir/page/file/1197631/download.

[221] A.B.'s counsel forcefully raised this argument in the briefs, observing that the regulations require referral *from the BIA*, which is not possible when the case is under the jurisdiction of the IJ. A.B. argued that Attorney General review of this case in contravention of that regulatory language was "without observance of procedure required by law," as required by the Administrative Procedure Act. Briefing for *Matter of A-B-* is available online courtesy of the Center for Gender and Refugee Studies at the University of California Hastings College of Law. *See* Brief for Respondent at 16–19, Matter of A-B-, 27 I&N Dec. 316 (Att'y Gen. 2018), https://cgrs.uchastings.edu/matter-b/backgrounder-and-briefing-matter-b; 5 U.S.C. § 706(2)(D) (2019).

[222] Matter of A-B-, 27 I&N Dec. 247, 247–49 (Att'y Gen. 2018).

[223] *Id.* at 248.

> to certify and review immigration cases is restricted to cases over which the Board expressly retains jurisdiction, excluding any cases that have been remanded for further proceedings. This restrictive interpretation of my jurisdiction finds no support in the law.
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> Under the INA, "[t]he Attorney General enjoys broad powers with respect to 'the administration and enforcement of [the INA itself] and all other laws relating to the immigration and naturalization of aliens.'" . . . The INA grants the Attorney General the authority to "review such administrative determinations in immigration proceedings, delegate such authority, and perform such other acts as the Attorney General determines to be necessary for carrying out" his duties related to the immigration and naturalization of aliens. . . . This authority includes the power to refer cases for my review, see 8 C.F.R. § 1003.1(h)(1), which the First Circuit has called an "unfettered grant of authority." Nothing in the INA or the implementing regulations precludes the Attorney General from referring a case for review simply because the Board has remanded the case for further proceedings before an immigration judge.[224]

In short, *Matter of A-B-* expressed a truly sweeping vision of the Attorney General's power to review agency decisions, one that is not constrained by the clear language of the regulation implementing that power. Rather than relying upon the precise regulatory language creating the review power (which, as we have seen, details specific types of cases available for Attorney General Review), Sessions turned to statutory language establishing the general "powers and duties" of the Attorney General to implement the immigration laws. This broad statutory language gives the Attorney General the power to "establish such regulations, prescribe such forms of bond, reports, entries, and other papers, issues such instructions, review such administrative decisions in immigration proceedings, delegate such authority, and perform such other acts as the Attorney General determines to be necessary for carrying out this section."[225]

Barr embraced a similarly expansive view of his power in a footnote to his opinion in *Matter of M-S-*, a case that was also in an awkward procedural posture for Attorney General review. In a footnote to the sentence acknowledging that the most recent action on the case was an unappealed decision by an IJ (and hence the case was not before the BIA at the time of self-referral), Barr asserted that he has "authority to answer [the question certified] by reviewing either the Board's decision or the second bond order," citing the above statute—not the regulation providing for

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[224] Matter of A-B-, 27 I&N Dec. 316, 323–24 (Att'y Gen. 2018) (citations omitted).

[225] 8 U.S.C. § 1103(g)(2) (2019).

Attorney General review—as the authority for that statement.[226] This statement suggests he may be seeking to expand the practice to essentially any decision rendered at any point in any immigration proceeding. Indeed, the same issue—Attorney General self-referral of a case that was not before the BIA when it was self-referred—recurred in Barr's second opinion. In that decision, Barr summarily dismissed the respondent's claims that his review was procedurally improper by explicitly relying upon the aforementioned Sessions analysis from *Matter of A-B-*.[227] Consistent with the views expressed in these opinions by Attorney General Barr, the Department of Justice has indicated its intention to pursue rulemaking that would greatly expand the power of Attorney General review to encompass many more categories of cases.[228] The new rule would include cases "pending before the Board of Immigration Appeals (BIA) but not yet decided and certain immigration judge decisions regardless of whether those decisions have been appealed to the BIA."[229] In other words, the rule would now encompass the procedural postures in *Matter of A-B-* and *Matter of M-S-* and would dramatically expand Attorney General review to a broad new swath of immigration adjudications.

In *Matter of L-E-A-*, Barr reversed longstanding decisions of both the BIA and the federal courts and decided that family membership could no longer constitute a "particular social group" for purposes of asylum applications. Barr devoted a full page of the opinion to discussing the authority of the Attorney General to interpret immigration law and arguing that his interpretation merited significant deference from reviewing courts. Courts of appeals had for years construed the asylum statute to permit "particular social groups" based on an applicant's family membership. Barr's reversal of this longstanding policy of both the BIA and the courts of appeals speaks loudly about his view regarding the power of the Attorney General over immigration policy. He justified this dramatic policy change by asserting that "[t]he Attorney General has primary responsibility for construing and applying provisions in the immigration laws," that "[t]he INA provides that, within the Executive Branch, the 'determination and

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[226] Matter of M-S-, 27 I&N Dec. 509, 515 n.6 (Att'y Gen. 2019).

[227] Matter of L-E-A-, 27 I&N Dec. 581, 585 (Att'y Gen. 2019) ("[T]he respondent argues that the Acting Attorney General could not certify this matter for review because the Board had remanded the case to the immigration judge for further proceedings. As Matter of *A-B-* recognized, 'nothing in the INA or the implementing regulations precludes the Attorney General from referring a case for review simply because the Board has remanded the case for further proceedings before an immigration judge.' I therefore reject this argument for the reasons stated in that opinion.") (citation omitted).

[228] Referral of Decisions in Immigration Matters to the Attorney General, *supra* note 158.

[229] *Id.*

ruling by the Attorney General with respect to all questions of law shall be controlling,'" (citing the same statute relied upon in both *Matter of A-B-* and *Matter of M-S-* to justify Attorney General review of cases not before the BIA).[230] He relied upon that statute to argue that his interpretation will be entitled to the substantial deference accorded administrative agencies under the framework established in *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*[231]

In addition to the expansion of the review power, the Trump administration Attorney General decisions build on the decisions of George W. Bush-era Attorneys General by selecting cases for the sole purpose of reshaping immigration law and policy. In *Matter of L-E-A-*, for example, the issue certified by the Attorney General—whether nuclear families could be "particular social groups"—was an issue conceded by DHS and uncontested in the decision below.[232] And indeed, the respondent in *Matter of L-E-A-* had been denied asylum, but on a different legal basis.[233] In other words, no party raised the issue of the definition of "particular social group" relied upon in this case. The decision of the Attorney General in that case, therefore, did not alter the outcome for this respondent, but instead created a legal issue out of one that no party was appealing. It is a curious case to select for review.

Similarly, in *Matter of Castro-Tum*, the BIA had vacated the IJ's decision to administratively close the case and had simply remanded for further proceedings.[234] Because that decision was nonprecedential and thus created no new law for the BIA or IJs, however, the actual law made by this referral is the Attorney General's decision to overrule the two BIA decisions that previously established the agency approach to administrative closure.[235] In other words, the substantive decision of that initial BIA

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[230] *Id.* at 591.

[231] *Id.* at 592 (citing 467 U.S. 837, 844 (1984)). Richard Frankel has recently argued that decisions issued via Attorney General review are not entitled to *Chevron* deference. Richard Frankel, *Deporting* Chevron*: Why the Attorney General's Immigration Decisions Should not Receive* Chevron *Deference* (November 22, 2019). DREXEL UNIVERSITY THOMAS R. KLINE SCHOOL OF LAW LEGAL STUDIES RESEARCH PAPER NO. 2019-W-02, Nov. 22, 2019. Frankel's paper is available at SSRN: https://ssrn.com/abstract=3492115.

[232] *Id.* at 583–84.

[233] *Id.* at 584. The BIA held that there was a lack of nexus between membership in the particular social group and the persecution. The Attorney General affirmed that aspect of the BIA's decision. *Id.* at 597.

[234] Matter of Reynaldo Castro-Tum, AILA Doc. No. 18010530, File A 206-842-910 at *1 (B.I.A. 2017).

[235] Matter of Avetisyan, 25 I&N Dec. 688 (B.I.A. 2012); Matter of W-Y-U-, 27 I&N Dec. 17 (B.I.A. 2017).

decision was immaterial. *Matter of Castro-Tum* was selected to address a procedural issue, not the substantive law.

That approach points to one aspect of the recent use of the referral power that differs markedly from that of earlier Attorneys General. Attorney General Sessions in particular demonstrated an unusual focus on using the referral power to reshape the procedural practices of immigration courts. Sessions self-referred *Matter of Castro-Tum* to overrule existing agency law guiding administrative closures to effectively abolish that docket management tool for IJs. Similarly, in *Matter of L-A-B-R-*, he self-referred three unpublished BIA decisions to articulate a heightened standard for the granting of continuances, the procedural mechanism he had permitted to remain in place after *Matter of Castro-Tum*.[236] Sessions lamented the "overuse of continuances in the immigration courts" as a "significant and recurring problem" that "provide an illegitimate form of de facto relief from removal."[237] In *Matter of S-O-G- and F-D-B-*, Sessions self-referred two nonprecedential cases to narrow the range of discretion available to IJs regarding terminations or dismissals of removal proceedings.[238]

The most curious of these procedurally-oriented opinions, however, is *Matter of E-F-H-L-*.[239] In that case, Sessions self-referred a published BIA decision from 2014.[240] In the earlier iteration of this case, the IJ had denied the respondent's asylum application without holding a hearing on the basis of his determination that the respondent failed to establish a prima facie case of asylum eligibility. The BIA vacated and remanded that determination, holding that:

> [I]n the ordinary course of removal proceedings, an applicant for asylum or for withholding or deferral of removal is entitled to a hearing on the merits of the applications, including an opportunity to provide oral testimony and other evidence, without first having to establish prima facie eligibility for the requested relief.[241]

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[236] 27 I&N Dec. 405 (Att'y Gen. 2018).

[237] *Id.* at 411.

[238] 27 I&N Dec. 462 (Att'y Gen. 2018).

[239] 27 I&N Dec. 226 (Att'y Gen. 2018).

[240] Matter of E-F-H-L-, 26 I&N Dec. 319 (B.I.A. 2014).

[241] *Id.* at 324. To be clear, the BIA did not create a right to an evidentiary hearing with this decision. The regulations explicitly require such a hearing for applicants for asylum and withholding of removal. *See* 8 C.F.R. 1240.11(c)(3) (2019) ("Applications for asylum and withholding of removal so filed will be decided by the immigration judge pursuant to the requirements and standards established in 8 CFR part 1208 of this chapter after an evidentiary hearing to resolve factual issues in dispute."). The regulations provide the IJ the ability to "properly control the scope of any evidentiary hearing" and to limit the hearing once the IJ determines he or she is required to deny the applications pursuant to 8 C.F.R. 1208.14 or 1208.16. 8 C.F.R. 1240.11(c)(3), (c)(3)(ii) (2019). The regulations also

Upon remand, the respondent withdrew the application for asylum and withholding of removal and the parties moved for administrative closure so the respondent could pursue status via a family-based immigration petition filed on his behalf.[242] The IJ granted the motions and administratively closed the case.

In a decision coming in at slightly over 200 words, the Attorney General held the following:

> Because the application for relief which served as the predicate for the evidentiary hearing required by the Board has been withdrawn with prejudice, the Board's decision is effectively mooted. I accordingly vacate the decision of the Board in this matter, and I also direct that this matter be recalendared and restored to the active docket of the Immigration Court.[243]

In essence, the Attorney General held that the withdrawal of the asylum applications rendered moot the BIA decision and the motions to administratively close the case. The posture of the case—a case that was administratively closed approximately four years before the Attorney General's decision and was not actively pending before any court—dramatically illustrates the extremes to which an Attorney General may go in selecting cases for self-referral to advance his desired policy goals. But the case also reveals a focus of Trump's Attorneys General in issuing decisions: controlling immigration court procedures. Indeed, with the lone exception of *Matter of A-B-*, all of the cases Sessions self-referred were cases involving some aspect of immigration court procedure, with opinions that consistently narrowed the scope of discretion afforded IJs.

The *Matter of A-B-* example is significant, however, because apart from procedure, the other area in which Trump's Attorneys General have been particularly active is in asylum law.[244] As noted, *Matter of A-B-* fundamentally recast the rules regarding victims of domestic violence and *Matter of L-E-A-* did the same for applicants whose particular social group

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specifically direct that "the alien shall be examined under oath on his or her application and may present evidence and witnesses in his or her own behalf." 8 C.F.R. 1240.11(c)(3)(iii) (2019). It is thus hard to imagine that the vacatur of this decision will have any lasting impact and makes the self-referral that much more curious.

[242] These facts are recounted in Attorney General Sessions' brief decision. Matter of E-F-H-L-, 27 I&N Dec. 226 (Att'y Gen. 2018).

[243] *Id.*

[244] Both of Barr's self-referrals have involved the intersection of criminal and immigration law, suggesting this area may be an emerging one for the Administration's focus, at least in this particular procedural arena. Matter of Thomas-Thompson, 27 I&N Dec. 674 (Att'y Gen. 2019) (state court orders affecting a criminal sentence and impact on immigration law); Matter of Reyes, 27 I&N Dec. 708 (Att'y Gen. 2019) (defining aggravated felonies for purposes of removability).

is grounded in their family. In *Matter of L-E-A-*, Attorney General Barr approvingly quoted language from *Matter of A-B-* asserting that "an alien may suffer threats and violence in a foreign country for any number of reasons relating to her social, economic, family, or other personal circumstances. Yet, the asylum statute does not provide redress for all misfortune."[245] This view perhaps undergirds the procedural decision in *Matter of M-S-* to deny bond hearings to asylum applicants who have passed their credible fear screenings, but in any event, it demonstrates that asylum appears to be another focus area for the Trump Attorneys General.

F. Empirical Summary

The use of the Attorney General's regulatory power to review decisions of the BIA has changed dramatically over time. Most notably, the Attorneys General of the George W. Bush administration increasingly used the power to reach out and reshape immigration law in ways that reflected policy priorities of that administration. The expanded use of self-referral came alongside a stronger articulation of executive power, which has continued to expand in the current administration. Now, self-referral is the *only* way in which the Attorney General asserts his review power and that power is increasingly used to reshape immigration procedure and settled areas of immigration law, most notably in the area of asylum.

The reason for the timing of that expansion of Attorney General power remains an open question. Many scholars point to the attacks of September 11, 2001 as working a fundamental change to our immigration system. Indeed, all of the Bush administration Attorney General decisions were issued after that date. Yet that begs the question of why September 11 might have initiated a change within the little-used power of Attorney General review. One reason might be the Bush administration's generally robust view of executive power. In this view, a tighter control of immigration adjudication in which decisions are handpicked and issued by the President's Attorney General is consistent with a view of a strong executive. Another possibility is that the decision to remove immigration enforcement from the Department of Justice (and move it into the newly created DHS), may have made the Attorney General more eager to assert his control over the remaining piece of immigration within his orbit (namely, adjudication). Both of these explanations are offered merely as possibilities and perhaps as suggestions for further research. Neither is explicitly confirmed or rebutted by the evidence in this article.

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[245] Matter of L-E-A-, 27 I&N Dec. 581, 596 (Att'y Gen. 2019) (brackets omitted).

Much like the historical origins of this power, then, a review of the empirical record demonstrates that Attorney General review as employed in the Trump administration is neither an inevitable feature of our system nor a *sui generis* creation of Attorney General Sessions carried on by his successors. Instead, it grew from practices established in the administration of President George W. Bush, whose Attorneys General broke with decades of practice to make new use of this administrative power. And more fundamentally, it grew out of a decision made decades prior to remove immigration from the Department of Labor and move it into the Department of Justice and under the direction of the Attorney General.

CONCLUSION

The argument of this article is a straightforward one: our system of immigration adjudication is located in the Department of Justice and that location is significant. The argument proceeded by first examining the history of the decision to move immigration into the Department of Justice and then by closely examining one consequence of that decision, namely, the power of the Attorney General to adjudicate individual immigration claims. In doing so, it attempted to examine the issue from both ends of the temporal timeline: why did we start at *this* particular point and how did we end up at *this other* particular point? The hope is that the lines of study will meet somewhere in the middle for a relatively fulsome (though far from complete) examination of the topic.

There are two assumptions embedded in this approach to the question that merit some discussion: location matters and history matters. Regarding location, the article does not attempt to argue that if immigration had remained within the Department of Labor our immigration system would look entirely different than it does today. There is no alternate reality, in other words, put forward in this analysis. During its time at the helm, the Department of Labor presided over a fraught immigration system that at times contained entrenched corruption (as we saw in the discussion of Perkins' reform efforts) and at other times enforced flatly racist and cruel immigration policies. The immigration agencies are, of course, creatures of statute and responsible for enforcing the laws passed by Congress. They are, in other words, responsive to politics.

But this article does suggest that the causal arrow does not run in only one direction. In other words, just as the politics of any given era will impact the policies of any given agency, it is also the case that the policies of an agency will impact the politics of any given era. In the oft-repeated

words of E.E. Schattschneider, "new policies create a new politics."[246] In this case, we are concerned with only one "new policy," that is, the decision to place immigration under the auspices of a law enforcement agency instead of a labor agency. That decision was, as we have seen, a significant policy choice that entailed both the embrace of a securitized view of immigration and threats posed by foreign subversives and a rejection of a civilian, labor-oriented approach to immigration.[247] It is within this new policy world, this new security- and law enforcement-laden context of immigration enforcement, that we see the Attorney General decisions that have so deeply unsettled our already fragile system of immigration adjudication.

To be sure, this article is not an empirical assessment of the changes wrought by that policy choice. Such a study would require a very different methodology than the one employed here.[248] Instead, this article has simply

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[246] Joe Soss and Sanford F. Schram, *A Public Transformed? Welfare Reform as Policy Feedback*, 101 AM. POL. SCI. REV. 111, 111 (2007) (quoting E.E. SCHATTSCHNEIDER, POLITICS, PRESSURE, AND THE TARIFF (1935)).

[247] While it is impossible to state what our immigration system would have looked like had it developed within a different institutional context, we can certainly get a clear picture of how it has in fact developed within the current law enforcement framework. We know, for example, that federal spending on immigration law enforcement operations exceeds—by thirty-four percent—the funding for the top five federal law enforcement agencies (including among them, the FBI) *combined.* Doris Meissner and Julia Gelatt, *Eight Key U.S. Immigration Policy Issues: State of Play and Unanswered Questions*, MIGRATION POLICY INSTITUTE, May 2019, at 3–4, https://www.migrationpolicy.org/research/eight-key-us-immigration-policy-issues. At the same time, we know that "spending on immigration enforcement in 2018 was an astonishing *11 times greater* than spending to enforce labor standards—despite the mandate labor agencies have to protect 146 million workers employed at 10 million workplaces." Daniel Costa, *Immigration Enforcement is Funded at a Much Higher Rate than Labor Standards Enforcement—and the Gap is Widening*, ECONOMIC POLICY INSTITUTE (June 20, 2019), https://www.epi.org/blog/immigration-enforcement-is-funded-at-a-much-higher-rate-than-labor-standards-enforcement-and-the-gap-is-widening/. This stark disparity in funding has many consequences, among them an increased vulnerability for immigrant workers. *Id.*

[248] *See, e.g.*, Francis E. Rourke, *The Politics of Administrative Organization: A Case History*, 19 J. OF POL. 461 (Aug. 1957). Rourke examines the relocation of the Bureau of Employment Security within different executive branch agencies and departments and determines that, contrary to expectations, the moves did not diminish the influence of the interest groups that were most strongly opposed to the moves, as they had feared. One reason for this misapprehension of the significance of agency moves in this instance, Rourke explains, was the "erroneous belief that the structure of public administration is always hierarchical in political fact as well as administrative theory." *Id.* at 476. In this particular instance, Rourke finds that the moves did not much matter because the Bureau had sufficient administrative strength to operate as a strong institutional actor and continue to work with existing interest groups, such that agency location did not have a large effect on its actual policy. As in so many other areas of American political life, however, immigration is quite

sought to shed light on one important feature of the administrative state as it regards immigration, namely, "that the choice of institutional structures . . . has a large impact on . . . policy outcomes."[249] One important way in which the impact of an agency's location may be felt is through the bureaucratic culture of one agency as opposed to another. While it is all too easy to attribute either everything or nothing to a concept as amorphous as "culture," a more precise version of bureaucratic culture is helpful in this context. Daniel Carpenter has defined a bureaucratic culture as a "metaphorical complex of language and symbols which defines the self-understanding of an agency as well as the view of the agency which prevails among those actors who oversee and interact with it."[250] But as Carpenter notes, "metaphors alone cannot create organizational cultures." Both "executive leadership and the institutional and structural foundations of culture" also play profound roles in shaping a bureaucratic culture.[251] Carpenter's definition assumes that the agency's internal culture is "influenced by those institutional actors who interact with and oversee the agency, such as executives, legislators, interest groups, professions, and parties."[252] An immigration agency located within the Department of Justice is surrounded and influenced by a different bureaucratic culture than one located within the Department of Labor. Again, this article does not attempt to define those different bureaucratic cultures or to put forward an alternative reality of what life might be like had the congressional debate gone differently in 1940. It aims merely to point our attention toward the decision itself.

This brings us to the other assumption embraced by this article, namely, that history matters. Specifically, it matters in three ways articulated by Victoria Hattam nearly two decades ago: "[F]irst history denaturalizes the present; second it is a source of alternative visions and practices; and

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different. The standard interest group assessment by political scientists holds far less water when the primary constituency is non-citizens who cannot participate in the political process. Administrative hierarchy is also much more a fact of life in immigration than it might be in other more autonomous agencies.

[249] DAVID E. LEWIS, PRESIDENTS AND THE POLITICS OF AGENCY DESIGN: POLITICAL INSULATION IN THE UNITED STATES GOVERNMENT BUREAUCRACY, 1946-1997 6 (2003). Lewis is specifically concerned with agency insulation and seeks to develop a "larger theory of agency design" regarding that particular feature of the agencies. *Id.* at 16. Lewis' study is therefore not perfectly on point for this article, but the general observations regarding agency design and policy are nonetheless useful.

[250] DANIEL CARPENTER, THE FORGING OF BUREAUCRATIC AUTONOMY: REPUTATIONS, NETWORKS, AND POLICY INNOVATION IN EXECUTIVE AGENCIES, 1862-1928 23 (2001).

[251] *Id.* at 24.

[252] *Id.* at 376 n.22.

finally, it helps to specify contemporary political topography."[253] On the last point, Hattam explains that political history should enhance our political agency, because in constructing the history:

> We lay bare past political settlements not so much to establish the set of current political choices, but rather so that we might know the terrain on which we are operating and thereby wage the most effective campaign to bring our various political visions to fruition. Put simply, in order to be politically effective we must know where the bodies are buried and political history is one of the key means of identifying their location. Mapping the political terrain will not, of course, predict the outcome; nor will it, or should it, lead to agreement over what the course of action ought to be. Rather it simply makes apparent the conditions under which we seek to specify and work toward our respective social visions.[254]

If we are concerned about our system of immigration adjudication and if we seek to change it, we ought first to understand how we got to the place where we are. This article started at the beginning (or close to it), by asking how we ended up with immigration courts that are housed within our nation's law enforcement agency and led by our chief law enforcement officer. Though offering this history neither tells us how the system ought to operate nor purports to be able to imagine an alternative reality, it does purport to denaturalize our current structure by reminding us that law enforcement is not the only home for immigration and to "alert us to the forces to be reckoned with in our own time" by directing our attention toward labor and security as competing frames surrounding immigration in the past. In doing so, it hopes to provide a "sense of political agency" that is a bit better informed about where some of the "bodies are buried" in the world of immigration adjudication.

APPENDIX

The full set of cases on which I relied is included in this appendix. I have gathered the opinions from the 1) Executive Office of Immigration Review Virtual Law Library website, 2) Lexis Nexis, and 3) Westlaw, searching for cases that appeared within the Immigration and Nationality Decisions reporter (the "I&N") and within other possible sources, including compilations of the opinions of the Attorney General. Though the Attorney General renders opinions on many aspects of immigration law, my review was, of course, limited only to those decisions rendered pursuant to the certification scheme set out in the regulations, either via an inter-agency

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[253] Victoria Hattam, *History, Agency, and Political Change*, 32 POLITY 333, 333 (2000).
[254] *Id.* at 335.

referral or self-referral. As noted, I also benefited from the generosity of Patrick Glen, who shared the set of cases upon which he and Gonzales relied for their article.[255] I also sought information directly from EOIR, the Department of Justice, and the National Archives through a series of Freedom of Information Act (FOIA) requests in 2019. Those FOIA requests were unsuccessful. I would be happy to share more information regarding that avenue of research with others writing in this area.

I have *excluded* opinions in a case that are not the final opinion but may more properly be considered interlocutory or procedural opinions, so as not to double-count or triple-count the same case. *Matter of A-B-*, for example, is counted only once, although there are three separate I&N decisions rendered in the case, because the first was simply the referral and briefing order and the second simply addressed the interlocutory issues raised on appeal. The exceptions to this rule are cases in which different Attorneys General issued different opinions with different substantive approaches to the same case or decided different issues of the same case.[256] There are two cases in this data set (confusingly, both titled *Matter of A-*) that present instances in which the same Attorney General reverses himself on a prior decision. No rationale is offered in either decision. I have counted each of these cases as summary opinions and each of them only once.[257]

The challenges of collecting these cases mean that it is possible a number of cases remain unaccounted for in this list. Gonzales and Glen, for example, cite a 1958 article by Harry N. Rosenfield, which claims to identify 148 decisions issued by the Attorney General in the first six volumes of the I&N (i.e., through approximately 1955).[258] But Rosenfield argues that these volumes do not contain all of the Attorney General's decisions on referral: "According to the Annual Reports of the Attorney General from 1942 through 1956, the Attorney General reviewed 444 BIA decisions of one kind or another during this fifteen year period, and reversed, modified or remanded in 69 instances. The number of reviews in the four-year period of 1953-1956 has dropped to an average of 8 cases per year from an average of 37 cases per year in the previous eleven-year period. However, the number of reversals, modifications or remands has

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[255] *See* note regarding sources, *supra* note 154.

[256] *See, e.g.*, Matter of R-A-, 22 I&N Dec. 906 (Att'y Gen. 2001) (Reno); Matter of R-A-, 23 I&N Dec. 694 (Att'y Gen. 2005) (Ashcroft); Matter of R-A-, 24 I&N Dec. 629 (Att'y Gen. 2008) (Mukasey); and Deportation Proceedings of Joseph Thomas Patrick Doherty, 12 Op. O.L.C. 1 (1988) (Meese), 13 Op. O.L.C. 1 (Thornburgh).

[257] *See* Matter of A-, 2 I&N Dec. 459 (1946) (disapproving and then approving the BIA decision); Matter of A-, 3 I&N Dec. 714 (1949) (approving and then disapproving the BIA decision).

[258] *See* Gonzales and Glen, *supra* note 84, at 857.

increased from fourteen and a half percent in the 1942-1952 period to twenty-eight per cent in the 1953-1956 period."[259] Rosenfield did not provide specific citation information for the sources of these numbers in his article.

I have found references to many Attorney General decisions that are not available on Westlaw, Lexis Nexis, or the EOIR website, indicating that there are certainly more decisions (perhaps many more) out there, but without exception, the additional opinions I have seen cited are *unpublished* decisions. Because this article is interested in the ways in which the Attorney General uses this power to shape immigration law, however, my focus is on *published* decisions (i.e., the decisions with clear precedential value that explicitly aim to shape immigration law and practice).

The possibility of missing cases is of little significance to this article for two additional substantive reasons. First, I am focused on opinions *after* the 1947 regulations shifted the referral structure to actor-based. Rosenfield's early numbers are not particularly useful to that analysis. Second, this article is focused on the shift in tactic by the Attorney General to using self-referral as a means of fundamentally reshaping immigration law. Even if there are additional cases and even if some subset of the missing cases are self-referrals, we know these opinions would not have fallen within this category because we do not see unidentified Attorney General opinions that are highly cited or relied upon in future BIA decisions, for example.

Case	Citation	Attorney General
Matter of G-*	1 I&N Dec. 8	Jackson
Matter of C-	1 I&N Dec. 14	Jackson
Matter of W-*	1 I&N Dec. 24	Jackson
Matter of P-	1 I&N Dec. 33	Jackson
Matter of B-*	1 I&N Dec. 47	Jackson
Matter of E-*	1 I&N Dec. 40	Jackson
Mater of G-*	1 I&N Dec. 59	Jackson
Matter of G-*	1 I&N Dec. 73	Jackson
Matter of F-*	1 I&N Dec. 84	Jackson
Matter of F-*	1 I&N Dec. 90	Jackson
Matter of B-	1 I&N Dec. 52	Jackson
Matter of S-*	1 I&N Dec. 111	Jackson
Matter of B-*	1 I&N Dec. 121	Jackson

[259] Harry N. Rosenfield, *Necessary Administrative Reforms in the Immigration and Nationality Act of 1952*, 27 FORDHAM L. REV. 145, 158 (1958).

Matter of F-	1 I&N Dec. 64	Jackson
Matter of D-	1 I&N Dec. 259	Biddle
Matter of P-*	1 I&N Dec. 127	Biddle
Matter of K-*	1 I&N Dec. 79	Biddle
Matter of H-*	1 I&N Dec. 166	Biddle
Matter of G-*	1 I&N Dec. 96	Biddle
Matter of G-*	1 I&N Dec. 278	Biddle
Matter of B-*	1 I&N Dec. 204	Biddle
Matter of H-*	1 I&N Dec. 239	Biddle
Matter of S-	1 I&N Dec. 376	Biddle
Matter of S-	1 I&N Dec. 476	Biddle
Matter of E-*	1 I&N Dec. 337	Biddle
Matter of the S.S. "Hornshell" et al.*	1 I&N Dec. 470	Biddle
Matter of G-	1 I&N Dec. 496	Biddle
Matter of H-	1 I&N Dec. 509	Biddle
Matter of Sam and Sarra C-*	1 I&N Dec. 525	Biddle
Matter of S-*	1 I&N Dec. 606	Biddle
Matter of C-	1 I&N Dec. 631	Biddle
Matter of S-	1 I&N Dec. 646	Biddle
Matter of T-	2 I&N Dec. 22	Biddle
Matter of P-*	2 I&N Dec. 84	Biddle
Matter of S.S. Atlantida*	2 I&N Dec. 571	Biddle
Matter of E-*	2 I&N Dec. 134	Biddle
Matter of J-*	2 I&N Dec. 99	Biddle
Matter of S-F-*	2 I&N Dec. 182	Biddle
Matter of C-*	2 I&N Dec. 220	Biddle
Matter of K-G-*	2 I&N Dec. 243	Biddle
Matter of A- and Matter of P-*	2 I&N Dec. 293	Biddle
Matter of K-*	2 I&N Dec. 253	Biddle
Matter of A-*	2 I&N Dec. 304	Biddle
Matter of O'N-*	2 I&N Dec. 319	Biddle
Matter of E-	2 I&N Dec. 328	Clark
Matter of S-*	2 I&N Dec. 353	Clark
Matter of Z-*	2 I&N Dec. 346	Clark
Matter of K-*	2 I&N Dec. 411	Clark

Matter of W-*	2 I&N Dec. 466	Clark
Mater of S.S. "Alacran"*	2 I&N Dec. 507	Clark
Matter of C-A-	2 I&N Dec. 378	Clark
In the matter of V-D-	2 I&N Dec. 417	Clark
Matter of A-H-	2 I&N Dec. 390	Clark
Matter of S-*	2 I&N Dec. 588	Clark
Matter of R-*	2 I&N Dec. 620	Clark
Matter of T-*	2 I&N Dec. 614	Clark
Matter of B-*	2 I&N Dec. 627	Clark
Matter of W-*	2 I&N Dec. 679	Clark
Matter of A-*	2 I&N Dec. 683	Clark
Matter of G-*	2 I&N Dec. 692	Clark
Matter of V-*	2 I&N Dec. 606	Clark
Matter of R-*	2 I&N Dec. 633	Clark
Matter of C-	2 I&N Dec. 593	Clark
Matter of G-	2 I&N Dec. 700	Clark
Matter of A-	2 I&N Dec. 582	Clark
Matter of F-	2 I&N Dec. 427	Clark
Matter of M-*	2 I&N Dec. 698	Clark
Matter of C-	2 I&N Dec. 263 (issued with 2 I&N Dec. 296)	Clark
Matter of A-*	2 I&N Dec. 731	Clark
Matter of F-*	2 I&N Dec. 709	Clark
Mater of H-	2 I&N Dec. 296 (issued with 2 I&N Dec. 263)	Clark
Matter of M-*	2 I&N Dec. 721	Clark
Matter of L-*	2 I&N Dec. 486	Clark
Matter of P-	2 I&N Dec. 712	Clark
Matter of P-	2 I&N Dec. 659	Clark
Matter of M-*	2 I&N Dec. 751	Clark
Matter of L-*	2 I&N Dec. 775	Clark
Matter of T-*	2 I&N Dec. 767	Clark
Matter of U-*	2 I&N Dec. 830	Clark
Matter of A-*	2 I&N Dec. 459	Clark
Matter of K-*	2 I&N Dec. 838	Clark
Matter of V-*	2 I&N Dec. 816	Clark
Matter of G-R-*	2 I&N Dec. 733	Clark

Matter of J-	2 I&N Dec. 545	Clark
Matter of J-*	2 I&N Dec. 892	Clark
Matter of G-	2 I&N Dec. 905	Clark
Matter of R-D-	2 I&N Dec. 758	Clark
Matter of S-	2 I&N Dec. 559	Clark
Matter of A-*	2 I&N Dec. 799	Clark
Matter of B- and P-*	2 I&N Dec. 638	Clark
Matter of B-	2 I&N Dec. 492	Clark
Matter of C-	2 I&N Dec. 895	Clark
Matter of J-*	2 I&N Dec. 876	Clark
Matter of P-†	3 I&N Dec. 5	Clark
Matter of O-*	2 I&N Dec. 840	Clark
Matter of W-M-S- and W-O-W-	3 I&N Dec. 131	Clark
Matter of S.S. Florida*	3 I&N Dec. 111	Clark
Matter of B-*	3 I&N Dec. 323	Clark
Matter of Z-*	3 I&N Dec. 379	Clark
Matter of R-*	3 I&N Dec. 343	Clark
Matter of M-*	3 I&N Dec. 490	Clark
Matter of O-	3 I&N Dec 33	McGrath
Matter of L-*	3 I&N Dec. 767	McGrath
Matter of H-*	3 I&N Dec. 784	McGrath
Matter of D-*	3 I&N Dec. 787	McGrath
Matter of A-	3 I&N Dec. 714	McGrath
Matter of C-S-H-*	3 I&N Dec. 582	McGrath
Matter of C-*	3 I&N Dec. 275	McGrath
Matter of O-*	3 I&N Dec. 209	McGrath
Matter of V-*	4 I&N Dec. 143	McGrath
Matter of M-*	4 I&N Dec. 82	McGrath
Matter of I-*	4 I&N Dec. 159	McGrath
Matter of C-	4 I&N Dec. 130	McGrath
Matter of G-Y-G-*	4 I&N Dec. 211	McGrath
Matter of P-*	4 I. & N. Dec. 252	McGrath
Matter of P-*	4 I. & N. Dec. 248	McGrath
Matter of H-*	4 I. & N. Dec. 260	McGrath
Matter of N-K-D-*	4 I&N Dec. 388	McGrath
Mater of R-*	4 I&N Dec. 275	McGrath

Matter of H-*	4 I&N Dec. 290	McGrath
Matter of S-*	4 I&N Dec. 180	McGrath
Matter of B-*	4 I&N Dec. 5	McGrath
Matter of D-F-*	4 I&N Dec. 589	McGrath
Matter of P-	4 I&N Dec. 610	McGrath
Matter of W-	4 I&N Dec. 64	McGranery
Matter of L-B-D-	4 I&N Dec. 639	McGranery
Matter of M-	4 I&N Dec. 532	McGranery
Matter of R-	5 I&N Dec. 29	Brownell
Matter of M-	5 I&N Dec. 120	Brownell
Matter of L-	5 I&N Dec. 169	Brownell
Matter of B-*	5 I&N Dec. 72	Brownell
Matter of A-	5 I&N Dec. 272	Brownell
Matter of S-N-	6 I&N Dec. 73	Brownell
Matter of T-*	6 I&N Dec. 136	Brownell
Matter of M-*	6 I&N Dec. 149	Brownell
Matter of SS Greystoke Castle and M/V Western Queen*	6 I&N Dec. 112	Brownell
Matter of V-	6 I&N Dec. 1	Brownell
Matter of C-	6 I&N Dec. 20	Brownell
Matter of S-*	6 I&N Dec. 392	Brownell
Matter of R-R-	6 I&N Dec. 55	Brownell
Matter of B-S-*	6 I&N Dec. 305	Brownell
Matter of T-	6 I&N Dec. 508	Brownell
Matter of N-	6 I&N Dec. 557	Brownell
Matter of H-*	6 I&N Dec. 619	Brownell
Matter of Y-C-C-*	6 I&N Dec. 670	Brownell
Matter of S-*	6 I&N Dec. 692	Brownell
Matter of B-	6 I&N Dec. 713	Brownell
Matter of J-	6 I&N Dec. 287	Brownell
Matter of J-*	6 I&N Dec. 562	Brownell
Matter of A-	6 I&N Dec. 651	Brownell
Matter of G-M-	7 I&N Dec. 40	Brownell
Matter of C- & S-*	6 I&N Dec. 597	Brownell
Matter of S-C-*	7 I&N Dec. 76	Brownell
Matter of B-	7 I&N Dec. 1	Brownell

Matter of R-S-	7 I&N Dec. 271	Brownell
Matter of L-R-	7 I&N Dec. 318	Brownell
Matter of M-	8 I&N Dec. 24	Rogers
Matter of J-*	8 I&N Dec. 78	Rogers
Matter of DeF-	8 I&N Dec. 68	Rogers
Matter of M-	8 I&N Dec. 118	Rogers
Matter of C-F-L-	8 I&N Dec. 151	Rogers
Matter of A-F-	8 I&N Dec. 429	Rogers
Matter of D-E-G-	8 I&N Dec. 325	Rogers
Matter of L-Y-Y-	9 I&N Dec. 70	Rogers
Matter of K-	9 I&N Dec.143	Rogers
Matter of G-	9 I&N Dec. 159	Rogers
Matter of Y-K-W-	9 I&N Dec. 176	Kennedy
Matter of P-	9 I&N Dec. 293	Kennedy
Matter of K-W-S-	9 I&N Dec. 396	Kennedy
Matter of Y-J-G-	9 I&N Dec. 471	Kennedy
Matter of S- and B-C-	9 I&N Dec. 436	Kennedy
Matter of S-	9 I&N Dec. 548	Kennedy
Matter of C-S-	9 I&N Dec. 670	Kennedy
Matter of R-E-	9 I&N Dec. 720	Kennedy
Matter of Picone	10 I. & N. Dec. 139	Kennedy
Matter of S.S. Ryndam	10 I. & N. Dec. 240	Kennedy
Matter of Martinez-Lopez	10 I. & N. Dec. 409	Kennedy
Matter of McNeil	11 I. & N. Dec. 378	Katzenbach
Matter of Hira*	11 I&N Dec. 824	Katzenbach
Matter of Becher	12 I. & N. Dec. 380	Clark (Johnson)
Matter of Ibarra-Obando	12 I. & N. Dec. 576	Clark (Johnson)
Matter of Sloan	12 I&N Dec. 840	Clark (Johnson)
Matter of Lee	13 I. & N. Dec. 214	Mitchell
Matter of Janati-Ataie	14 I. & N. Dec. 216	Kleindienst
Matter of Toscano-Rivas	14 I. & N. Dec. 523	Saxbe
Matter of Hernandez	14 I&N Dec. 608	Saxbe
Matter of Stultz	15 I&N Dec. 362	Levi
Matter of Blas	15 I. & N. Dec. 626	Levi
Matter of Cantu	17 I. & N. Dec. 190	Bell

Matter of Belenzo	17 I. & N. Dec. 374	Smith
Matter of Leon-Orosco and Rodriguez-Colas	19 I&N Dec. 136	Smith
Doherty	12 Op. O.L.C. 1	Meese
Doherty II	13 Op. O.L.C. 1	Thornburgh
Matter of Hernandez-Casillas	20 I&N Dec. 262	Thornburgh
Matter of Soriano	21 I&N Dec. 516	Reno
Matter of Farias-Mendoza	21 I. & N. Dec. 269	Reno
Matter of Ponce de Leon	21 I. & N. Dec. 154	Reno
Matter of Cazares-Alvarez	21 I. & N. Dec. 188	Reno
Matter of N-J-B-	22 I&N Dec. 1057	Reno
Matter of R-A-	22 I&N Dec. 906	Reno
Matter of Y-L-, Matter of A-G-, Matter of R-S-R-	23 I&N Dec. 270	Ashcroft
Matter of Jean	23 I&N Dec. 373	Ashcroft
Matter of D-J-	23 I&N Dec. 572	Ashcroft
Matter of R-A-	23 I&N Dec. 694	Ashcroft
Matter of E-L-H-	23 I&N Dec. 700	Ashcroft
Matter of Marroquin	23 I&N Dec. 705	Ashcroft
Matter of Luviano	23 I&N Dec. 718	Ashcroft
Matter of A-H-	23 I&N Dec. 774	Ashcroft
Matter of J-F-F-	23 I&N Dec. 912	Gonzales
Matter of S-K-	24 I&N Dec. 289	Gonzales
Matter of J-S-	24 I&N Dec. 520	Gonzales referred, Mukasey decided
Matter of A-T-	24 I&N Dec. 617	Mukasey
Matter of R-A-	24 I&N Dec. 629	Mukasey
Matter of Silva-Trevino	24 I&N Dec. 687	Gonzales referred, Mukasey decided
Matters of Compean, Bangaly, and J-E-C-	24 I&N Dec. 710	Mukasey
Matters of Compean, Bangaly, and J-E-C-	25 I&N Dec. 1	Holder
Matter of Dorman	25 I&N Dec. 485	Holder
Matter of Silva-Trevino	26 I&N Dec. 550	Holder
Maters of Chairez and Sama	26 I&N Dec. 796	Lynch
Matter of E-F-H-L-	27 I&N Dec. 226	Sessions

Matter of Castro-Tum	27 I&N Dec. 271	Sessions
Matter of A-B-	27 I&N Dec. 316	Sessions
Matter of L-A-B-R-	27 I&N Dec. 405	Sessions
Matter of S-O-G- and F-D-B-	27 I&N Dec. 462	Sessions
Matter of M-S-	27 I&N Dec. 509	Sessions referred, Barr decided
Matter of Negusie	27 I&N Dec. 481	Sessions (not yet decided)
Matter of Castillo-Perez	27 I&N Dec. 664	Whitaker referred, Barr decided
Matter of L-E-A-	27 I&N Dec. 581	Whitaker referred, Barr decided
Matter of Thomas, Matter of Thompson	27 I&N Dec. 674	Barr
Matter of Reyes	27 I&N Dec. 708	Barr referred (not yet decided)

* Summary decision
† First case decided under 1947 referral regime.

The Tie Goes to the Runner: The Need for Clearer and More Precise Criteria Regarding the Public Figure in Defamation Law

William P. Robinson III[*]
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Katherine M. King[***]

At the heart of the First Amendment is the recognition of the fundamental importance of the free flow of ideas and opinions on matters of public interest and concern.[1]

[T]he First Amendment does not speak equivocally. It prohibits any law 'abridging the freedom of speech, or of the press.' It must be taken as a command of the broadest scope that explicit language, read in the context of a liberty-loving society, will allow.[2]

Unfortunately, the Supreme Court has not yet fleshed out the skeletal descriptions of public figures and private persons enunciated in *Gertz*. The very purpose of the rule announced in [*Sullivan*], however, requires courts to articulate clear standards that can guide both the press and the public.[3]

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[1] Hustler Magazine, Inc. v. Falwell, 485 U.S. 46, 50 (1988).

[2] Bridges v. California, 314 U.S. 252, 263 (1941) (footnote omitted).

[3] Waldbaum v. Fairchild Publ'ns, Inc., 627 F.2d 1287, 1292 (D.C. Cir. 1980) (referring to Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974) and N.Y. Times Co. v. Sullivan, 376 U.S. 254 (1964)). The latter two Supreme Court cases are mentioned so often in the course of this article that they are often simply referred to as "*Sullivan*" and "*Gertz*" without further identification.

> In the parlance of the horse industry, part of the turf of being a public official or public person is to be subject to public scrutiny. This is not necessarily so in the case of private citizens.[4]
>
> Comment upon people and activities of legitimate public concern often illuminates that which yearns for shadow.[5]
>
> It is no answer to the assertion that one is a public figure to say, truthfully, that one doesn't choose to be. It is sufficient that "[the plaintiff] voluntarily engaged in a course that was bound to invite attention and comment."[6]
>
> It is true that becoming a public figure generally involves some notion of voluntariness. But the voluntariness requirement may be satisfied even though an individual does not intend to attract attention by his actions. When an individual undertakes a course of conduct that invites attention, even though such attention is neither sought nor desired, he may be deemed a public figure.[7]
>
> Uncertainty as to the scope of the constitutional protection can only dissuade protected speech—the more elusive the standard, the less protection it affords.[8]
>
> Without a precise diagram for guidance, courts and commentators have had considerable difficulty in determining the proper scope of the public figure doctrine.[9]
>
> The newspapers, magazines, and other journals of the country, it is safe to say, have shed and continue to shed, more light on the public and business affairs of the nation than any other instrumentality of publicity; and since informed public opinion is the most potent of all restraints upon misgovernment, the suppression or abridgement of the publicity afforded by a free press cannot be regarded otherwise than with grave concern.[10]

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[4] McCall v. Courier-Journal & Louisville Times Co., 623 S.W.2d 882, 886 (Ky. 1981).

[5] Rosanova v. Playboy Enters., Inc., 580 F.2d 859, 861 (5th Cir. 1978).

[6] *Id.* (quoting Rosanova v. Playboy Enters., Inc., 411 F. Supp. 440, 445 (S.D. Ga. 1976)).

[7] McDowell v. Paiewonsky, 769 F.2d 942, 949 (3d Cir. 1985) (citations omitted).

[8] Harte-Hanks Commc'ns, Inc. v. Connaughton, 491 U.S. 657, 686 (1989).

[9] Marcone v. Penthouse Int'l Magazine for Men, 754 F.2d 1072, 1082 (3d Cir. 1985).

[10] Grosjean v. Am. Press Co., 297 U.S. 233, 250 (1936).

INTRODUCTION

When all is said and done, the ultimate rationale underlying the broad protection which the modern American constitutional law of defamation accords to statements about public officials and public figures is the realization that intense and ceaseless *scrutiny* by the media,[11] as well as by individual citizens,[12] of persons and institutions of societal significance is of

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[11] *See* United States v. N.Y. Times Co., 328 F. Supp. 324, 331 (S.D.N.Y.) ("A cantankerous press, an obstinate press, an ubiquitous press must be suffered by those in authority in order to preserve the even greater values of freedom of expression and the right of the people to know."), *rev'd en banc*, 444 F.2d 544 (2d Cir.), *rev'd per curiam*, 403 U.S. 713 (1971).

We adopt the following terminological convention formulated by Professor David A. Anderson in one of his articles relating to the First Amendment: "I use the term 'press' to include all communications media engaged in journalism. The terms 'publisher' and 'newspaper' should be read with the understanding that they could as well refer to 'broadcaster' and 'station,' 'magazine,' 'book,' etc." David A. Anderson, *A Response to Professor Robertson: The Issue is Control of Press Power*, 54 TEX. L. REV. 271, 271 n.1 (1976) [hereinafter *Press Power*]; *see also* David A. Anderson, *Libel and Press Self-Censorship*, 53 TEX. L. REV. 422, 424 n.18 (1975) [hereinafter *Libel and Press Self-Censorship*]. Our references to "the media" are intended to embrace both the print media and the electronic media. Both constitute what the Supreme Court in *Gertz* referred to as "the communications media." Gertz v. Robert Welch, Inc., 418 U.S. 323, 345 (1974).

[12] Although this article focuses on the limited-purpose public figure issue as it relates to the scrutinizing role of the institutional media, the right of the individual citizen to scrutinize is also of importance for society's well-being. Indeed, the Supreme Court in *Sullivan* observed that individual citizens actually have a *civic duty* to constantly scrutinize matters of public concern. N.Y. Times Co. v. Sullivan, 376 U.S. 254, 282 (1964) ("It is as much [the duty of the citizen-critic of government] to criticize as it is the official's duty to administer."); *see generally* Buckley v. Am. Constitutional Law Found., Inc., 525 U.S. 182 (1999); McIntyre v. Ohio Elections Comm'n, 514 U.S. 334 (1995).

In connection with the citizen's duty to scrutinize and to criticize, it is helpful to recall

absolutely crucial importance.[13] That fundamental[14] and primordial insight is based upon the understanding that continual and searching *scrutiny* of such persons and institutions works for the good of the republic, for the good of society—and, in many instances, for the ultimate good of those persons and institutions that are the subjects of scrutiny. If the only result of this article is to remind its readers of the importance of that foundational principle, the authors would consider their research and writing efforts to have been worthwhile.

It is our conviction that, in spite of the discomforts and inaccuracies that may be the unfortunate result of the scrutinizing process, meaningful and focused scrutiny is a *necessary precondition* to the achievement of good and just journalistic results in both the public and private sectors. Our society is far too complex and human nature is far too imperfect to justify Panglossian assumptions about human institutions or human beings. The endeavors of those whose role it is to inquire, investigate, and scrutinize are more than just incidentally beneficial to society; those endeavors are

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the memorable passage in Canto III of Dante's *Inferno*, in which the great Italian poet converses as follows:

> And I, in the midst of all this circling horror,
> Began, "Teacher, what are those sounds I hear?
> What souls are these so overwhelmed by grief?"
>
> And he to me: "This wretched state of being
> Is the fate of those sad souls who lived a life
> But lived it with no blame and with no praise."
>
> They are mixed with that repulsive choir of angels
> Neither faithful nor unfaithful to their God,
> But undecided in neutrality.

DANTE ALIGHIERI, DANTE'S INFERNO 35 (Mark Musa, ed. and trans., The Ind. Critical Ed. 1995).

[13] *See* Book Note, *The Libel Game*, 101 HARV. L. REV. 555, 558 (1987) (reviewing RODNEY A. SMOLLA, SUING THE PRESS (1986)) (commenting on the opinion of the court in the well-known case of *Tavoulareas v. Piro*, 817 F.2d 762 (D.C. Cir.) (en banc), *cert. denied*, 484 U.S. 870 (1987) and stating: "In a carefully reasoned opinion, the en banc court found . . . that 'the First Amendment forbids penalizing the press for encouraging its reporters to expose wrongdoing by public corporations and public figures.' The court thus safeguarded the media's vital role as a watchdog of our public institutions.") (footnotes omitted) [hereinafter *The Libel Game*].

[14] *See, e.g.*, Estes v. Texas, 381 U.S. 532, 539 (1965) ("The free press has been a mighty catalyst in awakening public interest in governmental affairs, exposing corruption among public officers and employees and generally informing the citizenry of public events and occurrences . . . ."); Wiegel v. Capital Times Co., 426 N.W.2d 43, 47 (Wis. Ct. App. 1988) ("Those who debated and framed the constitution firmly believed that public discussion of public issues should be a fundamental principle of American government.").

indispensable if society is to be bettered through misfeasance and malfeasance being perceived, discussed, and exorcised.[15]

Perhaps no one has portrayed the significance of this core principle more cogently or more felicitously than did Justice Potter Stewart more than four decades ago in his incisive and powerful address at the Yale Law School Sesquicentennial Convocation. Justice Stewart's basic thesis in that important address is concisely summarized in his metaphorical declaration that "[t]he primary purpose of the constitutional guarantee of a free press was . . . to create a fourth institution outside the Government as an additional check on the three official branches."[16] Justice Stewart further stated:

> For centuries before our Revolution, the press in England had been licensed, censored, and bedeviled by prosecutions for seditious libel. The British Crown knew that a free press was not just a neutral vehicle for the balanced discussion of diverse ideas. *Instead, the free press meant organized, expert scrutiny of government.* The press was a conspiracy of the intellect, with the courage of numbers. This formidable check on official power was what the British Crown had feared—and what the American Founders decided to risk.[17]

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[15] *See, e.g.*, *Gertz*, 418 U.S. at 344 ("An individual who decides to seek governmental office must accept certain necessary consequences of that involvement in public affairs. He runs the risk of closer public scrutiny than might otherwise be the case."); Liberty Lobby, Inc. v. Pearson, 390 F.2d 489, 492 (D.C. Cir. 1967) (Wright, J., concurring) (discussing the role of lobbying in a democracy and stating that "[t]he public has an interest in knowing who is influencing or attempting to influence their public officers, for what purpose, the means adopted to that purpose, and the results achieved."); *Wiegel*, 426 N.W.2d at 48.

[16] Associate Justice Potter Stewart, Supreme Court of the United States, Address at Yale Law School Sesquincentennial Convocation (Nov. 2, 1974), *reprinted, except for introductory remarks, in* Potter Stewart, *Or of the Press*, 26 HASTINGS L.J. 631, 634 (1975); *see also* Minneapolis Star & Trib. Co. v. Minn. Comm'r of Revenue, 460 U.S. 575, 585 (1983) (citing Justice Stewart's words favorably); *see generally* THOMAS CARLYLE, ON HEROES, HERO-WORSHIP, AND THE HEROIC IN HISTORY 139 (David R. Sorenson & Brent E. Kinser eds., 2013) ("Burke said there were Three Estates in Parliament; but, in the Reporters' Gallery yonder, there sat a *Fourth Estate* more important far than they all. It is not a figure of speech, or a witty saying; it is a literal fact[] – very momentous to us in these times."); Randall P. Bezanson, *The New Free Press Guarantee*, 63 VA. L. REV. 731, 752 (1977) ("The press, according to Mr. Justice Stewart, is a constitutionally recognized 'Fourth Estate.' Its primary function is monitoring government and protecting against governmental abuses.") (footnote omitted).

[17] Stewart, *supra* note 16, at 634 (emphasis added); *see, e.g.*, Mangual v. Rotger-Sabat, 317 F.3d 45, 65 (1st Cir. 2003) ("The skepticism of government and the importance of the right to freely criticize it are concepts with both deep roots in American history and continuing importance.").

We recognize that Justice Stewart's address at Yale and many of the cases cited in the introductory portion of this article are focused on the issue of media scrutiny of public

In a tone entirely consistent with Justice Stewart's comments, the Supreme Court in *Mills v. Alabama* had several years earlier gone out of its way to observe that the Constitution itself "specifically selected the press . . . to play an important role in the discussion of public affairs."[18] The Court in *Mills* elaborated upon this point as follows:

> Suppression of the right of the press to praise or criticize governmental agents and to clamor and contend for or against change . . . muzzles one of the very agencies the Framers of our Constitution thoughtfully and deliberately selected to improve our society and keep it free.[19]

Courts have often reiterated their commitment to the fundamental principle that searching scrutiny and candid debate about issues of interest

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officials. However, as we shall explain in due course, the same fundamental principles apply to media scrutiny of public *figures* (the latter category being the focus of this article). *See* Curtis Publ'g Co. v. Butts, 388 U.S. 130, 163 (1967) (Warren, C.J., concurring) ("To me, differentiation between 'public figures' and 'public officials' . . . [has] no basis in law, logic, or First Amendment policy."); Brewer v. Memphis Publ'g Co., 626 F.2d 1238, 1253 (5th Cir. 1980).

[18] 384 U.S. 214, 219 (1966).

[19] *Id.* We submit that it is important for the reader to focus on the following observation made by Chief Justice Rehnquist writing for the Supreme Court in the case of *Hustler Magazine, Inc. v. Falwell*: "At the heart of the First Amendment is the recognition of the fundamental importance of the free flow of ideas and opinions *on matters of public interest and concern*." 485 U.S. 46, 50 (1988) (emphasis added) (emphasizing the issue rather than the degree of the individual's involvement). It is interesting to note the reference, in an almost casual and off-handed manner, to "matters of public interest and concern" without alluding at all to the more narrow "public controversy" concept that was explicitly addressed by the Court in *Gertz*. *Id.* at 50; *Gertz*, 418 U.S. at 351. It is further interesting to note that there were no dissents in the *Hustler Magazine* case. 485 U.S. at 47. It is notable that, even given what had been a marked retreat from the First Amendment principles so lyrically articulated in *Sullivan* in cases like *Time, Inc. v. Firestone*, 424 U.S. 448 (1976), *Wolston v. Reader's Digest Ass'n*, 443 U.S. 157 (1979), *Hutchinson v. Proxmire*, 443 U.S. 111 (1979), and *Gertz*, 418 U.S. 323, the Court in *Hustler Magazine* reverted to the core meaning of the First Amendment and its real-world implications.

A law review writer characterized Chief Justice Rehnquist's opinion for the Court in *Hustler Magazine* as "sweeping" and further remarked that, the Chief Justice "showed strong support for [*Sullivan*] and seemed to go beyond what the case before the Court required [and] showed that his vision is of a free and uninhibited press in the context of public affairs." Brigida Benitez, *Challenging a Conservative Stereotype: The Rehnquist Court's Treatment of the Print Media as Libel Defendants*, 34 B.C. L. REV. 83, 129–30 (1992); *see also* Sheldon W. Halpern, *Of Libel, Language, and Law:* New York Times v. Sullivan *at Twenty-Five*, 68 N.C. L. REV. 273, 274, (1990) ("What is remarkable is the fact that Chief Justice Rehnquist, in his opinion in *Hustler*, took pains to reaffirm a broad reading of *New York Times v. Sullivan* and its progeny. The Chief Justice affirmed the Court's 'considered judgment that [the *Sullivan*] standard is necessary to give adequate 'breathing space' to the freedoms protected by the First Amendment.'") (internal quotation marks and footnotes omitted). We shall return to this point later in the article.

to the public is vitally important.[20] In fact, the following well-known and much-quoted metaphorical observation of the then-future Justice Louis Brandeis is even more true today than it was when he first uttered it: "Publicity is justly commended as a remedy for social and industrial diseases. Sunlight is said to be the best of disinfectants . . . ."[21]

A crucially important corollary of the axiom that society, in all its complexity, *needs* scrutiny is the recognition that the media must have breathing space[22] so that effective scrutiny can take place. Even though scrutiny by the media and through investigative journalism[23] may wander

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[20] In elaborating upon the role of the media as an agent of scrutiny, the Supreme Court of Minnesota has perceptively and eloquently commented: "This scrutiny is considered a necessary and positive element of our democracy and, as a result, a public official may suffer injury to his or her professional reputation without recovery under defamation law because of the paramount free speech and free press rights at stake." Diesen v. Hessburg, 455 N.W.2d 446, 450 (Minn. 1990). The same principle would apply to a public figure. *See* Janklow v. Newsweek, Inc., 788 F.2d 1300, 1304–05 (8th Cir. 1986); *Diesen*, 455 N.W.2d at 451–52; *see generally* Cox Broad. Corp. v. Cohn, 420 U.S. 469, 491–92 (1975) (noting the significant role news organizations have in accurately reporting government actions to promote public scrutiny and help the public formulate informed opinions about their government).

[21] LOUIS D. BRANDEIS, OTHER PEOPLE'S MONEY AND HOW THE BANKERS USE IT 92 (Frederick A. Stokes Company 1914).

[22] The "breathing space" metaphor has an impressive historical pedigree in First Amendment jurisprudence. *See, e.g.*, NAACP v. Button, 371 U.S. 415, 433 (1963) ("First Amendment freedoms need breathing space to survive . . . ."); *see also* Milkovich v. Lorain Journal Co., 497 U.S. 1, 19 (1990) (commenting that "breathing space [is something] which freedoms of expression require in order to survive . . . ."); Harte-Hanks Commc'ns., Inc. v. Connaughton, 491 U.S. 657, 686 (1989) ("Our profound national commitment to the free exchange of ideas, as enshrined in the First Amendment, demands that the law of libel carve out an area of breathing space so that protected speech is not discouraged.") (internal quotation marks omitted); Phila. Newspapers, Inc., v. Hepps, 475 U.S. 767, 772 (1986); Bose Corp. v. Consumers Union of U.S. Inc., 466 U.S. 485, 513 (1984); *Gertz*, 418 U.S. at 342 (1974); Time, Inc. v. Pape, 401 U.S. 279, 292 (1971); *Sullivan*, 376 U.S. at 272.

The term "breathing space" brings to mind the vivid down-to-earth metaphor employed by Robert Frost as he sought to describe the nature of freedom: "You have freedom when you're easy in your harness." SIMPSON'S CONTEMPORARY QUOTATIONS 63 (James B. Simpson ed., Houghton Mifflin 1988).

[23] *See* Trotter v. Jack Anderson Enters., Inc., 818 F.2d 431, 434 (5th Cir. 1987) ("The purpose of investigative reporting is to uncover matters of public concern previously hidden from the public."); *see also* Tavoulareas v. Piro, 817 F.2d 762 (D.C. Cir. 1987) (en banc) (extensively discussing the important role played by investigative journalists and the challenges that they face); Reliance Ins. Co. v. Barron's, 428 F. Supp. 200, 205 (S.D.N.Y. 1977) (discussing the role of investigative reporting with respect to business and corporate affairs).

It is worth recalling that investigative journalism is not solely a modern-day phenomenon. *See, e.g.*, NELLIE BLY, TEN DAYS IN THE MADHOUSE (1887); UPTON SINCLAIR, THE JUNGLE (Doubleday, Jabber & Co. 1906) (exposing shortcomings within the meat-

into the realm of the frivolous, distasteful, or unfair,[24] scrutiny is nonetheless of vital importance in a healthy society. Accordingly, speech by the media must be shielded from any "chill"[25] which might induce the

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packing industry); *see generally* SAMUEL ELIOT MORISON, THE OXFORD HISTORY OF THE AMERICAN PEOPLE 814 (Oxford University Press) (1965) (commenting that, while Theodore Roosevelt had referred to writers like Ida Tarbell, Upton Sinclair, and Ray Stannard Baker as "muckrackers," those muckrakers nonetheless "muckraked to good purpose, exposing the evils of city and state governments, unions, business, the drug trade, and whatever was curably wrong in divers segments of American life.").

[24] The good taste *vel non* of a publication or broadcast is not a matter about which the judicial system should rule when dealing with allegedly actionable defamation. *See* Veilleux v. Am. Broad. Cos., 206 F.3d 92, 127 (1st Cir. 2000) ("[T]he First Amendment is concerned with speech itself, not the tone or tastefulness of the journalism that disseminates it."); Desnick v. Am. Broad. Cos., 44 F.3d 1345, 1355 (7th Cir. 1995); *see also* Cohen v. California, 403 U.S. 15, 25 (1971); Cinel v. Connick, 15 F.3d 1338, 1346 (5th Cir. 1994); Ross v. Midwest Commc'ns, Inc., 870 F.2d 271, 275 (5th Cir. 1989); *Tavoulareas*, 817 F.2d at 796 & n.47; Ollman v. Evans, 750 F.2d 970, 993 (D.C. Cir. 1984) (en banc) (Bork, J., concurring) ("[T]he first amendment must not try to make public dispute safe and comfortable for all the participants. That would only stifle the debate."); Fletcher v. San Jose Mercury News, 264 Cal. Rptr. 699, 709 (Cal. Ct. App. 1989).

These writers candidly admit that meaningful and unflinching scrutiny will often be unfair and even hurtful for those who undergo its intense heat. Nevertheless, it is these writers's conviction that, in spite of the discomforts and even injustices that the process sometimes occasions, ceaseless scrutiny is a necessary precondition to governmental and societal health.

[25] The need to shield the media from "chill" was a leitmotif of Justice Brennan's opinion for the Court in *Sullivan*. *See* LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW, § 12-12 at 863–64 (2d ed. 1988).

This same desire to minimize the possibility of a chilling effect on speech explains why so many courts have explicitly endorsed the use of the summary judgment mechanism by defendants in appropriate defamation cases. As District Judge Greene stated in a well-known defamation case: "Summary judgment is more appropriately granted in defamation actions than in other circumstances in order that the harassment that might otherwise chill essential First Amendment freedoms may be avoided." Dameron v. Wash. Magazine, Inc., 575 F. Supp. 1575, 1578 (D.D.C. 1983) (citation omitted), *aff'd*, 779 F.2d 736 (D.C. Cir. 1985); *see also* Farah v. Esquire Magazine, 736 F.3d 528, 534 (D.C. Cir. 2013) ("[T]his court has observed that summary proceedings are essential in the First Amendment area because if a suit entails 'long and expensive litigation,' then the protective purpose of the First Amendment is thwarted even if the defendant ultimately prevails."); Liberty Lobby, Inc. v. Rees, 852 F.2d 595, 601 (D.C. Cir. 1988) (affirming the grant of summary judgment); Wash. Post Co. v. Keogh, 365 F.2d 965, 968 (D.C. Cir. 1966) (Wright, J.) (emphasizing how essential summary judgment procedures are in the First Amendment area); Meeropol v. Nizer, 381 F. Supp. 29, 32 (S.D.N.Y. 1974) ("[T]he constitutional privilege mandates the granting of a motion for summary judgment as soon as it becomes clear that a plaintiff cannot establish the 'actual malice' required for recovery in defamation actions of this nature.") (footnote omitted); ELM Med. Lab. Inc. v. RKO Gen. Inc., 532 N.E.2d 675, 680 (Mass. 1989) ("Although the existence of actual malice raises a state-of-mind issue, summary judgment is still an appropriate method for resolving claims when a plaintiff has

failed to present evidence from which the motion judge could draw an inference of actual malice . . . . As this court has noted, summary judgment may be desirable in defamation cases to protect First Amendment rights, as the 'costs of litigation may induce an unnecessary and undesirable self-censorship.'") (citations omitted); *see generally Libel and Press Self-Censorship*, *supra* note 11, at 456–47.

The following statement by then-Circuit Judge Kavanaugh writing for a unanimous panel in the case of *Kahl v. Bureau of Nat'l Affairs, Inc.*, merits quotation in this context:

> The First Amendment guarantees freedom of speech and freedom of the press. Costly and time-consuming defamation litigation can threaten those essential freedoms. To preserve First Amendment freedoms and give reporters, commentators, bloggers, and tweeters (among others) the breathing room they need to pursue the truth, the Supreme Court has directed courts to expeditiously weed out unmeritorious defamation suits. (Citations omitted.)

856 F.3d 106, 109 (D.C. Cir. 2017)

It is one of our primary contentions that the plaintiff's status in a defamation action should be resolved as early as possible. Whether the operative standard is to be actual malice or negligence will, in virtually all instances, have a crucial bearing on all aspects of the trial. *See, e.g.*, Rebozo v. Wash. Post Co., 637 F.2d 375, 379 (5th Cir. 1981) ("Even if summary judgment were improper because of issues of fact that could only be resolved after evidentiary hearing, the trial court, not a jury, must determine whether the evidence showed that plaintiff was a public figure.") (citation omitted); Miller v. Transamerican Press, Inc., 621 F.2d 721, 724 (5th Cir.) ("In a defamation case, the question of public figure status is pervasive, and it should be answered as soon as possible."), *modified*, 628 F.2d 932 (5th Cir. 1980) (per curiam) (supplementing opinion with a paragraph irrelevant to the public figure issue).

It is essential that the public figure issue be decided at the earliest possible moment—through a pretrial evidentiary hearing if need be. Just as equity abhors a forfeiture, the judicial system abhors a waste of time; and it would indeed be a waste of time (and a costly endeavor) to litigate a defamation case to its conclusion in the trial court only to have the appellate court conclude that the case had been tried pursuant to an incorrect standard (i.e., negligence rather than actual malice). Accordingly, it is our view that the public figure issue must be resolved at the very latest before a trial begins.

There are sometimes instances where a court determines that it is unable to rule on a motion for summary judgment as to the public figure issue at an early pre-trial stage, but later determines that, given an expanded record, it is then in a position to rule on that issue. *See, e.g.*, Mandel v. Bos. Phx., Inc., 456 F.3d 198, 204 (1st Cir. 2006) ("[T]here are cases in which 'it may not be possible to resolve the [public-figure] issue until trial.'"(quoting *Miller*, 621 F.2d at 724); Bruno & Stillman, Inc. v. Globe Newspaper Co., 633 F.2d 583, 592 (1st Cir. 1980) ("We therefore conclude that the Globe has not, on this limited record, met its burden of establishing that the company is a public figure. Its motion to dismiss was improperly granted. This is not to say that under no circumstances could the Globe meet that burden. On remand it is not foreclosed from attempting to introduce additional evidence to satisfy the standard."); Bank of Or. v. Indep. News, Inc., 696 P.2d 1095, 1096 (Or. 1985) (per curiam) (en banc) (denying petition for rehearing, but leaving the public figure issue open on remand); *see also* Hill v. Evening News Co., 715 A.2d 999, 1006 (N.J. Sup. Ct. App. Div. 1998) (reversing summary judgment entered in favor of defendant news company and remanding the case to the trial court for further proceedings to resolve the public figure issue and to decide whether defendants are entitled to summary judgment).

media to be more timorous in their legitimate and vital role of scrutinizing those persons, entities, and activities which so very much need to be scrutinized. For if the media feel any meaningful degree of "chill," or are uncertain[26] as to which particular persons and institutions a court will ultimately declare to be public figures,[27] it follows as the night follows the day that the media will be unsure as to whether or not they will be able to avail themselves of the protections provided by the Constitution's freedom of speech and freedom of the press clauses. If such uncertainty is the result, as it so often will be, it is inevitable that society will be the ultimate victim of the consequent absence of unflinching scrutiny.[28] In view of these

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[26] *See Harte-Hanks*, 491 U.S. at 686 ("Uncertainty as to the scope of the constitutional protection can only dissuade protected speech—the more elusive the standard, the less protection it affords."); Greenbelt Coop. Publ'g Ass'n v. Bresler, 398 U.S. 6, 12 (1970) ("Because the threat or actual imposition of pecuniary liability for alleged defamation may impair the unfettered exercise of these First Amendment freedoms, the Constitution imposes stringent limitations upon the permissible scope of such liability.").

[27] An intrinsically related issue is that of determining what is a public controversy, a term discussed in *Gertz* and addressed in more detail later in this article. The District of Columbia Circuit succinctly stated in its much-cited *Waldbaum* decision that a "limited-purpose public figure is an individual (who) voluntarily injects himself or is drawn into a particular public controversy and therefore becomes a public figure for a limited range of issues." Waldbaum v. Fairchild Publ'ns, Inc., 627 F.2d 1287, 1292 (D.C. Cir. 1980) (quoting *Gertz*, 418 U.S. at 351). Thus, the determination as to public figure status depends on "the nature and extent of an individual's participation in the particular controversy giving rise to the defamation." *Id.* (quoting *Gertz*, 418 U.S. at 352). As will be discussed later in this article, when it is necessary for journalists to determine whether a person or entity is a public figure, they should have access to clear and easily understandable criteria as to what is and what is not a "public controversy."

This article will advocate for a rejection of the notion that limited-purpose public figures are *only* those who have chosen to actively thrust themselves into public controversies, and it will further advocate for a significantly broader understanding of what constitutes a "public controversy."

[28] *See* Time, Inc. v. Hill, 385 U.S. 374, 389 (1967) ("Fear of large verdicts in damage suits for innocent or merely negligent misstatement, even fear of the expense involved in their defense, must inevitably cause publishers to steer . . . wider of the unlawful zone and thus create the danger that the legitimate utterance will be penalized.") (internal quotation marks and citations omitted; ellipsis in original); Carr v. Forbes, Inc., 259 F.3d 273, 283 (4th Cir. 2001) ("Were the press subject to suit every time it erred, it would decline to speak out without resorting to the sort of cumbersome due diligence common in security offerings."); Time, Inc. v. McLaney, 406 F.2d 565, 566 (5th Cir. 1969) (reversing, on interlocutory appeal, the denial of summary judgment and stating that "the failure to dismiss a libel suit might necessitate long and expensive trial proceedings, which, if not really warranted, would themselves offend the principles enunciated in Dombrowski v. Pfister, 380 U.S. 479, because of the chilling effect of such litigation") (parallel citations omitted); *see generally* Marc A. Franklin, *Constitutional Libel Law: The Role of Content*, 34 UCLA L. REV. 1657, 1667 (1987) ("As matters now stand, it is increasingly difficult for editors or publishers, or their lawyers, to predict whether a court will determine a plaintiff to be public or private.

considerations, it is imperative that the media be afforded sufficient "breathing space" in order to function effectively.

I. THE *SULLIVAN* DECISION

In order to afford the media a substantial degree of "breathing space," the Supreme Court in its seminal opinion in the *Sullivan* case[29] introduced a standard to be applied in defamation actions involving public officials and, eventually, public figures—the actual malice standard.[30] This standard

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This difficulty might not be so serious if so much were not riding on the decision."); *Libel and Press Self-Censorship*, *supra* note 11, at 436 ("It is the magnitude of [the] financial burden, more than any other factor, that makes libel a threat to the press today."); Gregory Douglas Porter, *Self-Censorship After Herbert v. Lando: The Need for Special Pre-Trial Procedure in Defamation Action*, 58 N.C. L. REV. 1025, 1034 (1980) ("[L]egal fees and other pre-trial litigation costs raise the ante for the enterprising journalist or news medium that prints a controversial story.") (footnote omitted).

[29] N.Y. Times Co. v. Sullivan, 376 U.S. 254 (1964). Justice Brennan, writing for the Court in *Sullivan*, referred to "a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open . . . ." *Id.* at 270. The First Circuit in *Pendleton v. City of Haverhill*, 156 F.3d 57, 66–67 (1st Cir. 1998), described the evolution of the *Sullivan* principles at the Supreme Court level up to and including the opinion in *Gertz*. *See generally* Frederick W. Schauer, *Fear, Risk and the First Amendment: Unraveling the "Chilling Effect"*, 58 B.U. L. REV. 685, 709 (1978) ("The [*Sullivan*] decision is, at bottom, a finding that an erroneous penalization of a publisher is more harmful than a mistaken denial of a remedy for an injury to reputation.") (footnote omitted).

[30] It is no easy task to explain in a few words just what the term "actual malice" connotes. A public figure plaintiff cannot prevail in a defamation case absent a showing by clear and convincing evidence that the allegedly defamatory statement at issue was made with actual malice. *Sullivan*, 376 U.S. at 279–80; *see Harte-Hanks*, 491 U.S. at 686 ("The meaning of terms such as 'actual malice'—and, more particularly, 'reckless disregard'—however, is not readily captured in 'one infallible definition.'"). The Court in *Sullivan* required the plaintiff to prove that the defamatory publication "was made with knowledge that it was false or with reckless disregard of whether it was false or not." 376 U.S. at 279–80. However, the Court in *Sullivan* did not expound upon the elusive notion of "reckless disregard." It should be borne in mind that "the actual malice standard is subjective." McFarlane v. Sheridan Square Press, Inc., 91 F.3d 1501, 1508 (D.C. Cir. 1996) ("The actual malice standard is subjective; the plaintiff must prove that the defendant actually entertained a serious doubt."); *see also* Jankovic v. Int'l Crisis Grp., 822 F.3d 576, 589 (D.C. Cir. 2016) ("[I]t is not enough to show that defendant should have known better; instead, the plaintiff must offer evidence that the defendant in fact harbored subjective doubt."). *See generally* Deven R. Desai, *Speech, Citizenry, and the Market: A Corporate Public Figure Doctrine*, 98 MINN. L. REV. 455, 497 (2013) (summarizing the scope and effect of the actual malice concept in the law of defamation); Joel D. Eaton, *The American Law of Defamation Through* Gertz v. Robert Welch, Inc. *and Beyond: An Analytical Primer*, 61 VA. L. REV. 1349, 1370–74 (1975) (discussing the confusing nature of the term "actual malice").

The Supreme Court expressly acknowledged that, when actual malice is the operative standard of review, the result will be that some erroneous speech will result. *See* St. Amant

affords members of the media the breathing space that has been recognized as being "necessary to avoid a chilling effect on constitutionally valuable speech, a matter of critical importance to our democratic system."[31]

It is virtually impossible to overstate the groundbreaking nature of the principles outlined in *Sullivan*. Those principles gave birth to greater

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v. Thompson, 390 U.S. 727, 732 (1968). Incurring that risk is necessary to ensure effective scrutiny. *Id.* ("[T]o insure the ascertainment and publication of the truth about public affairs, it is essential that the First Amendment protect some erroneous publications as well as true ones.").

Just as summary judgment is the preferred means for resolving the public figure issue, so too should it be the procedural tool of choice with respect to the actual malice issue. Where actual malice is the operative standard, the defendant has the "initial burden on summary judgment [of] presenting colorable evidence that [defendant] did not act with actual malice." Hammer v. Slater, 20 F.3d 1137, 1142 (11th Cir. 1994); *see also* Bon Air Hotel, Inc. v. Time, Inc., 426 F.2d 858, 864–65 (5th Cir. 1970) (holding that summary judgment was correctly granted for the defendant because of insufficient evidence of actual malice and stating that "it is clear that, where a publication is protected by the [*Sullivan*] immunity rule, summary judgment, rather than trial on the merits, is a proper vehicle for affording constitutional protection in the proper case."). Furthermore, it is a question of law appropriately addressed by a judge and not a jury. *See Harte-Hanks*, 491 U.S. at 685 ("The question whether the evidence in the record in a defamation case is sufficient to support a finding of actual malice is a question of law.") (citing Bose Corp. v. Consumers Union of U.S. Inc., 466 U.S. 485, 510–11 (1984)); *see also* Cobb v. Time, Inc., 278 F.3d 629, 637 (6th Cir. 2002).

The ultimate burden that the defamation plaintiff must bear when actual malice is the operative standard is a heavy one. *See* Moffatt v. Brown, 751 P.2d 939, 941 (Alaska 1988) ("The actual malice standard is a difficult one to satisfy. Not only is the burden of proof on the plaintiff to show actual malice by *clear and convincing evidence*, but also, the standard is a subjective one."); *see also Harte-Hanks*, 491 U.S. at 659 ("A public figure may not recover damages for a defamatory falsehood without clear and convincing proof that the false statement was made with actual malice—that is, with knowledge that it was false or with reckless disregard of whether it was false or not.") (internal quotation marks omitted); Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255–56 (1986); Phila. Newspapers, Inc. v. Hepps, 475 U.S. 767, 773 (1986); McFarlane v. Esquire Magazine, 74 F.3d 1296, 1308 (D.C. Cir. 1996) ("The standard of actual malice is a daunting one."); Hotchner v. Castillo-Puche, 551 F.2d 910, 913 (2d Cir. 1977); *see generally* Lackland H. Bloom, Jr., *Proof of Fault in Media Defamation Litigation*, 38 VAND. L. REV. 247, 255–56 (1985).

[31] Marcone v. Penthouse Int'l Magazine for Men, 754 F.2d 1072, 1081 (3d Cir. 1985); *see also* Tavoulareas v. Piro, 817 F.2d 762, 771 (D.C. Cir. 1987) (en banc) (reading *Sullivan* as reflecting the Supreme Court's recognition that, inherent within the freedoms of speech and press guaranteed by the First Amendment, there is "a demand that writers and speakers enjoy enough 'breathing space' to avoid self-censorship and encourage 'debate on public issues [that is] uninhibited, robust, and wide open'" (quoting *Sullivan*, 376 U.S. at 270)); Brewer v. Memphis Publ'g Co., 626 F.2d 1238, 1251 (5th Cir. 1980) ("The Supreme Court in [*Sullivan*] emphasized this nation's profound historical commitment to robust debate on political issues, especially press criticism of the stewardship of public officials, and found that the constitution required a public official plaintiff to prove 'malice' in a libel action in order to allow sufficient breathing space for such criticism.").

protection for the media as they carry out their crucial role as agents of scrutiny. The Court in *Sullivan* was rather Delphic as to just what "actual malice" means, saying simply that it is equivalent to publishing "with knowledge that it was false or with reckless disregard of whether it was false or not."[32]

In *Sullivan*, the Court focused on allegedly defamatory statements made about a public official acting in his official capacity.[33] The Court concluded that, in accordance with its understanding of the plain language of the Constitution, the First Amendment requires that speech about public officials acting in their official capacity receive a heightened degree of protection.[34]

II. THE *CURTIS PUBLISHING* DECISION

In *Curtis Publishing Co. v. Butts*,[35] the Supreme Court significantly expanded the scope of this new rule, requiring that allegedly defamatory

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[32] 376 U.S. at 279–80 (footnotes omitted) (citing with approval Coleman v. MacLennan, 78 Kan. 711, 98 P. 281 (1908)); *see* John Bruce Lewis & Bruce L. Ottley, New York Times v. Sullivan *at 50: Despite Criticism, The Actual Malice Standard Still Provides "Breathing Space" for Communications in the Public Interest*, 64 DEPAUL L. REV. 1, 22–24 (2014).

[33] 376 U.S. at 256.

[34] *Id.* at 283.

[35] Curtis Publ'g Co. v. Butts, 388 U.S. 130, 155 (1967). The application of the principles set forth in *Sullivan* to public figures as effected by the Court in *Curtis Publishing* was anything but a bolt from the blue; there was a certain inevitability about it. *See* Harry Kalven, Jr., *The New York Times Case: A Note on "The Central Meaning of the First Amendment"*, 1964 SUP. CT. REV. 191, 221 (1964) ("It is not easy to predict what the Court will see in the *Times* opinion as the years roll by. It may regard the opinion as covering simply one pocket of cases, those dealing with libel of public officials, and not destructive of the earlier notions that are inconsistent only with the larger reading of the Court's action. But the invitation to follow a dialectic progression from public official to government policy to public policy to matters in the public domain, like art, seems to me to be overwhelming."); *see generally* Melville B. Nimmer, *The Right to Speak from Times to Time: First Amendment Theory Applied to Libel and Misapplied to Privacy*, 56 CAL. L. REV. 935, 953–54 (1968) ("[T]he *Curtis* [*Publishing*] extension to persons who are public figures but not public officials is certainly consonant with the fundamental objectives of the first amendment. Those objectives require full and free discussion of public issues. Since discussion of public issues cannot be meaningful without reference to [those] involved on both sides of such issues, and since [they] will not necessarily be public officials, one cannot but agree that the Court was right in *Curtis Publishing* to extend the [*Sullivan*] rule to all public figures.") (footnotes omitted). For example, in *Time, Inc. v. Hill*, an invasion of privacy case, the Supreme Court had explicitly stated that "[t]he guarantees for speech and press are not the preserve of political expression or comment upon public affairs, essential as those are to healthy government." 385 U.S. 374, 388 (1967). The Court went on to quote with approval the following ringing language from an earlier case: "Freedom of discussion, if it would fulfill its historic function in this nation, must embrace all issues about which

statements made about "persons who are not public officials, but who are '*public figures*,'" would be afforded identical First Amendment protection—that is, the actual malice standard would also apply to allegedly defamatory statements made about them, just as that standard applies when allegedly defamatory statements are made about public officials.[36]

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information is needed or appropriate to enable the members of society to cope with the exigencies of their period." *Id.* (quoting Thornhill v. Alabama, 310 U.S. 88, 102 (1940)); *see also* Jeffrey Omar Usman, *Finding the Lost Involuntary Public Figure*, 2014 UTAH L. REV. 951, 983 (2014) ("Protected speech could also, for example, be related to economic, religious, or cultural matters because First Amendment protections embrace a right of the public to receive suitable access to social, political, esthetic, moral, and other ideas and experiences. In fact, in recent years the non-political entertainment-related speech issues that have been before the Supreme Court have been so pronounced in terms of their 'sheer volume, [that] . . . media entertainment speech seems to be subtly changing the cultural backdrop of the First Amendment, relegating political speech to a subordinate level within the general cultural awareness,' though the actual importance of political speech is undiminished.") (footnotes and citations omitted); Eaton, *supra* note 30, at 1390.

In earlier cases, there had been adumbrations of the principles that would eventually be endorsed by the Supreme Court in *Curtis Publishing*. *See, e.g.*, Pauling v. Globe-Democrat Publ'g Co., 362 F.2d 188, 196 (8th Cir. 1966) ("The application of the [*Sullivan*] principle seems to be an expanding and not a restricting one . . . ."); Haas v. Evening Democrat Co., 107 N.W.2d 444, 448 (Iowa 1961) (holding that an otherwise ordinary private citizen who vigorously opposed a proposed construction project was required to prove actual malice and stating that "[t]he plaintiff was so evidently engaged here in a public controversy that no question should arise but that comment and criticism were permitted; in fact invited.").

[36] *Curtis Publ'g*, 388 U.S. at 134 (emphasis added); *see also* Harte-Hanks Commc'ns, Inc. v. Connaughton, 491 U.S. 657, 666 (1989) ("Today, there is no question that public figure libel cases are controlled by the [*Sullivan*] standard . . . .").

The history of the expansion of the principles articulated in *Sullivan* to non-official public figures in *Curtis Publishing* is succinctly summarized in *Lluberes v. Uncommon Prods., LLC*, 663 F.3d 6, 12 (1st Cir. 2011). *See also* Joseph H. King, Jr., Deus ex Machina *and the Unfulfilled Promise of* New York Times v. Sullivan*: Applying the* Times *for All Seasons*, 95 KY. L.J. 649, 661 n.55 (2007) [hereinafter King, Jr., *Unfulfilled Promise*] (explaining the voting pattern in *Curtis Publishing*, which resulted in the holding as to the applicability to public figures of the actual malice standard that was first propounded in *Sullivan*); Usman, *supra* note 35, at 962–67; Joseph H. King, *Whither the "Paths of Glory: The Scope of the New York Times Rule in Defamation Claims by Former Public Officials and Candidates*, 38 VT. L. REV. 275, 282, n.31 (2013) [hereinafter King, *Paths of Glory*]; Eaton, *supra* note 30, at 1393 n.183.

We consider the following perceptive words from Chief Justice Earl Warren's concurring opinion in *Curtis Publishing* to constitute especially helpful guidance as we undertake to bring increased clarity and precision to the often fog-shrouded subject of the limited-purpose public figure:

> To me, differentiation between "public figures" and "public officials" and adoption of separate standards of proof for each have no basis in law, logic, or First Amendment policy. Increasingly in this country, the distinctions between governmental and private sectors are blurred. . . . This blending of positions and power has also occurred in the

III. THE *GERTZ* DECISION

The goal of those who wish to maximize scrutiny of the persons and entities that deserve to be scrutinized ought to be the formulation of workable criteria that will make it substantially easier for journalists, their editors, and their advisors to predict in advance, with a high degree of confidence, whether the person or entity that they wish to subject to scrutiny will be deemed a public figure.

In an attempt to provide guidance to the media and others who opt to address situations in which they could invoke such constitutional protections, the Supreme Court in its 1974 *Gertz* opinion established two categories of public figures:[37] (1) all-purpose public figures; and (2) limited-purpose public figures.[38] All-purpose public figures are those

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> case of individuals so that many who do not hold public office at the moment are nevertheless intimately involved in the resolution of important public questions or, by reason of their fame, shape events in areas of concern to society at large.

Curtis Publ'g, 388 U.S. at 163–64; *see also* Thomas v. Collins, 323 U.S. 516, 531 (1945) ("[T]he rights of free speech and a free press are not confined to any field of human interest.").

The problem which is the principal focus of this article is that the issue of who is and who is not a public figure continues to be shrouded in uncertainty. *See* Rosanova v. Playboy Enters., Inc., 580 F.2d 859, 861 (5th Cir. 1978) ("[T]he public figure concept has eluded a truly working definition . . . ."); Harris v. Tomczak, 94 F.R.D. 687, 697 (E.D. Cal. 1982) ("[A] fundamental problem in the resolution of libel cases is the failure of the Supreme Court to provide an adequate definition of the term 'public figure.'"); *see also* King, Jr., *Unfulfilled Promise*, *supra* note 36 at 661 ("From the start, [the *Sullivan*] sequelae have come in tentative and uncertain steps, and increasingly appear as chaotic groping for direction beset by increasing legal complexity."); Alex B. Long, *The Lawyer as Public Figure for First Amendment Purposes*, 57 B.C. L. REV. 1543, 1544 (2016) ("Although the basic rule from [*Sullivan*] is well established, it is widely acknowledged that the focus on whether an individual qualifies as a public figure often yields unpredictable results.") (footnote omitted).

[37] This article will focus on the second category of public figures described by the Supreme Court in *Gertz* —viz., the limited-purpose public figure.

For the purposes of this article, we do not believe it necessary to dwell extensively on the distinction between general-purpose public figures and limited-purpose public figures. If a particular defamation plaintiff is classified as a general-purpose public figure, *a fortiori* reasoning would lead to the ineluctable conclusion that said plaintiff would necessarily be at least a limited-purpose public figure. *See* Michael Hadley, *The* Gertz *Doctrine and Internet Defamation*, 84 VA. L. REV. 477, 489 (1998) ("General purpose public figures . . . are required to prove actual malice for virtually any subject of defamation. Limited purpose public figures are those who have assumed prominence for a limited time or on a limited range of issues; the [*Sullivan*] privilege applies only to speech involving that limited range." (footnotes omitted)).

[38] *See Lluberes*, 663 F.3d at 13 ("Gertz contemplated that public-figure status usually would arise in one of two ways, each with different repercussions." (citing *Gertz*, 418 U.S. at

individuals who "occupy positions of such persuasive power and influence that they are deemed public figures for all purposes."[39] In contrast, limited-purpose public figures are those who have "thrust [themselves] into the . . . forefront of particular public controversies in order to influence the resolution of the issues involved."[40] As such, First Amendment protections will extend to the media when they publicly comment on individuals that fall into one of these two categories.

In *Gertz*,[41] Elmer Gertz, a reputable and well-known attorney, was the subject of an allegedly defamatory article published in the wake of his role as plaintiff's attorney in a civil action filed on behalf of the family of a murder victim. More important than the majority's ultimate holding that attorney Gertz was a private figure,[42] which is problematic in our view, was the majority's articulation of somewhat amorphous criteria designed to provide guidance as to who is and who is not a public figure.

Journalists, their editors, and their legal advisors have no choice but to acknowledge the general definitional criteria enunciated by the Supreme Court majority in *Gertz*, as well as that Court's specific holding with respect to the private figure status of the plaintiff in that case.[43] It must be noted, however, that this particular opinion can be said to be the source of subsequent confusion with respect to the public figure definitional issue.[44] It

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351)); Tavoulareas v. Piro, 817 F.2d 762, 772 (D.C. Cir. 1987) (en banc); Wayment v. Clear Channel Broad., Inc., 116 P.3d 271, 279–80 (Utah 2005); *see also* Medure v. N.Y. Times Co., 60 F. Supp. 2d 477, 484 (W.D. Pa. 1999); Long, *supra* note 36, at 1550.

[39] *Gertz*, 418 U.S. at 345.

[40] *Id.*

[41] It is generally recognized that *Gertz* does not reflect the same liberating spirit as did *Sullivan*. *See, e.g.*, James J. Brosnahan, *From* Times v. Sullivan *to* Gertz v. Welch: *Ten Years of Balancing Libel Law and the First Amendment*, 26 HASTINGS L.J. 777, 789–90 (1975) ("Since the defamatory allegation in *Gertz* involved a matter of considerable public concern—the existence of a national conspiracy to discredit the police—the majority opinion in *Gertz* represents a significant retreat from the *New York Times* commitment to free and open debate on *public issues*.").

[42] *See* Hotchner v. Castillo-Puche, 404 F. Supp. 1041, 1044 (S.D.N.Y. 1975) (describing the various activites and affiliations of attorney Gertz and then commenting: "Perhaps if attorney Gertz was not a public figure, nobody is.") (footnote omitted).

[43] We view as laudable the efforts of many courts to interpret the criteria set forth in *Gertz* in a broad manner—so as to maximize the degree of protection that the actual malice standard affords to the media and to others engaged in the crucial process of conducting scrutiny.

[44] Professor Usman has employed memorable metaphorical language in describing what he considers to be the erosion of the *Gertz* structure: "Like a beautifully crafted sandcastle built too close to the shore, these categorical distinctions have been hit by successive waves of First Amendment pressure that have taken a toll on the edifice. The categorical lines and rationales advanced in *Gertz* are worn and rounded. Rather than becoming clearer over time through courts' application of the *Gertz* framework, the categories have become more

is our contention that it is both erroneous and perilous to view the Court's 1974 opinion in *Gertz* as being the only appropriate reference point when addressing the public figure issue.[45]

IV. UNCERTAINTY IN THE WAKE OF *GERTZ*

In the wake of the Supreme Court's opinion in *Gertz*, various formulaic "tests" have been set forth by both federal and state courts to further guide the determination of who is and who is not a limited-purpose public figure. The formulations, though differing slightly, generally focus on: (1) whether there was a pre-existing public controversy relative to the subject of the publication or broadcast at issue; and (2) whether the plaintiff had played a sufficiently significant role in that controversy.[46]

We submit that the present criteria are inadequate for making consistent journalistic decisions regarding public figure status; there is still simply too much uncertainty with respect to which persons and entities will be deemed to be public figures, and uncertainty necessarily discourages the journalist.[47]

In order for the actual malice standard to apply, the defendant in a defamation action must first persuade the court that the plaintiff was, at the time of the allegedly defamatory publication or broadcast, a public figure.[48]

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confused, unsettled, and variant." Usman, *supra* note 35, at 975 (footnote omitted).

[45] *See* Hustler Magazine, Inc. v. Falwell, 485 U.S. 46, 50 (1988); Phila. Newspapers, Inc. v. Hepps, 475 U.S. 767 (1986). Also noteworthy is the apparent evolution at the Supreme Court level away from reliance on the "public controversy" expression used in *Gertz* in favor of the broader term "public interest." Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749, 766 (1985) (resting the analysis on the term"public interest" rather than "public controversy").

[46] Waldbaum v. Fairchild Publ'ns, Inc., 627 F.2d 1287, 1292 (D.C. Cir. 1980) ("A person has become a public figure for limited purposes if he is attempting to have, or realistically can be expected to have, a major impact on the resolution of a specific public dispute that has foreseeable and substantial ramifications for persons beyond its immediate participants."); *see also* Mangual v. Rotger-Sabat, 317 F.3d 45, 66 (1st Cir. 2003); Clyburn v. News World Commc'ns, Inc., 903 F.2d 29, 31 (D.C. Cir. 1990).

[47] *See, e.g.*, *Mangual*, 317 F.3d at 66.

[48] Foretich v. Capital Cities/ABC, Inc., 37 F.3d 1541, 1553 (4th Cir. 1994) (noting the court's "initial presumption that the defamation plaintiff is a private individual" and then noting "the defendant's burden of proving that the plaintiff is a public figure to whom the [*Sullivan*] standard applies."); Bruno & Stillman, Inc. v. Globe Newspaper Co., 633 F.2d 583, 592 (1st Cir. 1980); Reliance Ins. Co. v. Barron's, 442 F. Supp. 1341, 1346 (S.D.N.Y. 1977) ("Whether one is a public figure presents a mixed question of fact and law as to which defendants have the burden of persuasion."); Eramo v. Rolling Stone, LLC, 209 F. Supp.3d 862, 871 (E.D. Va. 2016) ("[T]he court's analysis of the five requirements for limited-public figure status, and its overall review of the record, lead to the conclusion that defendants have met their burden of establishing that, at the time of publication, Eramo warranted the limited-public figure designation."); Coronado Credit Union v. KOAT Television, Inc., 656

Once the court determines that the plaintiff was a public figure, the defendant will benefit from the actual malice standard, which protects the defendant from liability arising as a result of allegedly defamatory statements made about the public figure or public official. For that privilege to be overcome, the plaintiff in such a defamation case must bear the rather daunting burden of proving, by clear and convincing evidence,[49] that the defendant's allegedly defamatory statements were made with actual malice—that is, "with knowledge that [they were] false or with reckless disregard of whether [they were] false or not."[50] It should be noted that this standard is a high one[51] and is one which was intended to "avoid violating the free expression protections the First Amendment affords."[52] If the trial court concludes that a particular defendant, whether public official or public figure, did in fact make defamatory statements about the plaintiff with actual malice, it becomes the role of the appellate court to conduct a *de*

P.2d 896, 903 (N.M. Ct. App. 1982) ("A defendant has the burden of persuasion on [the public figure] issue by a preponderance of the evidence."); *see also* Penobscot Indian Nation v. Key Bank of Me., 112 F.3d 538, 562 n.31 (1st Cir. 1997). Later we propose that the presumption should be precisely the opposite—namely, that plaintiffs in defamation cases should be presumed to be public figures with the burden being on such plaintiffs to prove, if they choose, that they should be classified as private figures.

[49] Gertz v. Robert Welch, Inc., 418 U.S. 323, 342 (1974); *see also* Flowers v. Carville, 310 F.3d 1118, 1130 (9th Cir. 1992); Rodney A. Smolla, *Dun & Bradstreet, Hepps, and Liberty Lobby: A New Analytic Primer on the Future Course of Defamation*, 75 GEO. L.J. 1519, 1531 (1987).

[50] N.Y. Times Co. v. Sullivan, 376 U.S. 254, 279–80 (1964).

[51] *See Bruno & Stillman*, 633 F.2d at 586 (recognizing "the almost decisive amplitude" of the breathing space within which journalists (and others) operate in situations to which the *Sullivan* "actual malice" standard is applicable); *see also* Phila. Newspapers, Inc. v. Hepps, 475 U.S. 767, 775 (1986) ("When the speech is of public concern and the plaintiff is a public official or public figure, the Constitution clearly requires the plaintiff to surmount a much higher barrier before recovering damages from a media defendant than is raised by the common law."); Tavoulareas v. Piro, 817 F.2d 762, 797 (D.C. Cir. 1987) (en banc); Ryan v. Brooks, 634 F.2d 726, 733 (4th Cir. 1980); Amanda Goover Hyland, *The Taming of the Internet: A New Approach to Third-Party Internet Defamation*, 31 HASTINGS COMM. & ENT. L.J. 79, 91 (2008).

It should nevertheless be noted that "actual malice" protection is not the equivalent of absolute immunity. *See, e.g.*, Harte-Hanks Commc'ns, Inc. v. Connaughton, 491 U.S. 657, 688 (1989) ("We have not gone so far . . . as to accord the press absolute immunity in its coverage of public figures . . . ."); McKimm v. Ohio Elections Comm'n, 729 N.E.2d 364, 373 (Ohio 2000) ("[T]he actual-malice standard is not an impenetrable shield for the benefit of those who engage in false speech about public figures."); *see also* Celle v. Filipino Reporter Enters., Inc., 209 F.3d 163, 185–91 (2d Cir. 2000) (holding that two of the articles in question were published with actual malice); Murphy v. Bos. Herald, Inc., 865 N.E.2d 746, 753 (Mass. 2007).

[52] Faxon v. Mich. Republican St. Cent. Comm., 624 N.W.2d 509, 512 (Mich. Ct. App. 2001).

novo review in order to determine whether there was sufficient evidence of actual malice.[53] The determination as to whether the evidence is sufficient to support a finding of actual malice is a question of law for the courts to decide.[54] Moreover, the actual malice issue is often susceptible to disposition by summary judgment.[55]

The reason for including the provisions concerning freedom of speech and of the press in the First Amendment was to guarantee uninhibited speech about the workings of government and about political matters in general.[56] However, the inherent reach of the First Amendment's protections has been vastly extended through judicial interpretation over the years.[57] This extension is most visible in the cases following the Supreme Court's 1964 decision in *Sullivan*.

At least since the time of the *Sullivan* decision,[58] the First Amendment has consistently been interpreted as implicitly mandating that the media be

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[53] Bose Corp. v. Consumers Union of U.S., Inc., 466 U.S. 485, 508 (1984); Horne v. WTVR, LLC, 893 F.3d 201, 210–11 (4th Cir. 2019) ("This Court . . . reviews whether there was sufficient evidence of 'actual malice' de novo.") (citing *Harte-Hanks*, 491 U.S. at 685); Carr v. Forbes, Inc., 259 F.3d 273, 278 (4th Cir. 2001); Levinsky's, Inc. v. Wal-Mart Stores, Inc., 127 F.3d 122, 127 (1st Cir. 1997).

[54] *Harte-Hanks*, 491 U.S. at 685 ("The question whether the evidence in the record in a defamation case is sufficient to support a finding of actual malice is a question of law."); *see also Bose Corp.*, 466 U.S. at 510 (noting that the "requirement of independent appellate review . . . is a rule of federal constitutional law . . . .").

[55] *See* Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986); *see also* Smolla, *supra* note 49, at 1531 (stating that, in *Anderson*, "[t]he Court held that there is no genuine issue if the evidence brought forward in the opposing affidavits is 'of insufficient caliber or quantity to allow a rational finder of fact to find actual malice by clear and convincing evidence.'").

[56] *See, e.g.*, Douglass v. Hustler Magazine, Inc., 769 F.2d 1128, 1141 (7th Cir. 1985) ("[F]reedom of political speech, and in particular freedom to criticize government officials and aspirants to public office, was the original concern of the First Amendment.").

[57] *See, e.g.*, Time, Inc., v. Hill, 385 U.S. 374, 388 (1967) ("The guarantees for speech and press are not the preserve of political expression or comment upon public affairs . . . .").

[58] Since this article will advocate for a liberalization of some of the presently operative First Amendment-based principles in the law of defamation, we urge the reader from the outset to be mindful of what might be characterized as the slow-release effect of the far-reaching constitutional principles outlined in *Sullivan*. *See Levinsky's, Inc.*, 127 F.3d at 127 ("The seeds sown in [*Sullivan*] have blossomed over the years, giving rise to a crop of checks on the sweep of state defamation law."); *see also* Ollman v. Evans, 750 F.2d 970, 995 (D.C. Cir. 1984) (Bork, J., concurring) ("[W]e have a judicial tradition of a continuing evolution of doctrine to serve the central purpose of the first amendment."); Harry Kalven, Jr., *The Reasonable Man and the First Amendment: Hill, Butts, and Walker*, 1967 SUP. CT. REV. 267, 269 (1967) (predicting that "judicial review of the common law of defamation, launched by the *New York Times* case, is to be with us for a while to come.") (footnote omitted).

It was only over time that American society and its courts became more fully aware of the deeper significance of the language contained in the venerable First Amendment. The

accorded considerable latitude so that they may engage in their critically important function of scrutinizing public figures. This need for latitude, or breathing space, derives from the recognition that, in order for the media to effectively carry out their scrutinizing function, they must be accorded a margin of error[59] before there should arise any concern about the possibility

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Sullivan decision itself can be viewed as a late-have-I-loved-thee realization by the Supreme Court of the fuller sense of the profound meaning and reach of the First Amendment. *See, e.g.*, Bridges v. California, 314 U.S. 252, 263 (1941) ("What finally emerges from the '[clear] and present danger' cases is a working principle that the substantive evil must be extremely serious and the degree of imminence extremely high before utterances can be punished. Those cases do not purport to mark the furthermost constitutional boundaries of protected expression, nor do we here.").

[59] One of the purposes of according the media such wide latitude is to provide journalists with the assurance that a mere erroneous statement, even though it be the product of negligence, will not subject them to immediate second-guessing by a jury. While the Supreme Court majority in *Gertz* reached a result as to the public figure issue that surely cannot be classified as liberal or expansive from the perspective of the media, the text of the opinion nevertheless reflects a real sensitivity to the danger of a perverse sort of jury activism regarding the right to engage in unpopular speech. *See* Gertz v. Robert Welch, Inc., 418 U.S. 323, 349 (1974) ("The largely uncontrolled discretion of juries to award damages where there is no loss unnecessarily compounds the potential of any system of liability for defamatory falsehood to inhibit the vigorous exercise of First Amendment freedoms. Additionally, the doctrine of presumed damages invites juries to punish unpopular opinion rather than to compensate individuals for injury sustained by the publication of a false fact.").

No undue disrespect of the jury system is intended when one notes that the courts are quite hesitant about according a determinative role to the jury when a decision must be made as to what standards to apply where such an important constitutional right is involved. *See, e.g.*, *Hill*, 385 U.S. at 406 (Harlan, J., concurring in part and dissenting in part) ("[I]n many areas which are at the center of public debate 'truth' is not a readily identifiable concept, and putting to the pre-existing prejudices of a jury the determination of what is 'true' may effectively institute a system of censorship. Any nation which counts the Scopes trial as part of its heritage cannot so readily expose ideas to sanctions on a jury finding of falsity."); Haynes v. Alfred A. Knopf, Inc., 8 F.3d 1222, 1234 (7th Cir. 1993) ("[I]n cases involving the rights protected by the speech and press clauses of the First Amendment the courts insist on firm judicial control of the jury."); *see also* Monitor Patriot Co. v. Roy, 401 U.S. 265, 276–77 (1971); Rosenblatt v. Baer, 383 U.S. 75, 88 n.15 (1966); Veilleux v. Nat'l Broad. Co., 206 F.3d 92, 106 (1st Cir. 2000); Newton v. Nat'l Broad. Co., 930 F.2d 662, 666 (9th Cir. 1990); Locricchio v. Evening News Ass'n, 476 N.W.2d 112, 125 n.20 (Mich. 1991). *See generally* David A. Anderson, *The Promises of* New York Times v. Sullivan, 20 ROGER WILLIAMS U. L. REV. 1, 3–4 (noting that *Sullivan* and other (largely procedural) Supreme Court decisions eventuated in a repudiation of the centuries-old belief that juries, not judges, were the best safeguard against abuses in libel law.") (footnote omitted) [hereinafter *The Promises*]; David A. Anderson, *First Amendment Limitations on Tort Law*, 69 BROOK. L. REV. 755, 764 (2004) (discussing the First Amendment theme of the general distrust of juries) [hereinafter *Limitations*]; HENRIK IBSEN, AN ENEMY OF THE PEOPLE 76 (1882) (tr. James W. McFarlane) (New York: Oxford University Press, 1961) ("The worst enemy of truth and freedom in our society is the compact majority.").

of costly litigation and potential liability resulting from allegedly defamatory statements about public figures.[60] Furthermore, from a societal perspective, the rationale for affording such latitude to the media is that citizens need as much information as possible about matters of public interest and concern[61] if they are to function intelligently and effectively.[62] Several decades ago, Justice Frank Murphy succinctly articulated this fundamental point in his opinion for the Supreme Court in the historically significant case of *Thornhill v. Alabama*:

> Freedom of discussion, if it would fulfill its historic function in this nation, must embrace all issues about which information is needed or appropriate *to enable the members of society to cope with the exigencies of their period.*[63]

Being able to cope with the exigencies of one's historical moment—that's what it is all about.[64] And those multi-faceted exigencies are at this point in our history as great, if not greater, than ever before.

We acknowledge that an inevitable result of allowing the sort of breathing space which the actual malice standard affords is that, regrettably,

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[60] *See* Hotchner v. Castillo-Puche, 551 F.2d 910, 913 (2d. Cir. 1977) (stating that, even when actual malice is the applicable standard, "[t]o ensure that proper weight has been given to the protection of first amendment rights, it is important that the court make an independent examination of the whole record in scrutinizing a jury finding of scienter in a libel case.") (internal quotation marks omitted); *see also* Carr v. Forbes, Inc., 259 F.3d 273, 283 (4th Cir. 2001) ("Were the press subject to suit every time it erred, it would decline to speak out without resorting to the sort of cumbersome due diligence common in security offerings. For this reason, the Constitution provides the press with a shield whereby it may be wrong when commenting on acts of a public figure, as long as it is not intentionally or recklessly so.").

[61] It is a basic contention of this article that the definitional parameters of what constitutes a public controversy should always be broad, with the benefit of any doubt going to defendants in defamation actions. *See* Jankovic v. Int'l. Crisis Grp., 822 F.3d 576, 586 (D.C. Cir. 2016) (commenting that "courts often define the public controversy in expansive terms.").

[62] *See Carr*, 259 F.3d at 278 ("A free self-governing people must have access to all relevant information—both the laudatory and the critical—when choosing a course of public policy."); Trotter v. Jack Anderson Enters., Inc., 818 F.2d 431, 434 (5th Cir. 1987).

[63] 310 U.S. 88, 102 (1940) (emphasis added). It is noteworthy that this language from *Thornhill* was quoted with approval by Justice Harlan in his important concurring opinion in *Curtis Publ'g Co. v. Butts*, 388 U.S. 130, 147 (1967).

[64] *See* Wiegel v. Capital Times, Co., 426 N.W.2d 43, 47 (Wis. Ct. App. 1988) ("[The] historic commitment to robust debate is based on the desire to ensure that the widest possible range of information, from diverse and sometimes antagonistic sources, and the fullest possible interchange of ideas, may be brought to bear on matters affecting the public interest."); *see also Hill*, 385 U.S. at 388 (quoting *Thornhill*, 310 U.S. at 102); Waldbaum v. Fairchild Publ'ns., Inc., 627 F.2d 1287, 1297 n.25 (D.C. Cir. 1980); Campbell v. Seabury Press, 614 F.2d 395, 397 (5th Cir. 1980); Chuy v. Phila. Eagles Football Club, 595 F.2d 1265, 1280 (3d Cir. 1979).

some false and hurtful speech will be published from time to time without there being legal liability.[65] However, it is a fundamental, constitutionally-derived principle that "[t]he First Amendment requires that we protect some falsehood in order to protect speech that matters."[66]

It is precisely for that reason that it is vital for every working journalist and editor to know *beforehand*, and with a rather high degree of certainty,[67] whether or not the focus of a story will be deemed to be a public figure if the eventual story should result in a claim of defamation.[68] A high degree of prior assurance as to the public figure issue provides journalists with guidance as to whether they will be afforded protection under the media-friendly actual malice standard, or whether the far more plaintiff-friendly negligence standard will apply.[69] Just as the batter in a baseball game

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[65] *See* Levinsky's, Inc. v. Wal-Mart Stores, Inc., 127 F.3d 122, 125 (1st Cir. 1997) ("Our enduring national devotion to freedom of expression, embodied in the First Amendment and renewed in [*Sullivan*] inevitably means that much offensive and inaccurate speech will remain free from legal constraints.").

[66] Gertz v. Robert Welch, Inc., 418 U.S. 323, 341 (1974); *Waldbaum*, 627 F.2d at 1291 ("From its earliest days, the law of defamation made the individual's interest in his reputation supreme. Beginning with [*Sullivan*], however, the Court recognized the hard reality that society must afford a certain amount of 'strategic protection' to defamatory statements to avoid chilling the dissemination of truth and opinions.") (quoting *Gertz*, 418 U.S. at 342).

[67] Just as the Supreme Court has required a high degree of certainty with respect to testimonial privileges in the law of evidence, it is our conviction that there should be a similar degree of certainty with respect to the public figure issue in the law of defamation. As to the first proposition, *see, e.g.*, Upjohn Co. v. United States, 449 U.S. 383, 393 (1981) ("An uncertain privilege, or one which purports to be certain but results in widely varying applications by the courts, is little better than no privilege at all."). As to the second proposition, *see, e.g.*, Harte-Hanks Commc'ns, Inc. v. Connaughton, 491 U.S. 657, 685 (1989) ("Uncertainty as to the scope of the constitutional protection can only dissuade protected speech—the more elusive the standard, the less protection it affords."); Frederick Schauer, *Public Figures*, 25 WM. & MARY L. REV. 905, 906 (1984) ("The issue of who is a public figure and who is not remains both problematic and hotly contested.") (footnote omitted).

[68] The acute time pressures under which journalists and their editors so often work must also be borne in mind. The following observation by Justice Stewart in his concurring opinion in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 777 (1976) (Stewart, J., concurring) is reflective of that reality: "In contrast to the press, which must often attempt to assemble the true facts from sketchy and sometimes conflicting sources under the pressure of publication deadlines, the commercial advertiser generally knows the product or service he seeks to sell and is in a position to verify the accuracy of his factual representations before he disseminates them."

[69] The following observation by Justice Brennan dissenting from the denial of certiorari in the case of *Lorain Journal Co. v. Milkovich*, 474 U.S. 953, 954 (1985) (Brennan, J., dissenting), reflects a profound understanding of the real-world thought processes of working journalists: "[T]he rules we adopt to determine an individual's status as 'public' or

knows beforehand what rules govern his efforts at the plate, so too should the journalist know beforehand the applicable standard that will govern his or her conduct should a defamation claim eventuate.

Pursuant to that concededly rough analogy, the journalist should be entitled to as much advance knowledge as possible concerning what rules apply before he or she commences his or her journalistic function.[70] The importance of this point has been cogently articulated as follows in a particularly thought-provoking law review article:

> Federal and state courts have applied inconsistent methods of determining whether a plaintiff is a public or private figure. The *Gertz* distinction between public and private figures is broad. . . . *A great deal is at stake.* If a media outlet is reporting a story about a public figure or official, it need only take the precautions that it is not acting with knowledge of falsity or reckless

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'private' powerfully affect the manner in which the press decides what to publish and, more importantly, what not to publish."

[70] In its much-cited opinion in the case of *Ollman v. Evans*, 750 F.2d 970, 978 (1984) (en banc) the Court of Appeals for the District of Columbia Circuit forthrightly indicated that "the predictability of decisions . . . is of crucial importance" when First Amendment values are implicated. The court in *Ollman* went on to state that such predictability "is enhanced when the determination is made according to announced legal standards . . . ." *Id.*; *see also Harte-Hanks*, 491 U.S. at 686 ("Uncertainty as to the scope of the constitutional protection can only dissuade protected speech—the more elusive the standard, the less protection it affords.").

It is asking far too much of the working journalist and the harried editor to expect them to make extremely subtle distinctions with respect to public figure status. *See, e.g.*, Michaelis v. CBS, Inc., 119 F.3d 697, 700, 702–03 (8th Cir. 1997) (holding that the coroner of Otter Tail County, Minnesota, was a public official in connection with her work as a coroner for that county, but was not a public official with respect to certain autopsies that she performed for Becker County pursuant to her employment there by a private medical association).

The unusual case of *Healey v. New England Newspapers, Inc.*, 555 A.2d 321 (R.I. 1989), provides another example of a case in which the court reached a similarly complex conclusion as to public figure status on the basis of extremely subtle distinctions. The court in *Healey* indicated that the plaintiff (a medical doctor who also served as president of the board of directors of the local YMCA) may well have been a public figure with respect to his role on the board of the YMCA. *Id.* at 325. However, it simultaneously held that he was a private figure with respect to his role as a physician. *Id.* at 327. Thus, because the defamatory statement leading to the defamation action before the court focused on the doctor's alleged "inaction in response to the collapse of a person in [medical] need," the court held that the actual malice standard was inapplicable. *Id.* at 325. It should be noted that, even though the incident took place in the immediate vicinity of the YMCA board meeting over which the defendant doctor was presiding, the court held that the defamatory comments nonetheless pertained to the doctor's private professional life. *Id.* at 323.

The judicial reasoning in *Michaelis* and *Healey* is of less interest for our purposes (i.e. whether the public figure issue was correctly decided) than is the question of how a journalist could have been expected to make such subtle distinctions beforehand.

> disregard for the truth. But if that story is about a private figure, it must make sure that every word in that story is true. If not, the private figure plaintiff could sue for actual damages. Even if the suit has little merit or the plaintiff is unlikely to qualify as a private figure, the initial litigation before motions to dismiss or summary judgment could be quite costly.[71]

Here lies the problem: there is an absence of sufficiently clear and precise criteria for determining who is and who is not a public figure, and that absence has a dampening effect on the scrutinizing role of the media.[72] It is imperative that clearer and more precise criteria be articulated so that journalists may know beforehand—and not find out in the context of possibly expensive and time-consuming after-the-fact litigation—what the operative legal standard will be.[73] Such criteria set forth in a reasonably straightforward manner would serve to provide the media with a starting point from which they could, with reasonable ease, determine whether statements made about persons or entities will be afforded heightened constitutional protection. Such rules would allow for the breathing space that is so essential for journalists to effectively carry out their constitutionally recognized duty to scrutinize.[74]

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[71] Jeff Kosseff, *Private or Public? Eliminating the* Gertz *Defamation Test*, 2011 U. ILL. J.L. TECH. & POL'Y 249, 256–57 (2011) (emphasis added) (footnotes omitted); *see also* Nat Stern, *Unresolved Antitheses of the Limited Public Figure Doctrine*, 33 HOUS. L. REV. 1027, 1028 (1996); Franklin, *supra* note 28, at 1667 ("As matters now stand, it is increasingly difficult for editors or publishers, or their lawyers, to predict whether a court will determine a plaintiff to be public or private. This difficulty might not be so serious if so much were not riding on the decision.") (footnote omitted); Hyland, *supra* note 51, at 91 ("Identifying a plaintiff as a public or private figure is often outcome-determinative in libel cases, as proving actual malice is exceedingly difficult, and most cases involving public figures are dismissed outright.").

[72] *See* Waldbaum v. Fairchild Publ'ns, Inc., 627 F.2d 1287, 1293 (D.C. Cir. 1980) ("Clear guidelines are important, first, for the press. As noted above, the entire scheme of 'strategic protection' for certain defamatory statements rests not on the inherent value of those statements but instead on the need to avoid chilling the dissemination of information and ideas that are constitutionally protected for their own sake . . . Because the outcome of future litigation is never certain, members of the press might choose to err on the side of suppression when trying to predict how a court would analyze a news story's first amendment status.").

[73] In deciding whether to publish, the media must necessarily take into account the pecuniary impact that is potentially a consequence of guessing wrong—the cost of litigation as well as the possibility of a significant award of damages. *See* Greenbelt Coop. Publ'g Ass'n v. Bresler, 398 U.S. 6, 12 (1970) ("Because the threat or actual imposition of pecuniary liability for alleged defamation may impair the unfettered exercise of . . . First Amendment freedoms, the Constitution imposes stringent limitations upon the permissible scope of such liability.").

[74] N.Y. Times Co. v. Sullivan, 376 U.S. 254, 271–72 (1964).

The conviction that underlies this article is that the liberating *Sullivan* opinion can be best served by setting forth criteria that are as precise and understandable as possible, so that it will be easier for the working journalist and the harried editor to determine *ex ante*, with a high degree of confidence, which persons and entities the courts would likely classify as public figures if litigation were to ensue.[75]

An opinion from the Fifth Circuit nicely captured the great difficulty that even a trained legal mind seeking to apply existing standards often encounters in determining who is or who is not a public figure, asserting: "Although the public figure concept has eluded a truly working definition, it falls within that class of legal abstractions where 'I know it when I see it,' in Mr. Justice Stewart's words."[76]

Clear guidelines in this area are not merely helpful; they are *essential* if meaningful journalistic scrutiny and reporting are to take place. There is concededly more than a grain of truth in the observation that "limited purpose public figure determinations do not lend themselves easily to formulaic analysis."[77] Nevertheless, some sort of workable and broadly

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[75] An overly restrictive understanding and application of the limited-purpose public figure concept has prevailed in some quarters for far too long. Our goal is to advocate for a more expansive and broad-minded understanding of the principles so memorably and so insightfully articulated by Justice Brennan writing for the Court in *Sullivan*.

The article goes on to contend that the best touchstone for making the crucial decision as to who is and who is not a public figure is the extent to which a person or entity involves himself, herself, or itself in activities or holds a public role that is an appropriate focus of scrutiny by the media. The article further contends that there must be no paralyzing fog of uncertainty surrounding the requirement that, for public figure status to be recognized, there must have been some sort of pre-existing "public controversy." This article will eventually argue in a forceful manner that some activities and some positions and some social roles merit scrutiny *inherently and by their very nature*—even if it is not possible to isolate a public controversy in the narrow sense of that term.

[76] Rosanova v. Playboy Enters., Inc., 580 F.2d 859, 861 (5th Cir. 1978) (footnote omitted); *see also* Mangual v. Rotger-Sabat, 317 F.3d 45, 66 (1st Cir. 2003); Foretich v. Capital Cities/ABC, Inc., 37 F.3d 1541, 1551 (4th Cir. 1994); Marcone v. Penthouse Int'l Magazine for Men, 754 F.2d 1072, 1082 (3d Cir. 1985); *Waldbaum*, 627 F.2d at 1292; Harris v. Tomczak, 94 F.R.D. 687, 697 (E.D. Cal. 1982); Hotchner v. Castillo-Puche, 404 F. Supp. 1041, 1043 (S.D.N.Y. 1975); Miller v. KSL, Inc., 626 P.2d 968, 972 (Utah 1981); Norris v. Bangor Publ'g Co., 53 F. Supp. 2d 495, 503 (D. Me. 1999) ("Pinpointing a standard for ascribing limited purpose public figure status is a difficult matter.").

If, as the district court observed in *Norris*, "[p]inpointing a standard for ascribing limited purpose public figure status" is difficult for legal professionals, one should think about the plight of working journalists and their editors. 53 F. Supp. 2d at 503. Unlike lawyers and judges, these professionals usually lack formal legal training and often find themselves operating under acute time pressures.

[77] *Id.* (citations omitted); *see also Waldbaum*, 627 F.2d at 1292 (D.C. Cir. 1980) ("Unfortunately, the Supreme Court has not yet fleshed out the skeletal descriptions of public figures and private persons enunciated in Gertz. The very purpose of the rule

applicable, even if not entirely infallible, "formula" must be devised so that journalists will be able to make intelligent judgments before the fact as to whether or not they will be operating under the protective shield of the actual malice standard.[78]

This article represents an attempt to extrapolate consistent guiding principles from numerous decided cases and provide an earnest series of suggestions as to vital improvements that remain to be better formulated in this domain. Our goal is to come up with a practicable set of clear and understandable criteria.[79] After discussing a few cases where the public figure issue was readily resolvable and then several cases which exemplify the present confused state of defamation law as it relates to the public figure determination, this article will proceed to demonstrate how the "course of conduct" formulation provides the most workable touchstone for public figure analysis. The article will also advocate for a broad and liberal understanding of the "public controversy" requirement, and it will further propose some innovations as to the allocation of the burden of proof that, we submit, would better serve the "interest of transcending value"[80] which is the supremely important right to freedom of speech and freedom of the press that is guaranteed by the First Amendment. In that same vein, we will also propose that "close calls" as to whether a particular defamation plaintiff was or was not a public figure at the time of the publication or

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announced in New York Times, however, requires courts to articulate clear standards that can guide both the press and the public.").

[78] *See* Gertz v. Robert Welch, Inc., 418 U.S. 323, 343 (1974) ("Theoretically . . . the balance between the needs of the press and the individual's claim to compensation for wrongful injury might be struck on a case-by-case basis . . . . But this approach would lead to unpredictable results and uncertain expectations, and it could render our duty to supervise the lower courts unmanageable."); *see also Waldbaum*, 627 F.2d at 1292.

[79] In our judgment, it would be foolishly shortsighted to advocate for a broader definition of the limited-purpose public figure concept without simultaneously addressing the recurrent and disturbing tendency of some courts to define the "public controversy" component of the public figure analysis too restrictively. *See, e.g.*, Vegod Corp. v. Am. Broad. Cos. 603 P.2d 14 (Cal. 1979) (en banc); Wayment v. Clear Channel Broad., Inc., 116 P.3d 271 (Utah 2005); Nehls v. Hillsdale Coll., 178 F. Supp. 2d 771 (E.D. Mich. 2001), *aff'd on other grounds*, 65 F. App'x 984 (6th Cir. 2003); Naantaanbuu v. Abernathy, 816 F. Supp. 218 (S.D.N.Y. 1993).

[80] *See* Speiser v. Randall, 357 U.S. 513, 525 (1958) (explaining how the allocation of the burden of proof can aid a party that "has at stake an interest of transcending value").

The allocation of the burden of proof is especially significant in instances where the issue to be resolved is often not amenable to quick and unequivocal resolution. *Cf.* Phila. Newspapers, Inc. v. Hepps, 475 U.S. 767, 776 (1986) ("There will always be instances when the factfinding process will be unable to resolve conclusively whether the speech is true or false; it is in those cases that the burden of proof is dispositive.").

broadcast at issue should be resolved in favor of finding that the plaintiff was a public figure.

V. FIXED STARS

There are, in the limited-purpose public figure domain, a few (although distressingly few) factual contexts that constitute what one might call "fixed stars"—that is, contexts involving individuals or entities that will, largely without exception, be deemed to be public figures.[81]

An obvious example of such a "fixed star" would be individuals who are actively involved in the political process as candidates[82] or otherwise.[83]

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[81] It must be emphasized from the outset that the devil lies in the details. That is, with respect to almost every category within this listing of "fixed stars," one encounters one or more cases that call for a "contra" or "but see" signal. Clearly such lack of uniformity of reasoning and result constitutes a significant cause for concern among journalists and their advisors—especially in jurisdictions where there is no controlling judicial opinion squarely on point.

[82] *See, e.g.*, Harte-Hanks Commc'ns, Inc. v. Connaughton, 491 U.S. 657, 686–87 ("There is little doubt that 'public discussion of the qualifications of a candidate for elective office presents what is probably the strongest possible case for application of the *New York Times* rule'. . . ." (quoting Ocala Star-Banner Co. v. Damnon, 401 U.S. 295, 300 (1971)); Monitor Patriot Co. v. Roy, 401 U.S. 265 (1971); Jackson v. Hartig, 645 S.E. 2d 303 (Va. 2007) ("The Supreme Court has . . . required proof of actual malice in cases where a political candidate asserts a claim for damages allegedly caused by defamatory statements touching on his fitness for office."); Schatz v. Republican State Leadership Comm., 777 F. Supp. 2d 181, 183 (D. Me. 2011) ("Elections unsurprisingly are often rough-and-tumble events. But candidates become justifiably outraged when they are falsely accused, especially when the close date of the election prevents an effective rebuttal, and especially when the accusation is made not even by the opponent but by relatively anonymous outsiders. Nevertheless, in the service of robust public discourse, the First Amendment protects statements made in a campaign even if they turn out to be false—unless the speaker knows the statements are false, or makes them with reckless disregard for their truth."), *aff'd*, 669 F.3d 50 (1st Cir. 2012); *see also* Peterson v. N.Y. Times Co., 106 F. Supp. 2d 1227, 1233 (D. Utah 2000) ("A politician is the archetypal public figure."). *See generally* Verna v. Links at Valleybrook Neighborhood Ass'n, 852 A.2d 202, 214 (N.J. App. Div. 2004).

The principle that media scrutiny of candidates is deserving of a high degree of protection from liability long pre-dates *Sullivan*. *See, e.g.*, Coleman v. MacLennan, 98 P. 281, 286 (Kan. 1908) ("[I]t is of the utmost consequence that the people should discuss the character and qualifications of candidates for their suffrages. The importance to the state and to society of such discussions is so vast, and the advantages derived are so great, that they more than counterbalance the inconvenience of private persons whose conduct may be involved, and occasional injury to the reputations of individuals must yield to the public welfare, although at times such injury may be great.").

[83] This category could include such persons as campaign workers. We would also include in this category candidates involved in union elections. *See, e.g.*, Materia v. Huff, 475 N.E.2d 1212 (Mass. 1985) (holding unanimously that the plaintiff, a former secretary-treasurer in a union and a candidate for re-election, was a public figure). The unequivocal

Such persons will, with a fairly high degree of predictability, be classified as public figures[84] because, as the court noted in *Peterson v. New York Times Co.*, "[a] politician is the archetypal public figure."[85] In that same vein, voicing one's thoughts in a public manner about issues of public concern almost always results in public figure status for the writer or speaker.[86] Similarly, lobbyists are presumptively deemed to be at least limited-purpose public figures.[87]

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character of the Massachusetts Supreme Judicial Court's holding in *Materia* makes all the more surprising the same court's divided ruling just ten years later in *Bowman v. Heller*, 651 N.E.2d 369, 374–75 (Mass. 1995) (holding that the plaintiff, a candidate for election as president of a local union, was not a public figure and further stating that "[t]he fact that the controversy was a union election does not provide an automatic basis for deciding for First Amendment purposes that there was a public controversy"). *See* B. Stephanie Siegmann, *Constitutional Law—Arbitrary Judicial Determination Jeopardizes Free Speech in Massachusetts*, 30 SUFFOLK U. L. REV. 265 (1996).

[84] *See, e.g.*, Anderson v. Low Rent Hous. Comm'n, 304 N.W.2d 239, 246 (Iowa 1981) (determining that the plaintiff, who was formerly employed as secretary in the Community Development Department of the City of Muscatine, was a public figure because she had "thrust herself into the issues then swirling in city government . . . [and had] invited attention and influenced that controversy."); Norris v. Bangor Publ'g Co., 53 F. Supp. 2d 495, 504 (D. Me. 1999) (finding public figure status as to a political consultant who had "voluntarily accepted a job researching a candidate for national office on behalf of a national political organization.").

[85] 106 F. Supp. 2d at 1233. From time to time, however, one encounters judicial opinions that diverge to an unselling extent from the great bulk of authority in this domain. *See, e.g.*, Bell v. Nat'l Republican Cong. Comm., 187 F. Supp. 2d 605, 615 (S.D.W. Va. 2002) (holding that the plaintiff was a private figure even though he had appeared in a television commercial and photographic advertisements indicating his support for a particular Congressional candidate); Rutt v. Bethlehem's Globe Publ'g Co., 484 A.2d 72, 74, 87 (Pa. Super. Ct. 1984) (holding that the plaintiff who had been a "write-in" candidate in a mayoral primary election was neither an all-purpose nor a limited-purpose public figure). The existence of such "outlier" cases is troubling: the "star" in question is not truly "fixed"—and that is a matter of grave concern for practicing journalists, their editors, and their legal advisors.

[86] *See, e.g.*, Schwartz v. Am. Coll. of Emergency Physicians, 215 F.3d 1140 (10th Cir. 2000); Dilworth v. Dudley, 75 F.3d 307, 309 (7th Cir. 1996) ("By publishing your views . . . you enter voluntarily into one of the submarkets of ideas and opinions and consent therefore to the rough competition of the marketplace."); Underwager v. Salter, 22 F.3d 730, 734 (7th Cir. 1994) (holding that the plaintiff psychologists, who had written two books and whom the court described as "well-known personages in the legal, medical, and scientific debates about children's ability to describe their sexual experiences" were public figures); Franzon v. Massena Mem'l Hosp., 89 F. Supp. 2d 270, 278–80 (N.D.N.Y. 2000) (holding that a doctor who played an active role in a hotly contested community discussion about granting hospital privileges to nurse midwives had become a public figure); Church of Scientology of Cal. v. Siegelman, 475 F. Supp. 950, 954 (S.D.N.Y. 1979) (holding the plaintiff church organizations to be public figures because they "have taken affirmative steps to attract public attention, and actively seek new members and financial contributions from

In the present state of the law, it is widely held that, although the mere act of contracting with the government does not *ipso facto* result in an allegedly defamed plaintiff being deemed to have public figure status,[88]

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the general public."); *see also* Moffatt v. Brown, 751 P.2d 939, 939 (Alaska 1988) ("We agree with the superior court's conclusion that Dr. Brown is a public figure. Dr. Brown voluntarily sought appointment to the Medical Board, one of the functions of which is to regulate abortion procedures in the State of Alaska. As such, the public has an interest in the qualifications of a potential appointee to the Medical Board. Thus, Dr. Brown, who voluntarily placed herself in a position of public attention and comment, is a public figure, and the *N.Y. Times* protections here apply."); Nadel v. Regents of the Univ. of Cal., 34 Cal. Rptr. 188, 198–99 (Cal. Ct. App. 1994) (holding that two protestors who had been actively opposed to a change in the use of People's Park in Berkeley, California, were public figures); Exner v. Am. Med. Ass'n, 529 P.2d 863, 870 (Wash. Ct. App. 1974) ("The plaintiff was a public figure in regard to the limited issue of [the] fluoridation [controversy] by having abandoned his anonymity, by having assumed leadership and by having attempted to influence the outcome of the issue."); Liu v. N.Y. News, Inc., 583 N.Y.S.2d 391, 392 (App. Div. 1992).

[87] *See, e.g.*, McIntyre v. Ohio Elections Comm'n, 514 U.S. 334, 356 n.20 (1995) ("The activites of lobbyists who have direct access to elected representatives, if undisclosed may well present the appearance of corruption."); Pauling v. Globe-Democrat Publ'g Co., 362 F.2d 188, 196 (6th Cir. 1966).

In *Gray v. St. Martin's Press, Inc.*, No. 95-285-M, 1999 WL 813909 at *3 (D.N.H. May 19, 1999), Judge McAuliffe of the District of New Hampshire found the plaintiff to be a limited public figure. Judge McAuliffe identified the "public controversy" as "[the] familiar and often discussed" issue of "the influence of, and access provided to political figures, by powerful Washington D.C. lobbyists." Then, noting that "there can be little doubt that plaintiff, one of the more powerful, influential, and successful lobbyists in Washington, qualifies as a central figure in that controversy." *Id.* at *3. On appeal, the First Circuit affirmed that ruling as to Mr. Gray's limited-purpose public figure status. Gray v. St. Martin's Press, Inc., 221 F.3d 243, 251 (1st Cir. 2000) (noting that "a public controversy existed as to the methods and influence of lobbyists in Washington" and further noting that plaintiff was "identified as one of the best-known of the high-level Washington public relations experts, an emblematic figure, and a self-professed defender against attacks on lobbying.").

[88] *See* Carr v. Forbes, Inc., 259 F.3d 273, 280 (4th Cir. 2001) (holding that an engineer whose career consisted of managing the development of privately financed public infrastructure projects was a limited-purpose public figure, but also acknowledging that "[o]ne does not become a limited-purpose public figure merely by contracting with the government or accepting public money . . . but one who contracts with the government can become such a public figure because of the way in which he conducts himself in connection with those public contracts"); *see also* Hutchinson v. Proxmire, 443 U.S. 111, 135 (1979); *cf.* Vandentoorn v. Bonner, 342 N.W.2d 297, 300 (Mich. Ct. App. 1983) (holding that the owner and operator of a towing service that had a contract with the city of Grand Rapids was a limited-purpose public figure). *But see* Schiavone Constr. Co. v. Time, Inc., 847 F.2d 1069, 1079 n.10 (3d Cir. 1988) (stating in dictum that the corporate plaintiff's "public contract work, standing alone, would not suffice to deem it a limited purpose public figure.").

being subject to a high degree of government regulation,[89] performing a quasi-governmental function, or participating in a public bidding process will often yield public figure status.[90]

VI. SOME EXAMPLES OF UNCERTAINTY AND OF CONTRADICTORY RULINGS[91]

Few would quarrel with the proposition that consistency is of great importance in the law, and perhaps most especially when the freedom of speech and the freedom of the press clauses of the First Amendment are

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[89] *See, e.g.*, Silvester v. Am. Broad. Cos., 839 F.2d 1491, 1497 (11th Cir. 1988); Mosesian v. McClatchy Newspapers, 285 Cal. Rptr. 430, 440 (Cal. Ct. App. 1991) ("[T]he California regulatory scheme for licensing and oversight is detailed and replete with rules designed to protect the public from criminal elements who might be attracted to the horse races . . . . It is for these reasons that an applicant's personal qualifications to be licensed are subject to public scrutiny and comment in every case.").

[90] *See* Capuano v. Outlet Co., 579 A.2d 469, 473 (R.I. 1990) (upholding "that [the] plaintiffs are public figures for the limited purpose of this waste disposal controversy" after expressly referring to the evidence in the record that the plaintiffs "operated one of the major waste disposal enterprises in [the] state" and that they also "had rubbish collection contracts with at least two Rhode Island municipalities," thereby becoming involved "in the implementation of a quasi-governmental function."); Am. Benefit Life Ins. Co. v. McIntyre, 375 So. 2d 239, 242 (Ala. 1979) ("It cannot be successfully argued that a corporation whose dealings are subject to close regulation by our state government, and, indeed, whose very existence as an entity is owing to that government, does not invite attention and comment from the news media. The insurance business has long been held to be clothed with the public interest . . . and the power and influence of such a business over society cannot be ignored."); Metge v. Cent. Neighborhood Improvement Ass'n, 649 N.W.2d 488, 496 (Minn. Ct. App. 2002) (holding that, while "[plaintiff] is a private, non-profit corporation," it is a limited-purpose public figure because "it is imbued with a public purpose, it is substantially supported with public funds, and its activities are routinely reported in the media."); *see also* Nicholson v. Promotors on Listings, 159 F.R.D. 343, 344–45 (D. Mass. 1994) (noting that the plaintiff became a limited public figure by assuming a management role at a public auditorium and by seeking to influence the outcome of a controversy surrounding the auditorium's finances); Cont'l Cablevision, Inc. v. Storer Broad. Co., 653 F. Supp. 451, 460 (D. Mass. 1986) (concluding that "[g]iven the public importance of the licensing procedure, . . . [the counterclaim plaintiff] voluntarily thrust itself into a matter . . . which was a public controversy in Florissant, Missouri, [and then holding that said plaintiff] is a public figure . . . .").

[91] Numerous scholarly articles note the inconsistency among decided cases addressing the public figure issue. *See* Note, *Defining a Public Controversy in the Constutional Law of Defamation*, 69 VA. L. REV. 931, 944–54 (1983) (citing irreconcilable decisions concerning the public figure issue and focusing on the "public controversy" criterion); Kosseff, *supra* note 71, at 257–58 (noting that "despite similar facts," the courts have reached conflicting conclusions as to the public figure issues, whereas "a newsgatherer should ideally expect consistency in determinations of public figure status."); *see also* Stern, *supra* note 71, at 1044–79.

involved. A cursory review of the case law reveals far less consistency of reasoning and result than one might hope for in the crucial arena of determining who is a public figure.[92]

A. A Troubling Example of Irreconcilable Decisions

A good initial example is the unsettling holding of the Supreme Court of Utah in the case of *Wayment v. Clear Channel Broadcasting, Inc.*[93] In that case, the plaintiff, a health reporter employed by a local television station, was deemed by the Supreme Court of Utah to be a private figure.[94] The court came to this conclusion in spite of the fact that the plaintiff had given on-air reports on matters of public interest at least five days a week for a period of three years, had participated in related charitable events, had been featured in fifteen- and thirty-second commercials that had been promoted by the television station, and had even referred to herself as a "local celebrity."[95]

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[92] Kosseff, *supra* note 71, at 256–57 (footnotes omitted); *see also* Jadwin v. Minneapolis Star & Tribune Co., 367 N.W.2d 476, 484 (Minn. 1985) (acknowledging that "[t]he line between limited purpose public figure status and private individual status has proved difficult to draw."); Erik Walker, Comment, *Defamation Law: Public Figures—Who are They?*, 45 BAYLOR L. REV. 955, 955 (1993) ("One of the most troublesome issues for lower courts is determining whether particular plaintiffs are public figures. . . . This is particularly disconcerting since the purpose of the public figure doctrine is to prevent the chilling effect on the free exchange of ideas inherent in such ad hoc evaluations.").

Courts vary in defining who is a public figure because "[t]he Supreme Court has provided scant guidance beyond the generalizations of *Gertz*." Professor Halpern compares the case of *Blake v. Gannett Co.*, 529 So.2d 595 (Miss. 1988) with the case of *Wiegel v. Capital Times, Co.*, 426 N.W. 2d 43 (Wis. Ct. App. 1988), and he comments that those cases "reach[] different conclusions as to the status of apparently similarly situated plaintiffs." Halpern, *supra* note 19, at 282 n.53 (1990).

[93] 116 P.3d 271 (Utah 2005). *Compare, e.g.*, Blue Ridge Bank v. Veribanc, Inc., 866 F.2d 681 (4th Cir. 1989) (holding that a full-service banking institution is not a public figure) *with* Coronado Credit Union v. KOAT Television, Inc., 656 P.2d 896, 904 (N.M. Ct. App. 1982) (holding that a state-chartered credit union which advertises and holds itself out as serving present and former college employees is a public figure); *see also* Lundell Mfg. Co. v. Am. Broad. Cos., 98 F.3d 351, 364 (8th Cir. 1996) (holding that the manufacturer of a garbage recycling machine is not a public figure); Long v. Cooper, 848 F.2d 1202, 1206 (11th Cir. 1988) (holding that a company which the court describes as being "well known in the satellite television industry" and "a leader in its field" is nonetheless not a limited-purpose public figure); Quantum Elecs. Corp. v. Consumers Union of U.S., Inc., 881 F. Supp. 753, 766 (D.R.I. 1995) (holding a corporation that "manufactures and sells ozone generating air purifiers" to be a limited-purpose public figure).

[94] Wayment v. Clear Channel Broad., Inc., 116 P.3d 271, 285 (Utah 2005).

[95] *Id.* at 275, 280–81, 283.

In stark contrast, in determining the status of the television journalist plaintiff in the case of *San Antonio Express News v. Dracos*, the Texas Court of Appeals came to a very different conclusion, and seemed to put greater emphasis on the facts supporting a finding of public figure status.[96] Specifically, the court in *Dracos* stated that "[a]s a journalist and self-described public commentator, Dracos cannot hold himself out as a popular television personality and yet deny he is a public figure for purposes of the [*Sullivan*] standard and the First Amendment. He cannot, in other words, have it both ways . . . ."[97]

B. Another Troubling Example of Irreconcilable Decisions

In *Coronado Credit Union v. KOAT Television, Inc.*,[98] the Court of Appeals of New Mexico ruled that the plaintiff credit union was a public figure. The credit union brought a defamation action against the defendant television station, alleging that two of the station's broadcasts, which had discussed the financial status of the credit union, had caused customers to withdraw their deposits in an amount of over one-half million dollars. In determining that the Coronado Credit Union was a public figure, the court focused on the fact that the credit union was chartered to serve members of the public and that the broadcasts regarding the credit union's insolvency were of interest to the public. The court further noted that the credit union, a publicly held corporation that was closely regulated by the state, was functionally equivalent to a bank, and that "it cannot be seriously argued that [banks] are not affected with a public interest."[99]

By contrast, in the case of *Bank of Oregon v. Independent News, Inc.*, the Supreme Court of Oregon rejected the analysis employed by the court in *Coronado Credit Union*, determining instead that the plaintiff Bank of Oregon "does not present that exceedingly rare instance of an entity which is a public figure for all purposes," nor does it have "general fame or notoriety in the community in which the article was published" or "exhibit pervasive involvement in the affairs of society."[100] As a result, it concluded that the plaintiff bank was not a public figure and that the actual malice standard did not apply in that case.

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[96] 922 S.W.2d 242, 255 (Tex. App. 1996).

[97] *Id.*

[98] 656 P.2d 896 (N.M. Ct. App. 1982).

[99] *Id.* at 904.

[100] 693 P.2d 35, 43 (Or. 1985) (citations omitted). In the course of denying a motion for reconsideration, the majority specifically stated that the Bank was not precluded from submitted further evidence to establish public figure status. Bank of Or. v. Indep. News, Inc., 696 P.2d 1095, 1096 (Or. 1985).

VII. THE PUBLIC CONTROVERSY ISSUE

It is important that the public figure inquiry not be overly fixated on the "public controversy" issue. It is true that *Gertz* did allude to the need for there to be a public controversy into which the putative public figure needs to have thrust itself.[101] However, we submit that it is important that the term "controversy" be understood broadly and generously. And, most importantly, it should be borne in mind that there are some matters of an inherent and permanent controversial nature.[102]

In the many years that have passed since the issuance of the *Gertz* opinion in 1974, the Supreme Court has not significantly clarified precisely the real-world meaning of a "public controversy," which was an integral component of the *Gertz* Court's rather Delphic delineation of the limited-purpose public figure category. However, numerous lower courts have grappled with the concept, and we consider it important to focus on some of those lower court decisions.

The ground rules are deceptively simple. To qualify as a public controversy, the controversy at issue must be one that affects at least some segment of the public and not just the immediate participants in the controversy. Although it is the generally prevailing view at present that a purely private dispute cannot, without more, constitute a public controversy, judicial opinions from around the country have not been uniform in indicating the extent to which an issue must have a greater impact on society to be considered a public controversy. While other courts have indicated that public controversies revolve around issues which are of interest to the public, none has made clear the distinction between issues which are *of interest* to the public and issues which are merely *interesting* to the public.[103] Because of this lack of clarity, it falls upon judges to make such determinations. Thus, it is especially incumbent upon judges not to

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[101] Gertz v. Robert Welch, Inc., 418 U.S. 323, 345 (1974); *see also* Marcone v. Penthouse Int'l Magazine for Men, 754 F.2d 1072, 1083 n.7 (3d Cir. 1985) ("The proper dimensions of the public controversy requirement have proved difficult to diagram."); Gerald G. Ashdown, Gertz *and* Firestone*: A Study in Constitutional Policy-Making*, 61 MINN. L. REV. 645, 683 (1977) ("The Supreme Court in *Gertz*, however, provided no criteria for identifying a 'public controversy' . . . .").

[102] *See, e.g.*, Lerman v. Flynt Distrib. Co., 745 F.2d 123, 138 (2d Cir. 1984) ("A public 'controversy' is any topic upon which sizeable segments of society have different, strongly held views."); Street v. Nat'l Broad. Co., 645 F.2d 1227, 1234 (6th Cir. 1981) (concluding that infamous rape trials qualified as a public controversy because they "were the focus of major public debate over the ability of our courts to render even-handed justice"); ELM Med. Lab., Inc. v. RKO Gen., Inc., 532 N.E.2d 675 (Mass. 1989).

[103] *See* Waldbaum v. Fairchild Publ'ns, Inc., 627 F.2d 1287, 1296 (D.C. Cir. 1980); *see also Marcone*, 754 F.2d at 1083.

presume that their own range of interests will be coextensive with what is of legitimate public interest for other citizens.

In a decision which we consider to be especially troubling, the Wisconsin Court of Appeals agreed with the view of the trial court that the allegedly defamatory story published in the aftermath of divorce proceedings involving a woman who had often promoted concepts related to feminism and liberal Catholicism had not involved a public controversy.[104] The Court of Appeals in *Maguire v. Journal Sentinel, Inc.* quoted the following language from the trial court's ruling with approval:

> Marjorie Maguire's views about her ex-husband and Catholics for Free Choice and about divorce are her own. There's been no evidence that there's been any public debate about her personal views or any press coverage about those views prior to the defamation article.[105]

In our view, however, it is apparent that neither the trial court nor the Court of Appeals gave sufficient weight to the undisputed fact that the plaintiff, prior to publication of the allegedly defamatory statements, had actually published a column[106] in the Journal Sentinel relating directly to her active, volitional participation in a controversy that was undoubtedly of legitimate interest to a substantial segment of the newspaper's readership. The publication of such a column strikes us as the plaintiff voluntarily thrusting herself into a public controversy, which both "public debate" and "press coverage," with respect to the topic of the controversy, would likely follow.

Somewhat similarly, in another troubling ruling, the Court of Appeals for the District of Columbia in the case of *Moss v. Stockard*[107] concluded that what the court itself characterized as "the turmoil" surrounding the firing of a basketball coach at a local college did not constitute a controversy for the purpose of determining whether the coach was a public figure.[108] In its opinion, the court noted that the news of the firing "had undoubtedly spread through the college community and members of the community . . . were discussing it."[109] The court further indicated that, "as a public institution[,

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[104] Maguire v. Journal Sentinel, Inc., 605 N.W.2d 881, 886 (Wis. Ct. App. 1999) ("The Journal argues that the public controversy at issue here arose from a broader public controversy surrounding the ideals of feminism and liberal Catholicism, both of which Marjorie and her ex-husband were involved in promoting.").

[105] *Id.* at 887 (quoting the trial court).

[106] *Id.* at 886. The Court of Appeals referred to Ms. Maguire's published newspaper column by stating that it had "described husbands who unilaterally divorce their wives as suffering from the 'Jesse Anderson' syndrome." *Id.*

[107] 580 A.2d 1011 (D.C. 1990).

[108] *Id.* at 1031.

[109] *Id.*

the University] would invite some broader public interest in why it had fired one of its athletic coaches."[110] Nevertheless, after having made those preliminary observations, the court, quite surprisingly in our view, proceeded to conclude that it "would risk greatly exaggerating the turmoil over Stockard's firing by characterizing it as a controversy over an 'issue [that] was being debated publicly and . . . had foreseeable and substantial ramifications for non-participants.'"[111] We cannot help but wonder how much greater "the turmoil" would have to have been before the court would have concluded that a public controversy had existed.

We thus contend that the public controversy[112] criterion should be interpreted broadly and liberally by courts; great weight should be given to what the public de facto finds to be of interest. An expansive approach to the public controversy requirement would in fact be consistent with the underlying rationale of *Gertz*—viz., that the state's interest in protecting the reputational concerns of the individual citizen is greatly diminished when the speech at issue involves a public figure.[113] Accordingly, we maintain that the courts must make every effort to resist attempts to allow any desiccated notion of what legitimately constitutes a public controversy to limit the scope of who will be considered a public figure, thereby making more timid the journalistic function and narrowing the focus of journalism as journalists carry out their all-important scrutinizing function.

VIII. THE PROPOSED CRITERIA

It is a major contention of this article that, in determining who is and who is not a public figure, the principal focus should be on *the course of conduct* in which the plaintiff had engaged prior to publication of the allegedly defamatory statement(s).[114] Such is the case because a person or entity that

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[110] *Id.*

[111] *Id.* at 1031–32 (quoting Waldbaum v. Fairchild Publ'ns, Inc., 627 F.2d 1287, 1297 (D.C. Cir. 1980)).

[112] Curtis Publ'g Co. v. Butts, 388 U.S. 130 (1967). Justice Harlan went out of his way in his plurality opinion in *Curtis Publishing* to observe that "the public interest in the circulation of the materials here involved, and the publisher's interest in circulating them, is not less than that involved in *Sullivan*. And both Wally Butts and General Walker commanded a substantial amount of independent public interest at the time of the publications . . . ." *Id.* at 154. It is interesting to note that Justice Harlan employed the term "public interest" rather than "public controversy."

[113] *See* Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749, 761 n.7 ("[W]hat the *Gertz* language indicates is that the State's interest is not substantial relative to the First Amendment interest in *public speech*."); *see also* Long, *supra* note 36, at 1567 n. 196 (noting that the *Gertz* opinion itself "used the phrases 'public controversy' and 'public issue' seemingly interchangeably").

Unquestionably, numerous courts have come to adopt a broad and liberal

voluntarily engages in certain activities which involve a reasonable likelihood of ramifications for some segment of the public[115] necessarily

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understanding of the "public controversy" concept. *See, e.g.*, Jankovic v. Int'l Crisis Grp., 822 F.3d 576, 586 (D.C. Cir. 2016) ("Indeed, courts often define the public controversy in expansive terms."). In our judgment, it is imperative that the concept of "public controversy" alluded to in *Gertz* be understood as broadly as human language will reasonably permit. *See* Stern, *supra* note 71, at 1051.

[114] This is surely not an entirely original thesis. Several decided cases and at least one law review article have already pointed in this direction with varying degrees of explicitness. *See* Clyburn v. News World Commc'ns, Inc., 903 F.2d 29, 33 (D.C. Cir. 1990) ("Clyburn engaged in conduct that he knew markedly raised the chances that he would become embroiled in a public controversy."); McDowell v. Paiewonsky, 769 F.2d 942, 949 (3d Cir. 1985) ("When an individual undertakes a course of conduct that invites attention, even though such attention is neither sought nor desired, he may be deemed a public figure."); Ollman v. Evans, 750 F.2d 970, 993 (D.C. Cir. 1984) ("Those who step into areas of public dispute, who choose the pleasures and distractions of controversy, must be willing to bear criticism, disparagement, and even wounding assessments."); Nat'l Found. for Cancer Research, Inc. v. Council of Better Bus. Bureaus, Inc., 705 F.2d 98, 101 (4th Cir. 1983) ("*Gertz* recognizes that the key to determining whether a party is a public figure is the party's own conduct."); Rosanova v. Playboy Enters., Inc., 580 F.2d 859, 861 (5th Cir. 1978) (noting that the plaintiff in that case had "voluntarily engaged in a course that was bound to invite attention and comment") (internal quotation marks omitted); Freedlander v. Edens Broad., Inc., 734 F. Supp. 221, 230 (E.D. Va. 1990), *aff'd*, 923 F.2d 848 (4th Cir. 1991); Brueggemeyer v. Am. Broad. Cos., 684 F. Supp. 452, 458 (N.D. Tex. 1988) ("[The course of conduct in which Brueggemeyer engaged generated consumer complaints, government legal actions, BBB investigations and media attention."); Barry v. Time, Inc., 584 F. Supp. 1110, 1118 (N.D. Cal. 1984); Waicker v. Scranton Times Ltd. P'ship, 688 A.2d 535, 543 (Md. App. 1997) ("The sum of the reasoning underlying the theme of the *Gertz* test . . . and its progeny is that the key to determining whether a party is a public figure is the party's own conduct."); Wiegel v. Capital Times, Co., 426 N.W.2d 43, 85 (Wis. Ct. App. 1988); Dombey v. Phoenix Newspapers, Inc., 724 P.2d 562, 571 (Az. 1986) (discussing the above-cited *McDowell* decision from the Third Circuit and stating: "McDowell was . . . a public figure even though he neither sought nor desired public attention. Whatever requirement there might be to 'thrust' oneself into a public controversy was satisfied by his voluntary participation in activity calculated to lead to public scrutiny."); *see also Jankovic*, 822 F.3d at 587–89; Reuber v. Food Chem. News, Inc., 925 F.2d 703, 709 (4th Cir. 1991) ("[E]ven 'involuntary' participants can be public figures when they choose a course of conduct which invites public attention."); Stern, *supra* note 71, at 1050 ("Even plaintiffs ostensibly not propelled by a desire for the public limelight have been deemed public figures where their conduct can be expected to draw criticism.") (footnote omitted). *See generally* Erik Walker, Comment, *Defamation Law: Public Figures – Who are They?*, 45 BAYLOR L. REV. 955 (1995).

[115] The public controversy requirement may be fulfilled by the inherent nature of the activity or enterprise: some activities and some enterprises deserve ceaseless scrutiny. *See Waldbaum*, 627 F.2d at 1292 ("[A] person has become a public figure for limited purposes if he is attempting to have, or realistically can be expected to have, a major impact on the resolution of a specific public dispute that has foreseeable and substantial ramifications for persons beyond its immediate participants."). We view the phrase in *Waldbaum*, "or

brings with it public figure status and the possibility of scrutiny with respect to such conduct.[116]

After having reviewed post-*Gertz* decisions, one commentator concluded as follows:

> [V]oluntariness is no longer confined to individuals who thrust themselves into the vortex of a public controversy to try to influence the resolution of the matter in controversy. Instead voluntariness can be satisfied by a less demanding showing that plaintiffs willingly engaged in activity that foreseeably put them at risk of public attention.[117]

The approach proposed by these writers facilitates resolving the public figure issue consistently with the self-engagement approach endorsed by the Supreme Court in *Gertz*. In that case, the Court stated that "[a]n individual who decides to seek governmental office must accept *certain necessary consequences* of that involvement in public affairs. He runs the risk of closer public scrutiny than might otherwise be the case."[118] The Court further noted that those classified as *public figures*—or, those who have "thrust themselves to the forefront of particular public controversies in order to influence the resolution of the issues involved"[119]—are in a similar position.[120]

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realistically can be expected to have," as supportive of the idea that it is a mistake to apply the pre-existing public controversy requirement mechanistically.

[116] The District of Columbia Circuit in *Clyburn* articulated the underlying principle in a particular felicitous manner: "One may hobnob with high officials without becoming a public figure, but one who does so runs the risk that personal tragedies that for less well-connected people would pass unnoticed may place him at the heart of a public controversy." 903 F.2d at 33; see also *Jankovic*, 822 F.3d at 587 (taking note of the plaintiff's voluntary involvement in the reform movement in Serbia in the post-Milosevic era and concluding that "[h]is actions ensured that he would play a central role in the reform, and he engaged in conduct that he knew markedly raised the chances that he would become embroiled in a public controversy.") (internal quotation marks omitted); Lohrenz v. Donnelly, 350 F.3d 1272, 1280 (D.C. Cir. 2003); Marcone v. Penthouse Int'l Magazine for Men, 754 F.2d 1072, 1083 (3d. Cir. 1985) ("If a position itself is so prominent that its occupant unavoidably enters the limelight, then a person who voluntarily assumes such a position may be presumed to have accepted public figure status.").

[117] Usman, *supra* note 35, at 996–97 (footnote omitted).

[118] Gertz v. Robert Welch, Inc., 418 U.S. 323, 344 (1974) (emphasis added); *see also* Monitor Patriot Co. v. Roy, 401 U.S. 265, 270 (1971) (discussing the importance of applying the *Sullivan* rule to those who seek public office).

[119] *Id.* at 345; *see also Jankovic*, 822 F.3d at 587 (noting that plaintiff was "purposely trying to influence the outcome or could realistically have been expected, because of his position in the controversy, to have an impact on its resolution.") (quoting *Waldbaum*, 627 F.2d at 1297); Nat'l Found. for Cancer Research, Inc. v. Council of Better Bus. Bureaus, Inc., 705 F.2d 98, 101 (4th Cir. 1983) (interpreting *Gertz* as recognizing that "the key to determining whether a party is a public figure is the party's own conduct.").

[120] *Gertz*, 418 U.S. at 345.

Thus, the *activities* in which an otherwise private figure chooses to engage can cause that person or entity to become a public figure for defamation law purposes.[121] In fact, the Third Circuit in *Schiavone Construction Co. v. Time, Inc.* unequivocally indicated that the focus must be on the *activities* of the plaintiff rather than on his or her wishes:

> [T]he "voluntariness" of public figure status does not derive from a desire to be considered as such. Rather, the notion of voluntariness stems from *performance of purposeful acts* that propel an individual into a public controversy.[122]

A professional athlete's choice to engage in his or her chosen sport constitutes a per se voluntary option to engage in an activity where eventual controversy is virtually inevitable. The following comment by Professor Rodney Smolla is astute:

> Professional athletes voluntarily enter the "arena," quite literally the "sports arena," and issues germane to their performance or fitness, including issues relating to mental and physical health, but also to their character and position in society as role models, justify treating professional athletes as public figures and also justifies a reasonably broad understanding of the range of issues concerning the professional athlete's life that falls within the perimeter of that public figure status.[123]

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[121] *See, e.g.*, Trotter v. Jack Anderson Enters., Inc., 818 F.2d 431, 436 (5th Cir. 1987) (holding that the president of a corporation was a limited-purpose public figure and emphasizing the activities performed by him in his role as a corporate president); Hotchner v. Castillo-Puche, 404 F. Supp. 1041, 1045 (S.D.N.Y. 1975) (noting that the plaintiff had "written several novels and nonfiction books, as well as articles, short stories, and original television plays.").

[122] Schiavone Constr. Co. v. Time, Inc., 847 F.2d 1069, 1079 n.11 (3d Cir. 1988) (emphasis added).

[123] RODNEY A. SMOLLA, LAW OF DEFAMATION § 6:40, at 6-361 (1986); *see also* McGarry v. Univ. of San Diego, 154 Cal. App. 4th 97, 115 (2007) ("Numerous courts, beginning with the Supreme Court's opinion in *Curtis Publishing*, . . . have concluded professional and collegiate athletes and coaches are at least limited purpose public figures.").

Mention should also be made of the 2014 opinion of the California Court of Appeal (Second District, Division 4) in the case of *Nelson v. Time, Inc.* even though that opinion is classified as "Not Officially Published." No. B245212, 2014 WL 940448 (Cal. Ct. App. Mar. 11, 2014). The plaintiff in that case, one Reeves Nelson, a former member of the men's basketball team at the University of California at Los Angeles, argued that he was not a public figure, but the Court of Appeal agreed with the defendant's contention that, "because Nelson received national attention as a top college basketball player for a high profile team, he is, at a minimum, a limited purpose public figure." *Id.* at *13. The court in *Nelson* quoted from *Cepeda v. Cowles Magazines and Broad., Inc.*, 392 F.2d 417 (9th Cir. 1968), to the effect that included in the public figure category are persons who are not public officials but are "involved in issues which the public has a justified and important interest, further noting that that category would 'include artists, athletes, business people, dilettantes, anyone who is

The case of *Brewer v. Memphis Publishing Company, Inc.* is deserving of close attention.[124] The court in that case held that both Anita Brewer and her husband, John Brewer, were public figures. The court wrote as follows:

> In performing its role the press covers not only political events and public controversies, but also sports and entertainment. Entertainers (and sports figures as entertainers) typically put more of themselves in the public view than their particular performances; both plaintiffs in this case certainly did. Anita was in the spotlight not only because of her entertaining but also as the entertainer who was Presley's "girlfriend." John was portrayed in his campaign literature as one who had worked hard to become successful in football and would work hard if elected.[125]

The key inquiry is not whether the plaintiff affirmatively desired or actually sought public figure status as such, but rather whether the plaintiff's chosen course of conduct would foreseeably have held the reasonable possibility of attracting scrutiny.[126] In this regard, it would be difficult to improve upon the following statement by the United States Court of Appeals for the Fifth Circuit in the significant *Rosanova* case:[127]

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famous or infamous because of who he is or what he has done.'" *Id.* at *14 (citing *Cepeda*, 392 F.2d at 419). The court in *Nelson* went on to state: "Consonant with [the Cepeda court's definition of public figure] a college athletic director, a basketball coach, a professional boxer, and a professional baseball player, among others, have all been held to be 'public figures.'" *Id.*

Nonetheless, even in the realm of college sports there are some troubling exceptions. *See, e.g.*, Warford v. Lexington Herald-Leader Co., 789 S.W.2d 759, 769 (Ky. 1990) (declining to hold that the plaintiff, a former assistant basketball coach at the University of Pittsburgh, was a limited-purpose public figure).

[124] 626 F.2d 1238 (5th Cir. 1980).

[125] *Id.* at 1254.

[126] The inquiry into the plaintiff's status as a public figure or not is an issue of law. Celle v. Filipino Reporter Enters., Inc., 209 F.3d 163, 176 (2d Cir. 2000) ("Whether a plaintiff is a public figure is a question of law for the court."); Marcone v. Penthouse Int'l Magazine for Men, 754 F.2d 1072, 1081 n.4 (3d Cir. 1985). Some positions foreseeably bring a certain degree of fame to the occupiers of those positions. As one influential appellate court has cogently stated: "Fame often brings power, money, respect, adulation, and self-gratification. It also may bring close scrutiny that can lead to adverse as well as favorable comment. When someone steps into the public spotlight, or when he remains there once cast into it, he must take the bad with the good." *Waldbaum*, 627 F.2d at 1294–95.

Another example of a plaintiff's position being a major factor in the ruling that the plaintiff was a limited-purpose public figure is the case of *Fiacco v. Sigma Alpha Epsilon Fraternity*, 484 F. Supp. 2d 158 (D. Me. 2007). In that case, the plaintiff was the Director of Judicial Affairs at the University of Maine. *Id.* at 163. After first finding that the plaintiff was a public official occupying a position of sufficient public importance for the actual malice standard to apply, the court went on to also find that he was a limited-purpose public figure. *Id.* at 171.

[127] Rosanova v. Playboy Enters., Inc., 580 F.2d 859, 861 (5th Cir. 1978).

> It is no answer to the assertion that one is a public figure to say, truthfully, that one doesn't choose to be. It is sufficient . . . that "[the plaintiff] voluntarily engaged in a course that was bound to invite attention and comment."[128]

In other words, of practically no importance in the public figure analysis are the subjective wishes of the person or entity being scrutinized by the media as to whether he or she wishes to be scrutinized.[129]

In articulating rationales in support of the protection which the constitutionalized law of defamation affords to statements about public figures, some courts have explicitly alluded to the tort law concept of assumption of the risk.[130] These decisions are reflective of the elementary

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[128] *Id.*; *see also* McDowell v. Paiewonsky, 769 F.2d 942, 949 (3d Cir. 1985); Norris v. Bangor Publ'g Co., 53 F. Supp. 2d 495, 504 (D. Me. 1999) (noting that the plaintiff, a political consultant for a national political organization was apparently "well aware of the perils" of the project in which he was engaged.); Chuy v. Phila. Eagles Football Club, 431 F. Supp. 2d 254, 267 (E.D. Pa. 1977) (emphasizing that a person's deliberate choice of a particular profession which is apt to invite public discussion is an important factor in determining whether that person has public figure status), *aff'd*, 595 F.2d 1265 (3d Cir. 1979);.

[129] *See Rosanova*, 580 F.2d at 861 ("Comment upon people and activities of legitimate public concern often illuminates that which yearns for shadow."); *see also* Trotter v. Jack Anderson Enters., Inc., 818 F.2d 431, 436 (5th Cir. 1987) ("[A]n individual cannot erase his public-figure status by limiting public comment and maintaining a low public profile."); Ruebke v. Globe Commc'ns Corp., 738 P.2d 1246, 1252 (Kan. 1987) ("An individual may not choose whether or not to be a public figure. Public figure status is rather the result of acts or events which by their nature are bound to invite comment."); Bandlein v. Pietsch, 563 P.2d 395, 398 (Idaho 1977) ("Public figure status does not hinge upon an individual's preference in the matter."); RODNEY A. SMOLLA, LAW OF DEFAMATION § 2:32, at 2-51 (1986) ("It is no answer to the assertion that one is a public figure to say, truthfully, that one does not choose to be.").

[130] *See* Pendleton v. City of Haverhill, 156 F.3d 57, 71 (1st Cir. 1998) (stating that, since the plaintiff had invited the citizenry to judge his qualifications, he had thereby "assumed the risk that the ensuing discourse might contain errors of fact . . . ."); *Brewer*, 626 F.2d at 1254 (stating that the "voluntary assumption of risk" constituted, along with "access to the media for rebuttal," the "dual rationale for special treatment of public figures articulated in Gertz . . . ."); Holt v. Cox Enters., 590 F. Supp. 408, 412 (N.D. Ga. 1984) ("As a member of the Alabama football team, Holt voluntarily played that sport before thousands of persons – spectators and sportswriters alike – and he necessarily assumed the risk that these persons would comment on the manner in which he performed."); WFAA-TV, Inc. v. McLemore, 978 S.W.2d 568, 573 (Tex. 1998) ("By reporting live from the heart of the controversial raid McLemore assumed a risk that his involvement in the event would be subject to public debate."); Kaufman v. Fid. Fed. Sav. & Loan Ass'n, 140 Cal. App. 3d 913, 920 (Cal. Ct. App. 1983); *see also* Milsap v. Journal/Sentinel, Inc., 100 F.3d 1265, 1270 (7th Cir. 1996) ("A person who injects himself into public controversy assumes the risk of negative public comment on his role in the controversy, both contemporaneously and into the future."); Rebozo v. Wash. Post Co., 637 F.2d 375, 379 (5th Cir. 1981); *Waldbaum*, 627 F.2d at 1292

ethical principle that a person's *deliberate actions have consequences* for which the person may properly be held responsible.[131] Choosing certain courses of conduct will have consequences.[132]

For example, the decision of the Ohio Court of Appeals in the case of *Talley v. WHIO TV-7* was explicitly based on the concept that one's actions alone can lead to classification as a limited-purpose public figure.[133] In that case, the plaintiff Talley had been convicted of attempting "to murder his wife by repeatedly stabbing her."[134] The court indicated that the voluntary felonious attack committed by Talley constituted a voluntary thrusting into the vortex of that controversy. Specifically, the court concluded that

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(stating that public figures "accept the risk that the press, in fulfilling its role of reporting, analyzing, and commenting on well-known persons and public controversies, will focus on them and, perhaps, cast them in an unfavorable light."); Steaks Unlimited, Inc. v. Deaner, 623 F.2d 264, 273 (3d Cir. 1980) ("[P]ublic figures effectively have assumed the risk of potentially unfair criticism by entering into the public arena and engaging the public's attention."); *Rosanova*, 580 F.2d at 861 ("It is no answer to the assertion that one is a public figure to say, truthfully, that one doesn't choose to be. It is sufficient . . . that '[the plaintiff] voluntarily engaged in a course that was bound to invite attention and comment.'"); Barry v. Time, Inc., 584 F. Supp. 1110, 1114 (N.D. Cal. 1984) (quoting Gertz v. Robert Welch, Inc., 418 U.S. 323, 344 (1974)); Fitzpatrick v. Milky Way Prods., Inc., 537 F. Supp. 165, 167 n.4 (E.D. Penn. 1982); Reader's Digest Ass'n, v. Superior Court, 37 Cal. 3d 244, 253 (Cal. 1984); Lewis v. Ueberroth, 147 Cal. App. 3d 442, 446 (Cal. Ct. App. 1983). *See generally* Susan M. Gilles, *From Baseball Parks to the Public Arena: Assumption of the Risk in Tort Law and Constitutional Libel Law*, 75 TEMPLE L. REV. 231, 253 (2003).

[131] *See, e.g.*, *McDowell*, 769 F.2d at 950 ("Public officials and public figures in some sense voluntarily put themselves in a position of greater public scrutiny and thus assume the risk that disparaging remarks will be negligently made about them."); *Ueberroth*, 147 Cal. App. 3d at 446.

[132] *See Chuy*, 431 F. Supp. 2d at 267 ("If society chooses to direct massive public attention to a particular sphere of activity, those who enter that sphere inviting such attention must overcome the *Times* standard."), *aff'd*, 595 F.2d 1265 (3d Cir. 1979); *see also* Manzari v. Associated Newspapers Ltd., 830 F.3d 881, 884 (9th Cir. 2016) (holding that plaintiff, "one of the most well-known and popular soft-porn actresses in the world, as well as a highly successful entrepreneur, with one of the most visited websites on the Web[,] was a public figure"); Reliance Ins. Co. v. Barron's, 442 F. Supp. 1341, 1352 (S.D.N.Y. 1971) ("The Court is aware that any article replete with snide innuendos can be hurtful to a subject, and indeed may damage him in his business or reputation. But if he is a public figure, then he must bear the risk of such publicity as the price he pays for conducting activities or business in the public arena."); Cochran v. Indianapolis Newspapers, Inc., 372 N.E.2d 1211 (Ind. App. 1978) (holding that plaintiff satisfied the public figure requirements set forth in *Curtis Publishing*, after noting that she had been "a 'Playmate' appearing in Playboy Magazine and was also 'Miss Hurst Golden Shifter' at the Indianapolis '500' auto race, an event of international interest.").

[133] 722 N.E.2d 103, 107 (Ohio Ct. App. 1998).

[134] *Id.*

"Talley's classification as a limited purpose public figure ar[ose] from his active criminal act of attempted murder."[135]

The Georgia case of *Mathis v. Cannon* was similarly decided on the basis of the principle that the activities in which a person voluntarily engages can result in the plaintiff being classified as a limited-purpose public figure.[136] In that case, the Georgia Supreme Court concluded that the plaintiff—the president of a private solid waste management company which was closely involved with the Solid Waste Management Authority of Crisp County, Georgia—was a limited-purpose public figure with respect to the "controversy surrounding the recycling facility and landfill in Crisp County."[137] In arriving at this conclusion, the Georgia Supreme Court described in considerable detail the several activities in which Mr. Cannon had engaged,[138] which activities the court saw as having in effect constituted a voluntarily injection of himself into the public controversy at issue in the case.[139]

The plaintiffs in *Barger v. Playboy Enterprises, Inc.* were described as being members of a group which an article in Playboy Magazine had characterized as being the "brides" or "mommas" of the Hell's Angels Motorcycle Club of Oakland and Richmond, California,[140] and they conceded their public figure status for the purposes referenced.[141] Even though there was no dispute before the court in *Barger* concerning the

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[135] *Id.; see also* Van Straten v. Milwaukee Journal Newspaper-Publisher, 447 N.W.2d 105, 109 (Wis. Ct. App. 1989) (holding that the plaintiff, a prisoner who had deliberately chosen to slit his writs, had thereby "placed himself in the public eye"). A person does not acquire public figure status by virtue of the simple fact of having been arrested. Jones v. Taibbi, 512 N.E.2d 260, 268 (Mass. 1987).

[136] 573 S.E.2d 376 (Ga. 2002). The Supreme Court of Georgia reversed (by a 6-3 margin) the judgment of the Court of Appeals, which had held that Mr. Cannon was not a limited-purpose public figure. *Id.* at 386.

[137] *Id.* at 381.

[138] In summary, those activities consisted of (1) Mr. Cannon's "crucial" assistance in helping the Solid Waste Management Authority obtain commitments from other governmental entities in South Georgia; (2) his representing the Authority "in a variety of ways that far exceeded the terms [of his contractual obligations]"; and (3) his precipitation of a financial crisis by the filing of a lawsuit against the Authority and by "temporarily halting deliveries to the solid waste recovery plant." *Id.* at 382.

[139] *Id.* at 381. A later opinion of the Court of Appeals of Georgia in another case took specific note of the fact that, in concluding that the plaintiff was a limited-purpose public figure, the Georgia Supreme Court's opinion in *Mathis* "did not rely upon any media exposure," but rather based its holding on the fact that it was the plaintiff's activities in "facilitating his own business with the [Solid Waste Management Authority]" that constituted the requisite injecting of himself into the controversy surrounding that particular governmental entity. Sparks v. Peaster, 581 S.E.2d 579, 583 (Ga. Ct. App. 2003).

[140] 564 F. Supp. 1151, 1152 (N.D. Cal. 1983), *aff'd*, 732 F.2d 163 (9th Cir. 1984).

[141] *Id.* at 1156.

public figure issue, the District Court's decision has nonetheless been cited as authority for the proposition that participation in certain courses of activity should serve as a predicate for a finding of public figure status.[142]

In addition, a person's choice to enter into various close associational relationships with another person or entity that is or may foreseeably become the object of scrutiny can and should constitute a predicate for a finding of public figure status. The fact that a plaintiff has opted to enter into such a relationship has been deemed to constitute the choosing of a course of conduct that can result in scrutiny by the media. The associational relationship acts as a sort of magnet or vortex, drawing others into the circle where scrutiny is legitimate and is to be anticipated. Thus, for example, in finding that author A.E. Hotchner was a public figure, Judge Charles Brieant emphasized Mr. Hotchner's multiple contacts with the well-known American writer, Ernest Hemingway.[143]

Similarly, the court in the 1982 case of *Wynberg v. National Enquirer, Inc.* also focused on the relationship between two individuals in making the public figure status determination.[144] In that case, the plaintiff, one Henry Wynberg, had had a "close personal relationship"[145] with Elizabeth Taylor. In ruling upon defendant's motion for summary judgment, the Court held that, "[o]wing to his 'close personal relationship' with Elizabeth Taylor for over 14 months, and the substantial publicity they received," Mr. Wynberg was a public figure with respect to the relationship between him and Ms. Taylor.[146]

It is clear that engaging in certain courses of conduct is in actuality the equivalent of thrusting oneself into a particular public controversy,[147] and

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[142] *E.g.*, Marcone v. Penthouse Int'l Magazine for Men, 754 F.2d 1072, 1084 (3d Cir. 1985); Jensen v. Times Mirror Co., 634 F. Supp. 304, 312 (D. Conn. 19866); Schiavone Constr. Co. v. Time Inc., 619 F. Supp. 684, 705 (D.N.J. 1985).

[143] Hotchner v. Castillo-Puche, 404 F. Supp. 1041, 1045–47 (S.D.N.Y. 1975); *see also* Jankovic v. Int'l Crisis Grp., 822 F.3d 576, 587 (D.C. Cir. 2016) ("[plaintiff's] close political relationship with Prime Minister Djindjic carried a risk of public scrutiny"); Clyburn v. News World Commc'ns, Inc., 903 F.2d 29, 33 (D.C. Cir. 1990); Rebozo v. Wash. Post Co., 637 F.2d 375, 380 (5th Cir. 1981) (indicating that it was unnecessary [due to the fact that plaintiff "had in other ways voluntarily exposed himself to the risk of close public scrutiny"] to decide whether "a confidential relationship with the President of the United States automatically converts one into a public figure"); *Schiavone*, 619 F. Supp. at 705, n.14 (discussing various cases where a plaintiff has attained public figure status "by association").

[144] 564 F. Supp. 924, 926 (C.D. Cal. 1982).

[145] *Id.* at 925. The quoted language is plaintiff's own characterization. *Id.*

[146] *Id.* at 929; *see also* Brewer v. Memphis Publ'g Co., 626 F.2d 1238 (5th Cir. 1980) (discussing at length both Ms. Brewer's roles as an entertainer and as a person who had once had an extended dating relationship with Elvis Presley and also her role as the wife of John Brewer, who himself had had a career as a football player and businessman).

[147] *See* Gertz v. Robert Welch, Inc., 418 U.S. 323, 345 (1974). For example, it is fitting

one can become a public figure, *nolens volens*, as a result of his or her voluntary engagement in certain actions or activities.[148]

In that same vein, it is sometimes overlooked that the opinion in *Gertz* explicitly recognized that the *role* which a person or entity assumes can result in public figure status.[149] It is also of more than passing significance to further note that the Court's seminal opinion in *Curtis Publishing* also recognized the fact that public figure status can be attained by virtue of one's *position* or *role* in society alone, absent a more deliberate thrusting of the self into a public controversy. Specifically, the Court in *Curtis Publishing* indicated that:

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that political campaign advisors should be closely scrutinized by the media and that the journalists engaged in the process of scrutiny should benefit from the substantial degree of protection afforded by the "actual malice" standard. *See* McDowell v. Paiewonsky, 769 F.2d 942, 949 (3d Cir. 1985) ("When an individual undertakes a course of conduct that invites attention, even though such attention is neither sought nor desired, he may be deemed a public figure."); Norris v. Bangor Publ'g Co., 53 F. Supp. 2d 495 (D. Me. 1999); Dombey v. Phoenix Newspapers, Inc., 724 P.2d 562, 571 (Az. 1986) (discussing *McDowell*, which had noted that even though the architect for a government-built project "neither sought nor desired public attention," but, "*by dealing with the government on a succession of large and expensive projects, had undertaken 'a course of conduct' that invited attention and scrutiny.*") (emphasis added); *see, e.g.*, Cepeda v. Cowles Magazines & Broad., Inc., 392 F.2d 417, 419 (9th Cir. 1968) (quoted with approval in Rosanova v. Playboy Enters., Inc., 411 F. Supp. 440, 444 (S.D. Ga. 1976) (including within the definition of public figure "anyone who is famous or infamous because of who he is or what he has done."); Bay View Packing Co. v. Taff, 543 N.W.2d 522, 533 (Wis. Ct. App. 1995) ("Bay View Packing's and Liebner's action, or more properly stated, voluntary inaction, in not immediately complying with the state's advisory recommendation and the federal government's recall notice 'inevitably put [them] into the vortex of a public controversy.'"); *see also Marcone*, 754 F.2d at 1083 (noting that in some defamation cases "the plaintiff's action may itself invite comment and attention"); *Rebozo*, 637 F.2d at 380 (holding that plaintiff was a public figure and stating that the media were entitled to assume, "on the basis of [plaintiff's] voluntary activities," that he had voluntarily exposed himself "to the risk of close public scrutiny.").

[148] *See Cepeda*, 392 F.2d at 419 (stating that public figures "include artists, athletes, business people, dilettantes, anyone who is famous or infamous because of who he is or what he has done"). It is noteworthy that several appellate courts have quoted with approval that language from *Cepeda* even after the Supreme Court issued *Gertz*. *See, e.g.*, Manzari v. Associated Newspapers Ltd., 830 F.3d 881, 888 (9th Cir. 2016); Brewer v. Memphis Publ'g Co., 626 F.2d 1238, 1249 (9th Cir. 1980); Mobile Press Register, Inc. v. Faulkner, 372 So.2d 1282, 1286 (Ala. 1979); *see also* Curtis Publ'g Co. v. Butts, 388 U.S. 130, 155 (1967) ("Butts was the athletic director of the University of Georgia and had overall responsibility for the administration of its athletic program."); *Marcone*, 754 F.2d at 1083 (noting that some "courts have classified some people as limited purpose public figures because of their status, position or associations"); Chuy v. Phila. Eagles Football Club, 595 F.2d 1265, 1280 (E.D. Pa. 1977).

[149] *Gertz*, 418 U.S. at 345.

> [Plaintiff Wallace Butts] may have attained [his] status *by position alone* and [plaintiff Edwin Walker] by his purposeful activity amounting to a thrusting of his personality into the "vortex" of an important public controversy, but both commanded sufficient continuing public interest and had sufficient access to the means of counterargument to be able "to expose through discussion the falsehood and fallacies" of the defamatory statements.[150]

It is our conviction that there is something inherent in certain positions that invites scrutiny, and those who choose to occupy such positions should not be permitted to avoid being classified as at least limited-purpose public figures.[151] Several cases have also expressed the concept that a person's decision to assume certain positions or roles that foreseeably imply the possibility of scrutiny constitutes, without more, an engagement by that person in a public controversy for public figure definitional purposes.

For example, the Fifth Circuit's opinion in *Trotter v. Jack Anderson Enterprises, Inc.* acknowledged that certain positions bestow upon their occupants limited-purpose public figure status in virtually an *ipso facto*

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[150] 388 U.S. at 155 (emphasis added). It will be recalled that Mr. Butts was then the athletic director and had formerly been the football coach at the University of Georgia, and Mr. Walker was a retired general who had involved himself in the protests against the admission of James Meredith to the University of Mississippi.

[151] Sometimes a defamation plaintiff's role or position will result in a holding that that plaintiff was at least a limited-purpose public figure. *See, e.g.*, Chapman v. Journal Concepts, Inc., 528 F. Supp. 2d 1081, 1093 (D. Haw. 2007) (holding plaintiff, a prominent surfer in Hawai'i, to be a limited-purpose public figure because, *inter alia*, he had "assumed a role or position of special prominence and notoriety within the surfing community by tackling exceptionally dangerous and difficult waves (and, according to press reports, causing a certain degree of mischief)").

The court in *Chapman* addressed *Gertz* and stated that it "does not read *Gertz's* categorizations as finite or absolute prototypes." *Id.* at 1090. The court went on to point out that the Supreme Court in *Gertz* had "recognized that it was 'lay[ing] down broad rules of general application' and that 'the foregoing generalities [might] not obtain in every instance.'" *Id.* (quoting *Gertz*, 418 U.S. at 343–45). The *Chapman* court also looked to and quoted from certain significant post-*Gertz* federal court cases. *See id.* at 1091 ("In our view, . . . the court in Gertz did not define all subcategories of the public figure classification." (quoting *Brewer*, 626 F.2d at 1254)). The court in *Chapman* also noted that the opinion in *Barry* had understood the important en banc opinion of the Third Circuit in *Chuy* as "suggest[ing] that the *Gertz* test should not be applied woodenly, and that there may be persons whose fame is pervasive in a particular field or profession and who are public figures with respect to that field, without regard to whether there is a particular existing controversy." *Id.*; *see also Dombey*, 724 P.2d at 571 ("Like McDowell, Dombey entered into a continuing relationship with the government and could be expected to receive the scrutiny that eventually attends upon all major governmental efforts. Dombey cannot complain that the spotlight eventually turned on him; its unwelcome glare was a matter of time, not surprise."); James v. Gannett Co., 353 N.E.2d 834 (N.Y. 1976) (holding that the plaintiff, a professional belly dancer, was a public figure with regard to the newspaper accounts of her conduct.).

manner.[152] Specifically, it held that by virtue of the plaintiff's role as president of Embotelladora Guatemalteca, a Coca-Cola bottling company located in Guatemala City, the plaintiff was properly classified as a public figure with respect to the issues relating to the labor unrest at the company's facility.[153]

Similarly, in holding that the plaintiff, the former president of a non-profit corporation, was a limited-purpose public figure, the Eleventh Circuit in *Little v. Breland* focused on the plaintiff's deliberate decision to accept the position in question.[154] The court indicated that the plaintiff's "choice to assume the position of leadership at the Mobile Convention & Visitors Corporation, an organization involving public scrutiny, *shows a voluntary decision to place himself in a situation where there was a likelihood of public controversy.*"[155] The court in that case further noted that "Little voluntarily accepted a taxpayer-supported job to market the $60 million convention center and attract visitors to Mobile. His hiring, performance, and firing would all be the subject of public concern and debate."[156]

The court in *Little* focused on the plaintiff's course of conduct—viz., plaintiff's involvement, *by virtue of his role*, in a realm of public concern. It is our contention that American courts, as a matter of general policy, should strive to mirror this same focus and logic because roles such as these[157] are far too important for there not to be the ever-present possibility of scrutiny under the actual malice standard. It seems clear that some professions or callings, virtually by definition, cry out for scrutiny by the media.[158]

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[152] 818 F.2d 431, 435 (5th Cir. 1987); *see also Marcone*, 754 F.2d at 1083 (recognizing that there are situations which have resulted in defamation actions where "*the plaintiff's action may itself invite comment and attention*" and that some "courts have classified some people as limited purpose public figures because of their status, position or associations") (emphasis added).

[153] Trotter v. Jack Anderson Enters., Inc., 818 F.2d 431, 435 (5th Cir. 1987) ("*By virtue of his position* . . . Trotter was a central figure in important matters at Embotelladora, including the labor union controversy.") (emphasis added).

[154] 93 F.3d 755, 758 (11th Cir. 1996).

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

[156] *Id.* at 758.

[157] *See id.*

[158] The thought-provoking definition of the public figure that was articulated by the Court of Appeals in *Cepeda* is as helpful as it is succinct:

> "Public figures" are those persons who, though not public officials, are "involved in issues in which the public has a justified and important interest." Such figures are, of course, numerous and include artists, athletes, business people, dilettantes, anyone who is famous or infamous because of who he is or what he has done.

Cepeda v. Cowles Magazines & Broad., Inc., 392 F.2d 417, 419 (9th Cir. 1968); *see also* Woy v. Turner, 573 F. Supp. 35 (N.D. Ga. 1983).

The case of *Dameron v. Washington Magazine, Inc.* also deserves attention with respect to this subject.[159] Plaintiff Dameron was the sole air traffic controller on duty at the time of the 1974 crash of a TWA plane in Virginia.[160] The Court of Appeals classified the plaintiff as an involuntary public figure, and he was afforded the protection of the actual malice standard. While we agree with the court's overall conclusion, we would submit that there was a better analytic route to the result reached. We think it would have been wise to hold that the plaintiff was a limited-purpose public figure because his *deliberate act of choosing to occupy the position* of air traffic controller constituted a voluntary acceptance of public controversy. It is quite foreseeable that an air traffic controller may become the subject of media scrutiny because the safety of air travel never ceases to be a matter of public interest—and the person who opts for a career as an air traffic controller by that very fact thrusts himself or herself into that cauldron. Thus, by becoming an air traffic controller, Dameron had assumed the risk that his actions and inactions might be scrutinized.

Similarly, in the case of *Barry v. Time, Inc.*, Judge Marilyn Patel saw that plaintiff Barry's decision to accept the position of head basketball coach at the University of San Francisco was simultaneously, whether Barry desired it or not, a decision to accept the fact that, in all likelihood, there would be public interest in and media scrutiny of the holder of that position.[161] The trial judge stated:

> *Barry voluntarily accepted a position which inevitably made him the focal point of substantial media attention with regard to his team.* Given USF's recent history, this media attention expectably concerned not only the team's performance on the basketball court, but also Barry's performance in conducting the basketball program within NCAA rules.[162]

The Court in *Barry* carefully reviewed the pertinent Supreme Court cases and quite definitively articulated its view that a defamation plaintiff's position alone can confer public figure status. The Court noted:

> Barry's voluntary decision to accept the position of head basketball coach at USF inevitably thrust him into the forefront of an already existing public controversy regarding alleged recruiting violations at USF. Barry was well aware that the two previous head basketball coaches at USF had lost their

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[159] 779 F.2d 736 (D.C. Cir. 1985). Plaintiff Dameron had voluntarily chosen to be an air traffic controller—and thereby had voluntarily thrust himself into a field of inherent interest. Certain topics (like air safety) are inherently, and continuously and predictably cry out for constant scrutiny, constituting matters of public controversy in a per se manner. *See id.* at 742.

[160] *Id.* at 738.

[161] 584 F. Supp. 1110, 1118 (N.D. Cal. 1984).

[162] *Id.* at 1121 (emphasis added).

> positions due to NCAA and university investigations into possible recruiting infractions, and he was also aware of President Lo Schiavo's desire to run a "clean" basketball program. . . . Barry's voluntary decision to become head basketball coach is a sufficient "thrust" within the meaning of *Gertz* to create limited public figure status, since the responsibilities of the position he accepted inevitably put him at the center of public attention regarding a continuing public controversy.[163]

The decision of the Court of Appeals for the District of Columbia Circuit in the case of *Lohrenz v. Donnelly* constitutes further and significant recognition of the principle that the fact of occupying certain positions or assuming certain roles will bring with it public figure status.[164] The plaintiff was a female Navy fighter pilot, and the case arose from publicity surrounding the death of another female Navy fighter pilot in a landing accident on an aircraft carrier on October 28, 1994.[165] It was conceded that the plaintiff "never initiated any contacts with the media prior to the alleged defamations . . . ."[166] Nonetheless, as one of the factors leading it to conclude that the plaintiff was a limited-purpose public figure, the court took specific note of the fact that plaintiff Lohrenz "was well-aware that her *position* as one of the first female F-14 pilots would attract public attention."[167]

Similarly, in the course of determining the status of a defamation plaintiff who was a professional football player, Judge Edward Becker in *Chuy v. Philadelphia Eagles Football Club* expressly indicated that the holders of some positions should "by virtue of that fact" be classified as public figures, "[w]here a person has . . . chosen to engage in a profession which draws him regularly into regional and national view and leads to 'fame and notoriety in the community,' even if he has no ideological thesis to promulgate, he invites general public discussion."[168]

With respect to the practitioners of some professions, however, overly facile generalizations as to an individual's public figure status must be avoided; it is *sometimes* necessary to go behind the title.[169] Under the prevailing case law, professional persons are not easy to classify in a one-

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[163] *Id.* at 1118.

[164] 350 F.3d 1272 (D.C. Cir. 2003).

[165] *Id.* at 1276.

[166] *Id.* at 1275.

[167] *Id.* at 1276 (citing Clyburn v. News World Commc'ns, Inc., 903 F.2d 29, 33 (D.C. Cir. 1990)) (emphasis added).

[168] 431 F. Supp. 254, 267 (E.D. Pa. 1977), *aff'd*, 595 F.2d 1265 (3d Cir. 1979) (quoting Waldbaum v. Fairchild Publ'ns, Inc., 627 F.2d 1287, 1295 (D.C. Cir. 1980)); *see generally* Brewer v. Memphis Publ'g Co., 626 F.2d 1238, 1254 (5th Cir. 1980).

[169] *See generally* Marcone v. Penthouse Int'l Magazine for Men, 754 F.2d 1072 (3d Cir. 1985).

size-fits-all manner. For example, neither physicians, dentists, nor attorneys practicing in relative obscurity, are ordinarily deemed to be public figures merely by virtue of their membership in those particular professions.[170] A

[170] *See* Hotchner v. Castillo-Puche, 404 F. Supp. 1041, 1044 n.2 (S.D.N.Y. 1975) ("Whether an attorney is a public figure clearly depends upon the circumstances of the particular case. An attorney does not become a public figure or public official solely by reason of his membership in the bar of a state."); Marchiondo v. Brown, 649 P.2d 462, 467 (N.M. 1982) ("Generally, lawyers in pursuing their profession are not public figures unless they voluntarily inject themselves or are drawn into a particular public controversy."); Della-Donna v. Gore Newspapers Co., 489 So. 2d 72, 77 (Fla. Dist. Ct. App. 1986) (holding that the plaintiff attorney was a limited-purpose public figure not by virtue of the fact that he was an attorney, but because he "initiated a series of purposeful, considered actions, igniting a public controversy in which he continued to play a prominent role").

It should be stated that *the manner* in which some lawyers have chosen to pursue their profession constitutes, by the very nature of that pursuit, an engagement in a course of conduct. *See* Orr v. Argus-Press Co., 586 F.2d 1108 (6th Cir. 1978) (holding that a lawyer who was president of a development company and who had been indicted on securities law charges was a public figure); Partington v. Bugliosi, 825 F. Supp. 906, 917–18 (D. Haw. 1993) ("The evidence here shows that Partington's involvement in the case went far beyond the low-key participation one might expect of someone attempting to avoid the public eye."), *aff'd*, 56 F.3d 1147 (9th Cir. 1995); *see also* Coles v. Wash. Free Weekly, Inc., 881 F. Supp. 26, 31 (D.D.C. 1995), *aff'd*, 88 F.3d 1278 (D.C. Cir. 1996); Young v. The Morning Journal, 717 N.E.2d 356 (Ohio Ct. App. 1998); Finkelstein v. Albany Herald Publ'g Co., 392 S.E.2d 559, 561 (Ga. App. 1990) (holding that the plaintiff lawyer "had voluntarily and deliberately thrust himself into the forefront of the controversy surrounding the district attorney's office" and thereby had made himself "a public figure with respect to that controversy"); Hayes v. Booth, 295 N.W.2d 858, 864 (Mich. Ct. App. 1980) ("Criticism goes with the acceptance of the spotlight."). *See generally* Sparagon v. Native Am. Publishers, Inc., 542 N.W.2d 125, 135 (S.D. 1996); Healey v. New England Newspapers, Inc., 555 A.2d 321 (R.I. 1989); Benitez, *supra* note 19, at 83.

A physician who walks on a wider stage, however, can thereby acquire public figure status. *See, e.g.*, Franzon v. Massena Mem'l Hosp., 89 F. Supp. 2d 270, 278–80 (N.D.N.Y. 2000) (holding that a doctor who was active in a controversy about granting privileges to nurse midwives was a limited-purpose public figure); Exner v. Am. Med. Ass'n, 529 P.2d 863, 870 (Wash. Ct. App. 1974) (holding that a physician had become a public figure with respect to the fluoridation issue "by having abandoned his anonymity, by having assumed leadership and by having attempted to influence the outcome of the issue"); Brown v. Phila. Tribune Co., 668 A.2d 159, 162 (Pa. Super. Ct. 1995) (holding that the plaintiff dentist was not a public figure because, in spite of the fact that he was charged with welfare fraud, the court noted that he had "merely received state reimbursement for dental work performed on lower-income patients").

If a physician or other medical professional actively became involved in a matter of public interest other than his or her treatment of individual patients, then public figure status would likely attach. *See, e.g.*, Moffatt v. Brown, 751 P.2d 939, 941 (Alaska 1988) (holding that the plaintiff physician, an obstetrician, was a public figure, stating: "Dr. Brown voluntarily sought appointment to the Medical Board, one of the functions of which is to regulate abortion procedures in the State of Alaska. As such, the public has an interest in the qualifications of a potential appointee to the Medical Board.").

more nuanced approach to determine public figure status is required—without falling into the trap of implying that relatively clear-cut criteria cannot be formulated in this area.

For instance, the Tenth Circuit in its decision in *Schwartz v. American College of Emergency Physicians* had no difficulty in recognizing the public figure status of the plaintiff doctor, whose own pleadings had described him as being "a nationally-recognized pioneer in the professionalization of the field of Emergency Medicine . . . ."[171] The Court of Appeals of North Carolina similarly held in *Gaunt v. Pittaway* that a doctor who had "thrust himself into the vortex of the controversy" surrounding in vitro fertilization was a limited-purpose public figure.[172]

The decision of the Court of Appeals of Texas in *Swate v. Schiffers* is further instructive on this issue.[173] In that case, the plaintiff doctor had sued a reporter, her newspaper, and the publisher concerning allegedly defamatory statements contained in a newspaper article about the quality, or lack thereof, of the doctor's medical practice. In the course of holding that the doctor was a limited-purpose public figure, the Texas court noted that the defendants had submitted to the court for its review twenty-four previously published newspaper articles.[174] The court then concluded as follows:

> The 24 articles presented by the defendants support the conclusion that Swate is a public figure for the purposes of this lawsuit. These articles date back to 1986 and, if true, describe a medical practice that can only be characterized as atrocious. The type of behavior described by the articles is certainly the type of information that interests the public. Although Swate may not have voluntarily injected himself into controversy, he has certainly been drawn into controversy, so much so that the trial court properly concluded as a matter of law that Swate is a public figure for the purposes of this lawsuit . . . .[175]

A. Inherent Matters of Public Controversy

Just as some roles or courses of conduct can, or should, cause one, *ipso facto*, to be classified as a public figure, we submit that there are some issues and activities that are inherently and permanently matters of public controversy using our broad and flexible understanding of the term. Although we would agree that certain behavior or actions by an individual

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[171] 215 F.3d 1140, 1145 (10th Cir. 2000) (quoting from the Complaint filed by the plaintiff in that case).

[172] 534 S.E.2d 660, 665–66 (N.C. Ct. App. 2000).

[173] 975 S.W.2d 70 (Tex. App. 1998).

[174] *Id.* at 74.

[175] *Id.* at 76.

or entity should constitute an inherent public controversy, not all courts have come to this same conclusion.

In the Fourth Circuit's opinion in *Blue Ridge Bank v. Veribanc, Inc.*, the court declined to rule that the plaintiff bank was a public figure.[176] The plaintiff brought an action for libel, alleging that the defendant had published an article erroneously stating that Blue Ridge Bank was "possibly on the road to insolvency."[177] Although the court conceded that the bank had engaged in an extensive promotional campaign at the time of publication, it noted that the financial health of the bank was not an explicit part of the message conveyed by the promotional campaign.[178] Furthermore, the court stated that, even though the plaintiff bank participated "in a government regulated industry of national economic importance, and . . . [was] intimately involved in the economic welfare of Floyd County as one of only two local banks," it was not involved in any sort of public controversy and could not be deemed a public figure.[179] It is noteworthy that the court came to this conclusion in spite of the important and quite public role which banks play in our society.[180]

The decision of the United States Court of Appeals for the First Circuit in *Bruno & Stillman, Inc. v. Globe Newspaper Co* is similarly inconsistent with our thesis that there are some topics that should fall automatically into the "public controversy" realm.[181] It is important to bear in mind the nature of the journalistic revelations at issue in this case. Between 1977 and 1978, the Boston Globe published several stories alleging that there may have been defects in vessels manufactured by the plaintiff—a corporation engaged in the manufacture and sale of commercial fishing boats—and that those defects may have caused several of the vessels to sink. Distressed by certain alleged inaccuracies contained within the articles, the plaintiff filed a lawsuit against the Globe alleging libel. In addressing the issue of public figure status, the court conducted a public controversy analysis, which we contend was rather stinting. Specifically, in spite of the fact that the issues concerning the plaintiff's vessels would likely be of clear interest to a significant segment of the population, the court noted that, because "the

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[176] 866 F.2d 681 (4th Cir. 1989).

[177] *Id.* at 684.

[178] *Id.* at 687–88.

[179] *Id.* at 688.

[180] *See, e.g.*, Hufstedler, Kaus & Ettinger v. Superior Court, 49 Cal. Rptr. 2d 551, 561 (Cal. Ct. App. 1996); Coronado Credit Union v. KOAT Television, Inc., 656 P.2d 896, 904 (N.M. Ct. App. 1982).

[181] 633 F.2d 583 (1st Cir. 1980).

record reveals no public controversy antedating the publication of the Globe articles,"[182] the court determined that the plaintiff was not a public figure.

The fact that some courts state or assume that the public controversy must have existed *prior* to the publication of the allegedly defamatory statement is but one problem gracing the stage of the public controversy issue.[183] It would seem, however, that such a general rule cannot easily be squared with the idea of *inherently* controversial issues, such as those in the cases of *Blue Ridge*, the ruling in which case being inconsistent with our thesis. We believe that the *debate* about an issue of public concern need not be pre-existing. Judge Alvin Rubin observed that "[c]reating a public issue . . . is not the same as revealing one. The purpose of investigative reporting is to uncover matters of public concern previously hidden from the public view."[184] A fair extrapolation from that statement would be a broader legal principle to the effect that some issues *never cease* to be matters of public controversy.

For example, the Supreme Judicial Court of Massachusetts in *ELM Medical Laboratory, Inc. v. RKO General, Inc.*[185] based its holding that the plaintiff was a public figure on the *inherently controversial* nature of the topic at issue—allegedly erroneous medical lab testing results[186]—specifically stating without qualification that "[r]eports concerning dangers

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[182] *Id.* at 591. At the conclusion of its discussion of the public figure issue, the court added the following significant language that demonstrates how close the issue must have been for the judges on the appellate panel. *See id.* at 592 ("On remand [the Globe] is not foreclosed from attempting to introduce additional evidence to satisfy the standard. It will then be for the district court, on a fuller record, to determine whetehr a public controversy implicating the company existed apart from the challenged statements . . . .").

[183] *See* Gray v. St. Martin's Press, Inc., 221 F.3d 243, 251 (1st Cir. 2000) (stating that the public controversy must have existed prior to and up to the time of publication so as "to avoid bootstrapping"); *see also* Ferguson v. Watkins, 448 So.2d 271 (Miss. 1984).

[184] Trotter v. Jack Anderson Enters., Inc., 818 F.2d 431, 434 (5th Cir. 1987) (responding to plaintiff's argument which had invoked the Supreme Court's decision in *Hutchinson v. Proxmire*, 443 U.S. 111 (1979), as authority for the proposition that an otherwise private figure does not become a public figure when it is "the allegedly defamatory articles themselves" that have turned the person into a public figure).

[185] 532 N.E.2d 675 (Mass. 1989).

[186] *Id.* at 680 ("A public controversy is a dispute in which the outcome 'affects the general public or some segment of it in an appreciable way' . . . . Reports concerning dangers to the public health constitute public controversies . . . . Thus, the plaintiff here achieved public figure status because it was drawn into a public controversy.") (citations omitted); *see also* White v. Mobile Press Register, Inc., 514 So. 2d 902, 904 (Ala. 1987) ("White's prior association with the E.P.A., and his choice of a career as a high level executive in an industry that is the subject of much public interest and concern show a voluntary decision to place himself in a situation where there was a likelihood of public controversy. His action invited attention and comment.").

to the public health constitute public controversies" because they affect "the general public or some segment of it in an appreciable way."[187]

Issues of obvious importance to the health and safety of society should never be immunized from scrutiny under the actual malice standard.[188] Respectfully, it must be said that it is difficult to understand why news surrounding a company that made a conscious decision to build and market commercial fishing boats, or articles about a bank that held the accounts of a large portion of the citizens of a city, should be viewed as being anything other than public controversies, making both entities worthy of public figure status. In fact, we contend that entities and individuals that make such decisions have, *ipso facto*, assumed public figure status.

Thus, we should not allow the public figure determination to be cabined by the public controversy issue. To accomplish this goal, we are advocating for a broadening of the definition of what constitutes a public controversy, to expand the scope of who is ultimately considered a public figure, and to allow the media the breathing space necessary to carry out their constitutionally protected right to scrutinize.

B. Creating a Presumption of Public Figure Status for Corporations[189]

Just as some activities are inherently controversial, in the broad sense of that term, and are therefore perpetually deserving of scrutiny, so too are certain entities inherently public figures deserving of scrutiny. Accordingly, it is submitted that there should be a conclusive *presumption* that corporations, including senior corporate executives and managers,[190] are public figures.[191]

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[187] ELM Med. Lab., Inc. v. RKO Gen., Inc., 532 N.E.2d 675, 680 (Mass. 1989); *see also* United Med. Labs., Inc. v. Columbia Broad. Sys., Inc., 404 F.2d 706, 711 (9th Cir. 1968) (holding the *Sullivan* standard to be applicable to broadcasts about allegedly inaccurate test results from a mail order clinical testing laboratory and stating that that subject "would seem to us to be one of such inherent public concern and stake that there could be no possible question as to the applicability of the New York Times standard for any defeasance").

[188] *See* Wiegel v. Capital Times, Co., 426 N.W.2d 43, 50 (Wis. Ct. App. 1988) (expressly agreeing with the trial court's finding "that soil conservation and erosion have been issues of public concern for many years and that the effect of erosion on water quality is a matter of great societal interest").

[189] *See* Isuzu Motors Ltd. v. Consumers Union of U.S., Inc., 66 F. Supp. 2d 1117, 1122 (C.D. Cal. 1999) (noting that "the courts have not developed a uniform approach to considering a corporation's public status.").

[190] *See, e.g.*, Medure v. N.Y. Times Co., 60 F. Supp. 2d 477 (W.D. Penn. 1999) (classifying a businessman whose companies managed gaming casinos on Indian reservations as a public figure); *see also* Trotter v. Jack Anderson Enters., Inc., 818 F.2d 431 (5th Cir. 1987); *White*, 514 So. 2d at 904 ("White's prior association with E.P.A., and his

Let us be unequivocally clear: entities must be subjected to the same scrutiny to which persons of societal significance are subjected. The behemoth will overwhelm the individual if it is allowed to escape scrutiny.[192] Scrutiny and criticism of commercial institutions and those at their helm should be as unrestrained as criticism of government and those at its helm.[193]

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choice of a career as a high level executive in an industry that is the subject of much public interest and concern show a voluntary decision to place himself in a situation where there was a likelihood of public controversy.").

[191] If such a conclusive presumption were deemed too radical, then there should at least be a rebuttable presumption that publicly held corporations are public figures. *See* Restatement (Second) of Torts § 561; *see also* Nw. Airlines, Inc. v. Astraea Aviation Servs., Inc., 111 F.3d 1386, 1393 (8th Cir. 1997) (holding that "Minnesota law considers a corporation a public figure . . . ."); Martin Marietta Corp. v. Evening Star Newspaper, 417 F. Supp. 947, 956 (D.D.C. 1976) (proposing that corporations should be treated as public figures when "issues of legitimate public concern are discussed"). *But see* Reliance Ins. Co. v. Barron's, 442 F. Supp. 1341, 1347–48 (S.D.N.Y. 1977); TransWorld Accounts, Inc. v. Assoc. Press, 425 F. Supp. 814, 819 (N.D. Cal. 1977) (expressing disagreement with the reasoning of the court in *Martin Marietta*). *See generally* D. Mark Jackson, *The Corporate Defamation Plaintiff in the Era of SLAPPS: Revisiting* New York Times v. Sullivan, 9 WM. & MARY BILL RTS. J. 491, 492 (2001) ("A greater need for accountability demands that citizens be afforded the same First Amendment protections when speaking about corporations as afforded by New York Times when speaking about public officials. Corporate plaintiffs should be treated as per se public figures; that is, in order to prevail in defamation suits, corporations must prove that defamatory statements were made with actual malice"). Adoption of this approach suggested by the latter article would avoid the public controversy Serbonian bog entirely, at least when corporations are involved. *See* Patricia Nassif Fetzer, *The Corporate Defamation Plaintiff As First Amendment 'Public Figure': Nailing the Jellyfish*, 68 IOWA L. REV. 35 (1982); Lyrissa Barnett Lidsky, *Silencing John Doe: Defamation & Discourse in Cyberspace*, 49 DUKE L.J. 855, 908 n.279 (1999-2000) ("Other courts have held that corporate plaintiffs must prove actual malice, regardless of whether the plaintiff is a public figure, because the state interest in protecting corporate reputation is weaker than that in protecting individual reputation."); Norman Redlich, "*The Publicly Held Corporation As Defamation Plaintiff*," 39 ST. LOUIS U. L.J. 1167 (1995).

[192] *See* Curtis Publ'g Co. v. Butts, 388 U.S. 130, 163 (1967) (Warren, C.J., concurring) ("Increasingly in this country, the distinctions between governmental and private sectors are blurred."); *see also* Douglas E. Lee, Note, *Public Interest, Public Figures, and the Corporate Defamation Plaintiff: Jadwin v. Minneapolis Star & Tribune*, 81 NW. U. L. REV. 318, 332 (1987) ("[B]usinesses, by incorporating, assume special prominence in the affairs of society and voluntarily expose themselves to an increased risk of reputational injury. Corporations assume this role presumably because they obtain special benefits, such as advantageous income tax treatment and limited personal liability for owners, merely as a result of incorporation."); *see generally* D. Mark Jackson, *supra* note 191.

[193] *See* Rosenblatt v. Baer, 383 U.S. 75, 85 (1966) ("Criticism of government is at the very center of the constitutionally protected area of free discussion. Criticism of those responsible for government operations must be free, lest criticism of government itself be penalized.").

In our view, corporations which, needless to say, exist only pursuant to governmental approval, should be classified as at least limited-purpose public figures. No less prominent a jurist than Judge Richard Posner has suggested (in what might arguably be dictum) that large corporations should *never* be classified as private figures: "[I]f the purpose of the public figure-private person dichotomy is to protect the privacy of individuals who do not seek publicity or engage in activities that place them in the public eye, there seems to be no reason to classify a large corporation as a private person."[194] We contend that advertising surely is a deliberate, almost archetypical, form of seeking public attention, and the fact that a plaintiff has engaged in advertising should constitute a virtually irrebuttable presumption that it is at least a limited-purpose public figure.[195] If commercial advertising means putting the good word out there, then it is hard to accept the reasoning in those cases which have held that advertising without more is not enough to make the advertiser a public figure.[196] With the sweet comes the bitter.[197]

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[194] Brown & Williamson Tobacco Corp. v. Jacobson, 713 F.2d 262, 272 (7th Cir. 1983); *see also* Snead v. Redland Aggregates Ltd., 998 F.2d 1325, 1329 (5th Cir. 1993); Kroll Assocs. v. City & Cty. Of Honolulu, 833 F. Supp. 802, 805 (D. Haw. 1993); Nat'l Life Ins. v. Phillips Publ'g, Inc., 793 F. Supp 627, 648 (D. Md. 1992); Jadwin v. Minneapolis Star & Trib. Co., 390 N.W.2d 437 (Minn. Ct. App. 1986); Lisa Magee Arent, Note, A *Matter of 'Governing Importance': Providing Business Defamation and Product Disparagement Defendants Full First Amendment Protection*, 67 IND. L.J. 441 (1992).

Judge Flannery's decision in *Martin Marietta* reads *Gertz* in a limited manner. Martin Marietta Corp. v. Evening Star Newspaper, 417 F. Supp. 947 (D.D.C. 1976). While acknowledging that the *Gertz* Court rejected the *Rosenbloom* approach, Judge Flannery understood the rationale of *Gertz* as focusing on defamation plaintiffs who are natural persons rather than corporations, and he held that the *Rosenbloom* approach remained viable when a corporation is the defamation plaintiff. *Id.* at 954. The decision in *Martin Marietta* constitutes an interesting and innovative approach to the public figure issue where corporations are concerned. *But see TransWorld Accounts*, 425 F. Supp. at 819 (disagreeing with the reasoning of the court in *Martin Marietta*).

[195] *See, e.g.*, Journal-Gazette Co. v. Bandido's, Inc., 712 N.E.2d 446, 454 (Ind. 1999). *A fortiori*, where the advertising is directed toward an already existing public controversy, the fact of advertising should be held to constitute a thrusting into the vortex of that controversy. *See, e.g.*, Samuels v. Berger, 595 N.Y.S.2d 231, 233 (N.Y. App. Div. 1993) (holding that the plaintiffs, a marine contracting company and its president, were limited public figures with respect to certain environmental issues because both or one of the plaintiffs had advertised addressing those issues, had spoken at a public hearing, and had written a letter to the editor).

[196] *E.g.*, Vegod Corp. v. Am. Broad. Cos., 603 P.2d 14, 18 (Cal. 1979) (en banc) (expressing that advertising may evoke public interest, but it does not constitute a public controversy and then rejecting defendant's contention that "by selling goods to the public and by advertising the sale plaintiffs became public figures").

[197] *See generally* Nat'l Found. for Cancer Research, Inc. v. Council of Better Bus. Bureaus, Inc., 705 F.2d 98, 101 (4th Cir. 1983) (noting of the plaintiff's "massive

C. "The Tie Goes to the Runner"

Several American courts, at least in modern times, have sought in the realm of freedom of speech and of the press to suggest that the close calls should be in favor of the runner—i.e., opting not to find defamation defendants liable in close cases.[198] As the District of Columbia Circuit has noted, courts in such situations should "err on the side of nonactionabillity."[199]

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solicitation efforts" as an important factor leading to the court's holding that the plaintiff entity was a public figure). *But see*, however, the same Circuit's subsequent decision in *Blue Ridge Bank v. Veribanc, Inc.*, 866 F.2d 681, 687–88 (4th Cir. 1989).

[198] *See, e.g.*, RODNEY A. SMOLLA, LAW OF DEFAMATION § 2.115 (1986) ("In a close case on the issue of whether defamatory speech is 'of and concerning' an individual or the government itself, it should be construed as of and concerning the government."). The Court of Appeals of New Mexico has quoted with approval that sentence from Professor Smolla's treatise and indicated that there should be a sort of preferential option in favor of speech: "Where public figures are involved in issues of public concern, the Constitution contemplates a bias in favor of free speech." Andrews v. Stallings, 892 P.2d 611, 616 (N.M. Ct. App. 1995). In other words, viewing the defamation defendant as the runner, the tie should go to the runner! *See* Smolla, *supra* note 49, at 1527 (discussing the *Hepps* decision and concluding: "Under *Hepps*, therefore, ties go to the press."); *cf.* Fed. Election Comm'n v. Wis. Right to Life, Inc., 551 U.S. 449, 474 (2007) (plurality opinion of Roberts, C.J.) ("Where the First Amendment is implicated, the tie goes to the speaker, not the censor."). *See also* N.Y. Times Co. v. Sullivan, 376 U.S. 254, 302 (1964) (Goldberg, J., concurring) ("[O]ne main function of the First Amendment is to ensure ample opportunity for the people to determine and resolve public issues. Where public matters are involved, the doubts should be resolved in favor of freedom of expression rather than against it.") (quoting WILLIAM O. DOUGLAS, THE RIGHT OF THE PEOPLE 41 (Doubleday 1958); Liberty Lobby, Inc. v. Pearson, 390 F.2d 489, 491, (D.C. Cir. 1968) ("While the right of expression and publication is not absolute, the balance is always weighted in favor of free expression and tolerance for error is afforded; some utterances are protected not because of their merit or truth but because a free, open society elects to take calculated risks to keep expression uninhibited.") (footnotes omitted); Lins v. Evening News Ass'n, 342 N.W.2d 573, 577 (Mich. Ct. App. 1983) ("We believe that on summary judgment motions involving alleged libel of public officials or public figures by the media, if any advantage of the doubt is to be given, it must go to the media under First Amendment constitutional rights of free speech and free press.") (also attributed to *Meeropol*, 381 F. Supp. at 32).

[199] Liberty Lobby, Inc. v. Dow Jones & Co., 838 F.2d 1287, 1292 (D.C. Cir. 1988).

The language in *Dow Jones* about erring "on the side of nonactionability" was directed to situations where the question as to the truth or falsity of an allegedly defamatory statement is close. Nevertheless, the *Dow Jones* maxim has been applied more broadly by other courts confronted with related but not identical situations including the question of who is a public figure. *See* Johnson v. Columbia Broad. Sys., Inc., 10 F. Supp. 2d 1071, 1074 (D. Minn. 1998); Washington v. Smith, 893 F. Supp. 60, 65 (D.D.C. 1995) ("We recognize that plaintiff is deeply offended by these matters, however, the Court must 'err on the side of nonactionability.'"), *aff'd*, 80 F.3d 555 (D.C. Cir. 1996); *see also* Hunter v. Hartman, 545 N.W.2d 699, 705 (Minn. Ct. App. 1996); Rudnick v. McMillan, 31 Cal. Rptr.

It is undeniable that having public figure status is not an unmixed blessing. It is as inevitable as it is genuinely regrettable that some people will be harmed by unflinching adherence to the criteria proposed here.[200] Nevertheless, it is submitted that meaningful scrutiny of such persons and entities is so absolutely vital to society that that sort of incidental pain must be deemed acceptable—even though its effect upon the individual is real.[201]

Unquestionably, from time to time some entirely innocent individuals and entities will feel the heat of public scrutiny, and sometimes the allegations will be unfair and untrue but will survive actual malice analysis.

2d 193, 199 (Ct. App. 1994) ("Courts must be cautious lest we inhibit vigorous public debate about such public issues. If we err, it should be on the side of allowing free-flowing discussion of current events. We must allow plenty of 'breathing space' for such commentary."). *See generally* Wiegel v. Capital Times, Co., 426 N.W.2d 43, 47 (Wis. Ct. App. 1988) ("[I]n doubtful cases 'the doubt should be resolved in favor of free criticism and discussion.'") (quoting Grell v. Hoard, 229 N.W. 428, 430 (Wis. 1931)).

Although it does not expressly invoke "the tie goes to the runner" metaphor, the following statement in the case of *Jensen v. Times Mirror Co.* is illustrative of a court adhering to that principle:

> While this is not a clear-cut case, considering plaintiff's course of action, the choices she made in remaining as Boudin's roommate, the inevitability of publicity if Boudin's location were revealed, her interview and the publication of the intended news story resulting therefrom and her relationship to and knowledge of Boudin's identity require a finding that, for a limited purpose, which includes the publications in question, plaintiff was a public figure.

634 F. Supp. 306, 313 (D. Conn. 1986).

In *Jankovic v. International Crisis Group*, the court carefully exegeted the text of the *Gertz* opinion and noted that the Supreme Court in that opinion "accommodated the competing concerns between a free press and a private person's need to redress wrongful injury . . . ." 822 F.3d 576, 585 (D.C. Cir. 2016). The court then proceeded to signal what the outcome should be if a choice must be made between those "competing concerns" in a particular case: "[T]he Court accommodated the competing concerns between a free press and a private person's need to redress wrongful injury, but has 'been especially anxious to assure to the freedoms of speech and press that 'breathing space' essential to their fruitful exercise.'" *Id.* (citing *Gertz*, 418 U.S. at 342).

[200] 4 J. ELLIOTT, DEBATES ON THE FEDERAL CONSTITUTION 571 (1876) ("Some degree of abuse is inseparable from the proper use of everything; and in no instance is this more true than in that of the press.") (quoted in Time, Inc. v. Pape, 401 U.S. 279, 290 (1971).

[201] *See* St. Amant v. Thompson, 390 U.S. 727, 732 (1968); *see also* Tavoulareas v. Piro, 759 F.2d 90, 134 (D.C. Cir. 1985) (en banc) (Wright, J., concurring in part and dissenting in part) ("In our society speech may be controversial and contentious; words may be intended to arouse, disturb, provoke, and upset. For a primary 'function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger.'"), *vacated in part on reh'g*, 763 F.2d 1472 (D.C. Cir. 1985), and *on reh'g*, 817 F.2d 762 (D.C. Cir. 1987) (en banc) (reconsidering an issue that is irrelevant to the just-quoted language).

Nevertheless, this is the system upon which we have staked our all. As the Second Circuit said in *Hotchner*:

> Protection and encouragement of writing and publishing, however controversial, is of prime importance to the enjoyment of first amendment freedoms. Any risk that full and vigorous exposition and expression of opinion on matters of public interest may be stifled must be given great weight. In areas of doubt and conflicting considerations, it is thought better to err on the side of free speech.[202]

This is quite analogous to the price which public officials must sometimes pay in consequence of their governmental roles and the attendant scrutiny.[203] As the New Jersey Supreme Court has stated in *Maressa v. New Jersey Monthly*, "[t]he State House is no place for the meek and thin-skinned. Sometimes published statements will hurt. Sometimes they will turn out to be untrue. Nevertheless, those regrettable consequences must yield to the need for an informed citizenry."[204]

Thus, we firmly maintain that, when making public figure status determinations, close calls or ties should be made in favor of the media.[205]

D. A Rebuttable Presumption of Public Figurehood

As a corollary, we believe that the simplest and most constitutionally faithful approach would be for there to be a *rebuttable presumption of*

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[202] Hotchner v. Castillo-Puche, 551 F.2d 910, 913 (2d Cir. 1977); *see also* Peterson v. N.Y. Times Co., 106 F. Supp. 2d 1227, 1232–33 (D. Utah 2000) ("The court is in no way attempting to trivialize the misfortune that Mr. Peterson has suffered. It takes a good part of one's lifetime to establish a good reputation, and when that hard-earned reputation is tarnished in a mere day by an unfortunate error, one is certain to be left in despair."); Frederick Schauer, *Fear, Risk and the First Amendment: Unraveling the "Chilling Effect,"* 58 B.U. L. Rev. 685, 709 (1978) ("The *New York Times* decision is, at bottom, a finding that an erroneous penalization of a publisher is more harmful than a mistaken denial of a remedy for an injury to reputation.") (footnote omitted).

[203] *See* Saenz v. Playboy Enters., Inc., 653 F. Supp. 552, 573 (N.D. Ill. 1987) ("Saenz joins a goodly company of public servants who have been pummeled by abusive charges . . . . The constitutional balance which has been struck does not, however, permit the use of the libel laws for the vindication he here seeks.")(citation omitted), *aff'd*, 841 F.2d 1309 (7th Cir. 1988); *see also* Gertz v. Robert Welch, Inc., 418 U.S. 323, 342 (1974) ("[W]e have been especially anxious to assure to the freedoms of speech and press that 'breathing space' essential to their fruitful exercise."); Orr v. Argus-Press Co., 586 F.2d 1108, 1117 (6th Cir. 1978) ("An individual's interests in privacy, a good reputation, honor and equanimity are important values which the law must continue to protect. These interests must give way in part, however, when the citizen's public deeds arguably harm or seriously affect the interests of a significant number of his fellow citizens.").

[204] Maressa v. N.J. Monthly, 445 A.2d 376, 389 (N.J. 1982).

[205] *See* Murdock v. Pennsylvania, 319 U.S. 105, 115 (1943).

public figure status on the part of the plaintiff in all defamation cases.[206] The plaintiff would, in due course, have the right to challenge that presumption, but would be required to bear the evidentiary burden of establishing his, her, or its private figure status.[207]

Justice Potter Stewart has, with his customary eloquence, pithily summarized the value of a person's reputation: "The right of a man to the protection of his own reputation from unjustified invasion and wrongful hurt reflects no more than our basic concept of the essential dignity and worth of every human being—a concept at the root of any decent system of ordered liberty."[208] Defamation law reflects an appreciation of that value. In the end, however, the need for unceasing scrutiny of the behemoth should trump the reputational interest. As harsh as the result may be in a particular case, such is the price which adherence to First Amendment values and awareness of the overwhelming importance of the media's scrutinizing function sometimes require.[209]

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[206] At the present time, precisely the opposite is the case. *See, e.g.*, Foretich v. Capital Cities/ABC, Inc., 37 F.3d 1541, 1553 (4th Cir. 1994) ("We have proceeded upon the initial presumption that the defamation plaintiff is a private individual, subject to the defendant's burden of proving that the plaintiff is a public figure to whom the [*Sullivan*] standard applies."); Horne v. WTVR, LLC, No. 3:16-cv-000092-JAG, 2017 WL 1330200, at *4 (E.D. Va. Apr. 6, 2017) ("Courts must decide as a matter of law whether a plaintiff qualifies as a public official or public figure. . . . The analysis begins with the presumption that the plaintiff is a private individual, subject to the defendant's burden of proving that the plaintiff is a public officials or public figure."), *aff'd*, 893 F.3d 201 (4th Cir. 2018).

[207] Speiser v. Randall, 357 U.S. 513, 525 (1958) ("In all kinds of litigation it is plain that where the burden of proof lies may be decisive of the outcome.").

[208] Rosenblatt v. Baer, 383 U.S. 75, 92 (1966) (Stewart, J., concurring). Interestingly, in his opinion for the Court in *Gertz*, Justice Powell quotes with approval a portion of this sentence from Justice Stewart's concurring opinion in *Rosenblatt*. *See Gertz*, 418 U.S. at 341.

[209] Reliance Ins. Co. v. Barron's, 442 F. Supp. 1341, 1352 (S.D.N.Y. 1977) (acknowledging the high price that the individual must sometimes pay as a result of having engaged in certain courses of conduct and stating that "[t]he Court is aware that any article replete with snide innuendoes can be hurtful to a subject, and indeed may damage him in his business reputation. But if he is a public figure, then he must bear the risk of such publicity . . . ."); *see also* N.Y. Times Co. v. Sullivan, 376 U.S. 254, 271 (1964) (quoting James Madison's observation that "[s]ome degree of abuse is inseparable from the proper use of everything . . . ."); *The Libel Game*, *supra* note 13, at 560 ("The problems and complexities of libel law result not just from the actions of overbearing reporters, oversensitive celebrities, or overeager lawyers, but also from the genuine conflicts that inevitably arise in a society that endeavors to safeguard both individual reputation and the freedom to criticize. If we choose to give the press wide latitude, at least in cases involving people in the public eye, it is not because we fail to appreciate the value of a person's good name, but rather because we accord an even higher value to promoting accountability and openness in our society.").

Our society has struck a balance. As the Sixth Circuit stated in *Orr v. Argus-Press Co.*, "[a]n individual's interests in privacy, a good reputation, honor and equanimity are important values which the law must continue to protect. These interests must give way in part, however, when the citizen's public deeds arguably harm or seriously affect the interests of a significant number of his fellow citizens."[210]

There is every reason not to assume that all responsible journalists want to publish the truth or what they genuinely believe to be the truth.[211] For the journalist to have a sense of freedom in the harness, however, what is required is a mechanism whereby sufficient breathing space is afforded so that journalistic self-censorship does not occur, and another by which application of the actual malice standard and criteria for governing public figure status determinations ensure that journalists remain protected absent clear and convincing proof of actual malice. As the Supreme Court stated in *St. Amant v. Thompson*: "[T]o insure the ascertainment and publication of the truth about public affairs, it is essential that the First Amendment protect some erroneous publications as well as true ones."[212]

CONCLUSION

When considering issues related to the constitutional guarantee of freedom of speech and of the press, it is important to bear in mind the basic principle discussed at the outset—viz., that *scrutiny* is essential for the well-being of our governmental system and of our society. The First Amendment itself, the opinion of the Supreme Court in *Sullivan*[213] and *Curtis Publishing*, and the decisions by so many courts rendered in the wake of those epochal opinions all assume, but do not state often enough, that a healthy democracy should profit from the process of ceaseless scrutiny. This process is rarely gentle and is often contentious. As Judge J. Harvie Wilkinson III wrote for the en banc Fourth Circuit in *Reuber v. Food*

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[210] Orr v. Argus-Press Co., 586 F.2d 1108, 1117 (6th Cir. 1978).

[211] It seems appropriate to quote at this juncture the perceptive observation by the American novelist Thomas Wolfe: "What *is* truth? No wonder jesting Pilate turned away. The truth, it has a thousand faces—show only one of them, and the *whole* truth flies away!" THOMAS WOLFE, YOU CAN'T GO HOME AGAIN 411 (New York 1942) (emphasis in original).

[212] 390 U.S. 727, 732 (1968); *see also* Time, Inc. v. Pape, 401 U.S. 279 (1971).

[213] The obligatory citation is to Justice Brennan's reference in *Sullivan* to our "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials." *Sullivan*, 376 U.S. 254 at 270 (1964).

Chemical News, Inc., "[t]he [First] Amendment assumes that hard blows may be swapped in the search for just outcomes."[214]

It must be reiterated that, while such debate about public figures is made possible by the generous actual malice standard, there is still widespread ambiguity in this area of the law that necessarily lessens the extent and depth of such dialogue.[215] When the issue is one of public concern and public figures are involved, more speech is encouraged. Judge Frank Easterbrook has aptly made that point:

> More papers, more discussion, better data, and more satisfactory models—not larger awards of damages—mark the path toward superior understanding of the world around us.[216]

A liberal and generous approach is what the Great Amendment requires.[217] The right of the truly private individual to protect a good name

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[214] 925 F.2d 703, 711 (4th Cir. 1991) (en banc).

In his opinion for the majority of the court in *Reuber*, Judge Wilkinson also made reference to "the rough and tumble of a public controversy" and to "the hurly burly of political and scientific debate . . . ." *Id.* at 711, 717; *see also* Bose Corp. v. Consumers Union of U.S., Inc., 466 U.S. 485, 513 (1984) (speaking of "the forum of robust debate to which the [*Sullivan*] rule applies."); Cohen v. California, 403 U.S. 15, 26 (1971) ("In fact, words are often chosen as much for their emotive as their cognitive force."); NAACP v. Button, 371 U.S. 415, 429 (1963) (observing that "vigorous advocacy" is as constitutionally protected as is "abstract discussion); Bridges v. California, 314 U.S. 252, 270 (1941) ("[I]t is a prized American privilege to speak one's mind, although not always with perfect good taste, on all public institutions.") (footnote omitted); Stromberg v. California, 283 U.S. 359, 369 (1931); Peter Scalamandre & Sons v. Kaufman, 113 F.3d 556, 563 (5th Cir. 1997) ("Merco is a public figure engaged in a controversial business, and should not be shocked that some disagree with its practices."); Partington v. Bugliosi, 56 F.3d 1147, 1154 (9th Cir. 1995) (observing that "robust debate among people with different viewpoints . . . is a vital part of our democracy . . . ."); Rinsley v. Brandt, 700 F.2d 1304, 1309 (10th Cir. 1983) (stating that "exaggerated expressions of criticism" belong to the type of statement "that our society, interested in free and heated debate about matters of social concern, has chosen to protect."); Raible v. Newsweek Inc., 341 F. Supp. 804, 808–09 (W.D. Pa. 1972) ("Americans have been hurling epithets at each other for generations . . . Certainly such name calling, either express or implied, does not always give rise to an action for libel."); Mendoza v. Gallup Indep. Co. 764 P.2d 492, 496 (N.M. Ct. App. 1988); Desert Sun Publ'g Co. v. Superior Court, 158 Cal. Rptr. 519, 522 (Cal. Ct. App. 1979).

[215] *See* Marcone v. Penthouse Int'l Magazine for Men, 754 F.2d 1072, 1075 (3d Cir. 1985); *The Libel Game*, *supra* note 13, at 556 (commenting that the book being reviewed "shows how our evolving law of defamation, for all its imperfections, reflects a necessary tension between two crucial values: protecting individuals' reputations and nurturing a free press").

[216] Underwager v. Salter, 22 F.3d 730, 736 (7th Cir. 1994).

[217] Coles v. Wash. Free Weekly, Inc., 881 F. Supp 26, 29 (D.D.C. 1995) ("The First Amendment is one of the great pillars of our democratic system of government established by our founding fathers. The freedom of the press protects the public's ability to inform

is not derisory; but, when there is doubt, the balance must tip in favor of First Amendment protection for those engaged in scrutinizing the persons and entities in society that hold real or apparent power. Justice Hugo Black's clear prose is as much of a clarion call today as it was six decades ago:

> [T]he only conclusion supported by history is that the unqualified prohibitions laid down by the framers were intended to give to liberty of the press, as to the other liberties, *the broadest scope that could be countenanced in an orderly society*.[218]

This article has advocated vigorously for the courts to: (1) set forth clear criteria for making the determination as to who is a public figure and what is a public controversy; (2) focus on the course of conduct in which a plaintiff had engaged, or the role or position he or she had assumed prior to publication of the allegedly defamatory statements; (3) recognize that some issues constitute inherent controversies and some entities are inherently of public interest; and (4) adopt the notion that in defamation law cases there should be a rebuttable presumption in favor of public figure status, and when in doubt, close calls should be made in favor of the runner—the media.[219] That advocacy is not the result of any starry-eyed idealization of the media. It is rather the product of a fundamental conviction that institutions in society, including but certainly not limited to governmental institutions, must be ceaselessly scrutinized.

Every member of the media and indeed every citizen must be made to feel "easy in the harness" with respect to being empowered to express thoughts about issues and persons of public interest. There must be clarity as to the domains in which the all-important scrutiny may take place. As Chief Justice Marvin Rosenberry of the Supreme Court of Wisconsin stated: "We feel that in doubtful cases the doubt should be resolved in favor of free criticism and discussion."[220] This same jurisprudential attitude is reflected in the following passage from the Second Circuit's frequently cited opinion in *Hotchner*:

> [E]xcessive self-censorship by publishing houses would be a more dangerous evil. Protection and encouragement of writing and publishing, however

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itself about matters of public concern and engage in thoughtful debate."), *aff'd*, 88 F.3d 1278 (D.C. Cir. 1996).

[218] Bridges v. California, 314 U.S. 252, 265 (1941) (emphasis added).

[219] *See, e.g.*, Rudnick v. McMillan, 31 Cal. Rptr. 2d 193, 199 (Ct. App. 1994) ("Courts must be cautious lest we inhibit vigorous public debate about such public issues. If we err, it should be on the side of allowing free-flowing discussion of current events. We must allow plenty of 'breathing space' for such commentary.") (citations omitted).

[220] Grell v. Hoard, 239 N.W. 428, 430 (Wis. 1931).

> controversial, is of prime importance to the enjoyment of first amendment freedoms. Any risk that full and vigorous exposition and expression of opinion on matters of public interest may be stifled must be given great weight. *In areas of doubt and conflicting considerations, it is thought better to err on the side of free speech.*[221]

Government and many societal institutions have become immense and complex. For the sake of the individual citizen, those megaliths must be ceaselessly scrutinized. The role of those who by vocation or out of deep conviction engage in the process of scrutiny is of vital importance, and those who scrutinize must be afforded liberal constitutional protection.

POSTSCRIPT

The most important fruit of the research and reflection that led to the drafting of this article is our conviction that, inherent in the First Amendment, is the principle that "close calls" should always favor the runner—i.e., the defamation defendant.[222] That result can be achieved through the creation of new presumptions and a revised allocation of the burdens of proof.[223] If the goal is that the process of *scrutiny* be facilitated, then journalistic timidity must be minimized. The actual malice standard serves significantly to minimize such timidity, and it would be desirable if access to that standard could be maximized.

We conclude this postscript by once again acknowledging the regrettable fact that scrutiny by the media sometimes brings grief to persons and entities that are blameless.[224] Nevertheless, unless we are to disavow our

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[221] Hotchner v. Castillo-Puche, 551 F.2d 910, 913 (2d Cir. 1977) (emphasis added); *see also* Time, Inc. v. Hill, 385 U.S. 374, 389 (1967) ("A broadly defined freedom of the press assures the maintenance of our political system and an open society."); Tague v. Citizens of Law & Order, Inc., 142 Cal. Rptr. 689, 693–94 (Cal. App. Dep't Super. Ct. 1977) ("[A]s a matter of constitutional policy in libel actions, we believe that any doubt as to the public status of a government employee should be resolved in favor of the First and Fourteenth Amendments' guarantees of freedom of the press and the public's interest in open criticism of government operations.").

[222] Our society's understanding of the implications of the First Amendment has evolved over time. *See, e.g.*, Mangual v. Rotger-Sabat, 317 F.3d 45, 65 (1st Cir. 2003) (noting how the term "public official" is now more broadly interpreted in defamation law decisions than it was originally); United Med. Labs., Inc. v. Columbia Broad. Sys., Inc., 404 F.2d 706, 711 n.3 (9th Cir. 1968) ("The one certain prediction I can make is that judicial review of the common law of defamation, launched by the [*Sullivan*] case, is to be with us for a while to come.") (quoting Harry Kalven Jr., *supra* note 58, at 269).

[223] *See* Speiser v. Randall, 357 U.S. 513, 525 (1958) ("In all kinds of litigation it is plain that where the burden of proof lies may be decisive of the outcome.").

[224] The Court in *Gertz* was aware that there were two values at issue—the right of the person to not have his or her reputation tarnished and the right of the media to engage in

society's long-held belief that persons and entities of significance should not be allowed to operate on "automatic pilot" but rather must be scrutinized by outsiders, then we have to accept the bitter with the sweet.

This article has advocated vigorously for the close calls to be made in favor of the runner—the media. That advocacy is not the result of romantic idealization of the media.[225] It is rather the product of a conviction that certain persons and certain institutions in society, both those with governmental affiliations and those without such affiliations, must be ceaselessly scrutinized.[226]

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scrutiny. 418 U.S. 323, 342 (1974). Nevertheless, we do see significance in the Court's acknowledgement that it has "been especially anxious to assure the freedoms of speech and press that 'breathing space' essential to their fruitful exercise." *Id.*

[225] Recall Justice Jackson's comment in his dissenting opinion in *United States v. Ballard*, to the effect that "the price of freedom of . . . speech or of the press is that we must put up with, and even pay for, a good deal of rubbish." 322 U.S. 78, 95 (1944) (Jackson, J., dissenting).

[226] These writers dedicate this article to Attorney Floyd Abrams, the eminent advocate for First Amendment rights, to their several mentors at Boston College Law School, and to their numerous other teachers and role models from whom each of us has learned a great deal over the years. In addition, we are profoundly grateful to the legion of working journalists, practicing lawyers, and gifted law students who have meaningfully contributed to the preparation of this article. The members of that legion are too numerous to mention individually, but their contributions are nonetheless deeply appreciated.

Knick in Perspective: Restoring Regulatory Takings Remedy in Hawai'i

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I. INTRODUCTION

The Supreme Court's recent decision in *Knick v. Township of Scott*[1] has been aptly described by some commentators as the most significant property rights case of the last decade. In *Knick*, the Court found the regulatory takings claim, which had not yet been denied compensation in state court, may be ripe nonetheless.[2] In doing so, the Court explicitly overturned the second prong of the so-called *Williamson County* ripeness test that required property owners to seek remedy through state action—usually just compensation—for the alleged taking before coming to federal court.[3]

The development of regulatory takings theory has flourished over the past century thanks to efforts by the Court to fine-tune the appropriate tests and factors for non-physical takings effected by land use regulation. Unfortunately, utilization of such tests has been seriously diminished by the barrier *Williamson County* ripeness raised for many property owners seeking relief from a valid takings claim.[4] What follows is a brief summary of ripeness under *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City*, the principal features of *Knick*, the circuit split that ripened the issue for review by the Court, and a comment on the effect of *Knick* in Hawai'i.

II. THE STATE OF THE LAW BEFORE *KNICK*

The subject of takings law—government interference with an interest in real property, either physically, through eminent domain, or legislatively,

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1 139 S. Ct. 2162 (2019).

2 *See id.* at 2179.

3 *Id.*

4 *Id.* at 2179–80.

through the exercise of police power—has been the subject of continuous litigation for nearly a century. The extent to which overzealous exercise of the police power can sufficiently deprive a landowner of rights in property before the property has been "taken" by regulation has bedeviled scholars since Justice Holmes opined in *Pennsylvania Coal Co. v. Mahon* that a regulation that goes "too far" is a constitutionally-proscribed taking.[5]

It is in this area of regulatory takings that courts have added exponentially to the common law, during which state courts have chipped away at the doctrine rendering it nearly meaningless.[6] Although arguably commencing with its bizarre April Fool's Day decision in *Village of Belle Terre v. Boraas*,[7] the Supreme Court fully engaged the regulatory takings doctrine in 1978 with its historic preservation decision in *Penn Central Co. v. City of New York*,[8] breaking a near half-century silence following *Pennsylvania Coal*. *Penn Central* established the doctrine of partial regulatory takings, dependent upon the landowner's economic loss (and in particular the extent of interference with distinct, and later reasonable, investment-backed expectations) and the character of the taking—regulatory or physical. Fifteen years later, the Court set forth the "*per se*" or categorical rule on "total" regulatory takings: if a regulation leaves a landowner with no economically beneficial use, then the regulation must be treated as an exercise of eminent domain unless the regulation codified the applicable law of nuisance, or a background principle of a state's law of property, such as public trust or customary law.[9] In between these landmark takings decisions, the Court turned away several regulatory takings challenges on the ground that the controversy was not "ripe."[10]

The issue of when a regulatory takings claim is "ripe" for review is subject to tests the Supreme Court has articulated in deciding regulatory takings claims. If a court cannot determine the extent of economic loss (whether partial or total), it cannot decide whether a regulatory taking has

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[5] 260 U.S. 393 (1922).

[6] FRED BOSSELMAN, DAVID CALLIES & JOHN BANTA, THE TAKING ISSUE: AN ANALYSIS OF THE CONSTITUTIONAL LIMITS OF LAND USE CONTROL (1973).

[7] 416 U.S. 1 (1974).

[8] 438 U.S. 104 (1978).

[9] *See* Lucas v. S. C. Coastal Council, 505 U.S. 1003 (1992).

[10] *See e.g.* Arrigoni Enters., LLC v. Town of Durham, 136 S. Ct. 1409 (2016) (Thomas, J., dissenting) (arguing that certiorari should be granted in this case because *Williamson County*'s state action requirement is poorly justified but meanwhile imposes great burdens on takings plaintiffs); Mount Soledad Memorial Ass'n v. Trunk, 567 U.S. 944 (2012) (denying petition for certiorari because the case came to the court in an interlocutory posture following the Ninth Circuit remand of the case to district court to decide the appropriate remedy); Ohio Forestry Ass'n, Inc. v. Sierra Club, 523 U.S. 726 (1998) (declining to rule on the merits because the dispute was not justiciable as it was not ripe for court review).

occurred. When a claimant brings suit under the Fifth Amendment, the issue of damages is critical as the amendment does not categorically prohibit takings, but rather takings without just compensation.[11] This consideration underlies the so-called "ripeness doctrine," which is set out in the discussion of the Court's *Williamson County* decision.[12] Ever since, this "prudential" inquiry has become a virtually insuperable barrier to bringing regulatory takings claims, particularly because some courts have converted the two-part ripeness test into a jurisdictional, rather than a prudential, doctrine. The application of the test has become a further dilemma for plaintiff landowners due to the preclusion issues that arise.

Fortunately, the Court recently eliminated the state action/litigation requirement in *Knick*.[13] Moreover, a wave of other recent decisions recognize ripeness as primarily prudential. As a prudential inquiry, courts may refuse to raise the ripeness barrier in particularly egregious circumstances, such as when a plaintiff landowner has spent years in court attempting to reach the merits of a takings claim.

The state action requirement and its subsequent practical and doctrinal troubles began with *Williamson County*, in which the Court barred Hamilton Bank, the owner of a parcel that was denied development approval by Williamson County, from bringing a regulatory takings claim in federal court because the claim was not "ripe."[14] Ripeness, according to the Court, required the landowner to (1) obtain a "final decision" from the relevant state or county agencies on its application for development (in that case, subdivision approval)[15] and (2) seek and fail to obtain compensation for the regulatory taking in state court.[16] Noting that the property owner had sought neither a variance (or similar land use exception) for its project nor compensation for the alleged taking, the Court held that Hamilton Bank failed both prongs of the ripeness test and could therefore not bring a substantive takings challenge in federal court.[17] Since *Williamson County*, both the final decision rule and the compensation requirement have raised considerable barriers to the bringing of regulatory takings challenges to land use controls.[18]

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[11] U.S. CONST. amend. V.

[12] Williamson Cty. Reg'l Planning Comm'n v. Hamilton Bank of Johnson City, 473 U.S. 172 (1985).

[13] Knick v. Township of Scott,139 S. Ct. 2162 (2019).

[14] *Williamson County*, 473 U.S. at 200.

[15] *Id.* at 186–94.

[16] *Id.* at 186–97.

[17] *Id.*

[18] For critical comment on the insuperable barrier which *Williamson County* imposes, see Thomas E. Roberts, *Ripeness and Forum Selection in Fifth Amendment Takings Litigation*, 11 J. LAND USE & ENVTL. L. 37 (1995), and Michael M. Berger, *The "Ripeness"*

The subsequent Supreme Court decision in *San Remo Hotel, L.P. v. City and County of San Francisco* indirectly demonstrates the efforts of applying the ripeness doctrine to regulatory takings disputes.[19] *San Remo* does not deal directly with either prong, instead addressing the preclusion problem created for litigants whom federal courts direct to first seek relief in state court under either or both prongs of *Williamson County*.[20] Such litigants dutifully bring their claims in state court, are denied relief, and return to federal court, only to find that they are then precluded from "relitigating" the takings claims in the original federal court.[21]

The *San Remo* decision is just as important for what the Court does address as for what it does not. Carefully noting which parts of the petition for certiorari it chose to address, the five justice majority, penned by Justice Stevens, set out the narrow question before the Court: "This case presents the question whether the federal courts may craft an exception to the full faith and credit statute, 28 U.S.C. § 1738, for claims brought under the Takings Clause of the Fifth Amendment."[22] Notably, the correctness or continued validity of the *Williamson County* ripeness test was not addressed.[23] The Court dealt only with the limited issue of remedy for preclusion under the full faith and credit statute and narrowly ruled that federal courts may not carve out an exception to the statute—in this case for regulatory takings—unless Congress so allows, either explicitly or implicitly. Presumably, a petitioner in *San Remo*'s posture was precluded from raising regulatory takings issues litigated in federal court that it previously litigated in state court, despite being forced into state court in order to "ripen" the case under the first prong of *Williamson County*. Language elsewhere in the opinion suggests it was likely the majority would permit preclusion under other circumstances as well, although a five-

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Mess in Federal Land Use Cases, or How the Supreme Court Converted Federal Judges into Fruit Peddlers, *in* INSTITUTE ON PLANNING, ZONING, AND EMINENT DOMAIN (1991).

[19] 545 U.S. 323 (2005).

[20] *Id.*

[21] *See id.*; Kottschade v. City of Rochester, 319 F.3d 1038 (8th Cir. 2003), *cert. denied*, 124 S. Ct. 178 (2003); Mitchell v. Mills County, 673 F. Supp. 332 (S.D. Iowa 1987), *aff'd*, 847 F.2d 1988 (8th Cir. 1988); Thomas E. Roberts, *Ripeness Principles of Res Judicata*, 24 URB. LAW. 479 (1992); *see also* City of Chicago v. Int'l Coll. of Surgeons, 522 U.S. 156 (1997) (blessing the removal imbalance caused by *Williamson County* ripeness hurdles by permitting the regulator's removal game because property owners are "assuredly" not required to bring facial challenges to an allegedly unconstitutional zoning ordinance in state court, despite notable silence to its *Williamson County* decision).

[22] *San Remo Hotel*, 545 U.S. at 326.

[23] Neither was it addressed by the federal courts below nor raised before the Court by the parties, as correctly noted by Chief Justice Rehnquist in his concurring opinion. *See id.* at 352 (Rehnquist, C.J., concurring).

justice opinion is perhaps a slender reed upon which to rely for much beyond the holding itself.[24] Regardless, the Court makes it clear there is no right to hear a regulatory taking claim in federal court, whether a landowner is forced into state court under preclusion principles or not. From this decision, it is also clear that the *Williamson County* ripeness barrier against bringing regulatory takings claims remained intact. Chief Justice Rehnquist, writing for concurring members of the Court, quite transparently signaled his intent to revisit at least the second prong requiring state action.[25] A number of federal appellate courts have since agreed with the suggestion of the late Chief Justice that the interpretation of the state action prong as a jurisdictional test lacks sufficient base.

In recent decisions prior to *Knick*, the Court used language highlighting that *Williamson County* was, in fact, "a discretionary, prudential ripeness doctrine."[26] For example, in the 2010 decision of *Stop the Beach Renourishment Inc. v. Florida Department of Environmental Protection*,[27] the Supreme Court considered a case in which beachfront landowners alleged an inverse condemnation after the state undertook a "beach renourishment" project that deprived them of their littoral rights and rights to accretion.[28] The Court made short work of the respondents' attempt to argue the taking claim was not ripe because the petitioners had not sought just compensation in state court, holding the ripeness objection—which was not raised in the writ for certiorari—was not a jurisdictional issue and was therefore waived.[29] In the 2013 decision of *Horne v. U.S. Department of Agriculture*, the Court again clarified that "prudential ripeness" is "not, strictly speaking, jurisdictional."[30] In a footnote to the opinion, the Court further explained that a "[c]ase or [c]ontroversy exists once the government has taken private property without paying for it. Accordingly, whether an alternative remedy exists does not affect the jurisdiction of the federal court."[31] Commentators correctly speculated that the Supreme Court, by emphasizing the prudential nature of the doctrine, paved the way

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[24] *San Remo Hotel*, 545 U.S. at 343 (quoting Allen v. McCurry, 449 U.S. 90, 103–04 (1980)).

[25] *Id.* at 348 (Rehnquist, C.J., concurring).

[26] J. David Breemer, *The Rebirth of Federal Takings Review? The Courts' "Prudential" Answer to* Williamson County*'s Flawed State Litigation Ripeness Requirement*, 30 TOURO L. REV. 319, 339 (2014).

[27] 560 U.S. 702 (2010).

[28] *Id.* at 730.

[29] *Id.* at 729.

[30] 569 U.S. 513, 526 (2013).

[31] *Id.* at n.6 (internal quotations omitted).

for lower federal courts to relax the ripeness requirements and to address challenged regulations directly.[32]

Given the direction of a number of federal decisions following *San Remo*, *Stop the Beach*, and *Horne*, it is clear that the *Williamson County* ripeness rule had in fact been substantially diluted with respect to the state action requirement. First, many courts recast the ripeness doctrine as mostly prudential rather than jurisdictional. Second, courts have been increasingly loath to apply the state action prong, at least in part, to avoid lengthy delays in reaching the merits of a regulatory taking claim.

III. KNICK V. TOWNSHIP OF SCOTT

In *Knick*, the Court first clarifies that the government violates the Takings Clause once it takes property without just compensation, which gives rise to the property owner's Fifth Amendment claim under § 1983.[33] By crystallizing the proper understanding of the Fifth Amendment right to just compensation, *Knick*'s holding follows logically: the state procedure prong of *Williamson County* ripeness is overruled because of its poorly-reasoned and unworkable effects in practice.[34] The first prong, finality, was not at issue in *Knick* and was thus left undisturbed.[35]

The regulation underlying *Knick* involved a local ordinance that violated the fundamental right to exclude.[36] Knick owned 90 acres of pastureland in Scott Township, a small community outside of Scranton, Pennsylvania. Her land was primarily used as grazing area for horses and other farm animals, except for Knick's single-family home.[37] Pennsylvania has a long history of permitting backyard burials, and in 2012, the Township passed an ordinance requiring all cemeteries to maintain open public access during daylight hours.[38] The ordinance also authorized Township officers to enter property in order to determine the existence and location of a cemetery on privately owned property. After an officer allegedly discovered several grave markers on Knick's property, Knick was notified that she was in violation of the ordinance for failure to open her property for public access.[39]

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[32] Breemer, *supra* note 26, at 339.
[33] Knick v. Township of Scott, 139 S. Ct. 2162, 2177 (2019).
[34] *Id.* at 2178–79.
[35] *Id.* at 2169.
[36] *Id.*
[37] *Id.* at 2168.
[38] *Id.*
[39] *Id.*

Knick petitioned the state court for declaratory and injunctive relief on the ground that the ordinance effected a taking of her property. Upon the Township's stay of enforcement of the ordinance during state court proceedings, Knick was procedurally excluded from state remedy.[40] The state court declined to rule on Knick's request for declaratory and injunctive relief because she could not demonstrate the irreparable harm necessary for equitable relief without an ongoing enforcement action.[41] Knick then filed in District Court alleging the ordinance constituted a Fifth Amendment taking, however the claim was dismissed as Knick did not first pursue an inverse condemnation action in state court.[42] Despite the Third Circuit noting the ordinance was "extraordinarily and constitutionally suspect," the court affirmed the dismissal of Knick's claim under *Williamson County*.[43] The Supreme Court agreed that the contested ordinance clearly caused an uncompensated regulatory taking, and so accepted *Knick* on certiorari, ultimately eliminating the state procedure prong from the *Williamson County* two-prong test.[44]

The *Knick* opinion opens by characterizing *Williamson County* as holding "a property owner whose property has been taken by a local government has not suffered a violation of his Fifth Amendment rights—and thus cannot bring a federal takings claim in federal court—until a state court has denied his claim for just compensation under state law."[45] The Court corrects this misconception of when the right for compensation arises. According to *Knick*, the plaintiff's inability to pursue his federal claim due to *Williamson County* ripeness and the Court's subsequent decision in *San Remo* "rests on a mistaken view of the Fifth Amendment."[46]

Knick holds that the availability of any particular compensation remedy under state law cannot infringe upon or restrict the property owner's federal constitutional claim. The existence of state procedure that may result in compensation does not affect or deprive a property owner's right to just compensation.[47] The Court explained that the *Williamson County* Court created the state procedure prong under a different understanding of the Fifth Amendment. *Williamson County* explicitly held that the property owner "cannot claim" a violation of the Takings Clause until it has used the

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[40] *Id.*
[41] *Id.*
[42] *Id.* at 2169.
[43] *Id.*
[44] *Id.* at 2169–70.
[45] *Id.* at 2167.
[46] *Id.*
[47] *Id.* at 2171.

available state law procedure for compensation and been denied.[48] Under this view of the Takings Clause, the presence of a state remedy qualifies the right, preventing the right to compensation from vesting until exhaustion of state procedure proves unsuccessful.[49]

After citing a large body of cases that illustrate ambiguity in when the taking arises, *Knick* holds that plaintiffs may bring constitutional claims under the Takings Clause without first bringing any sort of state lawsuit, even when state court procedures to address the underlying contention are available.[50] The Court describes the state procedure prong as practically effectuating a state procedure exhaustion requirement.[51] Thus, the state procedure prong of *Williamson County* ripeness was based on a flawed interpretation of the Takings Clause.[52] *Knick* concludes that government violates the Takings Clause when it takes property without compensation, and that a property owner may bring a Fifth Amendment claim at that time. Because the violation is complete at the time of the taking, the plaintiff's pursuit of remedy in federal court need not yield to prior state procedure.[53]

The *Knick* dissent defends the *Williamson County* rationale that a Fifth Amendment violation does not arise until the government denies the property owner compensation in a subsequent proceeding.[54] Nevertheless, after *Knick*, it is clear where the law stands: An unconstitutional Fifth Amendment taking arises as soon as the property owner suffers an uncompensated taking. From this conclusion, it necessarily follows that the state procedure prong rested on a misunderstanding of the now-clarified law.

IV. THE CIRCUITS: WHERE WE WERE

Prior to *Knick,* both prongs of the *Williamson County* test were softened by various courts, and several circuits were trending towards treating ripeness as more of a prudential measure.[55] The circuits divided on applying the second prong of ripeness as either a jurisdictional barrier or a prudential evaluation.[56] Five circuits made up the prudential group, all of

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[48] *Id.* (quoting *Williamson County*, 473 U.S. at 195).

[49] *Id.* at 2171.

[50] *Id.* at 2173 (quoting D. DANA & T. MERRILL, PROPERTY: TAKINGS 262 (2002)).

[51] *Id.*

[52] *Id.*

[53] *Id.* at 2177.

[54] *Id.* at 2180–81 (Kagan, J., dissenting).

[55] David L. Callies, *Through a Glass Clearly: Predicting the Future in Land Use Takings Law*, 54 WASHBURN L.J. 43, 97, 101 (2014).

[56] Breemer, *supra* note 26, at 341.

which explicitly described the prudential nature of ripeness and reserved discretion in applying the state action prong accordingly. Three other circuits strictly adhered to *Williamson County*, requiring claims to satisfy the state action prong under all circumstances. Finally, two circuits recognized the second prong as prudential but had yet to use such discretion to waive the state action prong.

The prudential circuits did not eliminate the second prong. Rather, those circuits viewed ripeness as a prudential measure that vested final discretion in its judges. The Ninth Circuit was first to shift to an unequivocal prudential view.[57] The Fifth Circuit overturned precedent construing ripeness as strictly jurisdictional, holding the two-prong requirements of ripeness were merely prudential.[58]

The Fourth Circuit published a thorough rationale for prudential ripeness in its 2013 decision of *Town of Nags Head v. Toloczko*.[59] In deciding the applicability of a local ordinance that prohibited reconstruction of private residences on land designated "public trust area" by the town situated within the coastal zone, the court narrowly approached ripeness in response to the defense raised by the town. The court first held that ripeness is a prudential rule not a jurisdictional one.[60] Therefore, a federal court can exercise discretion in requiring ripeness.[61] The court then exercised its discretion and declined to apply the second prong of the ripeness rule "in the interests of fairness and judicial economy."[62]

In *Town of Nags Head v. Sansotta*, the Fourth Circuit took a further step toward ending the use of the state action prong as means to avoid judgment on the merits.[63] The interaction of removal and preclusion under *Williamson County* ripeness as interpreted in state courts could be used to protect challenged land use controls from federal court review.[64] Upon a plaintiff filing a takings claim in state court, as required by *Williamson County*, a defendant could simply remove to federal court and immediately unripen the removed claim in the new federal forum. The Fourth Circuit thwarted such removal maneuvering by holding in *Sansotta* that the town

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[57] *See* Guggenheim v. City of Goleta, 638 F.3d 1111, 1118 (9th Cir. 2010); *see also* MHC Fin. Ltd. P'ship v. City of San Rafael, 714 F.3d 1118, 1130 (9th Cir. 2013), *cert. denied*, 134 S. Ct. 900 (2014) (exercising its discretion not to impose the "prudential requirement of exhaustion in state court").

[58] Rosedale Missionary Baptist Church v. New Orleans City, 641 F.3d 86 (5th Cir. 2011).

[59] 728 F.3d 391 (4th Cir. 2013).

[60] *Id.* at 399.

[61] *Id.*

[62] *Id.*

[63] *See* Town of Nags Head v. Sansotta, 724 F.3d 533 (4th Cir. 2013).

[64] *Id.*

automatically waived ripeness arguments when it removed to federal court.[65]

The Second Circuit also reversed its position, holding *Williamson County* ripeness is prudential rather than jurisdictional, and reserving the right to exercise discretion in applying the doctrine in order to maintain power to decide a case.[66] The Sixth Circuit similarly joined the prudential group of circuits, noting that "dismissing a case on ripeness grounds does a disservice to the federalism principles embodied in [the] doctrine" upon holding a state litigation requirement "clearly has no merit."[67]

Prior to *Knick*, the Third, Seventh, and Tenth Circuits appeared to be on the verge of treating the second prong as prudential. These circuits all recognized ripeness is prudential, but expressed hesitance in using discretion to apply the doctrine.[68] The Seventh Circuit noted that the prudential nature of the *Williamson County* requirements "do[es] not, however, give the lower federal courts license to disregard them."[69] The First, Eighth, and Eleventh Circuits continued to strictly apply ripeness as a jurisdictional rule that bars claims that fail the *Williamson County* ripeness requirements from federal review.[70]

Similarly, the effect of the first prong of the ripeness doctrine (the finality requirement) was mitigated by lower courts. To satisfy the finality prong, the government entity issuing the offending regulation must first reach a final decision on the application of the subject regulation.[71] Because the finality requirement allegedly serves a legitimate purpose it has been spared the criticism that the state action requirement faced.[72] Federal courts had, however, imposed limitations on the finality requirement to avoid gamesmanship and repetitive, unfair, or futile efforts to pursue further administrative relief.[73]

The Supreme Court addressed the finality requirement in *Palazzolo v. Rhode Island*, creating a protection against government abuse through a

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[65] *Id.* at 544.

[66] Sherman v. Town of Chester, 752 F.3d 554, 561 (2d Cir. 2014).

[67] Wilkins v. Daniels, 744 F.3d 409, 418 (6th Cir. 2014).

[68] *See* Alto Eldorado P'ship v. County of Santa Fe, 634 F.3d 1170 (10th Cir. 2011); *see also* Peters v. Village of Clifton, 498 F.3d 727 (7th Cir. 2007); Cty. Concrete Corp. v. Township of Roxbury, 442 F.3d 159 (3d Cir. 2006).

[69] *Peters*, 498 F.3d at 734.

[70] *See* Marek v. Rhode Island, 702 F.3d 650, 653–54 (1st Cir. 2012); *see also* 126th Ave. Landfill, Inc. v. Pinellas County, 459 F. App'x 896, 900 (11th Cir. 2012); Snaza v. City of Saint Paul, 548 F.3d 1178, 1181–83 (8th Cir. 2008).

[71] Williamson Cty. Reg'l Planning Comm'n v. Hamilton Bank of Johnson City, 473 U.S. 172, 193 (1985).

[72] *See* Kurtz v. Verizon N.Y., Inc., 758 F.3d 506, 512 (2d. Cir. 2014).

[73] Callies, *supra* note 54, at 102.

prohibition on "burden[ing] property by imposition of repetitive or unfair land-use procedures in order to avoid a final decision."[74] *Palazzolo* also holds that a takings claim likely ripens once there is a reasonable degree of certainty that the government agency lacks further discretion to permit or deny development or use of land.[75] The reasonable measure test provided by the Court in *Palazzolo* reflects the observation by lower courts that some form of a "futility exception" exists to the ripeness finality requirement.[76]

In sum, *Knick* reduced ripeness to the finality prong, the strength of which has yet to be directly addressed by the Supreme Court. Nonetheless, the effects of *Williamson County* ripeness are not entirely resolved and, from its inception in 1985 to its overruling this year, the effects of the state action prong are not nearly forgotten. Ridding ripeness of the state action requirement is not the only work *Knick* accomplished. The ripeness doctrine is now clearly "prudential." *Knick* was unambiguous in clarifying the discretionary nature of the ripeness measure for entry to federal courts. Landowners facing ripeness challenges can at least beseech the court's discretion, as ripeness can no longer serve as a jurisdictional barrier to federal court. Further, the preclusion issues raised in *San Remo* and the removal game alleviated by *Sansotta* can now be avoided by landowners who patiently wait to satisfy the finality requirement and merely seek to challenge land use controls on the merits. *Knick* contracted ripeness considerably in the regulatory taking landscape and the continued mitigation of the finality requirement will allow plaintiffs to press regulatory takings claims in federal court.[77]

V. WHY IT MATTERS: HAWAI'I AND THE NEED FOR BRINGING REGULATORY TAKINGS CHALLENGES IN FEDERAL COURT

The importance of access to the federal court system to resolve regulatory takings disputes is superbly illustrated by the 2017 decision of the Hawai'i Supreme Court in *Leone v. County of Maui*.[78] There, the Court upheld a jury verdict finding no regulatory taking even though the landowners were prevented by local land use regulation from building a single-family house—or indeed anything else—on their lot.[79] The facts are

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[74] Palazzolo v. Rhode Island, 533 U.S. 606, 620–21 (2001).

[75] *Id.* at 620.

[76] Callies, *supra* note 55, at 102 (citing S. Pac. Transp. Co. v. City of Los Angeles, 922 F.2d 498, 504 (9th Cir. 1990)).

[77] *See also* Brian Connolly, *Takings Precedent Overruled*, 85 J. PLANNING 13, 13 (2019).

[78] 404 P.3d 1257 (2017).

[79] *Id.*

strikingly similar to *Lucas v. South Carolina Coastal Council*, a 1992 U.S. Supreme Court opinion finding a regulatory taking of a beachfront lot due to state coastal zone regulations forbidding the construction of a single-family home.[80] In *Lucas*, the Court held that, with exceptions relating to nuisance and background principles of a state's law of property (neither of which were at issue in *Leone*), government may not deprive a landowner of all economically beneficial use of its property without paying compensation, as if the property were acquired by eminent domain.[81] Maui County caused such a deprivation, but refused to either pay for the Leone parcel or to permit the construction of a single-family home on it, thereby bringing the case squarely within the rule and facts of *Lucas*.[82] It is inconceivable that a federal court would have ruled that there is no regulatory taking under *Lucas*.

The facts are instructive. In 1996, the Maui County Council adopted a resolution authorizing the mayor to acquire what would later become the Leone lot, along with eight others, for the creation of a public park. Accordingly, the applicable county plans, which have the force of law in Hawai'i, designated the Leone lot as "park" land.[83] The County was only able to purchase two of the lots intended for park use and the remaining lots were sold to private landowners. When the Leones sought a Special Management Area permit pursuant to constructing a single-family house on their single-family lot, purchased for that purpose, the County denied the permit solely on the ground that the property was designated "park" on the applicable county plan, thereby rendering the proposed single-family dwelling inconsistent with that plan.[84]

Acknowledging that the U.S. Supreme Court in *Lucas* held a regulatory taking "occurs when the 'regulation denies all economically beneficial or productive use of land . . . typically, as here, by requiring land to be left substantially in its natural state,'" the Hawai'i Supreme Court nevertheless upheld a jury verdict on the grounds of "conflicting testimony" about the value, not the use, of the Leone parcel.[85] The Leones' experts testified "unequivocally . . . that the County's regulations deprived the Leones of all economically beneficial use of their property."[86] The County's expert testified, in contrast, that "the property had great 'investment use'" and that "the property had 'tremendous opportunities for increases in value' because

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[80] 505 U.S. 1003 (1992).
[81] *Id.* at 1019.
[82] *Leone*, 1404 P.3d at 1278.
[83] *Id.*
[84] *Id.* at 1260–61.
[85] *Id.* at 1270, 1277 (quoting *Lucas*, 505 U.S. at 1015, 1018).
[86] *Id.* at 1277.

it was 'a very scarce commodity' and 'an ocean-front lot on one of the best beaches in south Maui.'"[87] After noting that the lot was placed in a family investment trust and that the Leones had placed it on the market for more money than they paid for it (before this 2017 decision denying the Leones a permit to construct a house on it), the Court blithely determined "that investment use is a relevant consideration in a takings analysis" which, if true, is a factor only in partial, not total, regulatory takings cases.[88] Following such assertions, the Court held, "[a]s such, there is evidence to support the jury's finding that the property retained some economically beneficial use."[89]

The decision is badly flawed on the law. Land always has *some* value. Land being what it is—as Will Rogers once observed, "they ain't making any more of it"—that value tends to rise over time.[90] If that increase in value is the equivalent of economically beneficial use—and the virtually identical fact pattern in *Lucas* makes it clear it is not—then there is nothing left of *Lucas*, and total, categorical regulatory takings. As long as state courts choose to ignore clear federal precedent in regulatory takings cases, as the Hawai'i Supreme Court has regrettably done in *Leone*, there must be an available remedy in federal court. The *Knick* decision opens federal courts to regulatory takings litigation which restores such remedy.

VI. CONCLUSION

The U.S. Supreme Court has reopened the door of federal courts to regulatory taking claims. The need for landowners to pursue a state action remedy—usually compensation—in order to ripen a claim before a federal court as required by *Williamson County* has been eliminated by the *Knick* decision. The Court gratuitously added that the regulatory taking occurs as soon as the relevant regulation affects the economically beneficial use or value of the relevant parcel. Where state supreme courts ignore federal case law on regulatory takings—as the Hawai'i Supreme Court did in *Leone*—this is a necessary and overdue correction to federal case law on both partial and total regulatory takings.

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[87] *Id.*
[88] *Id.* at 1277.
[89] *Id.*
[90] PETER M. WOLF, LAND IN AMERICA 6 (1981).

Coastline Non-Conformism

Ryan B. Stoa*

Coastlines have long served as convenient borders between human ideas. Coastlines may represent the boundary between what is considered to be land and sea, civilization and wilderness, private and public, or national and international, among many other dualities. Perhaps because coastlines have faithfully served as the boundary between so many human constructs, many now take for granted that coastlines so prevalently represent the boundary between political regions or legal jurisdictions. A coastline may serve as the legal boundary between a private landowner and the public, a local government and the state, a state and the federal government, or the federal government and the global commons.

But, since coastlines are still, in most cases, naturally formed and forming landscapes, their wildness often frustrates the either/or distinction that legal boundaries are predicated upon. Wetland ecosystems, for example, blur the line between land and sea, while many coastlines move and change shape over time.

The stubborn refusal of coastlines to adhere to the perfect dualities demanded by legal systems create conflicts and legal challenges for coastal stakeholders. This is not a new observation. However, with the dawn of a new decade approaching, it is worth reexamining the role that coastlines play in the law and the ways in which coastline change frustrates this role. This essay surveys the challenges presented by "coastline non-conformism."

Coastline non-conformism is defined as those characteristics of coastlines that do not conform to the rigid demands of fixed legal boundaries. The essay explores six such characteristics in particular: ambulatory coastlines, ambiguous coastlines, artificial coastlines, disappearing coastlines, the river problem, and the coastline paradox. Taken together, the characteristics call into question the current role played by coastlines in legal systems in the United States and around the world.

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I. INTRODUCTION

Why do so many coastlines serve as legal boundaries? In some cases, the logic is visually evident and intuitive. On the northern coast of the Hawaiian island of Molokai, for example, the world's tallest sea cliffs plunge over 3,000 feet into the sea.[1] The transition between land and sea is anything but gradual or ambiguous, at least not from a topographical perspective. In these cases, perhaps it is logical to superimpose a legal boundary onto a dramatic physical one.

In other cases, human ingenuity has, to some extent, fixed artificial coastlines in place. In the Netherlands, a country well-known for its hydrological engineering, an elaborate network of dams, dykes, and levees known as the North Sea Protection Works has allowed the country to create an artificial barrier between land and sea.[2] It is so comprehensive in scope the American Society of Civil Engineers named it one of the "Seven Wonders of the Modern World."[3] In that case, the logic of using a coastline as a legal boundary is relatively sound, since the coastline itself can be changed or restored to reflect legal realities.

But in most cases, perhaps, coastlines serve as legal boundaries because they have historically done so, or because their coastal stakeholders are unwilling or unable to imagine an alternative.[4] The characteristics of coastlines that do not conform to the expectations of rigid legal systems may not have been as important historically. If title to all lands and coastal waters is owned by a single government entity or monarch, for example, it matters less where exactly lands end and waters begin. Prior to the advent of modern flood control technology, furthermore, many coastal lands were not as valuable as they are today.[5]

What is clear is that today legal frameworks around the world, and throughout the United States, employ coastlines for purposes of delineating legal boundaries. But, as these frameworks enter the 2020s, it is also increasingly clear that coastlines are ill-suited for the job. Coastlines are

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[1] WADE GRAHAM, BRAIDED WATERS: ENVIRONMENT AND SOCIETY IN MOLOKAI, HAWAI'I 94 (2018) (describing a leper colony's lack of mobility due to the island's topography).

[2] *See* AM. SOCY CIVIL ENG'RS, *Seven Wonders of Modern World Are Named By ASCE*, 67 CIVIL ENG'R 70, 70 (1997).

[3] *Id.*

[4] *See infra* Part II.

[5] *See* Dylan E. McNamara et al., *Climate Adaptation and Policy-Induced Inflation of Coastal Property Value*, 10 PLOS ONE 1 (2015).

natural movers.[6] They shift and change with tides, winds, precipitation, extreme events, sea-level rise, and other processes.[7] At the same time, coasts are more valuable and are facing more pressure from human development, than ever before.[8]

This basic tension is reaching a critical phase, one in which coastal stakeholders, if they are to continue using coastlines as legal boundaries, must understand the limitations of that choice.[9] Only with an appreciation for the characteristics of coastlines that do not conform to the rigid demands of fixed legal boundaries can stakeholders adopt legal frameworks that incorporate and adapt to these limitations.[10]

The collection of these characteristics is referred to by the author as "coastline non-conformism." Six such characteristics are explored in this essay: ambulatory coastlines, ambiguous coastlines, artificial coastlines, disappearing coastlines, the river problem, and the coastline paradox. Considered together, these characteristics of coastline non-conformism call into question the wisdom of using coastlines as legal boundaries and suggest that stakeholders and ecosystems may benefit from an exploration of alternative approaches. This essay provides an overview of coastline non-conformism, as well as the ways in which its characteristics are acting to frustrate legal clarity in the coastal zone.

II. AMBULATORY COASTLINES

Coastlines are constantly shifting. With every wave that crashes on shore, sediments are deposited, adding to the coast (a process known as accretion).[11] As the water recedes, sediment is washed away, subtracting from the coast (a process known as erosion).[12] This pattern is magnified

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[6] *See infra* Part II.

[7] *See infra* Part II.

[8] *See generally*, 2017 WORLD OCEAN REVIEW 72 (2017); Rebecca J. Ingram et al., *Revealing Complex Social-Ecological Interactions Through Participatory Modeling to Support Ecosystem-Based Management in Hawai'i*, 94 MARINE POL'Y 180 (2018).

[9] *See infra* Part VIII.

[10] *See infra* Part VIII.

[11] *See, e.g.*, J. S. Schoonees et al., *Shoreline Accretion and Sand Transport at Groynes Inside the Port of Richards Bay*, 53 COASTAL ENGINEERING 1045, 1049–50 (2006) (documenting shoreline accretion and sediment transport at "protected" and "moderately protected" sites).

[12] *See, e.g.*, S. Penland & R. Boyd, *Shoreline Changes on the Louisiana Barrier Coast*, 81 OCEANS 209, 211–12 (1981) (examining the natural mechanisms and man-made interventions that underly present erosion problems); Manon Besset et al., *2500 Years of Changing Shoreline Accretion Rates at the Mouths of the Mekong River Delta*, 18 Geophysical Res. Abstracts, EGU GENERAL ASSEMBLY 2016.

with every ebb and flow of the tide.[13] Because coastal waters are always in motion, the coast is never static.[14] The processes of accretion and erosion are typically, however, gradual and imperceptible.[15] For this reason, in most jurisdictions, littoral property owners have a right to accretions, while at the same time their properties are at risk of erosion.[16]

Major events can make dramatic changes to a coastline as well. When a coastline is modified either suddenly or perceptibly, such as by a hurricane, the process is known as avulsion—whether the change enlarges or diminishes the coast.[17] In many cases, littoral property owners may have a right to restore the coastline to its pre-avulsion state.[18] However, coastal re-nourishment projects are often costly and labor-intensive.[19]

Hurricane Dorian's impact on the Bahamas in 2019, for example, illustrates the challenges of avulsion.[20] During and immediately after the hurricane, many islands in the Bahamas were completely underwater.[21] This in itself did not affect the legal boundaries of those islands. Restoring the island to its previous state, however, proved to be a monumental challenge that stressed local resources and relief efforts to their limits.[22]

Ambulatory coastlines can also be problematic for federal and state relations in the United States, as a shifting coastline also means a potential shift in federal-state jurisdiction over marine waters. In *United States v. Louisiana*,[23] for example, the Supreme Court held that ambulatory coastlines may shift the federal-state marine boundary if the state's coastline erodes, thereby ensuring the state's jurisdictional area remains the

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[13] *See* J. S. Schoones et al., *supra* note 11, at 1049–50.

[14] *See id.*

[15] *See id.*

[16] ALISON RIESER ET AL., OCEAN AND COASTAL LAW 165–66 (4th ed. 2013).

[17] *See, e.g.*, J. Silvestre et al., *Deltaic Avulsions over the past Half-Century Captured by Satellite Imagery*, AMN. GEOPHYSICAL UNION, FALL MEETING 2018; Janet Neuman, *Accretion, Reliction, and Avulsion – Oregon Common Law*, *in* ADAPTING TO CLIMATE CHANGE ON THE OREGON COAST: A CITIZEN'S GUIDE, OREGON SHORES CONSERVATION COALITION 55, 61 (2015).

[18] *See* Stop the Beach Renourishment, Inc. v. Fla. Dep't of Envtl. Prot., 560 U.S. 702 (2010); *see also* Richard A. Epstein, *Littoral Rights Under the Takings Doctrine: The Clash Between the IUS Naturale and Stop the Beach Renourishment The Very Idea of Judicial Takings*, 6 DUKE J. CONST. L. & PUB. POL'Y 37 (2011).

[19] RIESER ET AL., *supra* note 16, at 169–72.

[20] *See* Dan Sweeny, *From Little Abaco to Grand Bahama, an Island by Island Look at Damage from Hurricane Dorian*, SUN SENTINEL (Sep. 8, 2019), https://www.sun-sentinel.com/news/weather/hurricane/fl-ne-hurricane-dorian-abaco-grand-bahama.

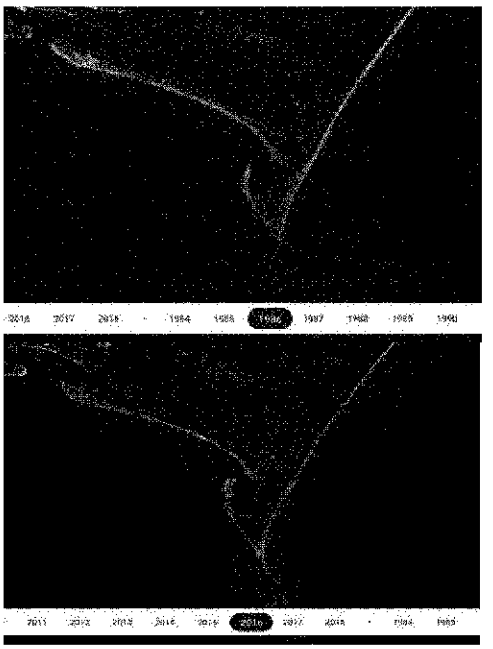
[21] *See id.*

[22] *See id.*

[23] 394 U.S. 11 (1969).

same.[24] However, when the state's coastline accretes, the federal-state marine boundary remains the same, thereby shrinking the state's jurisdictional area.[25] Although many other coastal states were not disadvantaged by a similar application of the rule, the case demonstrates the chaotic potential of ambulatory coastlines.[26]

Today the shifting—or ambulatory—nature of coastlines is nearly ubiquitous. A 2019 study of coastlines in the mid-Atlantic United States found that only 13.7% of coasts are considered stable.[27] The others are either in a process of accretion or erosion.[28] The images below demonstrate changes to a portion of the North Carolina coast between 1986 and 2016:



Between 1986 and 2016, significant accretion occurred in some places along the coastline, changing the shape of the coast and, therefore, legal boundaries.[29]

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[24] *Id.* at 33–35.

[25] *Id.*

[26] RIESER ET AL., *supra* note 16, at 88.

[27] Mark Crowell & Stephen P. Leatherman, *Reassessment of Large-Scale Reversals in Shoreline Trends Along the U.S. Mid-Atlantic Coast*, 35 J. COASTAL RES. 2, 2–3 (2019) .

[28] *See id.*

[29] The images were provided by the North Carolina Sea Grant and the North Carolina State University Center for Geospatial Analytics. They can be found at http://go.ncsu.edu/inletatlas.

The implications for coastal stakeholders are significant – in an era when coastal property is in high demand from private property owners and developers, public interests, and ecosystems, the precise shape, location, and nature of that property is almost always changing.[30]

III. AMBIGUOUS COASTLINES

How can a coastline be measured when it is not clear where land ends and water begins? Many coastlines are wetlands, which, by definition, are lands saturated with water.[31] There are over 40 million acres of coastal wetlands in the conterminous United States, found along the Pacific coast from California to Washington, along the Atlantic Coast from Maine to Florida, and along the Gulf of Mexico from Florida to Texas.[32] Alaska alone contains over 20 million acres of coastal wetlands.[33]

In these contexts, it is more difficult to delineate between land and sea using the typical "mean high water line" or "mean low water line" measurements, especially since many coastal wetlands can extend for miles inland.[34]

The Everglades in southern Florida, for example, comprise 1.5 million acres of wetlands, forming an ecosystem found nowhere else on earth.[35] On its southern boundary, the Everglades water system flows into Florida Bay across hundreds of miles of mangroves.[36] Mangrove habitats form in brackish or saline water, committing neither to land nor sea.[37] Does that make them part of a territorial or marine environment? More broadly, how can the Florida coastline be measured under these conditions? The image below reveals the incredible diversity of vegetation along Florida's southwest coast, as well as extensive commingling with water resources:

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[30] *See* Xin Liu et al., *A State of the art Review on High Water Mark (HWM) Determination*, 102 OCEAN & COASTAL MGMT. 178 (2014).

[31] *What is a Wetland?*, NAT'L OCEANIC & ATMOSPHERIC ADMIN., https://oceanservice.noaa.gov/facts/wetland.html (last updated Aug. 8, 2019).

[32] *Coastal Wetlands*, ENVTL. PROT. AGENCY, https://www.epa.gov/wetlands/coastal-wetlands (last visited Aug. 29, 2019).

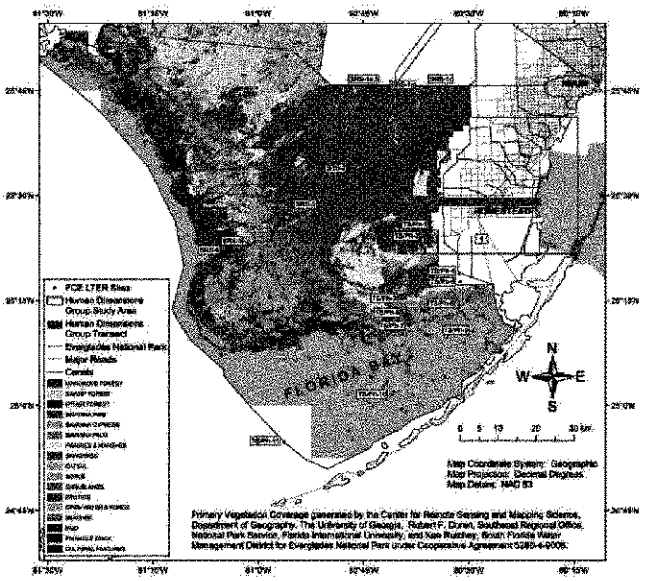
[33] JONATHAN V. HALL, U.S. FISH & WILDLIFE SERV., ALASKA COASTAL WETLANDS SURVEY 70 (1988).

[34] *Coastal Wetlands*, *supra* note 32.

[35] *America's Everglades – The Largest Subtropical Wilderness in the United States*, NAT'L PARK SERV., https://www.nps.gov/ever/index.htm (last updated July 30, 2019); Ian Frazier, *The Snakes that Ate Florida*, SMITHSONIAN MAG. (July 2019), https://www.smithsonianmag.com/science-nature/snakes-ate-florida.

[36] James Fourqurean & Michael Robblee, *Florida Bay: A History of Recent Ecological Changes*, 22 J. COASTAL & ESTUARINE RES. FED'N 345, 345 (1999).

[37] *World Vegetation*, MILDRED E. MATHIAS BOTANICAL GARDEN, UCLA, https://www.botgard.ucla.edu/world-vegetation (last visited Oct. 27, 2019).



Satellite imaging showing vegetation cover in the Florida Everglades.[38]

Courts in Florida, as well as the United States Supreme Court, have adopted a "meander line" approach to determining the contours of the coastline in circumstances when the mean high water mark would be unhelpful.[39] The meander line consists of a series of straight lines connecting points on the shore.[40] A meander line is, therefore, a very rough approximation of the coastline for the same reasons that straight lines are weak estimates of the length of a sinuous curve.

Even the public-private boundary of coastal wetlands is unclear. Historically, coastal wetlands were viewed by public officials as noxious wastelands impeding development, and many were practically given away to private property owners.[41] Today, those divestments are being challenged, and states are using various means to wrest them back into public control.[42]

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[38] Image provided by the Florida Coastal Everglades Long-Term Ecological Research Program. The image can be found at https://fcelter.fiu.edu/data/GIS.

[39] *See* Utah v. United States, 403 U.S. 9, 13 (1975); Fla. Bd. of Trs. v. Wakulla Silver Springs Co., 362 So. 2d 706, 711 (Fla. Dist. Ct. App. 1978).

[40] *See id.; See also* Monica K. Reimer, *The Public Trust Doctrine: Historic Protection for Florida's Navigable Rivers and Lakes*, 75 FLA. BAR J. 10 (2001).

[41] RIESER ET AL., *supra* note 16, at 152.

[42] *See* Monica K. Kalo & Joseph J. Kalo, *The Battle to Preserve North Carolina's Estuarine Marshes: The 1985 Legislation, Private Claims to Estuarine Marshes, Denial of*

Needless to say, ambiguous coasts are problematic for purposes of delineating legal boundaries, whether public and private or federal and state.[43] They are challenging to define, challenging to measure, and frequently in a state of change.

IV. ARTIFICIAL COASTLINES

In some cases, coastlines are fixed and not subject to fluctuations or significant ambiguities. This is possible when the coastline is artificially created, maintained, or reinforced by human activities. In other cases, coastlines are modified inadvertently by human activities. These inadvertent modifications may not be permanent, but still present their own legal challenges and implications.

While artificial coastlines may escape some of the dilemmas created by the coastline paradox described below, they present related challenges. It is not always clear if artificial coastlines become the new legal coastal boundary, for example. In cases where the artificial coastline does fix a new legal boundary, there are typically winners and losers, and the losers do not take the loss lightly.

Beach nourishment projects provide a modern example of this dynamic. Because coastal property—especially beachside property—is valuable to private landowners and the public, stakeholders often initiate beach nourishment projects to restore beaches that have lost coastal lands to erosion or avulsion.[44]

But, when those projects are funded by the public and create an "erosion control line" that provides a fixed coastline boundary, do coastal property owners lose their littoral rights? Property owners argued in the affirmative to the U.S. Supreme Court in *Stop the Beach Renourishment, Inc. v. Florida Department of Environmental Protection*.[45] The Supreme Court disagreed.[46]

Sometimes a government or private entity intentionally modifies a coastline for reasons other than coastline modification. In the aftermath of the Deepwater Horizon oil spill in the Gulf of Mexico, the largest oil spill in human history, mitigation teams rushed to create makeshift alterations to

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Permits to Fill, and the Public Trust, 64 N.C. L. REV. 565 (1986)

[43] SARA WARNER, DOWN TO THE WATERLINE: BOUNDARIES, NATURE, AND THE LAW IN FLORIDA 80–91 (2007),

[44] *See generally* ERIC BIRD & NICK LEWIS, BEACH RENOURISHMENT (2015).

[45] 560 U.S. 702, 711–12 (2010).

[46] *Id.*

the coastal environment in order to protect people, property, and ecosystems from exposure—or further exposure—to petroleum.[47]

In particular, 46 miles of sand berms were built seaward of barrier islands and coastal wetlands in an effort to block the oil from reaching more sensitive ecosystems.[48] Some inlets were blocked or restricted for similar reasons, and freshwater flows were diverted in order to flush oil back out to sea.[49] It is unclear if these coastline modifications achieved their goals, while it is likely that the modifications to the coastline will have long-lasting impacts.[50]

Finally, in many cases, coastlines are inadvertently modified by human activities. Construction of a jetty, for example, can disrupt the natural flow of sand and sediments and stimulate erosion or accretion patterns of nearby coasts.[51] Seawalls and erosion control structures, similarly, can interfere with natural processes so as to negatively impact neighboring properties.[52] These cases often illustrate that it takes relatively minimal human interference with these processes to create significant coastline modifications.[53]

V. DISAPPEARING COASTLINES

Even if coastlines were static, climate change and rising sea levels are disrupting previously held assumptions about the integrity, viability, and future of the world's coastlines. Though a full treatment of coastal dynamics in an era of climate change is very much outside the scope of this article, the basic parameters of the challenge, particularly regarding the uncertainty of coastlines and the boundaries they purport to create, bears mentioning.

Sea-level rise is one of many consequences of global climate change. It occurs primarily for two reasons: melting ice and glaciers add water to the

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[47] *See* M. Luisa Martinez et al., *Artificial Modifications of the Coast in Response to the Deepwater Horizon oil spill: Quick Solutions or Long-term Liabilities?*, 10 FRONTIERS ECOLOGY & ENV'T 44, 44 (2011).

[48] *See id.* at 45.

[49] *Id.*

[50] *Id.*

[51] PAUL D. KOMAR ET AL., AMN. SOC'Y CIVIL ENGINEERS, OREGON COAST SHORELINE CHANGES DUE TO JETTIES 79–81 (1977).

[52] *See* Savnah DeVoe, *Coastal Erosion in Southern Maine: An Evaluation of Coastal Armoring Structures and Their Effectiveness*, HONORS COLLEGE, Spring 2017; *but see* Stephanie M. Smallegan, *Morphological Response of Sandy Barrier Island with a Buried Seawall During Hurricane Sandy*, 110 COASTAL ENGINEERING 102 (2016).

[53] *See, e.g.*, United States v. Milner, 583 F.3d 1174 (9th Cir. 2009); Lummis v. Lilly, 429 N.E.2d 1146 (Mass. 1982); RIESER ET AL. *supra* note 16, at 174.

world's oceans and, as the oceans absorb more heat from the atmosphere, the seawater expands.[54] These processes reinforce each other as well—a loss in the total area covered by ice sheets reduces the amount of sunlight reflected back into space and increases the amount of sunlight directly absorbed by the oceans, while warmer oceans and higher seas help accelerate ice melt.[55] Taken together, these dynamics have led to a rise in global sea levels by about 8 inches since 1900, a rate higher than any century in at least 2,800 years.[56] Future projections of sea-level rise are notoriously difficult to estimate, with most credible estimates ranging between two and six feet of sea-level rise by 2100.[57] The U.S. National Climate Assessment concluded in 2017 that a global sea-level rise of eight feet was not impossible.[58] Importantly, however, sea level rise impacts vary across regions. Some studies suggest the United States coastline will likely be hit 20 percent harder than the global average.[59]

There is a major difference between sea levels rising two feet (under conservative projections) versus eight feet (under worst-case scenario-projections), but regardless of the relative extent of sea-level rise, the consensus is that sea levels will rise dramatically and with devastating consequences.

In low-elevation coastal zones (defined as coastal zones under 10 meters above sea level), the coastal population at risk will increase from 625 million people in 2000 to at least one billion people by 2060.[60] Most of the world's megacities are located in the coastal zone, and population density is greater in coastal versus non-coastal areas.[61] The United States is not immune to these trends, as nearly 40% of the national population lived in coastal counties in 2010.[62]

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[54] *Global Climate Change: Vital Signs of the Planet*, NASA, https://climate.nasa.gov/vital-signs/sea-level (last updated Aug. 28, 2019).

[55] NAT'L RES. COUNCIL NAT'L ACADS, ADVANCING THE SCIENCE OF CLIMATE CHANGE 241 (2010) [hereinafter ADVANCING CLIMATE CHANGE].

[56] W.V. Sweet et al., *Sea Level Rise*, *in* 1 CLIMATE SCIENCE SPECIAL REPORT: FOURTH NATIONAL CLIMATE ASSESSMENT 333, 333–63 (Linda O. Mearns et al. eds., 2017).

[57] ADVANCING CLIMATE CHANGE, *supra* note 55, at 245; *see also* Jonathan L. Bamber et al., *Ice Sheet Contributions to Future Sea-Level rise From Structured Expert Judgement*, 116 PROC. NAT'L ACAD. SCI. 11195, 11195 (2019).

[58] W.V. Sweet et al., *supra* note 56, at 333–63.

[59] ADVANCING CLIMATE CHANGE, *supra* note 55, at 246.

[60] Barbara Neumann et al., *Future Coastal Population Growth and Exposure to Sea-Level Rise and Coastal Flooding - A Global Assessment*, PLOS ONE, March 11, 2015, at 3, 10–11.

[61] *Id.*

[62] *What Percentage of the American Population Lives Near the Coast?*, NAT'L OCEANIC & ATMOSPHERIC ADMIN., https://oceanservice.noaa.gov/facts/population.html (last visited Sept. 21, 2018).

Property values of coastal properties will decline.[63] Many will be forced to migrate away from the coasts.[64] Lands will be lost as human development along the coastline prevents ecosystems from providing natural defenses to sea-level rise.[65] And, of course, the coastlines themselves will change along with rising sea levels. Some coastlines that were previously natural may become fixed as cities armor themselves with seawalls. Other coastlines will recede as lands are lost. The following images highlight the properties in Miami Beach and Southern Louisiana that will be lost if sea levels rise six feet and the new coastlines that will be left behind:

Miami Beach and Eastern Miami. Lands below sea level are shown in light blue.[66]

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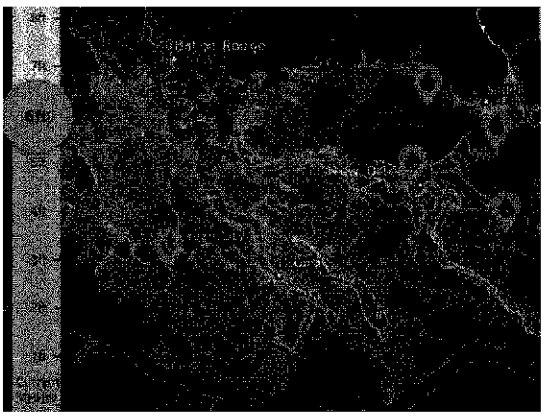
[63] *See* FIRST STREET FOUND., RISING SEAS ERODE $15.8 BILLION IN HOME VALUE FROM MAINE TO MISSISSIPPI (2019).

[64] Tim McDonnell, *Climate Change Creates a new Migration Crisis for Bangladesh*, NAT'L GEOGRAPHIC (Jan. 24, 2019), https://www.nationalgeographic.com/environment/2019/01/climate-change-drives-migration-crisis-in-bangladesh-from-dhaka-sundabans.

[65] MICHAEL J. SAVONIS & VIRGINIA BURKETT, IMPACTS OF CLIMATE CHANGE AND VARIABILITY ON TRANSPORTATION SYSTEMS AND INFRASTRUCTURE: GULF COAST STUDY (2008).

[66] NOAA Sea Level Rise Viewer. The image can be found at https://coast.noaa.gov.



New Orleans and surrounding lowlands.

It is unlikely that sea-level rise will cease to present challenges to the world's coastal populations and ecosystems anytime soon. The full effect of increased greenhouse gas emissions levels in the atmosphere is exponential and delayed by years or decades.[67] Spatially, the negative consequences of emissions released from one actor or group of actors are shared by the entire international community and felt disproportionately by poor and disadvantaged communities, minimizing incentives for individual actors to internalize their externalities.[68] And economically, climate change is a cross-sectoral issue, the regulation of which may curtail the profitability of certain industries (such as fossil fuel production, animal agriculture, and transportation), while ensuring the sustainability of others (such as renewable energy production and tourism).[69]

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[67] *See generally* OVE HOEGH-GULDBERG ET AL., IMPACTS OF 1.5°C OF GLOBAL WARMING ON NATURAL AND HUMAN SYSTEMS (Jose Antonio Marengo et al. eds., 2018).

[68] *See generally* Alessandro Del Ponte, *Passing it Along: Experiments on Creating the Negative Externalities of Climate Change*, 79 J. POL. 1 (2017).

[69] The divergence of these challenges has been called a "perfect moral storm" that pushes us towards moral corruption or inaction. Stephen M. Gardiner, *A Perfect Moral Storm: Climate Change, Intergenerational Ethics and the Problem of Moral Corruption*, 15 ENVT'L VALUES 397 (2006); *see also* Ryan Stoa, *Climate Change Mitigation and Adaptation: The Role of International Ocean and Freshwater Agreements*, *in* SUSTAINABILITY OF INTEGRATED WATER RESOURCES MANAGEMENT: WATER GOVERNANCE, CLIMATE AND ECOHYDROLOGY 445 (2014).

VI. THE RIVER PROBLEM

The essence of the river problem is that there are no objective criteria for determining where a river ends and the ocean begins. Especially when a large river system forms a delta at its mouth—such as by depositing sediment gathered upstream—it can be challenging to delimitate between the river and the ocean because deltas often form a network of channels that form or shape-shift very quickly.[70] Miles of land can emerge or submerge depending on the time of year, or, in the case of tidal lands, the time of day.[71] Because the landmass of a delta is not static, it becomes difficult to establish a coastline by connecting points on the shore.[72]

In theory, salinity measurements could be used to distinguish between freshwater (which would presumably be classified as internal water and therefore part of the coast) and saltwater (which would presumably be considered beyond the coastline). However, salinity levels are also variable, and many river systems form estuaries along the coast where salinity levels are not unambiguously fresh or salty.[73]

Even if the lands surrounding the mouth of a river were stable, the line between river and ocean can remain blurred. In the case of the Mississippi River, for example, NASA satellite imagery tracking the flow of freshwater and sediment from the river's mouth in 2004 made a surprising discovery.[74] The imagery showed the Mississippi River continuing on into the Gulf of Mexico for hundreds of miles, before eventually joining up with the Gulf Stream, rounding the coast of Florida, and heading north.[75] The Mississippi River's flow could be detected as far north as the coast of Georgia.[76]

Certainly, no one is arguing that the Mississippi River's resilient forays into the Atlantic Ocean should be grounds for rethinking political boundaries, but the impacts felt by the river's flow have long been a source

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[70] William W. Hay, *Detrital Sediment Fluxes Continents and Oceans*, 145 CHEMICAL GEOLOGY 287, 287–323 (1997); James P. M. Syvitski et al., *Impact of Humans on the Flux of Terrestrial Sediment to the Global Coastal Ocean*, 308 SCIENCE 376, 376–80 (2005); John D. Milliman & Robert H. Meade, *World-Wide Delivery of River Sediment to the Oceans*, 91 J. GEOLOGY 1 (1983).

[71] Michael Fenster & Robert Dolan, *Assessing the Impact of Tidal Inlets on Adjacent Barrier Island Shorelines*, 12 J. COASTAL RES. 294 (1996).

[72] *See id.*; Hay, *supra* note 70.

[73] *What is an Estuary?*, NAT'L OCEANIC & ATMOSPHERIC ADMIN., https://oceanservice.noaa.gov/education/kits/estuaries (last updated July 6, 2017).

[74] *Mississippi River Escapes the Gulf*, NAT'L AERONAUTICS & SPACE ADMIN., https://earthobservatory.nasa.gov/images/5868/mississippi-river-escapes-the-gulf (last visited Aug. 13, 2019).

[75] *Id.*

[76] *Id.*.

of tension between bordering states, and between the United States and other countries in the Caribbean.[77] Should the United States—or states contributing to water pollution carried by the river—be liable for the impacts caused by that pollution hundreds if not thousands of miles away?[78] Some have argued affirmatively, with mixed results.[79] Either way, the river problem presents ongoing measurement challenges and frustrates efforts to establish a consistent coastline.

VII. THE COASTLINE PARADOX

In 2006, a report by the Congressional Research Service (CRS) estimated the total length of the United States coastline to be 12,383 miles.[80] By contrast, the National Oceanic and Atmospheric Administration (NOAA) estimates the total length of the United States coastline to be 88,633 miles.[81] These figures suggest that NOAA believes the United States coastline is over seven times longer than the CRS estimate.

A comparison of the CRS and NOAA estimates is even more striking on the state level. The CRS estimates the Maryland coastline to be a relatively short 31 miles.[82] NOAA, on the other hand, provides an estimate over 100

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[77] Jack Cullen, *Mississippi River Generates $405,000,000,000 Annually*, QUAD-CITY TIMES (Sept. 16, 2015), https://qctimes.com/news/local/govt-and-politics/mississippi-river-generates-annually.

[78] For a contrast in approaches between the Rhine River and Mississippi River, see Stephanie K. Chase, *There Must be Something in the Water: An Exploration of the Rhine and Mississippi Rivers' Governing Differences and an Argument for Change*, 29 WIS. INT'L L.J. 609 (2011).

[79] *See* Theresa Heil, *Agricultural Nonpoint Source Runoff – The Effects Both On and Off the Farm*, 5 WIS. INT'L L.J. 43 (1998); J. W. Looney, *Rylands v. Fletcher Revisited: A Comparison of English, Australian and American Approaches to Common Law Liability for Dangerous Agricultural Activities*, 1 DRAKE J. AGRIC. L. 149 (1996); Jan G. Laitos & Heidi Ruckriegle, *The Clean Water Act and the Challenge of Agricultural Pollution*, 37 VT. L. REV. 1033 (2012).

[80] Janice Beaver, *U.S. International Borders: Brief Facts*, FAS.ORG, https://fas.org/sgp/crs/misc/RS21729.pdf (last updated Nov. 9, 2006).

[81] NAT'L OCEANIC & ATMOSPHERIC ADMIN., THE COASTLINE OF THE UNITED STATES (1975), https://shoreline.noaa.gov/_pdf/Coastline_of_the_US_1975.pdf [hereinafter NOAA, *Coastline*]; *see also* NAT'L OCEANIC & ATMOSPHERIC ADMIN., SHORELINE MILEAGE OF THE UNITED STATES, COAST.NOAA.GOV (2018), https://web.archive.org/web/20181204184024/https://coast.noaa.gov/data/docs/states/shorelines.pdf; NAT'L OCEANIC & ATMOSPHERIC ADMIN., *A Guide to National Shoreline Data and Terms*, https://shoreline.noaa.gov/faqs.html (last updated May 9, 2016). NOAA's frequently cited total is even larger, at 95,471 miles, which includes the coastline of the Great Lakes. The CRS estimate does not include the Great Lakes, so for comparison purposes, the NOAA total in the text above does not include the Great Lakes.

[82] Beaver, *supra* note 80, at 3.

times longer, at 3,190 miles.[83] The CRS estimate suggests the coast of Maryland is a few miles longer than a marathon. The NOAA estimate suggests the coast of Maryland is several hundred miles longer than the width of the contiguous United States.

At the opposite end of the spectrum, the state of Hawai'i provides a source of the relative agreement between the two agencies. The CRS and NOAA put the Hawaiian coastline at 750 and 1,052 miles, respectively.[84] The agencies diverge, however, when considering Hawai'i's relative ranking among other states. While the CRS believes Hawai'i to have the fourth longest coastline in the United States, Hawai'i's place in NOAA's rankings is a more modest eighteenth.[85]

Even more perplexing than these wildly divergent estimates of coastline length is the likely conclusion that neither agency's estimates are unequivocally correct. And, on some level, neither agency's estimates are incorrect, either. The reason for these seemingly inconsistent observations is a phenomenon known as the "coastline paradox."

The coastline paradox has confounded mathematicians and geographers, among other subject matter experts, for decades.[86] A coastline features an endless array of bays and promontories at all scales, from hundreds of miles to fractions of an inch. Thus, the length of a coastline depends on the unit of measurement being used. The smaller the unit of measurement, the more of these bays and promontories are detected, and thus, the longer the coastline becomes. Follow this logic down to the atomic level, and the length of a coastline—any coastline—approaches infinity.

The coastline paradox is an example of the randomness of fractal geometry in nature.[87] The length of a fractal curve is inherently elusive to measure because additional detail—and thus perimeter length—emerges as measurement precision increases.[88] And coastlines are even more difficult to measure because they add a degree of randomness and constant change to the equation.[89]

As a prime example of fractal geometry, then, the coastline paradox illustrates the fallacy in thinking that objects in nature can be easily measured or classified. The coastline length measurements described above

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[83] NOAA, *Coastline*, *supra* note 81.

[84] Schoonees et al., *supra* note 11, at 1049–50; Penland & Boyd, *supra*, note 12, at 211–12.

[85] *Id.*

[86] KENNETH FALCONER, FRACTAL GEOMETRY: MATHEMATICAL FOUNDATIONS AND APPLICATIONS (2d ed. 2003).

[87] *See id.*

[88] *See id.*

[89] *See id.*

make that clear. Two well-respected federal agencies come to very different conclusions about the length of U.S. coastlines because their measurement methodologies are not the same. While NOAA's estimates include bays, inlets, sounds, and other coastline intricacies, the CRS's estimates measure only the general outline of the coast. It is therefore logical (and inevitable) that NOAA's length estimates will be longer, in some cases dramatically so.

The paucity of literature on this subject might suggest that the coastline paradox is a purely academic oddity, a curious mathematical dilemma without any practical significance. Does the fact that a coastline cannot be conclusively measured matter in any legal sense?

The answer is yes. Not only does the coastline paradox have legal implications, those implications create significant challenges for current and future stakeholders in the coastal zone. In part, because coastlines play such an important role in legal frameworks at all scales—international, federal, and local—those frameworks are weakened by their failure to address the coastline paradox.[90]

On the international level, the coastline paradox's disruptive interactions with the law of the sea are at the root of international tensions over maritime jurisdictions. Similar tensions exist between states and the U.S. federal government, while federal agencies are using outdated measurements of coastline length to make critical funding decisions. Finally, the coastline paradox creates uncertainty and confusion at the local level for a troubling number of actors and processes, including property owners, real estate markets, and government agencies.[91]

VIII. CONCLUSION

A clear takeaway of coastline non-conformism is that coastlines present one of the most vexing—and, to a certain extent, impossible—measurement and definitional challenges. While it can be said that many natural objects can prove elusive when attempting to categorize them into easy anthropocentric constructs, coastlines may be one of the most elusive phenomena to grasp.

The implications of coastline non-conformism for policymakers, legal scholars, and coastal stakeholders are significant. Considering the rate of coastal change, it bears asking if natural coastlines are appropriate

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[90] *See generally* Ryan Stoa, *The Coastline Paradox*, 72 RUTGERS U.L. REV. (forthcoming, 2020).

[91] *See generally id.*

representatives of legal boundaries. If they are not, it may be worth exploring alternative approaches.

One alternative is provided most prominently by international maritime law, which allows countries to set artificial baselines representing the legal coastline. The baseline becomes the legal boundary of the country, as opposed to the coastline itself. In 1958, for example, the United Nations convened the Geneva Conference on the Law of the Sea in order to address growing concerns about the legal uncertainty of maritime claims.[92] Although the conference did not come to an agreement regarding the extent of national claims outward from the coast, it did establish a framework for establishing baselines from which maritime jurisdictions could be measured.[93]

Noting that in most cases the baseline is the coast itself, the Conference endorsed the occasional use of straight baselines in cases where the coastline is too sinuous or pocked with islands to be of practical use as a baseline.[94] In these circumstances, a straight line can be drawn between points on the coast, thereby converting some coastal waters into "internal waters."[95] However, in the decades since the Convention, it is clear that countries are taking advantage of this rule by drawing baselines far into the sea, thereby extending their maritime claims. The international context demonstrates the limitations of using artificial lines as legal boundaries.

United States case law addressing the tensions between coastline boundaries and their non-conformist tendencies, meanwhile, reveals the limitations of using a natural marker such as the mean high tide line as a legal line of demarcation. In 1953, Congress enacted the Submerged Lands Act (SLA).[96] The SLA gave states maritime jurisdiction over the seas within a 3-mile distance from the coastline, including title and ownership over the submerged lands, as well as the right to manage and regulate resource use.[97] The "coastline" is defined by the SLA as "the line of ordinary low water along that portion of the coast which is in direct contact with the open sea and the line marking the seaward limit of inland

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[92] *See* Tullio Treves, *1958 Geneva Conventions on the Law of the Sea*, U.N. AUDIOVISUAL LIBRARY INT'L L. (April 29, 1958), http://legal.un.org/avl/ha/gclos/gclos.html.

[93] *See id.*

[94] Convention on the Territorial Sea and the Contiguous Zone art. 4, Apr. 29, 2985, 15 U.S.T. 1606, 516 U.N.T.S. 205. By doing so, the conference incorporated principles articulated in the International Court of Justice's *Fisheries Case*. *See* Fisheries (U.K. v. Nor.), Judgment, 1951 I.C.J. 116 (1951).

[95] Sir Gerald Fitzmaurice, *Some Results of the Geneva Conference on the Law of the Sea*, 8 INT'L & COMP. L.Q. 73, 76 (1959).

[96] 43 U.S.C. § 1301 et seq. (1953).

[97] *Id.* at § 1311(a).

waters."[98] Unfortunately, perhaps, the SLA does not define these terms further.

Since the SLA did not define the term "inland waters," states began using straight baselines to incorporate large swaths of the open ocean into their inland waters, extending their 3-mile seaward boundary as a result. But, in *United States v. California*, the Supreme Court rejected California's liberal use of the straight baseline approach.[99] A number of states have since seen their straight baselines invalidated by the Supreme Court, including Maine's claim that Nantucket Sound is within its internal waters and Alaska's claim that parts of the Beaufort Sea are within its internal waters.[100]

When it comes to coastline non-conformism, both Congress and the Supreme Court have favored fixed coastlines. The Supreme Court has been permissive of states extending state baselines by creating artificial coastlines.[101] In addition, Congress amended the SLA in 1985 so that a coastline—and therefore the state-federal offshore boundary—would be considered fixed if the Supreme Court so held in a decree.[102] In other words, even if a coastline is ambulatory in reality, the legal coastline may not be.[103] The amendment would appear favorable to states if sea level rise pushes the low-water mark further inland since that would increase the total area of territorial sea controlled by the state.[104]

Encouraging coastal stakeholders to artificially fix coastlines may be attractive from a legal perspective, as that approach increases certainty with respect to the coastline's shape and location. However, the approach has some rather significant tradeoffs. Most importantly, perhaps, creating artificial coastlines is likely to have impacts on the coastal environment in some way, disrupting the flow of sediment, growth of vegetation, and movement of wildlife.[105] In addition, artificial coastlines require maintenance in order to preserve their fixed integrity, and even with regular maintenance, the integrity of fixed barriers can fail.[106]

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[98] *Id.* at § 1301(c).

[99] United States v. California, 381 U.S. 139 (1965).

[100] *See* United States v. Maine, 475 U.S. 89 (1986); United States v. Alaska, 521 U.S. 1 (1997); *but see* United States v. Maine, 469 U.S. 504 (1985) (classifying Long Island Sound as an internal water of New York and Connecticut).

[101] RIESER et al., *supra* note 6, at 88.

[102] *See* 43 U.S.C. § 1301(b).

[103] *See id.*

[104] Whether or not this is a favorable development when land loss is taken into account, however, is another matter.

[105] *See* KOMAR ET AL., *supra* note 51; DeVoe, *supra* note 52.

[106] Kabir Sadeghi et al., *Classification of Seawalls and Their Failure: An Overview*, 9 ACAD. RES. INT'L 12 (2018).

It is important to note, finally, that proposals to address coastline non-conformism should be sensitive to the laws and socio-historical context of the jurisdictions governing coastlines. In the United States, many solutions or approaches may take place at the state level, since the coastline has historically been a subject of state law governing public and private boundaries. That dynamic may play a role in dictating which approaches to coastline non-conformism are appropriate to a given jurisdiction.

In Hawai'i, for example, public trust obligations ensure that any attempt to address coastline non-conformism should be mindful of the strong preference for public use of the coast that legal precedents have expressed.[107] In *In re Ashford*,[108] the Hawai'i Supreme Court held that the legal boundary between public and private would be the "upper reaches of the wash of the waves, usually evidenced by the edge of vegetation or by the line of debris left by the wash of waves," which is typically much further inland than the high-tide line used by many other states.[109]

In the years since *In re Ashford*, courts and the Hawai'i state legislature have consistently reaffirmed the public's right to beach access, finding that "[p]ublic policy . . . favors extending to public use and ownership as much of Hawai'i's shoreline as reasonably possible."[110] For its part, the Hawai'i state legislature enacted a shoreline certification process by which the state and coastal landowners could delineate the public-private boundary,[111] with the Hawai'i Supreme Court later confirming the importance of considering historical evidence of the upper wash of the waves in making such a determination.[112]

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[107] Hawai'i shoreline law is a unique and nuanced area of law; this essay does not purport to explain its many facets. Instead, the essay utilizes certain aspets of Hawai'i's shoreline laws and public trust obligations to illustrate the ways in which jurisdictions differ in their application of shoreline laws and to point out that potential remedies discussed may not be applicable to Hawai'i's public trust laws.

[108] 50 Haw. 314, 440 P.2d 76 (Haw. 1968).

[109] *Id.* at 315, 440 P.2d 77.

[110] Hawai'i County v. Sotomura, 55 Haw. 176, 182, 517 P.2d 57, 62 (Haw. 1973); *see also* In re Sanborn, 57 Haw. 585, 588, 562 P.2d 771, 773 (Haw. 1977); Diamond v. State, 112 Haw. 161, 168, 145 P.3d 704, 711 (Haw. 2006); HAW. REV. STAT. § 205A-1 (2019) ("'Shoreline' means the upper reaches of the wash of the waves, other than storm and seismic waves, at high tide during the season of the year in which the highest wash of the waves occurs, usually evidenced by the edge of vegetation growth, or the upper limit of debris left by the wash of the waves.").

[111] *See* HAW. REV. STAT. § 205A-42 (2019) (authorizing the Hawai'i Board of Land and Natural Resources to adopt rules and procedures for determining a shoreline and appeal said shoreline determinations); HAW. ADMIN R. §13-222-10 (2019) (setting forth the procedure for shoreline certification and appeal).

[112] *See* Diamond v. Dobbin, 132 Haw. 9, 29, 319 P.3d 1017, 1037 (Haw. 2014).

What can Hawai'i tell us about how coastal stakeholders can approach coastline non-conformism? First, that attempts to measure the coastline will likely remain challenging regardless of the approach taken and, therefore, stakeholders should not expect a panacea.[113] Second, it is evident that what may work in one jurisdiction may not work in another jurisdiction. The meander line used in Florida to measure mangrove coastlines may not be appropriate in Hawai'i, just as the high wash of the waves determination used in Hawai'i may not be appropriate in Florida. Third, it is important to respect a state or region's history of coastal zone management, as that may dictate which approaches to coastline non-conformism are available. It is unlikely that fixing coastlines, for example, will be suitable in Hawai'i to the extent that doing so will interfere with the public's historically strong rights to coastal access.

This essay has explored six characteristics of coastline non-conformism that present significant challenges to legal systems and coastal stakeholders. There are undoubtedly more, reinforcing the questions raised by using coastlines as legal boundaries. Whether there is a more appropriate alternative to those boundaries remains to be seen and is likely context-dependent. But coastal stakeholders and their legal frameworks must reckon with coastline non-conformism. As coastal communities enter the new decade, it is clear that coastlines cannot be relied upon to provide a fixed legal boundary. Ideally, new and existing legal frameworks will adapt to and embrace the non-conforming nature of coastlines.

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[113] *See generally* Vance, Simeon L., and Richard J. Wallsgrove, *More than a Line in the Sand: Defining the Shoreline in Hawai'i after Diamond v. State*, 29 U. HAW. L. REV. 521 (2007); and Decker, Catherine E., *In Re Banning: The Hawai'i Supreme Court Keeps Hawaiian Beaches Accessible*, 97 OCEAN & COASTAL L.J. 1 (1994).

The Militarization of Social Media

Dr. Waseem Ahmad Qureshi*

The evolution of technology has given rise to the use of social media, a powerful platform which enables instantaneous communication among people living in distant regions of the world. Information can be quickly shared through social media, which can facilitate the viral sharing of information. Unfortunately, this feature is employed by individuals, termed information warriors for purposes of this essay, for waging information warfare via spreading propaganda, disinformation, and hateful content against their adversaries on social media. Just as concerning, terrorist groups also utilize social media for the recruitment of young people to their organizations. Unfortunately, due to the intangible nature of the damage caused by the ill-begotten use of social media for terrorist networking, spreading of disinformation, and dissemination of propaganda, regulating social media under international law poses a significant challenge. Moreover, the possible regulation of social media raises questions about induvidal rights and freedom of speech, which democratic nations wish to protect. Consequently, the contiued unregulated use of social media makes it a particulalry effective weapon of information warfare. Considering such weaponized use of social media, this essay serves as a call to action and urges the international community to take concrete steps towards regulating the use of social media in the information-warfare arena.

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1. INTRODUCTION

In the modern era of technological advancement, social media has emerged as a useful tool for networking among people on a global scale.[1] That is, people in different regions of the world are able to connect with each other through social media websites such as Facebook, Twitter, and LinkedIn.[2] Social media is also considered a tool for disseminating information.[3] With the emergence of information warfare strategy, social media is appearing as a cost-effective weapon of information warfare relied on by states as well as non-state elements to establish advantages over their adversaries.[4] If used successfully against one or more adversaries, social

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[1] *See* SHIRLEY A. FEDORAK, GLOBAL ISSUES: A CROSS-CULTURAL PERSPECTIVE 99 (2013).

[2] *See* ARMIN TROST, TALENT RELATIONSHIP MANAGEMENT: COMPETITIVE RECRUITING STRATEGIES IN TIMES OF TALENT SHORTAGE 48–49 (2014).

[3] *See* Mohan J. Dutta, *New Communication Technologies, Social Media, and Public Health*, *in* OXFORD TEXTBOOK OF GLOBAL PUBLIC HEALTH 388, 392 (Roger Detels et al. eds., 2017).

[4] NATO STRATEGIC COMMUNICATIONS CENTRE OF EXCELLENCE, SOCIAL MEDIA AS A

media can produce a number of negative results such as promoting disinformation, manipulation of correct information, misreporting of facts, meddling in the political processes of neutral states, and similar issues.[5] Moreover, it can be employed by terrorist groups for communication and recruitment purposes.[6]

Unfortunately, various challenges exist in regulating the use of social media as a weapon of information warfare.[7] Such challenges are ascribed to the wide range of limitations that exist in the sources of international law—treaties and agreements, the U.N. Charter, international customary law, *jus cogens*—and state practices in regulating the use of technology or in controlling the spread of information in times of war and peace.[8] In essence, the use of technology—and specifically the use of social media—is beyond the rules of international law that define the conduct of states. For example, the notion of self-defense stands toothless against the weapon of social media, primarily owing to the intangible nature of the damage that results from the nefarious use of social media.[9]

This essay attempts to serve as a call to action for the regulation of social media and precedes in six parts. Following a brief introduction of the premise of the essay in the first section, the second section will include an explanation of the emergence of social media as an instant source of information and networking for people at the global level. The third section will, then, elucidate how social media has become a weapon of information warfare. Social media is an active element of modern information warfare strategy and has been adopted by a number of states—as well as non-state actors—against their adversaries.[10] The fourth section of the essay will explain the use of social media by terrorist organizations, followed by a brief discussion about the challenges that are faced by international law in regulating the use of social media. In the final part, this essay will provide

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TOOL OF HYBRID WARFARE 8 (Anna Reynolds ed., 2016) [hereinafter NATO STRATCOM COE].

[5] *Id.*

[6] *Id.*

[7] Paulina Wu, *Impossible to Regulate: Social Media, Terrorists, and the Role for the U.N.*, 7 CHI. J. INT'L L. 281, 284 (2015).

[8] *Id.*

[9] Social media is an electronic weapon of war, which poses intangible damage. For instance, as discussed by Lawrence T. Greenberg et al., electronic attacks via computers, which may also include social media usage, cause intangible damage but are difficult to regulate. This is due, in part, to the limitations of the rules of war, which only provide for the regulation of conventional, physical use of force. *See* LAWRENCE T. GREENBERG ET AL., INFORMATION WARFARE AND INTERNATIONAL LAW 4 (1998).

[10] *See* NATO STRATCOM COE, *supra* note 4, at 8.

some suggestions that can assist the international community in paving the way for regulating the weaponized use of social media.

2. TECHNOLOGICAL EVOLUTION AND THE EMERGENCE OF SOCIAL MEDIA AS AN INFORMATION DISSEMINATION TOOL

During the technological revolution of the contemporary era, electronic media has progressed significantly.[11] Technology has effectively made the world smaller by facilitating faster communication, regardless of the physical distance between those engaged in conversation.[12] In particular, modern communication platforms over the internet have enabled people to propagate information from one region to another almost instantaneously.[13] Social media is an example of such a communication platform.[14] This section of the paper will evaluate the emergence of social media in the contemporary era and its consequent use as a weapon of information warfare.

2.1. The Massive Worldwide Growth of Social Media

According to one estimate, there are presently about 3.48 billion social media users in the world.[15] Among them, 2.38 billion are Facebook users, while 1 billion are Instagram users.[16] Other major social media platforms include YouTube, WhatsApp, and Twitter, which have approximately 1.9 billion, 1.6 billion, and 330 million regular users, respectively.[17] The aforementioned numbers illustrate the popularity of social media platforms.[18] People belonging to almost every age group use social media

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[11] ELI M. NOAM, MANAGING MEDIA AND DIGITAL ORGANIZATIONS 505 (2019).

[12] JULIA T. WOOD, INTERPERSONAL COMMUNICATION: EVERYDAY ENCOUNTERS, at xiv (7th ed. 2012).

[13] Orance Mahaldar & Kinkini Bhadra, *ICT: A Magic Wand for Social Change in Rural India*, *in* SOCIO-ECONOMIC DEVELOPMENT: CONCEPTS, METHODOLOGIES, TOOLS, AND APPLICATIONS: CONCEPTS, METHODOLOGIES, TOOLS, AND APPLICATIONS 1179, 1179 (Mgmt. Ass'n & Info. Resources ed., 2019).

[14] Eda Turanci, *Consumption in the Digital Age: A Research on Social Media Influencers*, *in* HANDBOOK OF RESEARCH ON CONSUMPTION, MEDIA, AND POPULAR CULTURE IN THE GLOBAL AGE 266, 269 (Ozlen Ozgen ed., 2019).

[15] *See* Simon Kemp, *Digital 2019: Q2 Global Digital Statshot*, DATAREPORTAL (Apr. 25, 2019), https://datareportal.com/reports/digital-2019-q2-global-digital-statshot.

[16] *Id.*

[17] *Id.*

[18] Nicholas Mathew & Ashutosh Dixit, *Emotional Branding and Social Media: Positive and Negative Emotional Appeals*, *in* SOCIAL MEDIA MARKETING: BREAKTHROUGHS IN RESEARCH AND PRACTICE: BREAKTHROUGHS IN RESEARCH AND PRACTICE 579, 586 (Mgmt. Ass'n & Info. Resources ed., 2019).

websites, but this is especially so with young people—those aged below thirty are the most active and regular users of social media.[19] Additionally, many users are active on more than one social media platform.[20]

With the ever-growing number of internet users worldwide, currently estimated to be around 4.4 billion, the total number of users of social media is expected to continue to rise.[21] Among them, 3.2 billion people use social media on their cell phones, allowing users to easily access social media sites in virtually any location.[22] This causes information to rapidly disseminate from one person to another, irrespective of whether they are located in different geographic locations.[23] In this regard, such forums can also be used by states, as well as non-state actors, to propagate the information they aim to disseminate to present or substantiate their biased narratives about any general or particular issue.[24]

Social media platforms are also becoming more crowded,[25] which directly boosts the financial strength of social media companies.[26] Moreover, the usage and effectiveness of social media is becoming variegated as, for instance, social media websites are being used by individuals and organizations for marketing purposes.[27] For example, U.S. companies are expected to make a total annual investment of $37 billion on social media marketing by 2020.[28] Hence, it can be inferred that social media platforms have gained notable importance among the public, and

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[19] RAVI GUPTA & HUGH BROOKS, USING SOCIAL MEDIA FOR GLOBAL SECURITY 35 (2013).

[20] *See* Maggie Clarke & Jilian Eslami, *Diversifying Content Across Social Media Platforms*, *in* SOCIAL MEDIA FOR COMMUNICATION AND INSTRUCTION IN ACADEMIC LIBRARIES 55, 57 (Jennifer Joe & Elisabeth Knight eds., 2019).

[21] *See* Simon Kemp, *Digital 2019: Global Digital Review*, DATAREPORTAL (Jan. 31, 2019), https://datareportal.com/reports/digital-2019-global-digital-overview.

[22] *Id.*

[23] *See* Jethro Tan et al., *Building National Resilience in the Digital Era of Violent Extremism: Systems and People*, *in* COMBATING VIOLENT EXTREMISM AND RADICALIZATION IN THE DIGITAL ERA 307, 316 (Majeed Khader et al. eds., 2016).

[24] *See* Carol K. Wrinkler, *Visual Reconciliation as a Strategy of Response to Offending Images Online*, *in* STUDIES COMBINED: SOCIAL MEDIA AND ONLINE VISUAL PROPAGANDA AS POLITICAL AND MILITARY TOOLS OF PERSUASION 55, 62 (Carol K. Wrinkler & Cori E. Dauber eds., 2017).

[25] KEITH A. QUESENBERRY, SOCIAL MEDIA STRATEGY: MARKETING, ADVERTISING, AND PUBLIC RELATIONS IN THE CONSUMER REVOLUTION 102 (2d ed. 2018).

[26] *Id.*; *see also* Tymoteusz Doligalski, *Social Network Marketing: Customer Value, CRM, and Competitive Actions*, *in* MARKETING IN THE CYBER ERA: STRATEGIES AND EMERGING TRENDS: STRATEGIES AND EMERGING TRENDS 96, 108 (Ali Ghorbani ed., 2013).

[27] *See* QUESENBERRY, *supra* note 25, at 102–103.

[28] *See* Vamsi K. Kanuri et al., *A Study Shows the Best Times of Day to Post to Social Media*, HARV. BUS. REV. (Sep. 12, 2018), https://hbr.org/2018/09/a-study-shows-the-best-times-of-day-to-post-to-social-media.

therefore the role they play in disseminating information—including disinformation—cannot be ignored.

2.2. Social Media as a Source of News and Political Information

A significant number of people rely on social media as their main source of news on both international and local issues, which has had a significant, negative impact on the use of print media as a primary news source for millions of people.[29] This is particularly true for social media users in the United States. For instance, sixty-one percent of millennials[30] in the United States rely on social media websites such as Twitter and Facebook as their primary news source according to a report published by the Pew Research Center.[31] Moreover, as of 2018, approximately seventy-three percent of American adults have used YouTube, while sixty-eight percent have accessed Facebook at least once.[32] In addition, social media sites are increasingly playing a larger role in politics, with political campaigns harnessing social media platforms as a major marketing tool.[33] Specifically, a number of past presidential candidates, such as current and former U.S. presidents, Donald Trump and Barrack Obama, have used Facebook as a medium for their presidential campaigns to reach a greater number of people and appeal to a wider age-range.[34]

3. SOCIAL MEDIA AS A WEAPON OF INFORMATION WARFARE

As social media is already playing a large role in society, serving both practical and entertainment purposes, it is being employed as a weapon of information warfare by state and non-state actors. This section of the essay

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[29] MICHAEL CROSS, SOCIAL MEDIA SECURITY: LEVERAGING SOCIAL NETWORKING WHILE MITIGATING RISK 45 (Rob Shimonski ed., 2013).

[30] Those born between the early 1980s and the 2000s are colloquially reffered to as millennials.

[31] *See* HEIDI A. URBEN, LIKE, COMMENT, RETWEET: THE STATE OF THE MILITARY'S NONPARTISAN ETHIC IN THE WORLD OF SOCIAL MEDIA 20 (2017); Elina Erzikova et al., *The 2014 NFL Player Ray Rice Domestic Abuse Case: An Analysis of Factors That Contributed to Tweet Popularity During the Scandal*, *in* PROCEEDINGS OF THE 3RD EUROPEAN CONFERENCE ON SOCIAL MEDIA 75, 76 (Christine Bernadas & Delphine Minchella eds., 2016).

[32] MARK D. BREWER & L. SANDY MAISEL, PARTIES AND ELECTIONS IN AMERICA: THE ELECTORAL PROCESS 337 (8th ed. 2018).

[33] *Id.*

[34] *See id.* For more on President Obama's use of social media during his political campaign, see DAVID KIRKPATRICK, THE FACEBOOK EFFECT: THE INSIDE STORY OF THE COMPANY THAT IS CONNECTING THE WORLD 293 (2011).

explores how state and non-state actors are using social media as a weapon in the technological era.

3.1. What Is Information Warfare?

As the evolution of technology has given birth to modern technological communication tools, the world has shifted its focus toward utilizing technology to advance warfare mechanisms.[35] Businesses, individuals, and governments are adopting technology into their operations.[36] In particular, states' military departments have adopted technology to gain advantages over their rivals.[37] Even non-state actors are relying on technology to conduct their operations with better coordination and communication.[38] Similarly, law enforcement agencies in various countries have begun using social media websites as a means of tracking the behavior of suspected criminals. This is especially true where such methodologies are used to track those who promote anti-state narratives on social media.[39]

In essence, the sphere of information warfare employs a multitude of strategies that can be utilized against an adversary, such as malware attacks, electronic signal disturbances, online propaganda, and social media campaigns.[40] As a tool of information warfare, social media can impose significant intangible damage in terms of creating propaganda, disinformation, and spreading contentious content against an adversary over the internet.[41] When used as a weapon, information warfare can cause significant damage to the reputation of an adversary, which is, generally, an essential objective pursued by one entity against its adversary in the sphere

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[35] YANA KOROBKO & MAHMOUD MUSA, THE SHIFTING GLOBAL BALANCE OF POWER: PERILS OF A WORLD WAR AND PREVENTIVE MEASURES 105 (2014).

[36] *See* Salem Al Shair Al Suwaidi & Ibrahim Ahmed Elbadawi, *Social Media Corporate Policies for Government Organizations: Lessons Learnt from the United Arab Emirates*, *in* ACTIVE CITIZEN PARTICIPATION IN E-GOVERNMENT: A GLOBAL PERSPECTIVE: A GLOBAL PERSPECTIVE 458, 473 (Aroon Manoharan & Marc Holzer eds., 2012).

[37] CHARLES H. ANDERTON & JOHN R. CARTER, PRINCIPLES OF CONFLICT ECONOMICS: THE POLITICAL ECONOMY OF WAR, TERRORISM, GENOCIDE, AND PEACE 164 (2d ed. 2019).

[38] M.A. Hannan Bin Azhar & Thomas Edward Allen Barton, *Forensic Analysis of Secure Ephemeral Messaging Applications on Android Platforms*, *in* GLOBAL SECURITY, SAFETY AND SUSTAINABILITY: THE SECURITY CHALLENGES OF THE CONNECTED WORLD 27, 27 (Hamid Jahankhani et al. eds., 2017).

[39] *See* R.J. PARKER & J.J. SLATE, SOCIAL MEDIA MONSTERS: INTERNET KILLERS 185 (Hartwell Editing ed., 2014).

[40] *See* GREENBERG ET AL., *supra* note 9, at 1.

[41] Anna-Marie Jansen van Vuuren et al., *The Susceptibility of the South African Media to be Used as a Tool for Information Warfare*, *in* PROCEEDINGS OF THE 11TH EUROPEAN CONFERENCE ON INFORMATION WARFARE AND SECURITY 127, 127 (Eric Filiol & Robert Erra eds., 2012).

of information warfare. If such information aimed at tarnishing the reputation of an adversary is spread on social media, then the social media platform utilized serves as an instrument to wage information warfare against that adversary. Information warfare in this context can be defined as "any action to deny, exploit, corrupt, or destroy the enemy's information and its functions; protecting ourselves against those actions; and exploiting [one's] own military information functions."[42] This is the most commonly used definition of information warfare, which has been adopted by various organizations, including the United States Air Force.[43]

3.1.1. Revolutionizing Warfare

In the contemporary era, the adoption of information warfare by states and their military departments can lead to a revolution in warfare methodologies.[44] Information warfare is free from physical confrontation, which surprisingly may cause more damage to the reputation of an adversary than could have been brought about by the conventional use of force.[45] These methodologies include attacks on the command and control systems of an adversary's military, which can paralyze the communication infrastructure in its military departments.[46] Resultantly, the attacker is able to gain a significant advantage without engaging in the expense and personnel loss of physical combat.[47]

However, information warfare can also be waged alongside the use of force against an adversary.[48] Through utilizing social or other electronic media, sophisticated, widespread propaganda and disinformation campaigns can be launched on a global scale to support military action.[49] For instance, an actor may spread an allegation that an adversary has committed a heinous act or human rights violation. Such atrocious actions can be revealed through the use of social media because such platforms have the

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[42] ATHINA KARATZOGIANNI, THE POLITICS OF CYBERCONFLICT 100 (2006).

[43] *Id.*

[44] ADRIAN R. LEWIS, THE AMERICAN CULTURE OF WAR: A HISTORY OF US MILITARY FORCE FROM WORLD WAR II TO OPERATION ENDURING FREEDOM 387 (2006).

[45] *See* GREENBERG ET AL., *supra* note 9, at 1.

[46] *Id.*

[47] *See id.* at 4.

[48] *See* Markku Jokisipila, *E-Jihad, Cyberterrorism and Freedom of Speech*, *in* PROBING THE BOUNDARIES: WAR, VIRTUAL WAR AND SOCIETY 94, 94 (Andrew R. Wilson & Mark L. Perry eds., 2008).

[49] *See* Cristian Barna, *The Road to Jihad in Syria: Using SOCMINT to Counter the Radicalization of Muslin Youth in Romania*, *in* COUNTERING RADICALISATION AND VIOLENT EXTREMISM AMONG YOUTH TO PREVENT TERRORISM 190, 193 (Marco Lombardi et al. eds., 2015).

capability of spreading information on a global scale instantaneously. Pictures and other evidence of the alleged atrocious action can be uploaded to support the claim on social media, which will ultimately put the adversary at a moral disadvantage in front of the world.

On the other hand, the sources or propagators of information on social media are often inauthentic and unreliable, which may raise questions about the accuracies of reporting of human rights violations on social media.[50] The inauthenticity of the sources results in the spread of misinformation. If such misinformation is spread against an adversary during an armed conflict against that adversary, then the misinformation has the ability to establish a false negative image of the adversary in front of the world, which may have significant consequences.[51]

3.1.2. Intangible Nature of the Damage

Information warfare depends, in large part, on the utilization of information technology.[52] This adoption of technology creates new modes and arenas of warfare for the world that differ significantly from conventional modes of attack.[53] The nature of the damage caused through information warfare is intangible,[54] but could be more effective in realizing an objective that may not be possible through conventional warfare.[55] This is especially true when certain technological tactics such as virus attacks, software intrusion, and social media networking are used against an adversary without the use of force.[56] That is, these tactics can cause damages such as the malfunctioning of an essential software system in opponents' aircraft; destroying their military command and control systems, leaving them insecure and more vulnerable creating panic in the public by spreading rumors on social media; causing malfunctions in certain publicly used software systems or online portals, which can directly affect the

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[50] Stefania Milan, *Human Rights and the Media/Protest Assemblage*, *in* THE ROUTLEDGE COMPANION TO MEDIA AND HUMAN RIGHTS 327, 327 (Howard Tumber & Silvio Waisbord eds., 2017)

[51] Such as causing the adversary to be put in a disadvantaged position during the armed conflict or prompting the international community to place them in isolation. *See id.*

[52] Roger Dean Thrasher, Information Warfare: Implications for Forging the Tools (June 1996) (unpublished M.S. thesis, Naval Postgraduate School).

[53] *Id.*

[54] Alexander Nitu, *International Legal Issues and Approaches Regarding Information Warfare*, *in* PROCEEDINGS OF THE 6TH INTERNATIONAL CONFERENCE ON INFORMATION WARFARE AND SECURITY 200, 200–01 (Leigh Armistead ed., 2011).

[55] Laurie R. Blank, *Media Warfare, Propaganda and the Law of War*, *in* SOFT WAR: THE ETHICS OF UNARMED CONFLICT 88, 90 (Michael L. Gross & Tamar Meisels eds., 2017).

[56] *See* GREENBERG ET AL., *supra* note 9, at 1.

civilian population; or a number of similar tactics.[57] The impact of such activities can be quite harmful to the adversary.[58] For instance, the panic created by rumors spread by an information warrior can cause the stock market to crash,[59] causing significant financial or economic loss to citizens or the adversary state, respectively.[60] Such intangible facets of damage are caused in the modern era of technological revolution by information warriors through tools, such as social media platforms, which make information warfare particularly harmful.[61]

Oftentimes, information warfare is waged alongside conventional war. For example, when attacking Iraq in 2003, the United States used information warfare to discourage a number of Iraqi army officers from fighting U.S. troops.[62] The United States relied on information warfare to persuade Iraqi senior officials not to obey Saddam Hussein's orders to destroy oil fields in Iraqi territory.[63] This left some oil fields unharmed, while others suffered only minor damage during the war.[64] The United States deployed this information warfare strategy in Iraq by spreading countless leaflets, pamphlets, and brochures, spreading content with customized information serving its own narrative and intentions.[65] While in this example, the United States did not use technology to carry out its strategy, it serves to demonstrate how effective such methodologies can be when coupled with technological advances. Therefore, information warfare can be considered a continuum of modern customized information dissemination strategies.[66]

3.2. Using Social Media as a Weapon of Information Warfare

In the contemporary era, social media is appearing as an effective weapon of information warfare.[67] When social media is used to pursue activities of information warfare such as spreading disinformation, manipulating facts, affecting political activities and elections, spying on

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[57] *Id.*

[58] *See id.*

[59] *See* JEANNE H. BALLANTINE & JOAN Z. SPADE, SCHOOLS AND SOCIETY: A SOCIOLOGICAL APPROACH TO EDUCATION 577 (4th ed. 2011).

[60] *Id.*

[61] *See* Nitu, *supra* note 54, at 200–01.

[62] *See* Maxie C. Thom, *Information Warfare Arms Control: Risks and Costs*, 63 INST. NAT'L STRATEGIC STUD. OCCASIONAL PAPER 45–47(2006).

[63] *Id.*

[64] *Id.*

[65] *Id.*

[66] *See* GREENBERG ET AL., *supra* note 9, at 1.

[67] Vuuren et al., *supra* note 41, at 127.

adversaries, disseminating propaganda, or spreading panic or anti-state sentiments through promoting anti-state narratives; it can leave behind damaging effects on the targeted society.[68] Furthermore, it becomes challenging to regulate, control, or prevent such use of social media,[69] primarily because many activities are carried out using disguised or fake identities.[70] How such activities are performed, and how social media is used as a weapon of information warfare in particular, are explored below.

3.2.1. Viral Sharing of Information

Unfortunately, given the high number of users on social media, any information can go viral on the internet. This feature of social media platforms is exploited by both state and non-state actors to use the platforms as weapons of war.[71] States, as well as non-state entities, have designated agents that run real and fake profiles on social media websites.[72] Through such accounts or channels, the agents propagate information, which is generally biased and supportive of their own narratives.[73] In particular, the military departments of a number of countries have begun establishing separate departments to operate social media profiles to disseminate customized information.[74] Through disguised identities, they aim to identify and track anti-state agents working through social media platforms.[75]

Perhaps one of the most effective tools that can be harnessed to wage information warfare is the ability to cause certain posts to go viral.[76] 'Going viral' occurs when users continuously share information with their contacts on a platform, effectively spreading the information to a larger audience than the original user could have reached alone. [77] In this manner, the

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[68] *See* GREENBERG ET AL., *supra* note 9, at 1.

[69] *See id.* at 4.

[70] *See* Wrinkler, *supra* note 24, at 62; *see also* PARKER & SLATE, *supra* note 39, at 185.

[71] *See* Jarred Prier, *The Command Of The Trend: Social Media As A Weapon In The Information Age*, 11 STRATEGIC STUD. Q. 50, 67 (2017).

[72] *See* Wrinkler, *supra* note 24, at 62; *see also* PARKER & SLATE, *supra* note 39, at 185.

[73] *See* Wrinkler, *supra* note 24, at 62.

[74] PARKER & SLATE, *supra* note 39, at 185.

[75] *Id.*

[76] The term 'viral' in the context of the has been described as, "giving something enough of a push out the door where it then begins to spread around the web on its own." For details, see JUSTIN BEEGEL, INFOGRAPHICS FOR DUMMIES 256 (2014). For a further discussion regarding the different definitions that have been proposed by experts for the word 'viral,' see Robert Wyne, *There Are No Guarantees -- Or Exact Statistics -- For Going Viral*, FORBES (Mar. 9, 2018, 3:25 PM), https://www.forbes.com/sites/robertwynne/2018/03/09/there-are-no-guarantees-or-exact-statistics-for-going-viral/#633972775e8c.

[77] *See* DANIEL HURRLE & JULIA POSTATNY, SOCIAL MEDIA FOR SCIENTIFIC INSTITUTIONS: HOW TO ATTRACT YOUNG ACADEMICS BY USING SOCIAL MEDIA AS A MARKETING TOOL 5

information essentially becomes viral through a word-of-mouth mechanism.[78] The more viral the information becomes, the more it is likely to reach a larger audience via the internet.[79] Each social media platform has a distinct set of tactics that can be utilized in order to facilitate a particular message or narrative about an incident to go viral on that platform.[80] Concomitantly, it becomes easier to spread false information about any issue or subject on social media platforms.[81]

A claim of fake protests against Trump in November 2016 provides an illustrative example.[82] Eric Tucker, a professional marketing expert, uploaded a message on Twitter stating that the protests held against Donald Trump in November 2016 in Austin, Texas, were fake.[83] To support the claim, he included pictures of tourist buses in the tweet. Subsequently, the tweet was shared approximately 16,000 times on Twitter and 350,000 times on Facebook. However, owing to the incorrect nature of the information, Tucker had to delete the tweet when the credibility of his information was later criticized on Twitter.[84]

At times, fake accounts naming fake identities on social media websites are also created to send particular information viral or to run social media campaigns to promote certain narratives.[85] This may include the use of automated bots to share the content.[86] Bots are automated software programs designed to perform certain repetitive functions within a software framework.[87] In the arena of social media, bots are pseudo-profiles that

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(2015).

[78] *See* SARAH GOTTSCHLING, WHETHER OR NOT SOCIAL MEDIA HAVE BECOME THE MOST IMPORTANT ELEMENT OF THE MARKETING STRATEGY FOR MUSIC ARTISTS TO BECOME FAMOUS 3 (2013).

[79] *See id.*

[80] For examples of making information viral in the field of marketing, see Ying Wu, *Social Networking Sites and Marketing Strategies*, *in* HANDBOOK OF RESEARCH ON INTEGRATING SOCIAL MEDIA INTO STRATEGIC MARKETING 207, 237 (Nicki Hajli ed., 2015).

[81] Tracy Simmons, *Media Literacy and Fake News: How Media Literacy Can Curb the Fake News*, *in* HANDBOOK OF RESEARCH ON MEDIA LITERACY IN HIGHER EDUCATION ENVIRONMENTS 255, 256 (Jayne Cubbage ed., 2018).

[82] For a detailed account about this protest, see *id.*

[83] *Id.*

[84] *Id.*

[85] *See* PARKER & SLATE, *supra* note 39, at 185.

[86] For examples of different types of bots, see Mariia Zhdanova & Dariya Orlova, *Ukraine: External Threats and Internal Challenges*, *in* COMPUTATIONAL PROPAGANDA: POLITICAL PARTIES, POLITICIANS, AND POLITICAL MANIPULATION ON SOCIAL MEDIA 41, 52–54 (Samuel C. Woolley & Philip N. Howard eds., 2018).

[87] *See* Stefano De Paoli, *A Comparison and a Framework for Investigating Bots in Social Networks Sites and MMOGs*, *in* HANDBOOK ON 3D3C PLATFORMS: APPLICATIONS AND TOOLS FOR THREE DIMENSIONAL SYSTEMS FOR COMMUNITY, CREATION AND COMMERCE 59,

perform the functions of sharing content and automated communication with other social media users.[88] Bots share content through texts, images, videos, and other forms in a manner that appears as though it was carried out by a genuine social media profile.[89] They function using proper algorithms that enable them to share particular content repeatedly at intermittent intervals of time.[90] Hence, a particular message can be shared several times in a short temporal period.[91] This strategy leads to the increased visibility of the shared content on social media websites, allowing the information to be seen by a large number of social media users. In this way, a dominant and general public opinion may be crafted through deceitful measures by making particular content visible to a large number of social media users. For this reason, internet giants such as Google have banned the use of bots.[94]

3.2.2. Influenced Political Campaigns

Social media is also used as a means for political campaigning.[92] The U.S. presidential election in 2016 provides a pertinent example, where social media was used to the advantage of the campaign of Donald Trump in the United States.[93] However, the use of social media by Trump's political team resulted in scandal, as it involved the unauthorized access to data of millions of Facebook users.[94] A political consulting firm, Cambridge Analytica, was involved in the scandal, in which Donald Trump's political advisors accessed the Facebook data of several million

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60 (Yesha Sivan ed., 2015). For more details on BOTS, see PARTHA SARKAR, MEDIA AND POLITICS 227–29 (2019).

[88] Shalin Hai, *Multidimensional Mapping of Political Accounts for Malicious Political Socialbot Identification: Exploring Social Networks, Geographies, and Strategic Mapping*, *in* GLOBAL CYBER SECURITY LABOR SHORTAGE AND INTERNATIONAL BUSINESS RISK 263, 270 (Bryan Christiansen & Agnieszka Piekarz eds., 2018).

[89] *Id.*

[90] *See* SARKAR, *supra* note 87, at 227–29.

[91] *See* Zhdanova & Orlova, *supra* note 86, at 52–54.

[94] *See* Hai, *supra* note 88, at 270.

[92] *See* DAVID KIRKPATRICK, THE FACEBOOK EFFECT: THE INSIDE STORY OF THE COMPANY THAT IS CONNECTING THE WORLD 293 (2010).

[93] *See* Wei Sun, *A Critical Discourse Analysis of "Minority Women for Trump" Campaigns on Social Media*, *in* RECONCEPTUALIZING NEW MEDIA AND INTERCULTURAL COMMUNICATION IN A NETWORKED SOCIETY 303, 305 (Nurhayat Bilge & María Inés Marino eds., 2018).

[94] *See* Carole Cadwalladr & Emma Graham-Harrison, *Revealed: 50 Million Facebook Profiles Harvested for Cambridge Analytica in Major Data Breach*, THE GUARDIAN (Mar. 17, 2018), https://www.theguardian.com/news/2018/mar/17/cambridge-analytica-facebook-influence-us-election.

users.[95] According to Facebook, Cambridge Analytica accessed this data through Aleksandr Kogan, a lecturer at Cambridge University.[96] Kogan had created an application called "This Is Your Digital Life," which was portrayed as a personality testing application for Facebook users.[97] The application asked its online visitors to allow access to Facebook profiles, thereby accessing their data, including their Facebook friends list.[98] Facebook reported that Kogan not only accessed but *shared* this data with Cambridge Analytica without the permission of Facebook, in contravention of Facebook rules.[99] According to Facebook, the data of more than 87 million users may have been accessed by Kogan and shared with Cambridge Analytica.[100] In response to the allegations from Facebook, Kogan produced a non-disclosure agreement and refused to comment on the matter.[101]

3.2.2.1. Affecting the Result of Elections

Before the data breach, Donald Trump's political team had hired Cambridge Analytica to run Trump's online campaign for the 2016 U.S. presidential election.[102] Steve Bannon, the chief strategist of Trump's election campaign team, was also a member of the Cambridge Analytica board.[103] Cambridge Analytica used the data stolen by Kogan, allegedly in collusion with Trump's political team, to create targeted political advertisements on social media and other forums in accordance with the preferences and likes of those whose data was compromised.[104] As the ads more relevantly reflected people's preferences, the subsequent campaigning by Trump's political team resulted in particularly effective ads and

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[95] *Id.*

[96] *See* Ian Sherr, *Facebook, Cambridge Analytica and Data Mining: What You Need to Know*, CNET (Apr.18, 2018, 5:10 PM), https://www.cnet.com/news/facebook-cambridge-analytica-data-mining-and-trump-what-you-need-to-know.

[97] *Id.*

[98] *Id.*

[99] *Id.*

[100] *See* Olivia Solon, *Facebook Says Cambridge Analytica May Have Gained 37m More Users' Data*, THE GUARDIAN (Apr. 4, 2018), https://www.theguardian.com/technology/2018/apr/04/facebook-cambridge-analytica-user-data-latest-more-than-thought.

[101] *See* Sherr, *supra* note 96.

[102] MEHNAAZ MOMEN, POLITICAL SATIRE, POSTMODERN REALITY, AND THE TRUMP PRESIDENCY: WHO ARE WE LAUGHING AT? 244 (2018).

[103] Editorial, *Facebook Leaves Its Users' Privacy Vulnerable*, N.Y. TIMES (May 19, 2018), https://www.nytimes.com/2018/03/19/opinion/facebook-cambridge-analytica-privacy.html.

[104] *See* Sherr, *supra* note 96.

appealed to a larger audience on both television and social media.[105] Cambridge Analytica even advised Trump's political team on the content of his speeches to align with what people wanted to hear.[106]

Due to the influence of social media on the election results described above, Facebook's founder and chief executive officer, Mark Zuckerberg, was called to testify before Congress. He confirmed that certain pages on Facebook run by Russian troll farms were creating fake social media identities, but emphasized Facebook was attempting to eliminate all such pages.[107] He further admitted that Cambridge Analytica accessed Facebook users' data illegally and in violation of Facebook's rules.[108] The *New York Times* reported that it was the largest data leak in the social networking platform's history. Interestingly, it was later revealed the same data may have been used to influence the Brexit referendum in the United Kingdom.[109]

3.2.2.2. The Contentious Nature of Illegality in Accessing Data from Social Media in the Cambridge Analytica Scandal

Facebook put the blame for the data leak on Kogan, and the culpability for utilizing the data for election campaigns on Cambridge Analytica.[110] Nonetheless, critics have argued that Facebook's rules allowed software application developers to access data of Facebook users during the period of 2014 to 2015.[111] Reportedly, Facebook abolished this provision in 2015.[112] By this time, however, Kogan had already accessed the data of a number of Facebook users, as was permissible under Facebook's rules at the time.[113] Hence, the purported illegality of the data leak became slightly contentious in nature, as at one point, Facebook admitted the way Kogan accessed and collected the data was in accordance with Facebook's rules.[114]

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[105] *Id.*

[106] *Id.*

[107] Donna Brazile, *Russia's Interference Spotlights Weaknesses in US Election Process*, *in* INTERFERENCE IN ELECTIONS 7, 75 (Kristina Lyn Heitkamp ed., 2018).

[108] *See* Sherr, *supra* note 96.

[109] Matthew Rosenberg et al., *How Trump Consultants Exploited the Facebook Data of Millions*, N.Y. TIMES (Mar. 17, 2018), https://www.nytimes.com/2018/03/17/us/politics/cambridge-analytica-trump-campaign.html. *See also* Solon, *supra* note 100.

[110] *See* Sherr, *supra* note 96.

[111] *See* Kurt Wagner, *Here's How Facebook Allowed Cambridge Analytica to Get Data for 50 Million Users*, VOX (Mar. 17, 2018), https://www.vox.com/2018/3/17/17134072/facebook-cambridge-analytica-trump-explained-user-data.

[112] *See* Sherr, *supra* note 96.

[113] *Id.*; *see* Wagner, *supra* note 111.

[114] *See* Sherr, *supra* note 96; Wagner, *supra* note 111.

That is, Facebook users themselves provided Kogan with access to their data when they clicked on Kogan's personality testing application on Facebook.[115] Moreover, the application asked for users' permission to allow access to their Facebook profiles, friends, and timelines, which users approved to gain access to the personality test.[116] It was though this mechanism that their data was received by Kogan.[117]

Illegality was raised only at the point of Kogan sharing the accessed data with a third party, Cambridge Analytica.[118] By sharing the accessed data with Cambridge Analytica without the permission of those who used Kogan's application, Kogan stood in violation of Facebook's rules.[119] Further illegal acts were committed when Kogan and Cambridge Analytica accessed the data of millions of Facebook users who had never used Kogan's application and had thus never agreed to release their data to Kogan. Such users were in the friends lists of those who had used Kogan's application.[120] How that data was accessed by Cambridge Analytica is also interesting to explicate here. As mentioned above, Kogan's application asked its users to provide access to their Facebook friends. Consequently, when the users allowed the application access, Kogan was able to access the data of the individual's Facebook friends.[121] He then shared this data with Cambridge Analytica.[122]

Thus, on the one hand, Kogan accessed the data of some Facebook users within Facebook's rules, but, on the other hand, he shared the data with Cambridge Analytica illegally to influence elections. In this regard, the legality of accessing the data raised questions among social media users that their privacy on Facebook, or any other social media platform, could be compromised if access to their data is facilitated by that platform's rules.[123] Eventually, Zuckerberg admitted that Facebook had discrepancies in protecting its users' data and made a renewed commitment to ensure the protection of users' data by initiating a complete audit of all the online

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[115] *See* Andrew Wyrich, *What Is Cambridge Analytica, the Data Firm Connected to the Trump Campaign?* THE DAILY DOT (Mar. 19, 2018), https://www.dailydot.com/layer8/what-is-cambridge-analytica.

[116] *See* Rosenberg et al., *supra* note 109.

[117] *See* Cadwalladr & Graham-Harrison, *supra* note 94.

[118] *Id.*

[119] *See* Wagner, *supra* note 111.

[120] *See* Solon, *supra* note 100.

[121] *Id.*

[122] *See* Sherr, *supra* note 96.

[123] *See* Julia Carrie Wong, *Facebook Acknowledges Concerns over Cambridge Analytica Emerged Earlier than Reported*, THE GUARDIAN (Mar. 22, 2019), https://www.theguardian.com/uk-news/2019/mar/21/facebook-knew-of-cambridge-analytica-data-misuse-earlier-than-reported-court-filing.

software applications that connected or stored any data from Facebook.[124] He said, "at the end of the day, this is my responsibility. I started this place, I run it, I'm responsible."[125] Though for context, this statement was made after significant backlash and criticism by social media users and news agencies in response to Facebook's failure to protect its users' data.[126]

Nevertheless, Trump's political team's use of Facebook for its presidential election campaign is an example of the use of social media as a weapon of information warfare. Christopher Wylie, the co-founder of Cambridge Analytica, said about the leaders of the firm in response to the scandal: "Rules don't matter for them. For them, this is a war, and it's all fair. They want to fight a culture war in America. Cambridge Analytica was supposed to be the arsenal of weapons to fight that culture war."[127] In addition, investigations were conducted to affirm whether foreign involvement, primarily from Russia, was behind the access of data from Facebook that affected the presidential election result in the United States.[128]

The data leak by Kogan and Cambridge Analytica effectively invited calls from lawmakers to enact laws regulating social media firms.[129] The Honest Ads Act in the United States was made strictly applicable to social media platforms—particularly Facebook and Twitter—in the aftermath of the Cambridge Analytica scandal.[130] The Act requires all social media firms to disclose the parameters of running any kind of political ads on their platforms[131] and proscribes any kind of foreign intervention in elections or political campaigns.[132] Relatedly, Facebook is also under investigation by the Federal Trade Commission for violating the 2011 consent provision.[133]

3.2.3. Propaganda

Propaganda is the most lethal weapon that social media users can deploy against any entity or state.[134] In the contemporary era, propaganda is

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[124] *See* Brazile, *supra* note 107.

[125] *See* Sherr, *supra* note 96.

[126] *Id.*

[127] *See* Wyrich, *supra* note 115; Rosenberg et al., *supra* note 109.

[128] *See* Brazile, *supra* note 107.

[129] *Id.*

[130] *Id.*

[131] *See* Sherr, *supra* note 96.

[132] *See* Brazile, *supra* note 107.

[133] *See* Sherr, *supra* note 96. The FTC requires all firms working in the United States to comply with the data security rules affirming the privacy of the data of individuals and firms.

[134] *See* Barna, *supra* note 49, at 193.

actively being launched through the use of social media platforms due to its effectiveness and low cost.[135] Generally, the aim of propaganda and disinformation is to promote certain narratives to a community. Social media platforms thus present the perfect tool for propaganda due to the vast online presence and attention of millions of active users. For example, a large number of tweets and retweets on Twitter, the sharing of a post numerous times on Facebook, and making a particular YouTube video can reach a significant number of people, allowing propagandized information to reach millions of Twitter users, over a billion Facebook users, and a great number of YouTube users in a relatively short period of time.[136] Thus, social media websites like Facebook, Twitter, YouTube, and Instagram are attractive and effective tools for those who wish to disseminate propaganda.[137]

3.2.4. Disinformation and Manipulation of Facts

The use of social media as a weapon of information warfare can also lead to the spread of disinformation.[138] Correct information about an issue can be disguised through propagating manipulated information to the users of social media.[139] This is done by sharing manipulated information on a mass scale through social media management teams.[140] Facts are manipulated by spreading false information over social media.[141] Such can be done at times of war and peace to create a favorable narrative among the public regarding virtually any issue.[142] False or fake information is shared repeatedly to make it more visible on social media websites in order to confuse or conceal the facts.[143]

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[135] *See* Lisa-Maria N. Neudert, *Germany: A Cautionary Tale*, *in* COMPUTATIONAL PROPAGANDA: POLITICAL PARTIES, POLITICIANS, AND POLITICAL MANIPULATION ON SOCIAL MEDIA 153, 168 (Samuel C. Woolley & Philip N. Howard eds., 2018); GARTH JOWETT & VICTORIA O'DONNELL, PROPAGANDA AND PERSUASION 363 (2006).

[136] *See id.* For examples of social media as a propaganda tool in Brazilian politics, see Dan Arnaudo, *Brazil: Political Bot Intervention During Pivotal Events*, *in* COMPUTATIONAL PROPAGANDA: POLITICAL PARTIES, POLITICIANS, AND POLITICAL MANIPULATION ON SOCIAL MEDIA 128, 133 (Samuel C. Woolley & Philip N. Howard eds., 2018).

[137] *See* Barna, *supra* note 49, at 193.

[138] *See* TOBY MATTHIESEN, SECTARIAN GULF: BAHRAIN, SAUDI ARABIA, AND THE ARAB SPRING THAT WASN'T 33 (2013).

[139] *See* Barna, *supra* note 49, at 193.

[140] *Id.*

[141] SETH ASHLEY ET AL., AMERICAN JOURNALISM AND "FAKE NEWS": EXAMINING THE FACTS 158 (2018).

[142] VINCENT F. HENDRICKS & MADS VESTERGAARD, REALITY LOST: MARKETS OF ATTENTION, MISINFORMATION AND MANIPULATION 69 (2018).

[143] CELESTE LAWSON ET AL., COMMUNICATION SKILLS FOR BUSINESS PROFESSIONALS 249

For instance, the manipulation of facts by Indian social media activists after the Indian Air Force's intrusion into Pakistan's airspace on February 26, 2019, provides a recent example. The day after the intrusion, the Pakistan Air Force shot down at least two Indian fighter jets.[144] Instead of admitting its loss, the Indian Air Force attempted to manipulate the facts by presenting a narrative that only one Indian fighter plane crashed during the battle with the Pakistan Air Force planes, and further that an Indian pilot had shot down a Pakistani F-16 fighter jet.[145] Moreover, the Indian Air Force claimed that it had launched an attack on a militant camp and killed numerous militants residing within the camp inside the Pakistani village of Balakot.[146] This narrative was promoted through social media with the aim of disseminating the information to an Indian audience, as well as the international community.[147] Indian social media activists bragged on social media about their military's action, which made social media, especially Twitter and Facebook, the site of counterclaims by Indian and Pakistani citizens.[148] Thus, information warfare started on these platforms between the two nations due to the manipulation of facts by the Indian authorities.

Shortly thereafter, when prominent international media agencies inspected the area, they found no evidence of damage to any camp.[149] The failure of the journalist to find even one corpse at the location discredited the Indian government's claims.[150] Soon after, the Indian Air Force's claim of shooting down a Pakistani F-16 was rejected by the United States when a U.S. team visited Pakistan and counted that the Pakistani fleet of F-16 fighter planes was the same planes given to Pakistan by the United States a few years beforehand. Subsequently, the United States officially announced that no Pakistani fighter plane had been shot down by the Indian Air

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(2d ed. 2019).

[144] *See* Ashfaq Ahmed, *How Indian Jets Were Shot Down by Pakistan Air Force*, GULF NEWS (Feb. 27, 2019), https://gulfnews.com/world/asia/pakistan/how-indian-jets-were-shot-down-by-pakistan-air-force.

[145] *Id.*

[146] *See* Simon Scarr et al., *India-Pakistan Tensions: An Air Strike and Its Aftermath*, REUTERS (Mar. 6, 2019), https://graphics.reuters.com/INDIA-KASHMIR/010090XM162/index.html.

[147] Ejaz Haider, *Indian Strike in Pakistan Is More About Hype than It Is About Action*, TRT WORLD (Feb. 26, 2019), https://www.trtworld.com/opinion/indian-strike-in-pakistan-is-more-about-hype-than-it-is-about-action.

[148] *Id.*

[149] *See Indian Air Violation: Int'l Journalists, Foreign Envoys Visit Balakot to See Ground Realities*, THE NEWS INT'L (Apr. 10, 2019), https://www.thenews.com.pk/latest/456063-indian-air-violation-intl-journalists-foreign-envoys-visit-balakot-to-see-ground-realities.

[150] *Id.*

Force.[151] Although the Indian media and its social media teams waged information warfare against Pakistan and manipulated the facts surrounding the February skirmishes between the military forces of the two countries, the truth was eventually exposed. India's information warfare campaign against Pakistan failed miserably, due in part to the findings and belief of U.S. officials that India misled the international community over the sequence of events.[152]

As illustrated above, deceitful content can be shared on social media and sent to a large number of social media users as a means of promoting a certain narrative or viewpoint.[153] All that is required is repetitive sharing of the content by one or more individual accounts on a social media website.[154] Such content can promote hatred and violence against a state, individual, or group.[155] Moreover, if the false narrative of events is not rectified by reputable and reliable sources, disinformation can persist and overshadow facts.

3.2.5. Running Paid or Free Campaigns against an Adversary on Social Media

Certain social media websites such as Facebook allow paid campaigns, setting an upper limit that users can spend to boost their Facebook posts by publishing advertisements for their page or any of their other activities on Facebook.[156] Many Facebook page administrators exercise the option to 'boost a post' on Facebook.[157] Boosting a post is the simplest and easiest way to run an advertisement on Facebook, though such advertisements may not be customized by the owner of the page.[158] The paid campaigns give higher visibility to the boosted post, promoting it over other posts by social media users that would otherwise appear.[159] Facebook earns almost ninety-eight percent of its earnings through these advertisements.[160] Though the

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[151] *See* Lara Seligman, *Did India Shoot Down a Pakistani Jet? U.S. Count Says No*, FOREIGN POL'Y (Apr. 4, 2019), https://foreignpolicy.com/2019/04/04/did-india-shoot-down-a-pakistani-jet-u-s-count-says-no.

[152] *Id.*

[153] Barna, *supra* note 49, at 193.

[154] *See* HURRLE & POSTATNY, *supra* note 77, at 5.

[155] Barna, *supra* note 49, at 193.

[156] *See* KRIS OLIN, FACEBOOK ADVERTISING GUIDE: #1 STEP-BY-STEP GUIDE HOW TO REACH MILLIONS OF TARGETED CUSTOMERS 36 (2d ed. 2009).

[157] For Facebook's official policy, see *The Difference Between Boosted Posts and Facebook Ads*, FACEBOOK (2019), https://web.facebook.com/business/help.

[158] *Id.*

[159] *Id.*

[160] *See* RICKY W. GRIFFIN, MANAGEMENT 289 (11th ed. 2012).

advertisements are mostly run by businesses,[161] they can also be run by propagandists, non-state actors, and state agencies due to the lack of regulation of such campaigns.[162] That is, both state agencies and non-state actors use paid social media campaigns facilitated by bots to promote narratives helpful to their relative interests on social media platforms.[163]

As the campaigns allow particular content to reach a larger audience, they can facilitate the spread of false information, fake news, and propaganda on a social media platform when manipulated information is shared through the advert campaigns.[164] Such use of social media becomes particularly dangerous when it is used by terrorists or anti-state elements—or even state elements—to mask atrocious activities or human rights violations in a war or conflict-stricken area.[165] Masking the truth prevents correct information from reaching the international community, which leaves the atrocities in the conflict-stricken area unaddressed and uncontrolled. Resultant misunderstanding of the conflict can hinder its abatement, and further, can prevent the appropriate application of international humanitarian principles.[166]

3.3. Factors Promoting Social Media's Use as a Weapon

The most significant factor driving the use of social media in the sphere of information warfare is the lack of cost associated with it.[167] Furthermore, the use is convenient and relatively simple, but produces substantial results in fostering a particular narrative on any number of issues among the general public.[168] Social media is widely available and accessible almost

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[161] *Id.*

[162] *See* Wrinkler, *supra* note 24, at 70.

[163] *Id.*

[164] *See* Barna, *supra* note 49, at 193.

[165] For example, Al-Qaeda and Jabhat ul Nasra have used social media for spreading propaganda. For details, see *id.*

[166] A pertinent example of such disguised information relates to Russia's annexation of Crimea in 2014. Russia shared disguised information preventing the applicability of international law on armed conflict. For more on Russia's use of hybrid warfare, see Andrés B. Muñoz Mosquera & Sascha Dov Bachmann, *Understanding Lawfare in Hybrid Wars: The 21st Century Warfare*, 7 J. INT'L HUMANITARIAN LEGAL STUD. 62, 63–87 (2016) and Sascha Dov Bachman & Andrés B. Muñoz Mosquera, *Hybrid Warfare as Lawfare: Towards a Comprehensive Legal Approach*, *in* A CIVIL-MILITARY RESPONSE TO HYBRID THREATS 61, 80–81 (Eugenio Cusumano & Marian Corbe eds., 2018).

[167] *See* Prier, *supra* note 71, at 67.

[168] *See* JASON FALLS & ERIK DECKERS, NO BULLSHIT SOCIAL MEDIA: THE ALL-BUSINESS, NO-HYPE GUIDE TO SOCIAL MEDIA MARKETING 233 (2011); JAY LEVINSON, GUERRILLA SOCIAL MEDIA MARKETING: 100+ WEAPONS TO GROW YOUR ONLINE INFLUENCE, ATTRACT CUSTOMERS, AND DRIVE PROFITS, at xii (2010); CONNIE M. WHITE, SOCIAL MEDIA, CRISIS

everywhere in the world,[169] allowing this medium to be highly effective in the dissemination of information to a large number of people in a small amount of time.[170] Through the repeated sharing of information by users, a multiplying effect occurs, facilitating the dissemination of the information with little to no effort by the propagator.[171]

Such ease and consequent mass effect of the utilization of social media encourages non-state actors to resort to social media not only to justify their stance, but also to propagandize any peace efforts a state's military may pit against them.[172] This helps militant groups as they are able to disseminate information without significant infrastructure.[173] Consequently, they are able to utilize social media as a weapon against their adversaries.[174]

4. The Use of Social Media by Terrorists Poses a Threat to International Peace and Security

Unfortunately, the weaponized use of social media at the hands of terrorist organizations is emerging as a serious threat to international peace and security.[175] This is particularly true in light of terrorist groups' use of social media as a means of recruiting young people to their organizations.[176] Through these platforms, terrorist groups are able to more effectively communicate with like-minded groups as well as their own members.[177] Moreover, such groups can run violent campaigns through social media websites, promoting hatred and inciting violence.[178] Such threats are elaborated in detail below.

4.1. Terrorist Groups Recruiting through Social Media

Social media websites such as Twitter, Facebook, WhatsApp, and Instagram are offered for use free of charge and require no significant

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Communication, and Emergency Management: Leveraging Web 2.0 Technologies 52 (2012).

[169] *See* Uwe Flick, An Introduction to Qualitative Research 391 (6th ed. 2019).

[170] 1 George A. Barnett, Encyclopaedia of Social Networks 318 (Sage Publ'n 2011).

[171] *Id.*

[172] *See* Prier, *supra* note 71, at 66–67.

[173] *Id.*

[174] *See* Simon Harding, Global Perspectives on Youth Gang Behavior, Violence, and Weapons Use 117 (2016); Barna, *supra* note 49, at 193.

[175] *See* Harding, *supra* note 174, at 117; Barna, *supra* note 49, at 193.

[176] *See* Harding, *supra* note 174, at 117; Barna, *supra* note 49, at 193.

[177] *See* Barna, *supra* note 49, at 193.

[178] *Id.*

identification from individuals who sign up or subscribe to these forums.[179] An email, password, age, gender, and other generic information is typically all that is required and can be easily manipulated by the user.[180] After logging into social networking sites, one is able to connect with as many individuals as one finds on these sites.[181] Moreover, there are a variety of different privacy settings available to users ranging from entirely public to viewable only to those the user has added on the site. Notably, young people often set their profile visibility to 'public,' which allows their profile to be viewed by anyone, and allows anyone to add or friend them on the site without user approval.[182] Consequently, users can be approached by terrorist elements, as terrorist groups are always in search of energetic youths for the purpose of recruiting them to their organizations. Several incidents have been reported in which terrorist groups have approached young people on social media websites such as Twitter, Facebook, and Instagram, and effectively brainwashed them through the sharing of hate-provoking content.[183] For instance, a number of youths from Europe, specifically from France and the United Kingdom, have joined ISIS in recent years.[184] Investigation revealed these youths were in contact with ISIS recruiters through social media platforms.[185]

4.2. Increased Connectivity and Communication among Terrorists

Often, these kinds of recruiting methods are employed by use of messaging applications on social media. Notably, social media platforms have free messenger applications that allow users to connect and communicate conveniently.[186] An internet connection, download, and log-in are all that are required to take advantage of the service.[187] Hence, social

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[179] *See* Prier, *supra* note 71, at 67.

[180] BOTTLETREE BOOKS, FACEBOOK FANATIC: EXPLODE YOUR POPULARITY, SECURE YOUR PRIVACY AND BUZZ YOUR BAND ON FACEBOOK 14–15 (2007).

[181] *Id.* at 13.

[182] *See* MIZUKO ITO ET AL., LIVING AND LEARNING WITH NEW MEDIA: SUMMARY OF FINDINGS FROM THE DIGITAL YOUTH PROJECT 38 (2009).

[183] *See* HARDING, *supra* note 174, at 117.

[184] The number is particularly high in the United Kingdom, from where approximately 700 to 800 young men and women have traveled to ISIS camps to join the organization. *See* SHAILJA SHARMA, POSTCOLONIAL MINORITIES IN BRITAIN AND FRANCE: IN THE HYPHEN OF THE NATION-STATE 59 (2016).

[185] *See* HARDING, *supra* note 174, at 117.

[186] For examples of the interplay of messaging platforms in the medical field, see Elgiz Yilmz Altuntas, *Mobile Applications User Trend Analysis of Turkish Physicians in Digital Environments*, *in* CURRENT AND EMERGING MHEALTH TECHNOLOGIES: ADOPTION, IMPLEMENTATION, AND USE 189, 191 (Emre Sezgin et al. eds., 2018).

[187] *Id.*

media platforms provide opportunities for increased and relatively private communication among groups of people.[188] Unfortunately, this aspect of social media platforms is exploited by terrorist groups, who establish increased connectivity and communication with each other through social media messengers.[189] This allows for transmission of terrorist plans and enhanced control over members, which poses a grave threat to the international community, as terrorist groups now have an enhanced level of mutual connectivity and communication, allowing them to effectively execute terrorist activities.[190]

It is pertinent to mention here that the purpose of security institutions, including anti-terrorist task forces, has always been to break the communication chain between the members of terrorist organizations in order to disrupt their plans.[191] However, free access to social media platforms utilized by terrorist groups and their facilitators has the capability of damaging the effectiveness of the anti-terrorist operations and complicates the effort to eliminate terrorist groups' communication infrastructures.[192]

Essentially, it can be argued that social media can be used by both state and non-state actors to demonize their adversaries, spread chaotic information, and disseminate propaganda.[193] Such use of social media can also result in the spread of hate against an individual, entity, group, or state.[194] Again, the free and simple use of social media platforms and messengers provides an opportunity for terrorist and militant groups not only to spread hateful content against the state, but also to connect with and recruit a larger number of people.[195] Furthermore, such access to social media can facilitate communication among terrorist groups, which can damage the attempts of antiterrorist agencies to break the communications set-ups of terrorist groups.[196] Hence, the consequent impact will be a spread of terrorist activities following a threat to peace and security. Therefore, it

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[188] Jesper Falkheimer & Mats Heide, *Strategic Communication in Participatory Culture: From One-and-Two-Way Communication to Participatory Communication Through Social Media*, *in* THE ROUTLEDGE HANDBOOK OF STRATEGIC COMMUNICATION 337, 342 (Derina Holtzhausen & Ansgar Zerfass eds., 2014).

[189] *See* Azhar & Barton, *supra* note 38, at 27.

[190] *See id.*

[191] *See* JOHN HARRISON, INTERNATIONAL AVIATION AND TERRORISM: EVOLVING THREATS, EVOLVING SECURITY 39 (2009).

[192] GUS MARTIN & FYNNWIN PRAGER, TERRORISM: AN INTERNATIONAL PERSPECTIVE 249 (2019).

[193] *See* Wrinkler, *supra* note 24, at 70.

[194] *See* Barna, *supra* note 49.

[195] *See* HARDING, *supra* note 174, at 117.

[196] *See* MARTIN & PRAGER, *supra* note 192, at 249.

is necessary to control the use of social media as a weapon of information warfare.

5. CHALLENGES FACED BY INTERNATIONAL LAW IN REGULATING SOCIAL MEDIA

International law has continued to provide guidance for regulating international affairs, particularly those related to warfare.[197] However, when social media is used as a tool of warfare, international law becomes, to a certain degree, ineffectual due to a number of regulatory challenges.[198] These challenges and the consequent limitations of international law in regulating the use of social media as a weapon of information warfare are elaborated below.

5.1. The Notion of Self-Defense and Use of Force

As has been discussed in relative detail, non-state actors and terrorist groups can use social media and run full-fledged online campaigns against states.[199] However, here, the question arises whether the state can retaliate and use force in self-defense. The answer is quite confusing. According to international law, the use of force is permitted only in response to an actual, physical armed attack.[200] This rule is memorialized in Article 51 of the Charter of the United Nations, which states: "Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security."[201] This implies that the notion of self-defense and use of force is applicable only in the event of an actual armed attack.[202] Here, it is also evidently clear that an armed attack includes the physical use of force.[203] However, there is no use of physical force when social media is harnessed as a weapon in the field of information warfare.[204]

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[197] *See* PAUL D'ANIERI, INTERNATIONAL POLITICS: POWER AND PURPOSE IN GLOBAL AFFAIRS 281 (Brief ed. 2010).

[198] A number of limitations have been witnessed in international law in regulating information warfare. These limitations also relate to international law's inability to regulate social media, because the use of social media as a weapon is an element of information warfare. For details of the challenges in regulating information warfare due to international law, see GREENBERG ET AL., *supra* note 9, at 4.

[199] *See* Wrinkler, *supra* note 24, at 70.

[200] *See* HANS KELSEN, COLLECTIVE SECURITY UNDER INTERNATIONAL LAW 86 (2001).

[201] *See* U.N. Charter art. 51.

[202] *See* KELSEN, *supra* note 204, at 86.

[203] JACKSON MAOGOTO, TECHNOLOGY AND THE LAW ON THE USE OF FORCE: NEW

5.2. The Intangible Nature of the Damage

A major challenge that prevents international law from regulating the use of social media as a weapon of information warfare is the intangible nature of the damage caused.[205] That is, the major damage caused by the weaponized use of social media is that which results from propaganda, disinformation, and the creation of communication infrastructure among terrorist organizations. The damage caused by the foregoing are intangible as they cannot be easily calculated or measured.[206] Due to these non-corporal damages, the physical evidence of the damage caused by social media is difficult to quantify. Consequently, in the arena of information warfare, the weaponized use of social media continues without any significant regulation. Any entity that is targeted by social media propaganda may also resort to using social media either for replying to propaganda asserted against it or for counter-attacks on the adversary with its own version of disinformation or propaganda. Such a situation involving disinformation and propaganda makes it additionally challenging for the international law in preventing the weaponized use of social media in the arena of information warfare.[207]

5.3. Freedom of Speech and Freedom of Expression

Freedom of speech is regarded as one of the fundamental rights of human beings.[208] This right has been endorsed in Article 19 of the Universal Declaration of Human Rights, providing that: "Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers."[209] Such a bold statement of freedom of expression implies that an individual or a group of individuals may use social media as a means to share their opinion, and can upload any content on social media in pursuance of this freedom.[210]

It is pertinent to mention here that the U. N. Charter is one of the fundamental sources of international law and, therefore, every right provided in the text of the Charter has to be regarded as universal in

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SECURITY CHALLENGES IN THE TWENTY-FIRST CENTURY 9 (2014).

[204] *See* GREENBERG ET AL., *supra* note 9, at 4.

[205] *Id.*; *see* Nitu, *supra* note 54, at 201.

[206] *See* GREENBERG ET AL., *supra* note 9, at 4; Nitu, *supra* note 54, at 201.

[207] *See* Thom, *supra* note 62, at 19.

[208] *See* LUCY VICKERS, FREEDOM OF SPEECH AND EMPLOYMENT 1 (2002).

[209] G.A. Res. 217 (III) A, Universal Declaration of Human rights (Dec. 10, 1948).

[210] *Id.*

nature.[211] Thus, freedom of speech and freedom of expression are fundamental human rights from which derogation is not permitted in the normative sphere of international law.[212] Therefore, when one or more individuals use social media and maintain that the basis of that use is their fundamental freedom of speech, then preventing them from doing so may constitute an infringement of Article 19 of the U.N. Charter. Hence, this situation ultimately presents an enormous challenge for any international law seeking to prevent an individual from using social media for information warfare.[213] On the other hand, the protection of an individual's freedom of speech and freedom of expression may vary from state to state, as not every state provides such rights to its citizens.[214] States may apply their domestic laws to prevent the use of social media as tools of propaganda and disinformation,[215] however the applicability of international law remains uncertain.[216]

Consequently, it is unclear what can be done to regulate information warfare if individuals resort to using social media as a weapon also claim their action is an exercise of their inherent freedom of speech.[217] That is, any individual can use their inherent freedom of speech to express their discontent or displeasure at the policies taking place in another state, thus justifying their use of social media for such purposes. Such a situation is likely to become complex in nature, complicating the application of international law in controlling the use of social media as a weapon of information warfare.[218]

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[211] *See* BARRY E. CARTER ET AL., INTERNATIONAL LAW 756 (7th ed. 2018); *see also* 2 U.N. Human Rights Comm., *General Comment No. 31, The Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, *in* COLLECTION OF INTERNATIONAL INSTRUMENTS AND LEGAL TEXTS CONCERNING REFUGEES AND OTHERS OF CONCERN TO UNHCR 583, 583 (2007).

[212] *See* VICKERS, *supra* note 208, at 1.

[213] *See* Tamara Amoroso Goncalves & Daniela Rosendo, *New Communication Technologies: Women's Rights Violations, Limits on Freedom of Expression, and Alternative Ways to Promote Human Rights*, *in* JOURNALISM AND ETHICS: BREAKTHROUGHS IN RESEARCH AND PRACTICE: BREAKTHROUGHS IN RESEARCH AND PRACTICE 198, 198–199 (Mgmt. Ass'n & Info. Resources ed., 2019).

[214] For examples of restrictions on freedom of speech in European countries, see ANDREW JONES ET AL., GLOBAL INFORMATION WARFARE: HOW BUSINESSES, GOVERNMENTS, AND OTHERS ACHIEVE OBJECTIVES AND ATTAIN COMPETITIVE ADVANTAGES 99–100 (2002). For examples in other countries such as Saudi Arabia, see JONATHON GREEN & NICHOLAS J. KAROLIDES, ENCYCLOPEDIA OF CENSORSHIP 494 (2014).

[215] *See* GREEN & KAROLIDES, *supra* note 214, at 494.

[216] *See* JONES ET AL., *supra* note 214, at 100.

[217] *Id.*

[218] *Id.*

5.4. The Concept of State Neutrality

The concept of state neutrality implies that the soil of a state must not be used against any other state to commit terrorism or disseminate propaganda if the former wishes to maintain neutral international relations.[219] Similarly, the principle requires that the nationals of the former to refrain from initiating any violent campaign against another state.[220] However, the question raised is whether the concept of neutrality applies to the state in the same manner when its own citizens are involved in acts of information warfare against another state. In particular, the neutrality of a state may appear questionable when its citizens use social media to wage information warfare and that state takes no action to prevent them from doing so.

In order to preserve its neutrality in the sphere of information warfare, a state should refrain from endorsing individuals' use of social media against another state for conspiracy, propaganda, or disinformation. Moreover, the state may need to act to proscribe them from doing so; but, here again the freedom of speech of those citizens may pose a challenge to a state in attempting to prevent its citizens from using social media as a tool of information warfare.[221]

5.5. Lack of Any Treaty of International Law in Regulating Social Media

It is also relevant to mention here that no treaty or international convention has been signed regulating the use of social media as a weapon of information warfare.[222] In fact, the international community has not given any major attention to this area.[223] Consequently, social media's use as a weapon of information warfare remains unregulated by international law.[224] The primary reason ascribed to such a lack of attention is one of timing, in that the world has not yet fully recognized the impact of information warfare.[225] Therefore, the issue remains untouched. Though there are calls for a new treaty or agreement to be drafted regulating

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[219] For a definition of the concept of state neutrality, see *Neutrality – International Relations*, BRITANNICA.COM, https://www.britannica.com/topic/neutrality (last visited Dec. 24, 2019). For a historic view of states such as Austria who have applied and practiced the principle of state neutrality, see Otmar Holl and Heinz Gartner, *Austria*, *in* SMALL STATES AND ALLIANCES 194 (Erich Reiter & Heinz Gärtner eds., 2001).

[220] *See* HEINER HANGGI, ASEAN AND THE ZOPFAN CONCEPT 27 (1991).

[221] *See* JONES ET AL., *supra* note 214, at 100.

[222] Phillip A. Johnson, *Is It Time for a Treaty on Information Warfare?*, 76 COMPUTER NETWORK ATTACK AND INT'L L. 439, 439 (2010).

[223] *Id.*

[224] *Id.*

[225] *Id.*

information warfare, the lack of response from the international community implies little interest.[226] Unsurprisingly, the lack of attention by the international community in regulating social media is one of the fundamental reasons for non-existence of regulation on the use of social media as a weapon of information warfare.

6. POSSIBLE WAYS OF LEGALLY REGULATING THE NEGATIVE USE OF SOCIAL MEDIA

Despite the aforementioned limitations of international law in regulating social media platforms, there are certain strategies and principles of international law that can be invoked by states to curb the weaponization of social media.

6.1. Invoking the Principle of State Sovereignty

A state is sovereign within its territorial limits, and therefore it has the essential authority to arrest and punish those individuals or groups that conspire against it.[227] International law upholds this sovereignty of every state as supreme and indivisible.[228] Thus, the state can make and implement laws that govern all individuals and groups residing in its territory.[229] Concomitantly, this gives authority to states to legally arrest and those using social media or other tools as weapons of information warfare against the state within its territorial limits.[230] In fact, it becomes the duty of the state to stop such individuals if they use social media to incite hatred, violence, or terrorist inclinations among its citizens.[231] However, things

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[226] *Id.*

[227] JUSTICE BANKOLE THOMPSON, UNIVERSAL JURISDICTION: THE SIERRA LEONE PROFILE 66 (2015).

[228] MICHAEL GRAHAM FRY ET AL., GUIDE TO INTERNATIONAL RELATIONS AND DIPLOMACY 459 (2002).

[229] CHRISTOPHER C. JOYNER, INTERNATIONAL LAW IN THE 21ST CENTURY: RULES FOR GLOBAL GOVERNANCE 340 (2005).

[230] *See* Damien Cave, *Australia Passes Law to Punish Social Media Companies for Violent Posts*, N.Y. TIMES (Apr. 3, 2019), https://www.nytimes.com/2019/04/03/world/australia/social-media-law.html; *West Bengal Plans New Law to Tackle Fake News on Social Media*, ECON. TIMES (June 15, 2018), https://economictimes.indiatimes.com/news/politics-and-nation/west-bengal-plans-new-law-to-tackle-fake-news-on-social-media/articleshow.

[231] For instance, China has censored the use of social media in its territory and banned social media accounts and posts showing or supporting Hong Kong protests. It carried out these measures to prevent the development of positive public opinion of the protestors demands for electoral reforms. Considering the Hong Kong protests as incitement, the Chinese government banned the coverage of these protests on its mainland. For details, see

become complicated, as described in the previous section, when such individuals or groups reside in the territory of another state. In such a situation, it becomes nearly impossible for that state to exercise authority over such individuals. The most state authorities can do is to request that the host state extradite individuals or prevent them from utilizing social media to wage information warfare.[232]

6.2. Enactments Curbing Hate Speech and Hateful Content on Social Media

In order to prevent the spread of propaganda and disinformation on social media, the international community will need to adopt laws specifically regulating hate speech as hate speech is especially effective in igniting violence and spreading disinformation.[233] Such laws should prohibit the dissemination of hateful content over social media and create mechanisms to discipline those individuals who use social media to spread hate, violence, and extremism against an entity or state.[234] Through such laws, the state would be legally equipped to prosecute the perpetrators of hate crimes over social media.

6.3. Initiating Defamation Lawsuits

Additionally, states or individuals targeted by social media warriors can initiate defamation lawsuits as a means of combatting information warfare.[235] Sucessful litigation on a large scale may serve to discourage users from disseminating propaganda and other reputational attacks on any state or non-state entity.[236]

There are several examples of the successful invocation of defamation lawsuits to combat the use of information warfare.[237] For instance, in

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China 'Censors Hong Kong Protest Posts on Social Media', BBC NEWS (Sep. 29, 2019), https://www.bbc.com/news/world-asia-china-29411270. For a brief description of recent steps taken by China to appease protestors, see *Hong Kong Protests: China's Leaders Send Message to Protesters*, BBC NEWS (Nov. 1, 2019), https://www.bbc.com/news/world-asia-china-50261319.

[232] *See* THOMPSON, *supra* note 227, at 65.

[233] *See* Cave, *supra* note 230.

[234] *Id.*

[235] *See* SUNSHINE COAST DAILY, *Social Media Warriors Risk Defamation Lawsuits* (Aug. 25, 2015), https://www.sunshinecoastdaily.com.au/news/social-media-warriors-risk-defamation-lawsuits.

[236] *Id.*

[237] *Id.*; *see* Roziya Abu & Ahmed Zaharuddin Sani Ahmad Sabri, *Information Ethics: Malaysian Breach of Trust*, *in* STATE-OF-THE-ART THEORIES AND EMPIRICAL EVIDENCE: SELECTED PAPERS FROM THE 6TH INTERNATIONAL CONFERENCE ON GOVERNANCE, FRAUD,

Malaysia, a Twitter activist with several thousand followers, Fahmi Fadzil, once alleged that employers at a renowned magazine of BluInc Media behaved poorly with his pregnant friend. Fadzil soon tweeted an apology that his earlier tweet against the magazine was incorrect.[238] Nonetheless, the magazine's lawyer had in the meantime sent a legal notice of defamation to Fadzil. Ultimately, a settlement was agreed between Fadzil and the magazine's legal team, demanding that Fadzil apologize one hundred times on Twitter for defaming the magazine. Fadzil accepted the condition and apologized accordingly on Twitter.[239] Thus, the defamation lawsuit prevented the further spreading of disinformation against an organization. Similar lawsuits against perpetrators of propaganda and disinformation can establish a legacy discouraging the perpetrators in spreading such disinformation. The imposition of civil consequences for engaging in the spread of false information will encourage potential perpetrators to behave more responsibly when utilizing social media.

6.4. Applying the Concept of State Responsibility

Similarly, the concept of state responsibility may be used to help curb the use of nefarious or illegitimate social media use. Under the concept of state responsibility, each state is regarded as responsible for the actions of individuals residing in its territory;[240] therefore, the state can act responsibly in preventing its citizens from committing any form of criminal activity.[241] This further implies that a state has the jurisdiction and responsibility to prevent any social media warriors who distribute propaganda against the state. However, a question arising here is, if an individual or a group uses social media against another state or an entity located there, can the principle of state responsibility then be invoked against such individuals? In a normative sense, the principle of state responsibility should be applied in such situation, because the state is also responsible for the actions of social media warriors that negatively affect another state. The matter relates entirely to ensuring that the state remains responsible for the actions of its individuals, regardless of what entity the actions are aimed at.[242] In this regard, whether a certain act by a state or by its citizens constitutes a

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ETHICS, AND SOCIAL RESPONSIBILITY 239, 241 (Roshima Said et al. eds., 2018).

[238] *See* ABU & SABRI, *supra* note 237.

[239] *Id.*

[240] *See* FRANCISZEK PRZETACZNIK, PROTECTION OF OFFICIALS OF FOREIGN STATES ACCORDING TO INTERNATIONAL LAW 201 (1983).

[241] *Id.*

[242] *Id.*

wrongful act is evaluated as per the rules of international law.[243] For instance, the state is held responsible for the wrongful acts if such acts are committed by its authoritative organs.[244] Thus, if a citizen or an entity that is connected with the government or any other state-authorized institution indulges in wrongful acts, whether using social media or any other electronic transmission source, then the responsibility of the committed wrongful acts will also be ascribed to the state.

6.5. The Way Forward: Is There a Need for a New Multilateral Treaty?

A number of international legal experts have called for the drafting of a multilateral treaty to regulate the use of the internet and social media.[245] These calls have been vocalized with the rationale of controlling information warfare.[246] Owing to the lack of regulation, information warfare is increasingly complicated, effective, and fatal in the contemporary era.[247] Therefore, it is imperative the international community collaborate and create rules regulating the use of social media as a weapon of information warfare. A separate treaty or a convention on the issue would serve greatly in this regard. However, historic state practices suggest that sovereign states rarely take joint action on an issue unless they have witnessed its physical manifestations.[248] As the use of social media poses a more significant risk of intangible rather than physical, tangible damage, the future remains uncertain as to whether the use of social media as a weapon of information warfare could produce sufficient physical damage in the international arena to spur action.[249] Therefore, as a consequence of the intangible nature of the damage, the international community may not take seriously this demand to draft a separate convention or a multilateral treaty to regulate the use of social media.[250] Nonetheless, examples of the deleterious use of social media in recent years should raise alarm bells for the international community and encourage collaborative regulation of the use of social media as a weapon.[251] The use of social media by ISIS as a brainwashing and recruitment tool through the dissemination of violent

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[243] *See* Int'l L. Comm'n Rep. on the Works of Its Fifty-Third Session, U.N. Doc A/56/10, at 3.

[244] *See generally id.* at 26–143.

[245] *See* Johnson, *supra* note 222, at 439.

[246] *Id.*

[247] *Id.*

[248] Duncan B. Hollis, *Why States Need an International Law For Information Operations*, 11 LEWIS & CLARK L. REV. 1023, 1034 (2007).

[249] *See* GREENBERG ET AL., *supra* note 9, at 4.

[250] *Id.*

[251] *See* SHARMA, *supra* note 184, at 117.

content is a grave example of the use of social media as a weapon by terrorist groups, and serves to show that the weaponization of social media can eventually result in devastating physical damage.[252] Such examples highlight the urgent need to regulate the use of social media.

7. CONCLUSION

During the twenty-first century, a technological revolution has spread around the world and has given rise to the use of social media.[253] The social media platforms were designed to facilitate communication among people living in distant regions of the world.[254] With the passage of time, these platforms gained popularity among the global community; and nowadays, a significant proportion of the world's population regularly use social media.[255] Typically offered at little to no cost, the ease and accessibility associated with such platforms makes them ideal for social networking.[256] Through such platforms, people are able to connect with one another on a global scale, exchanging messages, pictures, and videos.[257] Moreover, social media sites are the sole source of news and information for the vast majority of the world's population.[258] As a result, social media has emerged as one of the greatest technological advances of the modern era.[259]

Unfortunately, social media is also used by non-state actors, including terrorist organizations, to carry out nefarious purposes, such as the recruitment of young people,[260] whereby terrorist groups extend hateful and inciteful content to vulnerable individuals through social media.[261] Further, the messaging applications on social media platforms are quite easy to use and install; posing challenges to anti-terrorism efforts to eliminate terrorist groups' communication infrastructure.[262] In addition to terrorist

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[252] *Id.*; *see* HARDING, *supra* note 174, at 117.

[253] *See* NOAM, *supra* note 11, at 269; Turanci, *supra* note 14, at 269.

[254] *See* TROST, *supra* note 2.

[255] *See* DONNA K. GOESTENKORS & GEORGIA DAY, THE MEDICAL SERVICES PROFESSIONAL CAREER GUIDEBOOK: CHARTING A DEVELOPMENT PLAN FOR SUCCESS 64 (2011).

[256] *See* Levinson, *supra* note 168, at xii; JOWETT & O'DONNELL, *supra* note 135, at 363.

[257] *See* TROST, *supra* note 2, at 48–49; Ivant Bulut et al., *Researching the Role of Social Media Marketing in Contemporary Business Practices*, *in* PROCEEDINGS OF THE XIII INTERNATIONAL SYMPOSIUM SYMORG 2012: INNOVATIVE MANAGEMENT AND BUSINESS PERFORMANCE 1185, 1185 (Maja Levi-Jakšić ed., 2012).

[258] *See* Tan et al., *supra* note 23, at 316.

[259] *See* Bulut et al., *supra* note 257, at 1185; Turanci, *supra* note 14.

[260] *See* Barna, *supra* note 49, at 193; HARDING, *supra* note 174.

[261] *See* HARDING, *supra* note 174, at 117.

[262] *Id.*; *see* MARTIN & PRAGER, *supra* note 192.

organizations, other non-state actors use social media to share propaganda or anti-state sentiments.[263] Certain state agencies also use social media platforms to build their own narratives among the public,[264] and wage information warfare against adversary states, as recently exemplified by India's actions against Pakistan.[265] Hence, it can be asserted that social media is being used as an active tool of information warfare in the current era.[266]

However, due in part to the intangible nature of the damage caused by information warfare, international law has been unable to effectively regulate such use of social media.[267] Here, the intangible nature of the damage is the effect of propaganda, disinformation, and the establishment of terrorist communication infrastructure, all facilitated by the use of social media. As it is impossible to measure, calculate or physically assess the corporal nature or magnitude of the damage caused by propaganda or disinformation, this kind of damage is regarded as intangible in nature. The nature of the intangible damage caused by the use of social media makes it challenging to apply the international law of armed conflict, notion of self-defense, or use of force in the arena of information warfare.[268] As a result, international legal scholars are calling for a new treaty or convention regulating information warfare.[269] However, again, the intangible nature of the damage caused by this use of social media prevents the international community from responding seriously to calls for a separate convention or treaty on the issue.[270] History suggests that the international community has only given attention to those issues that have caused tangible damage, instead of intangible damage, in the world.[271] Hence, calls for regulating the use of social media as a weapon of information warfare remain unsuccessful. Moreover, the international community has shown little interest in measuring or assessing the magnitude or seriousness of the damage caused by social media when it is used as a weapon of information warfare.[272] Thus, these two issues, firstly, the intangible damage by social media; and secondly, a lack of attention given so far by international legal experts in regulating social media and in assessing the magnitude of

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263 *See* HARDING, *supra* note 174, at 117.
264 *See* Wrinkler, *supra* note 24, at 62.
265 *See* Haider, *supra* note 147.
266 *See* Vuuren et al., *supra* note 41, at 127.
267 GREENBERG ET AL., *supra* note 9, at 4.
268 *Id.*
269 *See* Johnson, *supra* note 222, at 439.
270 *See* GREENBERG ET AL., *supra* note 9, at 4.
271 *See* Hollis, *supra* note 248, at 1034.
272 *See* Johnson, *supra* note 222.

damages caused by the use of social media, are the main obstacles in creating a new treaty or laws for controlling the arena of information warfare.[273] In recognizing these obstacles and posing suggestions of ways to implement regulation, this essay reiterates and echoes the calls of other legal scholars to the international community to finally address and regulate the use of social media for information warfare.

[273] *See id.*

Hokulani McKeague v. Department of Hawaiian Home Lands: A Case for the Unconstitutionality of Blood Quantum

Hokulani McKeague*

Section 209 of the Hawaiian Homes Commission Act requires a successor to a Department of Hawaiian Home Lands lease to have at least one-quarter Hawaiian blood. This article explores the unconstitutionality of blood quantum as it relates to section 209 and argues that it violates the Fifth and Fourteenth Amendments to the United States Constitution because it restricts the right of individual successors to choose with whom they procreate. Considerations of blood quantum cloud the decision-making processes of successors when selecting a partner for marriage, procreation, and other intimate relationships. The Supreme Court has repeatedly upheld the right to marriage and the freedom of choice therein and language in many Supreme Court opinions suggest that decisions relating to procreation should rise to the same level. Selecting a partner of one's choosing is inherent to the fundamental right to marry and is inextricably linked to the right of procreation and should therefore be made free from governmental intrusion.

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I. INTRODUCTION

> WHEREAS, members of the Hawaiian race or blood should be encouraged to return to the status of independent and contented tillers of the soil, preserving to posterity the valuable and sturdy traits of the race, peculiarly adapted to the islands comprising the Territory of Hawaii, inhabited and governed by peoples of their race and blood as their birthright for a long period of time prior to annexation with the United States of America . . . [1]

Prince Jonah Kūhiō Kalaniana'ole had a dream.[2] The Hawaiian Dream. To rehabilitate his people.[3] To return them to the land, working it to feed themselves, their families, and their community. To live and to lead a sustainable lifestyle.

In 1902, Prince Kūhiō had just been elected as the Territorial Delegate to Congress, yet as he sat at his desk in Washington D.C., his mind wandered across the continent and over the sea, to his home and to his people.[4] In the shadow of the illegal overthrow of the Hawaiian Kingdom in 1893, the Hawaiian people were a diminishing race.[5] With the number of "full-blooded Hawaiians" dropping drastically from 142,650 in 1826 to just 22,500 in 1919, Prince Kūhiō felt that immediate action was necessary to rehabilitate the Native Hawaiian[6] population.[7] In order to combat this steep decline, Prince Kūhio along with Territorial Senator John H. Wise, championed the Hawaiian Homes Commission Act ("HHCA" or "Act"), which culminated in the reservation of approximately 200,000 acres of former government and crown lands "to establish a permanent homeland for native Hawaiians."[8]

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[1] Davianna Pōmaika'i McGregor, *'Āina Ho'opulapula: Hawaiian Homesteading*, 24 HAWAIIAN J. OF HIST. 1, 15 (1990).

[2] *Prince Jonah Kuhio Kalaniana'ole*, DEPT. OF HAWAIIAN HOME LANDS, http://dhhl.hawaii.gov/kuhio-2/
(last visited Apr. 22, 2019).

[3] *Id.*

[4] *Id.*

[5] H.R. REP. NO. 66-839, at 11 (1920).

[6] The terms "native Hawaiian" "Native Hawaiian" and "Hawaiian" carry different meanings and are not interchangeable. For the purposes of this article, "Native Hawaiian" and "Hawaiian" generally refer to those of Hawaiian ancestry, descendants of the aboriginal people of Hawai'i. The term "native Hawaiian" refers to those of at least one-half Hawaiian Blood.

[7] 103 CONG. REC. 4703 (1957).

[8] Hawaiian Homes Commission Act, 1920, Pub. L. No. 67-34, § 203, 42 Stat. 108, 109–10 (1921) (formally codified as amended at 48 U.S.C. §§ 691–718 (1958)) (omitted from codification in 1959) (set out as fully amended in 1 HAW. REV. STAT. 261) (amended from time to time, subject to the approval of Congress); *see also* H.R. REP. NO. 839, at 7

The federal government served as the trustee of the Hawaiian Home Lands program for decades, until 1959 when Hawai'i became the fiftieth state.[9] Upon admission to the union, the State of Hawai'i assumed responsibility from the federal government for the administration of the program through a compact enshrined in the Hawai'i State Constitution.[10] Due to the HHCA's federal inception and subsequent transfer of administration to the State of Hawai'i, amendments to the Act passed by the state legislature must be approved by Congress.[11] The shift of responsibility was mandated by the federal government, "as a condition of Hawai'i's admission to the union, a forcible inclusion that is currently contested by Hawaiian sovereignty activists who challenge the very legitimacy of statehood."[12]

(1920); *Prince Jonah Kuhio Kalaniana'ole*, *supra* note 2. The Hawaiian Homes Commission Act of 1920 is a complex law that requires certain amendments passed by the state legislature to be approved by Congress. In recognition of the intricacies and procedural complexities of the statute, when a citation refers to the "Hawaiian Homes Commission Act, 1920" the author is referring to the act as approved by Congress. When a citation refers to "HHCA," the author is referring to the law as it appears in the Hawai'i Revised Statutes and Hawai'i State Constitution, as amended. The Hawaiian Homes Comission Act of 1920 as it appears in the state materials presently includes provisions that have not yet been approved by Congress. The U.S. Department of the Interior makes the determination as to whether an amendment to the Hawaiian Homes Commission Act passed by the state legislature requires the approval of Congress. *See Appendix A: Inventory of Proposed and Passed HHCA Amendments*, DEPT. OF THE INTERIOR, OFFICE OF NATIVE HAWAIIAN RELATIONS, https://www.doi.gov/hawaiian/hhca-amendments (last visited Feb. 11, 2020).

[9] J. KĒHAULANI KAUANUI, HAWAIIAN BLOOD: COLONIALISM AND THE POLITICS OF SOVEREIGNTY AND INDIGENEITY 3–4 (2008).

[10] HAW. CONST. art. XII, §§ 1–3 (1978).

[11] Hawai'i Admission Act, Pub. L. No. 86-3, § 4, 73 Stat. 4 (1959) ("As a compact with the United States relating to the management and disposition of the Hawaiian home lands, the Hawaiian Homes Commission Act, 1920, as amended, shall be adopted as a provision of the Constitution of said State, as provided in section 7, subsection (b) of this Act, subject to amendment or repeal only with the consent of the United States."); HAW. CONST. art. XII, § 1 (1978).

[12] KAUANUI, *supra* note 9, at 3. If the blood-quantum requirement for successors to Department of Hawaiian Home Lands leases is in fact determined to be unconstitutional in violation of the 5th and 14th Amendments to the Consitution, there could be possible implications to the legitimacy of Hawai'i's statehood because the compact in the State Constitution was a condition of Hawai'i's admission to the union. *Id.* at 5. *See also* Williamson Chang, *Darkness over Hawai'i: The Annexation Myth Is the Greatest Obstacle to Progress*, 16 ASIAN-PAC. L. & POL'Y J. 70, 71–72, 97 (2015). As Professor Williamson Chang has asserted:

> The world, and particularly the United States of America, is deeply ignorant about the history of Hawai'i. In 1897, the U.S. failed to ratify a treaty to acquire Hawai'i. A year later, the U.S. turned to legislation, a Joint Resolution of Congress, to annex Hawai'i. There is a pervasive belief among Americans that Hawai'i was acquired by

The HHCA is the legal basis for the establishment of the Department of Hawaiian Home Lands ("DHHL").[13] Pursuant to provisions of the Act, the DHHL provides direct benefits to native Hawaiians in the form of ninety-nine-year homestead leases at an annual rental of one dollar.[14] The HHCA requires the original lessee to be a native Hawaiian that is at least eighteen years of age, and defines a native Hawaiian as having at least one-half Hawaiian blood.[15] In 1990, the DHHL was authorized to extend leases for an aggregate term not to exceed 199 years.[16] The price and term of the leases was specifically outlined by the Commission in order "*to allow a*

> this joint resolution of Congress in 1898, and thus is presently the territory [and a State] of the U.S. This is the official view of the U.S. with respect to the status of Hawai'i. Based on this claim, the U.S. exercises sovereignty and jurisdiction over the Hawaiian Islands as American territory.

However, "no lands or waters were acquired by the Joint Resolution. Only a treaty could convey the lands and waters of Hawai'i to the U.S." Professor Chang aimed to disprove these claims:

> Since 1898, the governments of the U.S. and the State of Hawai'i have deliberately misled the people of Hawai'i, the U.S., and the world. Current scholarship in Hawai'i, is proving these claims false. Yet, the grip of a century of deception, denationalization, and deliberate ignorance of the obvious reaches far and deep into American and Hawaiian society. The destruction of this falsehood is the most important next step for Native Hawaiians. . . .

Id. (okinas added).

[13] Hawaiian Homes Commission Act, 1920, Pub. L. No. 67-34, § 202(a), 42 Stat. 108, 109–10 (1921) (formally codified as amended at 48 U.S.C. §§ 691–718 (1958)) (omitted from codification in 1959) (set out as fully amended in 1 HAW. REV. STAT. 261); Act of June 18, 1982, No. 272, § 209, 1982 Haw. Sess. Laws 703 (1982) (as approved by Congress, Act of Oct. 27, 1986, Pub. L. No. 99-557, 100 Stat. 3143 (1986)) (allowing a husband, wife, or child who is at least one-quarter Hawaiian to succeed to a lesee's interest); Act of Apr. 28, 1994, No. 37, 1994 Haw. Sess. Laws 127 (1994) (as approved by Congress, Act of June 27, 1997, Pub. L. No. 105-21, 111 Stat. 235 (1997)) (allowing a grandchild who is at least one-quarter Hawaiian to succeed to a lessee's interest) [hereinafter HHCA]. *See also Hawaiian Homes Commission Act*, DEPT. OF HAWAIIAN HOME LANDS, https://dhhl.hawaii.gov/hhc/laws-and-rules/ (last visited Apr. 22, 2019).

[14] HHCA § 208(1); *see also Hawaiian Homes Commission Act*, *supra* note 13.

[15] HHCA § 208(1) (providing that "the original lessee shall be a native Hawaiian, not less than eighteen years of age."); *id.* at § 201(a) (defining a native Hawaiian as "any descendent of not less than one-half part of the blood of the races inhabiting the Hawaiian Islands previous to 1778.").

[16] Act of July 3, 1990, No. 305, Haw. Sess. Laws 954 (codified as amended at HHCA §§ 208(2)–(3), (8) (2013)). Act 305 was subsequently approved by Congress. *See* Act of Oct. 6, 1992, Pub. L. No. 102-398, 106 Stat. 1953 (1992). The 99 year lease terms are set to expire as early as 2021. If the blood-quantum requirement for successors to DHHL leases is found to be unconstitutional in violation of the 5th and 14th Amendments of the Consitution, the aggregate lease term—not to exceed 199 years—could be problematic to the perpetual succession of a lease.

lessee to pass a homestead from generation to generation."[17] The intent of the homesteading program is to "enable native Hawaiians to return to their lands in order to fully support self-sufficieny for native Hawaiians . . . in the administration of this Act, and the preservation of the values, traditions, and culture of native Hawaiians."[18] E ho'i nō kākou i ka 'āina.[19]

In the Congressional record of 1920, Prince Kūhio stated, "I am a believer in giving the small man a piece of land and assisting him to become a prosperous member of the community. There is no patriotism so great as that which is rooted in the soil."[20] Prince Kūhio's vision was to bring his people out of the poverty stricken tenaments of the city and restore them to their rightful place, to the land upon which their ancestors once thrived.[21] However, the Prince's vision was clouded by compromises, the most fatal being the blood-quantum requirement of the HHCA.[22] The detrimental effects of this particular compromise have been felt throughout the entirety of the program and continue to affect the lives of beneficiaries and their successors[23] today when making intimate decisions regarding family and marriage, myself included.

My name is Hokulani Mckeague and I am from Hilo, Hawai'i. My 'ohana[22] lives in the Hawaiian Homestead of Keaukaha.[24] Although we are

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[17] KAUANUI, *supra* note 9, at 4–5 (emphasis added); *see also* HHCA § 208; Paul Nahoa Lucas et. al., *Hawaiian Homes Commission Act*, *in* NATIVE HAWAIIAN LAW: A TREATISE, 176–91 (Melody Kapilialoha MacKenzie, Susan K. Serrano & D. Kapua'ala Sproat eds., 2015); *Hawaiian Homes Commission Act*, *supra* note 13.

[18] *A Bill for an Act Relating to the Hawaiian Homes Commission Act*, Haw. Sess. Laws 349 § 1(a) (codified as amended at HHCA § 101(a) (1990)).

[19] The phrase "e ho'i nō kākou i ka 'āina" can be translated as "we shall return to the land." The word 'āina can be translated as "that which feeds." MARY KAWENA PUKUI & SAMUEL H. ELBERT, HAWAIIAN DICTIONARY (5th ed. 1986).

[20] 59 CONG. REC. 7455 (1920) (statement of Del. Kalaniana'ole).

[21] *See* Davianna Pōmaika'i McGregor, *'Āina Ho'opulapula: Hawaiian Homesteading*, 24 HAWAIIAN J. OF HIST. 1, 2–4, 14 (1990).

[22] *See* KAUANUI, *supra* note 9, at 8; HHCA § 209.

[23] For the purposes of this article, "successors" refers to the beneficiaries who will likely succeed the current lessee, and who desire to pass the lease onto their children.

[22] 'Ohana is defined as "family, relative, kin group." PUKUI & ELBERT, *supra* note 19, at 276.

[24] Upon passage of the Hawaiian Homes Commission Act by Congress in 1921, the Hawaiian Homes program was initially implemented on the islands of Moloka'i and Hawai'i as a pilot project. Established in 1924, Keaukaha is one of the oldest homesteads in the state. Originally named the Kuhio Settlement, Keaukaha homestead is considered one of the pioneers of the Hawaiian Homes Commission Act. Over 60 Native Hawaiian families became Kuhio Settlement lessees on December 16, 1924 and were determined to turn the barren land that they were given into a bountiful community. Their success in building their homes and harvesting food from their plots of land was instrumental in proving to Congress that beneficiaries were up to the challenge. *Keaukaha Homestead Celebrates 90 Years*, DEPT. OF HAWAIIAN HOME LANDS, http://dhhl.hawaii.gov/2014/11/18/keaukaha-homestead-

not among the original settlers of our beloved homestead, we have lived in Keaukaha for over fifteen years and have a deep connection to our community. Fortunately, my father met the blood-quantum requirement for the initial homestead lease, and therefore I qualify as a successor. But what about my future children and the subsequent generations of our family? Will we be able to keep our home? The blood quantum requirement for successors, which I posit is unconstitutional, rests the answer to these questions on my shoulders. Specifically, it rests on my choice of life partner, the father of my future children.

The blood-quantum requirement embodied in section 209 of the HHCA, requiring successors to have at least one-quarter Hawaiian, violates the right to liberty protected by the Fifth and Fourteenth Amendments of the Constitution as it constitutes an impermissible governmental intrusion on intimate decisions pertaining to family and procreation.[25] The HHCA requires an initial lessee to have at least one-half Hawaiian blood.[26] Amendments to the act further require a successor to a DHHL lease have at least one-quarter Hawaiian blood.[27] Since the original lessee is required to have at least one-half Hawaiian blood, their children will automatically meet the one-quarter requirement regardless of their choice of partner.[28] Thus, the burden of maintaining the requisite amount of blood quantum falls on the successors of the original lessee. If a successor chooses a partner who does not have enough blood quantum to supplement their own, their offspring will not meet the one-quarter requirement.[29] In such a case, a successor would be unable to name their child as the successor to their DHHL lease.

The reality of the blood-quantum requirement and its implications weigh heavily on many successors when choosing a life partner or spouse with whom they will procreate. Furthermore, the requirement has the practical effect of forcing qualified successors to procreate with individuals of a

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celebrates-90-years/ (last visited Apr. 22, 2019).

[25] *See* HHCA § 209; *see also* Obergefell v. Hodges, 135 S. Ct. 2584 (2015); Loving v. Virginia, 388 U.S. 1 (1967); Skinner v. Oklahoma *ex rel.* Williamson, 316 U.S. 535 (1942); Kitchen v. Herbert, 755 F.3d 1193, 1209 (10th Cir. 2014).

[26] HHCA §§ 201(a)(5), 208(1).

[27] HHCA § 209(a); *see* Act of June 18, 1982, No. 272, § 209, 1982 Haw. Sess. Laws 703 (1982) (as approved by Congress, Act of Oct. 27, 1986, Pub. L. No. 99-557, 100 Stat. 3143 (1986)); S. JOURNAL, 11th Leg., Reg. Sess., 695 (Haw. 1982); Act of Apr. 28, 1994, No. 37, 1994 Haw. Sess. Laws 127 (1994) (as approved by Congress, Act of June 27, 1997, Pub. L. No. 105-21, 111 Stat. 235 (1997)).

[28] *See* HHCA §§ 201(a), 208(1), 209.

[29] *Id.*; *see also Obergefell*, 135 S. Ct. at 2584; *Loving*, 388 U.S. at 1; *Skinner*, 316 U.S. at 535; *Kitchen*, 755 F.3d at 1209.

certain quantum of Hawaiian blood in order to pass on their family homes.[30] Consequently, the limitations presented by this requirement constitue substantial governmental interference into the autonomy of choice and personal decision-making processes of successors.[31] Selecting a partner of one's choosing is inherent to the fundamental right to marry and is inextricably linked to the right of procreation, and should be made free from governmental intrusion.[32] Native Hawaiian successors of DHHL leases, like everyone else, should have the ability to freely chose their partner in marriage, procreation, and other intimate relationships, without government imposed requirements affecting their choice.[33]

This article makes a case for the unconstitutionality of the blood-quantum requirement articulated in section 209 of the HHCA and proceeds in five parts. Part II explores the history of the HHCA as well as the evolution of the blood-quantum requirement. Part III highlights the pervasive issues of the unsustainable blood-quantum requirement and the recent amendments to section 209. Though the Supreme Court often engages in a 'hybrid' analysis utilizing both principles of substantive due process and equal protection in this area of the law, this article assesses the constitutionality of section 209 under each theory separately.[34] Part IV delineates the substantive due process analysis, characterizes the fundamental right at issue, and emphasizes the importance of the individual autonomy of choice in selecting one's partner for marriage, procreation, and other intimate relationships. The subsections of Part IV outline section 209's infringement upon the individual right to liberty protected by the Due Process Clause of the Fifth and Fourteenth Amendments to the Constitution as it relates to the fundamental rights of marriage and procreation. Further, it argues for an extension of the right to procreate to include protection against governmental interference into the intimate choice of one's partner in procreation. Part V explains how section 209 violates equal protection and argues that strict scrutiny is the appropriate standard of review to apply in the face of a constitutional challenge. Lastly, Part VI concludes by proposing an amendment to the definition of a successor under the Act and

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[30] HHCA § 209.

[31] *See Obergefell*, 135 S. Ct. at 2854; *Lawrence*, 539 U.S. at 574.

[32] *See Obergefell*, 135 S. Ct. at 2854; *Lawrence*, 539 U.S. at 574.

[33] *See e.g. Obergefell*, 135 S. Ct. at 2584; *Loving*, 388 U.S. at 1; *Skinner*, 316 U.S. at 535; *Kitchen*, 755 F.3d at 1209.

[34] The cases discussed in parts III and IV fall into a hybrid-type category of substantive due process and equal protection. However, the author engages in a separate and distinct analysis of section 209 under both theories in part because it is often unclear from caselaw in which theory the Court grounds its opinion. *See generally Obergefell*, 135 S. Ct. at 2854; *Lawrence*, 539 U.S. at 574.

suggests eliminating the unconstitutional blood-quantum requirement from section 209 entirely.

II. BATTLE FOR BLOOD: THE HISTORY OF THE HAWAIIAN HOMES COMMISSION ACT[35]

At the beginning of the twentieth century, shortly after the illegal overthrow of the Hawaiian Kingdom and American annexation, "concern about the plight of the Hawaiian people who had been displaced from rural to urban areas began to emerge as a result of the serious disruption in their traditional way of life."[36] This disturbance sparked the concern of members of the United States Congress as the number of full-blooded Hawaiians continued to decline.[37] Additionally, Congress recognized that "all previous systems of land distribution [in Hawai'i] were ineffective," and began entertaining "various homesteading proposals designed to rehabilitate the native Hawaiian people."[38]

In response to the dwindling Native Hawaiian population, Prince Kūhiō and Senator Wise proposed a rehabilitation program to the Congress, spearheading the passage of the HHCA.[39] The drastic deterioration of the Native Hawaiian population was a constant reminder that immediate action was necessary and that if the HHCA failed, it could lead to the eventual extinction of the race.[40] This stark reality ignited a fire within many legislators who felt that this was a 'now or never' situation.[41] The effort to pass the HHCA "wove together the various strands of political issues which concerned the Native Hawaiian community during the first two decades of American rule after annexation."[42] The goal of Prince Kūhiō and Senator Wise, to return Hawaiians—at least some—back to the land was ultimately achieved, but at what cost?

During the 1920s, Hawaiian politicans and leaders were able to gain certain concessions that provided material benefits and advantages to the

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[35] The legislative history of the Hawaiian Homes Comission Act of 1920 is extensive. This section is a mere summary of the Act's journey from inception to passage and is not intended to be a full legislative history.

[36] Kalima v. State, 137 P.3d 990, 993, (2006). The term "native Hawaiian" refers to those of at least one-half Hawaiian blood as defined in section 201 of the Hawaiian Homes Commission Act, 1920. *Id.*

[37] *Id.*

[38] *Id.*

[39] *See* H.R. REP. NO. 66-839, at 2 (1920).

[40] *Kalima*, 137 P.3d at 993.

[41] *See* H.R. REP. NO. 66-839, at 2 (1920).

[42] McGregor, *supra* note 1, at 7.

Native Hawaiian people.[43] However, they were also manipulated by politically influential economic forces, namely the Big Five.[44] The aggregate result was the furtherance of the Big Five's own economic agendas at the cost of Native Hawaiian interests.[45] Consequently, "[t]he process of drafting, introducing, and amending the [HHCA] reflected the ongoing contention between the Hawaiians and the haole elite. In this, the balance of influence clearly rested with the haole elite."[46] The HHCA is a prime example of the kinds of compromises Native Hawaiians were historically forced to make.[47] The sense of urgency surrounding the passage of the HHCA resulted in certain detrimental compromises, such as the poor quality of homestead land and, relevant to the present discussion, the blood-quantum requirement.[48] In order to further the negotiations surrounding the HHCA,

> Hawaiian political leaders had to support the Big Five's efforts to preserve the public lands for leasing by the plantations and ranches in order to gain support for the exclusive homesteading of selected lands by Native Hawaiians. Moreover, they had to settle for the poorest lands and for a limited definition by which Hawaiians could qualify for benefits under the Act.[49]

This problematic position led to an inherent detriment to the already disadvantaged Native Hawaiian people who were attempting to reclaim some semblance of their ancestral land, resulting in concessions that did not align with the original spirit of legislative intent.

In its initial form, Senate Concurrent Resolution 2—the bill that eventually became the HHCA—was "simple and direct."[50] It specified the "primary concerns of the Ahahui Pu'uhonua O Na Hawai'i with regard to the destitute conditions endured by Native Hawaiians in Honolulu's tenements," and petitioned for the implementaion of a homesteading

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[43] *Id.* at 32.

[44] *Id.* The term "Big Five" refers to the interlocking elite haole families who owned controlling interests in Castle & Cooke, Alexander & Baldwin, C. Brewer, Theo H. Davies, and American Factors (formerly Hackfeld & Co., renamed during World War I). *See Big Five*, HAWAIIHISTORY.ORG, http://www.hawaiihistory.org/index.cfm?fuseaction=ig.page&PageID=29 (last visited Oct. 27, 2019).

[45] McGregor, *supra* note 1, at 32.

[46] McGregor, *supra* note 1, at 32. The term "haole" is commonly used to refer to white person, American, English, Caucasian, or any foreigner or foreign thing that was introduced or of foreign origin. PUKUI & ELBERT, *supra* note 19, at 58.

[47] *Id.*

[48] *Id.*

[49] *Id.*

[50] S. Con. Res. 2, 10th Terr. Leg. (1919), *reprinted in* S. JOURNAL,10th Terr. Leg., 25–26 (Haw. 1919).

program for the rehabilitation of Native Hawaiians.[51] The second proposal, House Concurrent Resolution 28, requested that Congress amend the Organic Act to allow one-fifth of the "highly cultivated public lands" to be sold to the highest bidder, and to be exempt from the general homesteading laws. [52] This would have allowed prime public lands to be leased by big businesses at very low rates.[53] These two proposals were revised, combined, and resubmitted as House Resolution 12683, which eventually became House Resolution 13500.[54]

House Resolution 13500 included the first blood-quantum requirement of one-thirty-second or more Hawaiian in order to be eligible to obtain a homestead lease. [55] The Resolution also exempted "all cultivated sugar-cane lands" from the inventory of "available lands" that would be set aside, designating the most marginal and remote lands for Hawaiian homesteading.[56] When first presented, the length of the leases was 999 years but under the new proposed law, the lease term was drastically

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[51] *Id.*; McGregor, *supra* note 1, at 14 ("The Ahahui Pu'uhonua was a political organization dedicated to social and educational work among the Hawaiian people in order to improve their conditions . . . The Ahahui Pu'uhonua planned to reclaim and uphold the traditional principles of good and just living of the Hawaiian race, such as: living as one with the land; in one spirit, one thought, one shoulder; and one in work under leaders and chiefs.").

[52] *See* McGregor, *supra* note 1, at 17. The Hawaiian Organic Act was enacted by the United States Congress to establish the Territory of Hawaii and to provide a Constitution and government for the territory. *See* Hawaiian Organic Act, Pub. L. No. 56-339, 31 Stat. 141 (1900) (prior to the admission of Hawai'i to the Union in 1959).

[53] H. Con. Res. 28, 10th Terr. Leg. (Haw. 1919), *reprinted in* H. JOURNAL, 10th Terr. Leg., 300–06 (Haw. 1919).

[54] H.R. Res. 13500, 66th Cong. (1920).

[55] *Id.* During the 1920 hearings, dialogue about who would count as a "Hawaiian" for the purpose of entitlement first emerged. *See Hearings on Amendments on the Rehabilitation and Colonization of Hawaiians and Other Proposed Amendments to the Organic Act of the Territory of Hawaii and on the Proposed Transfer of the Buildings of the Federal Leprosy Investigation Station at Kalawao on the Island of Molokai, to the Territory of Hawaii Before the H. Comm. on the Territories*, 66th Cong. 45 (1920). Senator Wise initially argued that blood quantum should not matter, however, this did not satisfy some members of Congress. *Id.* For example, Senator Cassius C. Dowell of Iowa requested a definition of "Hawaiian" because he was concerned about the number of "mixed blood[s]." *Id.* Wise asserted, "*Anybody*, even to the thirty-second degree should be included." *Id.* (emphasis added). Thereafter, the one-thirty-second blood quantum amount "began to circulate as the proposed definition." KAUANUI, *supra* note 9, at 112. Originally, however, Wise merely intended to "distinguish Hawaiians from non-Hawaiians in the discussion of indigenous social rehabilitation," rather than for purposes of exclusion. *Id.*

[56] H.R. Res. 13500, 66th Cong. (1920); *see also* McGregor, *supra* note 1, at 21.

reduced to 99 years.[57] House Resolution 13500 circulated through several rounds of congressional hearings and the House Committee on Territories issued their report concluding that:

> (1) [T]he Hawaiian must be placed upon the land in order to insure his rehabilitation; (2) alienation of such land must, not only in the immediate future but also for many years to come, be made impossible; (3) accessible water in adequate amounts must be provided for all tracts; and (4) the Hawaiian must be financially aided until his farming operations are well under way.[58]

Unfortunately, House Resolution 13500 ultimately failed to pass, and was sent back to the Territorial Legislature to be further amended in an attempt to compromise with business interests that were in opposition of the measure.[59] These negotiations resulted in Senate Concurrent Resolution 8, which would eventually be passed as the HHCA in 1921.[60] Specifically, Senate Concurrent Resolution 8 amended House Resolution 13500 to include language that required a five-year trial program before permanent implementation of the homestead program, repealed the 1,000-acre limit on corporate ownership in public lands available for leasing, and *required beneficiaries to have at least one-half Hawaiian blood.*[61]

The end result echoed the inferior negotiating position of those in favor of the HHCA, as "[t]he bill in its final form embodied the types of political compromises that Hawaiians often found necessary to make in order to gain concessions from the haole elite in Hawai'i."[62] The most fatal of these compromises[63] was the blood-quantum requirement of the HHCA.[64] From its inception, the requirement was intentionally created to be unsustainable, and moreover, the motives behind its implementation remain suspect.[65] The

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[57] H.R. Res. 13500, 66th Cong. (1920); *see also* McGregor, *supra* note 1, at 22.

[58] H.R. REP. NO. 66-839, at 7 (1920).

[59] KAUANUI, *supra* note 9, at 150; *see* S. Con. Res. 8, 11th Terr. Leg. (Haw. 1921), *reprinted in* S. JOURNAL, 11th Terr. Leg., 670–84 (Haw. 1921).

[60] S. Con. Res. 8, *reprinted in* S. JOURNAL, 11th Terr. Leg., 670–84 (Haw. 1921).

[61] *Id.*

[62] McGregor, *supra* note 1, at 7.

[63] The blood-quantum requirement was a compromise that fragmented the Hawaiian community, and the effects of this 'colonizer quantification' continue today. Quantifying indigenous peoples based on their blood quantum segregates a population. This segregation is intensified by offering benefits to some at the exclusion of others. The blood-quantum requirement of the HHCA created two classes of Hawaiians, those with fifty percent blood quantum and those with less, distinguished by the capitalization of the letter "n" in native.

[64] *See* KAUANUI, *supra* note 9, at 8.

[65] In her book, Professor Kauanui explains:

> The different arguments about who exactly needed rehabilitation and what constituted rehabilitation, given its broad meaning, and how Kanaka Maoli eligibility would be

blood-quantum requirement has been described as "a manifestation of a settler colonialism that works to deracinate—to pull out by the roots—and displace indigenous peoples."[66]

It is important to note that the original version[67] of the HHCA did not specify a blood-quantum requirement.[68] The language merely stated that public land "be set aside permanently as government lands . . . for the encouragement of associations or colonies of individuals of Hawaiian blood for mutual growth and help to bring a rehabilitation of their race[.]" [69] The bill did not specify any particular percentage of ancestry, but rather designated benefits for "individuals of Hawaiian blood in whole or in part[.]"[70] A specified blood quantum first appeared in House Resolution 13500, requiring one thirty-second or more Hawaiian blood in order to qualify for a homestead lease.[71] As noted above, Senate Concurrent Resolution 8 amended House Resolution 13500 to require that beneficiaries have at least one-half Hawaiian blood in order to be eligible for an initial

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defined raised many historical questions—most notably the matter of how the United States came to claim the land in the first place. After the unilateral U.S. annexation of Hawai'i in 1898, the U.S. government's favored option of 'returning Hawaiians to the land' rather than returning land to the Hawaiians was a typical colonial stance. It is not surprising, then, to find that Hawaiian blood quantum classification originates in the dispossession of Native claims to land and sovereignty.

See id.

[66] *Id.* at 9.

[67] The "original version" being referenced is Senate Concurrent Resolution 2. *See* McGregor, *supra* note 1, at 14–15.

[68] In the original version, the comparable provision read:

> WHEREAS, there is now available or soon to become available large tracts of public lands under the control of the United States of America from which suitable areas could readily be set aside permanently as government lands subject to long term leases and renewals of leases for the encouragement of associations or colonies *of individuals of Hawaiian blood for mutual growth and help to bring a rehabilitation of their race* and to furnish an incentive for the preservation of the best characteristics of an independent citizenship of Hawaiian blood . . .
>
> . . . that from time to time there may be set aside suitable portions of the public lands of the Territory of Hawaii by allotments to or for associations, settlements, or *individuals of Hawaiian blood in whole or in part*, the fee simple title of such lands to remain in the government, but the use thereof to be available under such restrictions as to improvements, size of lots, occupation and otherwise as may be provided for said purposes.

Id. at 104 (emphasis added).

[69] *Id.*

[70] *Id.*

[71] H.R. Res. 13500, 66th Cong. (1920).

homestead lease.[72] Today, section 201(a) of the HHCA specifically defines a native Hawaiian as "any descendent of not less than one-half part of the blood of the races inhabiting the Hawaiian Islands previous to 1778."[73] This was the price that Prince Kūhiō and Sentaor Wise had to pay in order to return Hawaiians to their rightful place.

III. UNSUCCESSFUL SUCCESSION: RECENT AMENDMENTS TO THE BLOOD-QUANTUM REQUIREMENT FOR SUCCESSORS

A generation after the passage of the HHCA, issues associated with the blood-quantum requirement began to emerge as a result of beneficiaries and successors intermarrying and procreating with individuals who had lower concentrations of Hawaiian blood.[74] In response, the Hawai'i State Legislature has attempted to pass various amendments over the years. However, efforts to amend the HHCA are complicated by the unique legislative procedure involved: pursuant to section 4 of the Admission Act and Article XII section 1 of the Hawai'i State Constitution, Federal Congressional approval is required before certain amendments to the HHCA can pass into law.[75] The difficulties of this procedure were compounded by the disagreements among senators regarding how to address the issues caused by the blood-quantum requirement and the growing discontent of the Native Hawaiian community.

In 1982, the frustrations of the community were echoed in the state legislature in the form of an amendment to section 209. Passed by the Hawai'i State Legislature and approved by Congress, this amendment expanded the list of relatives who could be designated as a successor.[76] Following the passage of the amendment, section 209 of the HHCA provides that, "a lessee may designate any one of the specified relatives

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[72] S. Con. Res. 8, 11th Terr. Leg. (Haw. 1921), *reprinted in* 1921 S. JOURNAL, 11th Terr. Leg., 670–84 (Haw. 1921).

[73] HHCA § 201(a).

[74] *See generally* S. JOURNAL, 11th Leg., Reg. Sess., 695 (Haw. 1982).

[75] Congressional approval of amendments to the HCCA are required by section 4 of the Admission Act as well as Article XII section 1 of the Hawai'i State Constitution. *See* MACKENZIE, SERRANO & SPROAT, *supra* note 17, at 192; *see also* H.R. REP. NO. 99-473, at 2 (1986); *Consenting to the Amendments Enacted by the Legislature of the State of Hawaii to the Hawaiian Homes Commission Act, 1920: Hearing on H.R.J. Res. 17 Before the Senate Comm. on Energy and Natural Resources,* 99th Cong. 85 (1986) (statement of Gard Kealoha, Office of Hawaiian Affairs) ("The 50% blood-quantum requirement has caused many horror stories relating to the eviction of families from Hawaiian Home Lands homestead areas.").

[76] *See* Act of June 18, 1982, No. 272, § 209, 1982 Haw. Sess. Laws 703 (1982) (as approved by Congress, Act of Oct. 27, 1986, Pub. L. No. 99-557, 100 Stat. 3143 (1986)).

listed in the section as a successor to the leasehold upon the lessee's death."[77] These qualified relatives now include: spouses, children, grandchildren, and siblings[78] who are at least one-quarter Hawaiian, as well as native Hawaiian fathers and mothers, widows or widowers of children, widows or widowers of siblings, or nieces and nephews.[79] Prior to 1982, all successors were required to be at least one-half Hawaiian, the same blood quantum required for the initial lessee. While the 1982 amendment reduced the blood-quantum requirement to "at least one-quarter Hawaiian" for spouses and children of the leaseholder, the remainder of the specified relatives were still required to have at least one-half Hawaiian blood.[80]

During floor discussion in the Hawai'i State Legislature on the 1982 amendment, tensions arose amongst supporters of the proposed amendment and two factions emerged.[81] One group of senators clearly supported the proposed amendment in its current form, while others expressed doubt and questioned whether the reduction went far enough.[82] The latter group suggested either maintaining the original requirement of at least one-half Hawaiian blood or removing the blood-quantum requirement entirely.[83]

Sentaor Young spoke in support of the proposed amendment in its current form, explaining by way of example that "eight leases had been cancelled because the spouse or children of the deceased lessee did not meet the blood-quantum requirement," and that the DHHL had identified

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[77] MACKENZIE, SERRANO & SPROAT, *supra* note 17, at 192.

[78] Siblings are listed in the HHCA as qualified one-quarter relatives who are eligible successors to the leasehold upon the lessee's death. However, this amendment has yet to be approved by Congress. *See* Act of Apr. 20, 2005, No. 16, 2005 Haw. Sess. Laws 18 (2005); S.J. Res. 12, 113th Cong. (introduced July 15, 2013) (to approve, *inter alia*, the Act of Apr. 20, 2005, No. 16, to amend § 209 of the HHCA). The Senate Congressional Record shows unanimous consent that the text of Senate Joint Resolution 12 be printed in the record as resolved by Congress, however, this joint resoltion has yet to be formally approved. S. CONG. REC. S2162, 113th Cong. (daily ed. Mar. 21, 2013). Despite this, the curent version of the HHCA, set out as fully amended in the Hawai'i Revised Statutes, includes the language of the 2005 amendment. *See* HHCA § 209.

[79] HHCA § 209; *see id.* at § 201(a) (defining a native Hawaiian as "any descendent of not less than one-half part of the blood of the races inhabiting the Hawaiian Islands previous to 1778.").

[80] *See* Act of June 18, 1982, No. 272, § 209, 1982 Haw. Sess. Laws 703 (1982) (as approved by Congress, Act of Oct. 27, 1986, Pub. L. No. 99-557, 100 Stat. 3143 (1986)) (allowing a husband, wife, or child who is at least one-quarter Hawaiian to succeed to a lesee's interest).

[81] *See* S. JOURNAL, 11th Leg., Reg. Sess., 695 (Haw. 1982).

[82] *See id.*

[83] *See id.*

329 additional families that could be negatively affected by this section.[84] Senator Young further argued that "these situations threaten family security and stability and frustrate[ ] the intent of the [HHCA] which is to assist the Hawaiian people by returing them to the land." [85] Also in support of the Amendment in its current form, Senator Kuroda emphasized how the issue of home maintenance and improvements was tied to the blood-quantum requirement:

> Although most of the present Hawaiian homesteaders have positive attitudes and have maintained their home improvements, some still fear and hesitate to make improvements because of the eventual loss of their homes. What this does in a positive way is to encourage the present Hawaiian homesteaders to make these improvements on their domicile and their surroundings.[86]

This statement embodied central concerns of many leaseholders at the time, who did not wish to put time and money into land that they could not guarantee would pass on to their successors.[87]

On the other side of the coin, several members of the senate doubted the productivity of the proposed amendment in its current form. Central to these senators' concerns was the recurring nature of the problems created by the blood-quantum requirement. Sentaor Cayetano was part of this faction and questioned whether the amendment's reduction would be sufficient, stating:

> This bill proposed to reduce [the blood quantum] to twenty-five percent, as I understand it, so that those who are on right now can pass it on to their children who have at least that percent blood quantum. I do think, however, that if there is one fault with this bill it is that perhaps that what we're really doing is postponing coming to grips with the problem for another generation or so. Sooner or later the Legislature is going to have to decide, as more of the

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[84] Specifically, Senator Young stated:

> The Department of Hawaiian Home Lands testified that since 1975, eight leases had beeen cancelled because the spouse or children of the deceased lessee did not meet the blood-quantum requirement. Three of those eight had been cancelled in 1981. A 1976 study carried out by the Department identified 329 families which could be affected by this section. The Waianae Valley Homestead Community Association identified 15 families in a comminity of 153 which were in jeopardy of being dislocated through the death of a lessee. Your committee is concerned that these situations threaten family security and stability and frustrates the intent of the Hawaiian Homes Commussion Act which is to assist the Hawaiian people by returing them to the land.

S. JOURNAL, 11th Leg., Reg. Sess., 695 (Haw. 1982) (statement of Sen. Young).

[85] *Id.*

[86] S. JOURNAL, 11th Leg., Reg. Sess., 697 (Haw. 1982) (statement of Sen. Kuroda).

[87] *Id.*

> Hawaiian population intermarries, whether for [sic] even passing it on to heirs, we would have to reduce the blood quantum further.[88]

In response to Senator Cayetano's statement, Senator Young explained,

> The original intent of this act did not specify any blood quantum. The original act stated that any Hawaiian or part-Hawaiian may get on to leasehold land. It has been diluted since then, but the original intent was not to bar but to put any Hawaiian with even one-sixteenth or one-thirty-second blood quantum to get on this land, but through various schemes it has been reduced to fifty percent.[89]

Senator Abercrombie joined Senator Cayetano's sentiments of concern, stressing the practical reality that the requirement imposed. Specifically, he stated:

> It simply runs against the grain of modern historical analysis to think that [Native Hawaiians] will not continue to be out married. And to that extent that that [sic] is going to be the social reality, we should recognize it now. We should either stick with the fifty percent figure or we should get rid of it entirely. . . . To do otherwise, it seems to me, is not just to postpone the problem, but to commit a continuing sin against the object of the act in the first place.[90]

Notably, Senator Abercrombie highlighted that:

> Once you move from the fifty percent it does not make any sense to stop at one-quarter. What does make sense is to say the Hawaiian people, to the degree that we are going to define people as Hawaiian in terms of blood quantum, should be *anyone* who had *ancestral claim with respect to the Hawaiians*. To do anything else is simply create one series of tragedy after another where people will be reduced to pawing through ancestral records to make sure that they can squeeze themselves into the proper category.[91]

Though not exhaustive, the selected content of this floor discussion illustrates the pervasive concern that section 209's blood-quantum requirement for successors to DHHL leases is unsustainable and problematic.[92] The statements of the various senators, regardless of the faction they represent, demonstrate their awareness of the practical effect of the blood-quantum requirement: that it jeopardizes family security where

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[88] S. JOURNAL, 11th Leg., Reg. Sess., 695 (Haw. 1982) (statement of Sen. Cayetano).

[89] S. JOURNAL, 11th Leg., Reg. Sess., 695 (Haw. 1982) (statement of Sen. Young).

[90] S. JOURNAL, 11th Leg., Reg. Sess., 695–97 (Haw. 1982) (statement of Sen. Abercrombie).

[91] *Id.* (emphases added).

[92] *See* S. JOURNAL, 11th Leg., Reg. Sess., 695 (Haw. 1982).

there is intermarrying of beneficiaries and results in an inability to pass on property to subsequent generations.[93]

In response to similar concerns about the constraints of the blood-quantum requirement, section 209 was again amended in 1994, extending the reduced blood quantum of at least one-quarter Hawaiian to grandchildren of native Hawaiian lessees.[94] In 2005, the Hawai'i State Legislature passed Act 16, which amended section 209 to include brothers and sisters of a native Hawaiian lessee who are at least one-quarter Hawaiian.[95] In 2017, the state legislature passed Act 80, which proposed to change the blood-quantum requirement for spouses, children, grandchildren, and siblings from at least one-quarter to at least one-thirty-second Hawaiian.[96] During conference committee discussion on the 2017 amendment to section 209, Representative Gene Ward rose to speak in support of the measure, arguing that the change "allows the Hawaiians who are born in a Hawaiian homestead to stay on the land because of the lowering of the quantum amount."[97] Representative Ward's written remarks in support of the measure further explained that:

> [T]he Hawaiian people have seen how throughout generations they have been unable to keep their homesteads because their descendants did not 'qualify' or were not 'Hawaiian enough.' This bill seems to solve that problem by offering a solution and saying: if you have lived in this house, and so have your parents, grandparents, and many generations before you, your kids or grandkids should not lose that privilege that was earned by your predecessors many decades back. Let us not look at the percentage of 'Hawaiian-ness' but at the fact that families will get evicted if we don't pass this bill. They will get 'punished' for not having enough concentration of Hawaiian blood. . . .[98]

Unfortunately, this amendment has yet to be approved by Congress. However, in the event that this amendment does go into effect, is it enough? Or does it just continue to postpone the issue, as it did in 1982? In any event, the amendment ignores the salient issue of the blood-quantum requirement: that the burden it imposes on named successors to DHHL leases constitutes a violation of the Due Process and Equal Protection Clauses of the Fifth and Fourteenth Amendments.

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[93] *Id.*

[94] *See* Act of Apr. 28, 1994, No. 37, 1994 Haw. Sess. Laws 127 (1994) (as approved by Congress, Act of June 27, 1997, Pub. L. No. 105-21, 111 Stat. 235 (1997) (allowing a grandchild who is at least one-quarter Hawaiian to succeed to a lessee's interest).

[95] Act of Apr. 20, 2005, No. 16, 2005 Haw. Sess. Laws 18 (2005).

[96] H.B. 451, 29th Leg., Reg. Sess. (Haw. 2017).

[97] H. JOURNAL, 29th Leg., Reg. Sess., 645 (Haw. 2017) (statement of Rep. Ward).

[98] *Id.*

IV. DUE PROCESS

The Fourteenth Amendment of the Constitution reads:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.[99]

Additionally, the Fifth Amendment in relevant part, provides that "[n]o person shall . . . be deprived of life, liberty, or property, without due process of law. . . ."[100]

There are two types of interests protected by the due process clauses: substantive and procedural.[101] Substantive due process protects individuals from governmental interference in regards to "rights implicit in the concept of ordered liberty."[102] This substantive component prevents the government from intruding into the exercise of fundamental rights and liberties that are deeply rooted in America's history and traditions.[103] Procedural due process ensures that laws and government actions are implemented in a "substantively reasonable" manner.[104] A procedural due process claim differs from a substantive due process claim because it is not the deprivation of liberty or property that is unconstitutional but rather that the deprivation occurred without the due process of law.[105]

Ultimately, substantive due process is concerned with the fairness of the content of the law, and the determination of whether such fairness is present requires a case-specific analysis of the particular set of circumstances. In *Poe v. Ullman*,[106] Justice Harlan noted:

> Due process has not been reduced to any formula; its content cannot be determined by reference to any code. The best that can be said is that through the course of this Court's decisions it has represented the balance which our Nation, built upon postulates of respect for the liberty of the individual, has

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[99] U.S. CONST. amend. XIV.

[100] U.S. CONST. amend. V.

[101] *See* Troxel v. Granville, 530 U.S. 57 (2000).

[102] United States v. Salerno, 481 U.S. 739, 746 (1987) (quoting Palko v. Connecticut, 302 U.S. 319, 325–26 (1937)).

[103] *See* Washington v. Glucksberg, 521 U.S. 702, 703 (1997).

[104] In this context, 'substantively reasonable' means that "deprivations of life, liberty, or property" must be "supported by some legitimate justification." *Russell* W. Galloway, Jr., *Basic Substantive Due Process Analysis*, 26 U.S.F. L. REV. 625, 625 (1992).

[105] *See* Lawrence Alexander, *The Relationship Between Procedural Due Process and Substantive Constitutional Rights*, 39 U. FLA. L. REV. 323, 324 (1987).

[106] Poe v. Ullman, 367 U.S. 542, 543 (1961).

> struck between that liberty and the demands of organized society. The balance of which I speak is the balance struck by this country, having regard to what history teaches are the traditions from which it developed as well as the traditions from which it broke. That tradition is a living thing. A decision of this Court which radically departs from it could not long survive, while a decision which builds on what has survived is likely to be sound. [107]

A substantive due process analysis may consist of five inquiries: (1) whether there is a protected right at issue, (2) whether that protected right is deemed fundamental by the court, (3) whether the challenged law unduly burdens that fundamental liberty interest such that strict scrutiny applies, (4) whether the law furthers a compelling state interest, (5) and whether the law is the least burdensome means of achieving that interest.[108]

Expanding on the bounds and application of the Due Process clause, Justice Harlan further noted:

> [T]he full scope of the liberty guaranteed by the Due Process Clause cannot be found in or limited by the precise terms of the specific guarantees elsewhere provided in the Constitution . . . It is a rational continuum which, broadly speaking, includes a freedom from all substantial arbitrary impositions and purposeless restraints, . . . and which also recognizes, what a reasonable and sensitive judgment must, that certain interests require particularly careful scrutiny of the state needs asserted to justify their abridgment.[109]

The right of privacy has been used as a means of protection for individual autonomy and a limitation on the government's ability to interfere with certain personal decisions such as those relating to family, marriage, procreation, childrearing, contraception, abortion, and end-of-life healthcare choices.[110] The Supreme Court has grounded these most fundamental rights in the Due Drocess Clause of the Fifth and Fourteenth Amendments, and has secured their protection through the precedents set by decades of case law.

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[107] Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833, 849–50 (1992) (quoting *Poe,* 367 U.S. at 543).

[108] *See* Galloway, *supra* note 104, at 626–27.

[109] *Casey,* 505 U.S. at 848–49 (quoting *Poe*, 367 U.S. at 542, 543).

[110] *See* Obergefell v. Hodges, 135 S. Ct. 2584, 2597 (2015) (holding that the right to marry extends to same-sex couples); Lawrence v. Texas, 539 U.S. 558, 574 (2003) (holding that laws prohibiting same-sex sexual activity are unconstitutional on the basis of an individual's right to privacy).

A. The Inextricable Link: Procreation as a Fundamental Right

In its jurisprudence, the Supreme Court of the United States has repeatedly extolled the importance of marriage in American society: "[t]he centrality of marriage to the human condition makes it unsurprising that the institution has existed for millennia and across civilizations. Since the dawn of history, marriage has transformed strangers into relatives, binding families and societies together."[111] The fundamental right to marry and choice therein has been well-established by America's highest court.[112] Various cases stand for the proposition that there are certain fundamental freedoms that accompany this right to marry, such as the right to establish a home and raise children in the manner of one's choosing.[113] By the same token, the right to choose one's partner, and by implication, with whom one procreates, is fundamental to the right of marriage.

Though the right to procreate may not be as well-established as the fundamental right to marry, language in Supreme Court opinions suggests that perhaps such a right *should* be equally recognized as fundamental under the law.[114] Taken together, the following line of cases support the proposition that the right to choose one's partner in marriage is inextricably linked to the right to procreate. Any law that unduly burdens those rights, such as a blood-quantum requirement, is therefore unconstitutional.

In the seminal case *Skinner v. Oklahoma ex rel. Williamson*, the Court espouses perhaps the strongest language in support of the fundamental right to procreate in response to a claim involving Oklahoma's Habitual Criminal Sterilization Act.[115] The Supreme Court of Oklahoma affirmed a judgement

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[111] *Obergefell*, 135 S. Ct. at 2594 (2015).

[112] *See e.g. Obergefell*, 135 S. Ct. at 2584; Loving v. Virginia, 388 U.S. 1, 12 (1967); Skinner v. Oklahoma *ex rel.* Williamson, 316 U.S. 535 (1942).

[113] *See Obgerfell,* 135 S. Ct. at 2584.

[114] *See e.g. Obergefell*, 135 S. Ct. at 2601 ("The constitutional marriage right has many aspects, of which childbearing is only one."); *Skinner*, 316 U.S. at 541 ("Marriage and procreation are fundamentals to the very existence and survival of the race.").

[115] *Skinner*, 316 U.S. at 541. The act defines a "habitual criminal" to mean a person who has been convicted two or more times to final judgment of the commission of crimes amounting to felonies involving moral turpitude, either in a court of competent jurisdiction of this state or any other state, and is thereafter convicted to final judgment in a court of competent jurisdiction of this state of the commission of a crime amounting to a felony involving moral turpitude and sentenced to serve a term of imprisonment in an Oklahoma penitentiary or reformatory or any other like penal institution now or hereafter established by the state. Excepted from the act are persons convicted of offenses arising out of the violation of the prohibitory laws, revenue acts, embezzlement, or political offenses. The act provides that any person adjudged to be such a habitual criminal shall be rendered sexually sterile; if a male, by the operation of vasectomy; and, if a female, by the operation of salpingectomy. *Id.*

directing the operation of a vasectomy to be performed on Jack T. Skinner.[116] Skinner was deemed a habitual criminal under the act following a series of crimes beginning in 1926 when he was convicted of "stealing chickens" and was thereafter sentenced to the state penitentiary.[117] Subsequently, he was convicted of robbery with firearms twice, first in 1929 and then again in 1934, again resulting in confinement to the state penitentiary where he resided in 1935 when Oklahoma's Sterilization Act was passed.[118] A year later, in 1936, the Attorney General instituted proceedings against him.[119]

This case touched on a sensitive and important area of human rights. The Oklahoma Statute deprived certain individuals of a right which is basic to the perpetuation of humankind—the right to have offspring.[120] The Court cautioned:

> [T]he power to sterilize, if exercised, may have subtle, far-reaching and devastating effects. In evil or reckless hands, it can cause races or types which are inimical to the dominant group to wither and disappear. There is no redemption for the individual whom the law touches. Any experiment which the State conducts is to his irreparable injury. *He is forever deprived of a basic liberty.*[121]

The Court resoundingly declared that, "marriage and procreation are fundamental to the very existence and survival of the race."[122] This particular language linked the right to marry with procreation and thus established procreation as a basic, or "fundamental" right.[123] The Court's language in *Skinner* evinces the connection between the right to marry and the right to procreate and establishes that both are fundamental rights worthy of constitutional protection.[124]

More recently, in *Obergefell v. Hodges*, fourteen same-sex couples and two men whose same-sex partners were deceased filed suit in federal district courts in their respective home States.[125] The plaintiffs claimed that respondent state officials violated the Fourteenth Amendment by denying them the right to marry, or to have their marriages lawfully performed in

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[116] *Id.* at 541.
[117] *Id.* at 537.
[118] *Id.*
[119] *Id.*
[120] *Id.* at 536.
[121] *Id.* at 541 (emphasis added).
[122] *Id.*
[123] *See id.*
[124] *Id.*
[125] Obergefell v. Hodges, 135 S. Ct. 2584, 2588 (2015).

another State given full recognition.[126] The Sixth Circuit court consolidated the cases, and certiorari was granted.[127] The Court overruled their previous decision in *Baker v. Nelson*,[128] which held that the exclusion of same-sex couples from marriage did not present a substantial federal question.[129]

Writing for the majority, Justice Anthony Kennedy declared that "[t]he Constitution promises liberty to all within its reach, a liberty that includes certain specific rights that allow persons, within a lawful realm, to define and express their identity."[130] More specifically, the *Obergefell* Court held that "the right to marry is a fundamental right inherent in the liberty of the person, and under the Due Process and Equal Protection Clauses of the Fourteenth Amendment couples of the same-sex may not be deprived of that right and that liberty."[131] The petitioners in these cases sought to find that liberty by marrying someone of the same sex and having their marriages deemed lawful on the same terms and conditions as marriages between persons of the opposite sex.[132] Justice Kennedy expounded:

> The nature of injustice is that we may not always see it in our own times. The generations that wrote and ratified the Bill of Rights and the Fourteenth Amendment did not presume to know the extent of freedom in all of its dimensions, and so they entrusted to future generations a charter protecting the right of all persons to enjoy liberty as we learn its meaning. When new insight reveals discord between the Constitution's central protections and a received legal stricture, a claim to liberty must be addressed.[133]

This case reaffirmed the importance of Due Process and its application to rights the Supreme Court has declared to be fundamental.

Notably, the *Obergefell* Court concluded that marriage is a fundamental right because it "safeguards children and families and thus draws meaning from related rights of childbearing, procreation, and education."[134] The Court explicitly recognized this connection, stating: "the right to 'marry, establish a home and bring up children' is a central part of the liberty protected by the Due Process Clause."[135] Furthermore, in accordance with

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[126] *Id.* at 2593.

[127] *Id.*

[128] 409 U.S. 810 (1972).

[129] *Obergefell*, 135 S. Ct. at 2605.

[130] *Id.* at 2593.

[131] *Id.* at 2604.

[132] *See id.* at 2598.

[133] *Id.*

[134] *Id.* at 2599–00; *see also* Pierce v. Society of Sisters, 268 U.S. 510 (1925); Meyer v. Nebraska, 262 U.S. 390, 399 (1923).

[135] *Obergefell*, 135 S. Ct. at 2600 (citing Zablocki v. Redhail, 434 U.S. 347, 384 (1978)).

Lawrence v. Texas, the Court declared, "[l]ike choices concerning contraception, family relationships, procreation, and childrearing, *all of which are protected by the Constitution*, decisions concerning marriage are among the most intimate that an individual can make."[136] This language creates an indivisible link between the right to marry and the right to procreate, establishes that an individual has a right to personal choice in such pursuits, and clearly explains that *choices concerning procreation* are protected by the Constitution.[137] Here, the Court drew upon past precedent invalidating laws that restricted procreation or marriage, such as *Zablocki v. Redhail*.[138] There, the Court opined that "[i]t is not surprising that the decision to marry has been placed on the same level of importance as decisions relating to procreation, childbirth, child rearing, and family relationships."[139] Importantly, this case placed the right to procreate on a similar level as the fundamental right to marry and emphasized the importance of the decision therein residing with the individual.[140] The language throughout this line of cases has formally established that there is a right to procreate, and has emphasized the Fourteenth Amendment's protection of the fundamental freedom to choose with whom you procreate. Section 209 of the HCCA infringes upon this fundamental right and is therefore unconstitutional.

B. Section 209: A Due Process Violation

Section 209 of the HHCA infringes on the individual liberty and freedom of choice in a fundamental right protected by the Fifth and Fourteenth Amendments, in direct contravention of the due process rights of successors.[141] By requiring a successor of a DHHL lease to be at least one-quarter Hawaiian, section 209 pierces the sphere of privacy that should be accorded to the fundamental right of procreation in recognition of the fact that the need to produce children with a certain blood quantum could significantly impact successors' choice of partner.[142] The limitation presented by this requirement constitues an impermissible governmental

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[136] *Id.* at 2599 (citing Lawrence v. Texas, 539 U.S. 558, 574 (2003)) (emphasis added).

[137] *Id.* at 2600.

[138] 434 U.S. at 347.

[139] *Zablocki*, 434 U.S. at 386.

[140] *See id.*

[141] *See* HHCA § 209; *Obergefell*, 135 S. Ct. at 2584 (2015); Loving v. Virginia, 388 U.S. 1, 12 (1967); Skinner v. Oklahoma *ex rel.* Williamson, 316 U.S. 535 (1942); Kitchen v. Herbert, 755 F.3d 1193, 1209 (10th Cir. 2014).

[142] *See* HHCA § 209(a)(1)–(2); *Lawrence*, 539 U.S. at 560; *Obergefell*, 135 S. Ct. at 2599–00.

interference into the autonomy of choice and the personal decision-making processes of successors of DHHL leases.[143] The selection of a partner is inherent to the fundamental right to marry which is inextricably linked to the right of procreation. Therefore, the intimate decision regarding with whom one procreates should be free from governmental intrusion.[144]

The idea that such intimate decisions should be afforded Constitutional protection was exhibited by the Supreme Court's landmark decision in *Loving v. Virginia*.[145] During a time that interracial marriage was illegal in Virginia, two Virginia residents, Mildred Jeter, a black woman, and Richard Loving, a white man, were married in the District of Columbia in June 1958.[146] The Lovings thereafter returned to Virginia and four months later, a grand jury indicted the Lovings, charging them with a violation of Virginia's ban on interracial marriages.[147] The Lovings pled guilty to the charge and were sentenced to one year in jail; however, their sentences were suspended for a period of twenty-five years on the condition that the Lovings leave the State and not return to Virginia together for the twenty-five year term.[148] In his opinion, the circuit court judge reasoned:

> Almighty God created the races white, black, yellow, malay and red, and he placed them on separate continents. And but for the interference with his arrangement there would be no cause for such marriages. The fact that he separated the races shows that he did not intend for the races to mix.[149]

After their convictions, the Lovings moved to the District of Columbia and filed a motion in Virginia state court to vacate the judgment and set aside the sentence on the ground that the statute they were charged with violating was repugnant to the Fourteenth Amendment.[150]

This case presented a constitutional question never before addressed by the Court: whether a statutory scheme adopted by the State of Virginia to prevent marriages between persons solely on the basis of racial classifications violated the Due Process and Equal Protection Clauses of the

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[143] *See* HHCA § 209(a)(1)–(2); *Lawrence*, 539 U.S. at 560; *Obergefell*, 135 S. Ct. at 2599–00.

[144] *See* HHCA § 209(a)(1)–(2); *Lawrence*, 539 U.S. at 560; *Obergefell*, 135 S. Ct. at 2599–00.

[145] 388 U.S. 1 (1967).

[146] *Loving*, 388 U.S. at 2–3.

[147] *Id.*

[148] *Id.*

[149] *Id.* at 3.

[150] *Id.*

Fourteenth Amendment.[151] The Supreme Court unanimously answered in the affirmative.[152] Chief Justice Warren declared,

> [t]o deny this fundamental freedom [to marry] on so unsupportable a basis as the racial classifications embodied in these statutes, classifications so directly subversive of the principle of equality at the heart of the Fourteenth Amendment, is surely to deprive all the State's citizens of liberty without due process of law. The Fourteenth Amendment requires that the freedom of choice to marry not be restricted by invidious racial discriminations. Under our Constitution, the freedom to marry or not marry, a person of another race resides with the individual and cannot be infringed by the State.[153]

The Court further held that, "[t]he freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men."[154] Here, a statute interfering with the fundamental choice of selecting one's partner in marriage was unanimously invalidated.

Virginia's ban on interracial marriage is similar to section 209 of the HHCA in that both laws infringe on the individual liberty and freedom of choice in the fundamental rights of marriage and procreation.[155] While the Virginia anti-miscegenation law criminalized and blatantly prohibited the marriage of white and colored persons, thereby infringing on an individual's liberty to choose whom they marry, the restrictive blood-quantum requirement of section 209 infringes on that same liberty by leaving the affected successor with a choice burdened by governmental intrusion.[156] Section 209 forces successors to procreate with someone of a certain race and, even more intrusively, of a certain quantum of that race in order to pass down the DHHL lease to their children.[157] The forced consideration of blood quantum when selecting a partner is an unconstitutional interference of the state into the autonomy of an individual.[158] This restriction of an individual's choice of partner impinges on the right to procreate and constitutes an infringement upon the same

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[151] *Id.*

[152] *Id.*

[153] *Id.* at 12.

[154] *Id.*

[155] *See id.*

[156] *See id.* at 12.

[157] HHCA § 209(a)(1)–(2); MACKENZIE, SERRANO & SPROAT, *supra* note 17, at 192. One of the articulated purposes of the Hawaiian Homes Commission Act is "placing native Hawaiians on the lands set aside under this Act in a prompt and efficient manner and *assuring long-term tenancy to beneficiaries of this Act and their successors*." HHCA § 101(b)(2) (emphasis added).

[158] *See* MACKENZIE, SERRANO & SPROAT, *supra* note 17, at 192.

individual liberty, and a similar fundamental right, as was found to be violated in *Loving*: the decision of choosing a life partner.[159] As the *Loving* court unanimously opined, the Fourteenth Amendment of the Constitution requires "the freedom [of choice] to marry or not marry[] a person of another race [to reside] with the individual and cannot be infringed by the State."[160] Section 209 removes this choice from the individual by injecting the consideration of blood quantum into an individual's intimate decision-making and places it in the hands of the State in violation of the Fourteenth Amendment of the Constitution.

Similarly, section 209 of the HHCA is analogous to the Oklahoma Habitual Criminal Sterilization Act struck down in *Skinner* because they both "deprive[] certain individuals of a right which is basic to the perpetuation of a race—the right to have offspring."[161] Although section 209 does not order the sterilization of an individual, the same liberty is being burdened, albeit in a different manner.[162] The blood-quantum requirement articulated in section 209 deprives an individual of the basic liberty of choice in procreation, which has been established as "fundamental to the very existence and survival of the race."[163] Section 209 essentially restricts qualified successors of DHHL leases to select partners of a certain quantum of Hawaiian blood in order to produce offspring that are at least one-quarter Hawaiian in order for the offspring to qualify as a subsequent successor.[164] This infringement upon a basic liberty, the right choose with whom to produce offspring, violates the Fourteenth Amendment of the Constitution and should therefore be overturned.[165]

Moreover, a state regulation need not prohibit marriage or procreation to unconstitutionally infringe or burden the fundamental right to marry and procreate. In *Zablocki*, the Court came to a similar conclusion when it determined a state law placing an unduly burdensome condition on marriage was unconstitutional. The state law prevented any "Wisconsin resident having minor issue not in his custody and which he is under obligation to support by any court order or judgment" to obtain a court

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[159] *See Loving*, 388 U.S. at 12.

[160] *Loving*, 388 U.S. at 12.

[161] *See* Skinner v. Oklahoma *ex rel.* Williamson, 316 U.S. 535, 536 (1942).

[162] *See id.*; HHCA § 209(a)(1)–(2).

[163] *Skinner*, 316 U.S. at 535.

[164] *See* HHCA § 209(a)(1)–(2); Obergefell v. Hodges, 135 S. Ct. 2584 (2015); Lawrence v. Texas, 539 U.S. 558 (2003).

[165] *See Obergefell*, 135 S. Ct. at 2584; *Lawrence*, 539 U.S. at 560; *Skinner*, 316 U.S. at 536; Loving v. Virginia, 388 U.S. 1 (1967).

order granting permission to marry before obtaining a marriage license.[166] The Court found that the statute effectuated that "members of a certain class of Wisconsin residents may not marry, within the State or elsewhere, without first obtaining a court order granting permission to marry."[167] Falling within this class, Redhail was denied a marriage license pursuant to the terms of the statute.[168] Unable to enter into a lawful marriage in Wisconsin—or any other state—and unwilling to change his Wisconsin residency, Redhail brought a class action under 42 U.S.C § 1983 "challenging the statute as violative of the Equal Protection and Due Process Clauses of the Fourteenth Amendment."[169]

After careful consideration, the Court concluded that "the right to marry is of fundamental importance for all individuals and is part of a fundamental 'right of privacy' implicit in the Fourteenth Amendment's due process clause."[170] The Court further opined:

> It is not surprising that the decision to marry has been placed on the same level of importance as decisions relating to procreation, childbirth, child rearing, and family relationships. As the facts of this case illustrate, it would make little sense to recognize a right of privacy with respect to other matters of family life and not with respect to the decision to enter the relationship that is the foundation of the family in our society.[171]

The Wisconsin statute was problematic because it prohibited only a specific class of individuals from marriage without first obtaining a court order granting permission to do so, thereby infringing on their enjoyment of a fundamental right that has been well established by this nation's Court.[172]

Similarly, in order to be able to pass on a DHHL lease to the family home, section 209 of the HHCA implicitly restricts qualified successors to procreate with a certain class of individuals—individuals with a specific quantum of Hawaiian blood.[173] This restriction, like the condition placed on those delinquent in their child support payments in *Zablocki*, violates the Fourteenth Amendment of the Constitution because it infringes upon an

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[166] Zablocki v. Redhail, 434 U.S. 374, 375–76 (1978).

[167] *Id.*

[168] WIS. STAT. §§ 245.10 (1), (4), (5) (1973) (repealed 1978).

[169] *Zablocki*, 434 U.S. at 376.

[170] *Id.* at 384 (citing U.S. CONST. amend. XIV).

[171] *Id.* at 386.

[172] *Id.* at 375; *see also* Loving v. Virginia, 388 U.S. 1, 12 (1967); Skinner v. Oklahoma *ex rel.* Williamson, 316 U.S. 535, 541 (1942); Meyer v. Nebraska, 262 U.S. 390 (1923) (recognizing that the right "to marry, establish a home and bring up children" is a central part of the liberty protected by the Due Process Clause).

[173] *See* HHCA § 209(a)(1)–(2).

individuals' choice in the exercise of a fundamental right.[174] While section 209 does not outright prevent the acquisition of a marriage license in the same manner as the statute in *Zablocki*, it does place an unconstitutional burden on the exercise of a fundamental right. By injecting the consideration of blood quantum into the characteristics a DHHL lessee has to consider when choosing a partner, the state regulation has the effect of infringing on a fundamental right.[175] The *Zablocki* Court clearly stated that "the decision to marry has been placed on the same level of importance as decisions relating to procreation, childbirth, child rearing, and family relationships."[176] Just as the restrictive Wisconsin statute was held to be a violation of the Fourteenth Amendment, section 209's restrictive blood-quantum requirement should similarly be found unconstitutional because it infringes upon the right to marry and procreate.[177]

Twenty-five years after *Zablocki*, the Court affirmed that the right to freely choose one's partner is protected by the Constitution. In *Lawrence v. Texas*, petitioner Lawrence was convicted of engaging in "homosexual conduct" when police, responding to a reported weapons disturbance, entered his apartment.[178] Both Lawrence and his sexual partner were arrested and convicted of "deviate sexual intercourse in violation of a Texas statute forbidding two persons of the same sex to engage in certain intimate sexual conduct."[179] The *Lawrence* Court referenced two principal cases in its analysis. The first, *Planned Parenthood of Southeastern Pennsylvania v. Casey*, reaffirmed the substantive force of the liberty right protected by the Due Process Clause.[180] As the Court noted, "the *Casey* decision again confirmed that our laws and tradition afford constitutional protection to personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education."[181] In explaining the respect the Constitution demands for the autonomy of the person in making these choices, the *Lawrence* Court stated:

> These matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment. At the heart of

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[174] *Zablocki*, 434 U.S. at 375.

[175] *Id.* at 386.

[176] *Id.*

[177] *See id.*

[178] Lawrence v. Texas, 539 U.S. 558, 562–63 (2003).

[179] *Id.*

[180] *Id.* at 573–74; Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833 (1992).

[181] *Lawrence*, 539 U.S. at 573–74; *Casey*, 505 U.S. at 851.

> liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State.[182]

From this, the majority further reasoned that "individual decisions concerning the intimacies of physical relationships, even when not intended to produce offspring, are a form of 'liberty' protected by due process."[183] This language clearly suggests that procreation is a due process right, and further, that the liberty to choose with whom one procreates must be protected by the Fourteenth Amendment.[184] The principles affirmed in *Lawrence* support the conclusion that the one-quarter blood-quantum requirement articulated in section 209 of the HHCA restricts the freedom of individual decision-making in selecting a partner for intimate physical relationships, including procreation.[185] Moreover, the *Lawrence* Court held that "constitutional protection to personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education" is required by the laws and traditions of the United States.[186] In a similar vein, successors of DHHL lessee should be afforded constitutional protection against governmental intrusion into their choice of sexual partner in accordance with this nation's laws and traditions.[187]

Language in the Tenth Circuit Court's ground-breaking decision *Kitchen v. Herbert* further supports the proposition that the right to choose one's partner is fundamental and should be protected by the Constitution.[188] While this case pre-dates *Obergefell*—where the Supreme Court agreed marriage between same-sex couples cannot be prohibited—the language in *Kitchen* is helpful insofar as it explicitly engages in a discussion of marriage as a fundamental right.[189] The case involved three gay and lesbian couples who either desired to be married in Utah or, having already married elsewhere, wished to have their marriage recognized in Utah.[190] The plaintiffs challenged an amendment to the Utah State Constitution, as well as two statutes, that prohibited same-sex marriage.[191] The complaint alleged

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[182] *Lawrence*, 539 U.S. at 573–74.

[183] *Id.* at 560.

[184] *See id.*

[185] *See id.*

[186] *Id.* at 573–74; *Casey*, 505 U.S. at 851.

[187] *See Lawrence*, 539 U.S. at 560.

[188] Kitchen v. Herbert, 755 F.3d 1193 (10th Cir. 2014).

[189] *Compare* Obergefell v. Hodges, 135 S. Ct. 2584 (2015), *with Kitchen*, 755 F.3d at 1193.

[190] *Kitchen*, 755 F.3d at 1200.

[191] *See id.* (challenging the statutes as violative of their Due Process and Equal Protection rights under the Fourteenth Amendment).

that Amendment 3 violated their right to due process under the Fourteenth Amendment by depriving them of the fundamental liberty to marry the person of their choice and to have such marriage recognized by the State.[192]

"[The Supreme] Court has long recognized that marriage is 'the most important relation in life.'"[193] Here, the Tenth Circuit court embraced this principle and held that "the liberty protected by the Fourteenth Amendment includes the freedom to marry, establish a home[,] and bring up children."[194] The Tenth Circuit's opinion, citing *Griswold v. Connecticut*, declared that:

> [T]here can be little doubt that the right to marry is a fundamental liberty. The marital relationship is older than the Bill of Rights—older than our political parties, older than our school system. Marriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred.[195]

Further, the *Kitchen* opinion is consistent with the Supreme Court case *Cleveland Board of Education v. LaFleur* in which Justice Potter Stewart proclaimed that the "Court has long recognized that freedom of personal choice in matters of marriage and family life is one of the liberties protected by the Due Process Clause of the Fourteenth Amendment."[196] The *Kitchen* court further explained:

> [A]ll fundamental rights comprised within the term liberty are protected by the Federal Constitution from invasion by the States. . . . To qualify as 'fundamental,' a right must be objectively, deeply rooted in this Nation's history and tradition and implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if [it] were sacrificed.[197]

The Tenth Circuit's conclusion that Amendment 3 violated the Plaintiffs rights to due process under the Fourteenth Amendment was "consistent with the [Supreme] Court's other pronouncements on the freedom to marry, which focus on the freedom to choose one's spouse."[198]

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[192] *Id.*

[193] *Id.* at 1209.

[194] *Id.* at 1209 (citing Meyer v. Nebraska, 262 U.S. 390, 399 (1923)) (internal quotations omitted); *see also* Loving v. Virginia, 388 U.S. 1, 12 (1967) ("The freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men.").

[195] *Id.* at 1209 (citing Griswold v. Connecticut, 381 U.S. 479, 486 (1965)).

[196] Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632, 639–40 (1974).

[197] *Kitchen*, 755 F.3d at 1208–09 (quotations omitted) (citing *Planned Parenthood of* Southeastern Pennsylvania *v. Casey*, 505 U.S. 833, 846–47 (1992), *and* Washington v. Glucksberg, 521 U.S. 702, 720–21 (1997)).

[198] *Kitchen*, 755 F.3d at 1212; *see Cleveland Bd. of Educ.*, 414 U.S. at 639–40 ("This

The court in *Kitchen* recognized that marriage is not mentioned in the Bill of Rights and further acknowledged that interracial marriage was illegal in most States in the 19th century. However, the court also stated that "the [Supreme] Court was no doubt correct in finding it to be an aspect of liberty protected against state interference by the substantive component of the Due Process Clause in *Loving*. . . ."[199] Thus, the question as stated in *Loving,* and as characterized in subsequent opinions, was not whether there is a deeply rooted tradition of interracial marriage, or whether interracial marriage is implicit in the concept of ordered liberty. Rather, the right at issue was "the freedom of choice to marry" the person of one's choosing.[200]

In *Kitchen*, the plaintiffs alleged that "Amendment 3 violate[d] their right to due process under the Fourteenth Amendment by depriving them of the fundamental liberty to marry the person of their choice."[201] The challenged law is similar to section 209 of the HHCA because the same issue of "freedom of choice" as to a fundamental right is present in both circumstances.[202] While Amendment 3 prohibited same-sex marriage, section 209 restricts qualified successors to choose certain individuals—those with a certain quantum of Hawaiian blood—as their partner in procreation in order to pass on their homes to their children, who wouldn't otherwise qualify to be named as a successor.[203] Consider the issue presented by same-sex couples who are DHHL beneficiaries wanting to pass on a lease to their future children. Would their options be limited to only adopting children that they know meet the blood-quantum requirement? Or would they have to use a surrogate or sperm donor with a certain quantum of Hawaiian blood? Just as the court in *Kitchen* concluded

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Court has long recognized that freedom of personal choice in matters of marriage and family life is one of the liberties protected by the Due Process Clause of the Fourteenth Amendment."); *see also* Hodgson v. Minnesota, 497 U.S. 417 (1990) (plurality opinion) ("[T]he regulation of constitutionally protected decisions, such as where a person shall reside or whom he or she shall marry, must be predicated on legitimate state concerns other than disagreement with the choice the individual has made."); Roberts v. U.S. Jaycees, 468 U.S. 609, 620 (1984) ("[T]he Constitution undoubtedly imposes constraints on the State's power to control the selection of one's spouse. . . ."); Carey v. Population Servs., Int'l, 431 U.S. 678, 684–85 (1977) ("[A]mong the decisions that an individual may make without unjustified government interference are personal decisions relating to marriage. . . ." (quotation omitted)).

[199] *Kitchen*, 755 F.3d at 1210; *see Casey*, 505 U.S. at 847–48; *see also* Lawrence v. Texas, 539 U.S 558, 577–78 (2003) ("[N]either history nor tradition could save a law prohibiting miscegenation from constitutional attack." (quotation omitted)).

[200] Loving v. Virginia, 388 U.S. 1, 12 (1967); *Kitchen*, 755 F.3d at 1210.

[201] *Kitchen*, 755 F.3d at 1200.

[202] *See Loving*, 388 U.S. at 12; *Kitchen*, 755 F.3d at 1210.

[203] *See* HHCA § 209(a)(1)–(2).

that Amendment 3 violated the plaintiffs' rights to due process under the Fourteenth Amendment, so too should a court recognize that the rights of successors to DHHL leases are presently being violated.[204] The fundamental right "to marry, establish a home, and bring up children" is burdened by the state's interference with the choice of the individual.[205] The *Kitchen* court held that this type of restriction on the freedom of choice to marry an individual of the same-sex violated the Fourteenth Amendment to the Constitution.[206] As such, the restriction of that same freedom of choice articulated in section 209 merits the same conclusion.[207]

Just one year later, in *Obergefell v. Hodges*, the Supreme Court also recognized this fundamental right and struck down similar restrictions on same-sex marriage.[208] Justice Kennedy proclaimed that the fundamental liberties protected by the Due Process Clause of the Fourteenth Amendment "extend to certain personal choices central to individual dignity and autonomy, including intimate choices that define personal identity and beliefs."[209] Justice Kennedy further declared that "[t]he right to personal choice regarding marriage is inherent in the concept of individual autonomy."[210] The inextricable connection between marriage and liberty is why the *Loving* Court invalidated Virginia's interracial marriage ban under the Due Process Clause of the Fourteenth Amendment.[211] "Like choices concerning contraception, family relationships, procreation, and childrearing, *all of which are protected by the Constitution*, decisions concerning marriage are among the most intimate that an individual can make."[212] The *Obergefell* Court explicated that recognizing a right of privacy in certain aspects of family life, and "not with respect to the decision to enter the relationship that is the foundation of the family in our

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[204] *Kitchen*, 755 F.3d at 1230.

[205] *See id.* at 1209 (citing Meyer v. Nebraska, 262 U.S. 390, 399 (1923)); *see also Loving*, 388 U.S. at 12 ("The freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men.").

[206] *Kitchen*, 755 F.3d at 1230.

[207] *See Kitchen*, 755 F.3d at 1212; *see also* Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632, 639–40 (1974); Hodgson v. Minnesota, 497 U.S. 417, 435 (1990); Roberts v. U.S. Jaycees, 468 U.S. 609, 620 (1984); Carey v. Population Servs., Int'l., 431 U.S. 678, 684–85 (1977).

[208] Obergefell v. Hodges, 135 S. Ct. 2584 (2015).

[209] *Id.* at 2597 (citations omitted).

[210] *Id.*

[211] *Id.*; *see* Loving v. Virginia, 388 U.S. 1, 12; *see also* Zablocki v. Redhail, 434 U.S. 374, 384 (1978) (observing *Loving* held "the right to marry is of fundamental importance for all individuals").

[212] *Obergefell*, 135 S. Ct. at 2599 (emphasis added); *see* Lawrence v. Texas, 539 U.S. 558, 574 (2003).

society[,]" would present a direct contradiction.[213] Citing *Goodridge v. Department of Public Health*, the Court in *Obergefell* further stated that the "decision whether and whom to marry is among life's momentous acts of self-definition."[214] The Court concluded that "there is dignity in the bond between two men or two women who seek to marry and in their *autonomy to make such profound choices*."[215]

Section 209 of the HHCA infringes on the same autonomy to make profound choices regarding procreation with its qualification requirement for successors to be at least one-quarter Hawaiian.[216] The highest court in the land has repeatedly upheld the right of marriage and procreation as a fundamental liberty protected by the Fourteenth Amendment of the Constitution.[217] Section 209 of the HHCA violates these most fundamental liberties because a successor's right to procreate is unduly burdened by governmental interference as the pool of eligible partners is effectively restricted to those with a large enough quantum of Hawaiian blood to supplement their own. [218] Furthermore, there is no stated purpose for the blood-quantum requirement in the HHCA and as such there is little argument to be made that it furthers a compelling state interest.[219] The Court has consistently recognized that there are some choices regarding child rearing, marriage, procreation, and education that are fundamental to our concept of ordered liberty. Such choices should not be unreasonably or arbitrarily infringed by governmental intrusion, especially here where there is a less burdensome means of achieving the same end. Under the precedent set by the Supreme Court, this infringement into the intimate sphere of privacy cannot stand without being in violation of the Due Process Clause of the Fifth and Fourteenth Amendments of the Constitution.[220]

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[213] *Obergefell*, 135 S. Ct. at 2599 (quoting *Zablocki*, 434 U.S. at 386).

[214] *Obergefell*, 135 S. Ct. at 2599 (citing Goodridge v. Dept. of Pub. Health, 798 N.E.2d 941, 955 (Mass. 2003)).

[215] *Id.* at 2599 (citing *Loving*, 388 U.S. at 12 ("[T]he freedom to marry, or not marry, a person of another race resides with the individual and cannot be infringed by the State.")).

[216] *See* HHCA § 209(a)(1)–(2).

[217] *See* Loving v. Virginia, 388 U.S. 1, 1 (1967) (holding that the freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men); Skinner v. Oklahoma *ex rel.* Williamson, 316 U.S. 535, 541 (1942) (finding that marriage is one of the "basic civil rights of man," fundamental to our very existence and survival); Meyer v. Nebraska, 262 U.S. 390 (1923) (recognizing that the right "to marry, establish a home and bring up children" is a central part of the liberty protected by the Due Process Clause).

[218] *See* HHCA § 209(a)(1)–(2).

[219] *See id.*

[220] *See e.g. Obergefell*, 135 S. Ct. at 2584; Lawrence v. Texas, 539 U.S. 558, 573–74 (2003); Zablocki v. Redhail, 434 U.S. 374, 375 (1978); *Loving*, 388 U.S. at 1; *Skinner*, 316 U.S. at 535.

V. EQUAL PROTECTION

> The Due Process Clause and the Equal Protection Clause [of the Fourteenth Amendment] are connected in a profound way. Rights implicit in liberty and rights secured by equal protection may rest on different precepts and are not always co-extensive, yet each may be instructive as to the meaning and reach of the other.[221]

This dynamic is reflected in *Loving* and *Zablocki*, where the Court invoked both the Equal Protection and the Due Process Clauses to conclude that the government action in each case was unconstitutional.[222] The Equal Protection Clause of the Fourteenth Amendment provides that no state shall "deny to any person within its jurisdiction *the equal protection of the laws*."[223] The Equal Protection Clause has been characterized as "[t]he single most important concept in the Constitution for the protection of individual rights." [224] It protects minority and marginalized groups, and "places strict limits on the government's ability to infringe fundamental constitutional rights of all class of persons."[225] Moreover, it requires that government classifications justifiable, or "rationally related to legitimate purposes."[226] When an Equal Protection issue arises, the classification must be analyzed to determine whether the clause has been violated, in that the regulation is inconsistent with the Constitution.

When conducting an Equal Protection analysis, the first step is to determine whether the clause is applicable.[227] The Equal Protection Clause only applies to government classifications, "a classification is created when government action imposes a burden or confers a benefit on one class of persons to the exclusion of others."[228] The purpose of the Fourteenth Amendment is to "eliminate all official state sources of invidious racial discrimination in the States." Thus the principal inquiry posed by the Equal Protection clause is "whether the classifications drawn by any statute constitute an arbitrary and invidious discrimination."[229] Government

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[221] *Obergefell*, 135 S. Ct. at 2590.

[222] *Id.* (citing *Loving*, 388 U.S. at 12; *Zablocki*, 434 U.S. at 374).

[223] U.S. CONST. amend. XIV § 1 (emphasis added).

[224] Russell W. Galloway, Jr., *Basic Equal Protection Analysis*, 29 SANTA CLARA L. REV. 121 (1989).

[225] *Id.*

[226] *Id.*

[227] *Id.* at 123.

[228] *Id.*

[229] Loving v. Virginia, 388 U.S. 1, 10 (1967) (citing Slaughter-House Cases, 83 U.S. 36, 71 (1873); Strauder v. West Virginia, 100 U.S. 303, 307-8 (1880); *Ex parte* Virginia, 100 U.S. 339, 344–45 (1880); Shelley v. Kraemer, 334 U.S. 1 (1948); Burton v. Wilmington

classifications may be either "facial" or "in effect."[230] Where the classification appears "on the face of a statute, court decision, or other government action" an equal protection analysis is required.[231] Similarly, if the government action is "neutral on its face but has the effect of distributing burdens or benefits unequally[,]" the obligations under the Equal Protection Clause must be met.[232] Classifications can also be labeled as suspect or semi-suspect.[233] There are four types of suspect or semi-suspect classifications currently recognized by the Court: (1) classifications based on race, ethnicity, or national origin; (2) state classifications based on resident alienage; (3) classifications based on gender; and (4) classifications based on illegitimacy.[234] The Court will apply one of three standards when examining governmental action involving classifications of persons: strict scrutiny, intermediate scrutiny, or a rational basis review.[235] If a suspect classification is involved, the strict scrutiny standard will be applied, and the action will be struck down unless the government proves that it is necessary to achieve a compelling interest.[236] Strict scrutiny also applies if the government action infringes on a fundamental right of the members of a class.[237]

When evaluating whether the Equal Protection Clause is applicable, one must first determine whether the challenged government action affects any fundamental constitutional right. For example, the right to marry and procreate.[238] If the government action is found to affect a fundamental right, then the next issue is whether the government action *substantially infringes* upon that right.[239] If so, strict scrutiny applies, and the government action violates the Equal Protection Clause unless the government shows that its conduct is necessary to further a compelling interest.[240] A classification that is not based on a suspect class but is based on what has been declared a "semi-suspect" class is subject to intermediate scrutiny.[241] "Gender and illegitimacy based classifications are semi-suspect and violate

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Parking Auth., 365 U.S. 715 (1961)).

[230] Galloway, *supra* note 224, at 123.

[231] *Id.*

[232] *Id.*

[233] *Id.* at 124.

[234] *Id.*

[235] *Id.* at 124–25.

[236] *See* Loving v. Virginia, 388 U.S. 1, 12 (1967) (citing U.S. CONST. amend. XIV); Zablocki v. Redhail, 434 U.S. 374, 388 (1978).

[237] Galloway, *supra* note 224, at 125.

[238] *Id.* at 124–45.

[239] *Id.* at 125.

[240] *Id.*

[241] *Id.*

the Equal Protection Clause unless the government can satisfy intermediate scrutiny by showing that the classification is substantially related to an important interest."[242] If any other classification is involved, the action will be upheld unless the challenger proves that the action is not rationally related to a legitimate government interest.[243] Here, the burden of proof shifts from the government to the individual.[244] For many of the cases previously discussed, strict scrutiny was applied by the Court to strike down the government regulation.

For example, in *Loving*, the Court applied strict scrutiny and declared that "[t]here can be no doubt that restricting the freedom to marry solely because of racial classifications violates the central meaning of the Equal Protection Clause."[245] The fact that Virginia's marriage ban only prohibited interracial marriages involving white persons demonstrates that "the racial classifications must stand on their own justification, as measures designed to maintain White Supremacy."[246] Chief Justice Warren, writing for the Court, reasoned that "at the very least, the Equal Protection Clause demands that racial classifications . . . be subjected to the 'most rigid scrutiny[.]"[247] If such classifications "are ever to be upheld, they must be shown to be necessary to the accomplishment of some permissible state objective," separate and distinct from racial discrimination.[248] After recognizing that the Virginia statute rested "solely upon distinctions drawn according to race," the court then explained that "[o]ver the years, this Court has consistently repudiated '(d)istinctions between citizens solely because of their ancestry' as being 'odious to a free people whose institutions are founded upon the doctrine of equality.'"[249]

Similarly, in *Zablocki v. Redhail,* the Court held that "when a statutory classification significantly interferes with [the] exercise of a fundamental right, it cannot be upheld unless it is supported by sufficiently important state interests and is closely tailored to effectuate only those interests."[250] Relying on precedent holding that the right to marry is of fundamental importance, the *Zablocki* Court further concluded that "since the classification at issue here significantly interferes with the exercise of that

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[242] *Id.*
[243] *Id.* at 126.
[244] *Id.*
[245] Loving v. Virginia, 388 U.S. 1, 12 (citing U.S. CONST. amend. XIV).
[246] *Id.* at 11.
[247] *Id.* at 11 (citing Korematsu v. United States, 323 U.S. 214, 216 (1944)).
[248] *Id.*
[249] *Id.* at 11.
[250] Zablocki v. Redhail, 434 U.S. 374, 388 (1978).

right, we believe that 'critical examination' of the state interests advanced in support of the classification is required."[251] However, the Court cautioned that not "every state regulation which relates in any way to the incidents of or prerequisites for marriage must be subjected to rigorous scrutiny," and stated contrarily "reasonable regulations *that do not significantly interfere with decisions to enter into the marital relationship* may legitimately be imposed."[252] The Court held that the statute at issue was impermissible because it constituted a "serious intrusion into [the] freedom of choice in an area in which we have held such freedom to be fundamental" and could not "be upheld unless it [wa]s supported by sufficiently important state interests and [wa]s closely tailored to effectuate only those interests."[253] The Court's finding here is consistent with precedent and supports the proposition that unreasonable government interference into the intimate fundamental decisions of individuals regarding marriage and procreation is unconstitutional.

The state regulation in *Zablocki* and the interracial marriage ban in *Loving* are analogous to section 209 of the HHCA in this context because they all create classifications that significantly interfere with the exercise of a fundamental right.[254] In *Zablocki*, the Court invalidated a law barring fathers delinquent on child-support payments from obtaining a marriage license as an unreasonable infringement on a fundamental right.[255] In *Loving*, the Court outlawed an interracial marriage ban in violation of the Due Process and Equal Protection Clauses of the Fourteenth Amendment of the Constitution.[256] Section 209 imposes a significant burden upon an individual's choice in procreation with its eligibility requirement of successors to DHHL leases to be at least one-quarter Hawaiian.[257] This requirement constitutes a "serious intrusion" into the freedom of choice in procreation of currently qualified successors because it interferes with the intimate decision-making in partner selection.[258] The blood-quantum requirement forces successors to procreate with other individuals of a certain quantum of Hawaiian blood in order to perpetuate their family's

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[251] *Id.* at 383 (citing Mass. Bd. of Ret. v. Murgia, 427 U.S. 307, 312, 314 (1976)); *see also* San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 17 (1973).

[252] *Zablocki*, 434 U.S. at 386 (emphasis added).

[253] *Id.* at 387–88.

[254] *See id.* at 383; Loving v. Virginia, 388 U.S. 1, 12 (1967).

[255] *Zablocki*, 434 U.S. at 375.

[256] *Loving*, 388 U.S. at 12.

[257] *See* HHCA § 209(a)(1)–(2); Obergefell v. Hodges, 135 S. Ct. 2548, 2600 (2015); *Zablocki*, 434 U.S. at 375; *Loving*, 388 U.S. at 12.

[258] HHCA§ 209(a)(1)–(2); *Obergefell*, 135 S. Ct. at 2600; *Zablocki*, 434 U.S. at 375; *Loving*, 388 U.S. at 12.

presence on the land and keep their family homes.[259] The state's interference in the exercise of this most fundamental right to choose a life partner warrants a "critical examination" of the state interests advanced in support of the classification.[260]

In applying an Equal Protection analysis to section 209 of the HCCA, there are three main inquiries: (1) identification of the classification; (2) determination of what level of scrutiny should be applied; and (3) evaluation of whether the particular government action is necessary to achieve a compelling government interest.[261] First, the HHCA is codified under both federal and state law and is implemented by the State of Hawai'i through the DHHL, therefore section 209 of the Act qualifies as a "government action."[262] Second, section 209 burdens the fundamental right to procreate, and creates a classification that in turn, burdens the interests of qualified successors in the freedom of choice in procreation.[263] Alternatively, it could also be argued that the blood-quantum requirement utilizes a suspect classification because it qualifies native Hawaiians based on race/ethnicity.[264] Here, the classification appears on the face of the statute because section 209 *explicitly* requires all eligible successors to have at least one-quarter Hawaiian blood in order to qualify to succeed a DHHL lease.[265] This requirement infringes on successors' right to liberty guaranteed by the Fifth and Fourteenth Amendments because of the restriction on their right to choose with whom they procreate.[266] Due to this infringement upon a constitutionally protected fundamental right, strict scrutiny is the applicable standard of review.[267]

Furthermore, the particular government action fails to serve a compelling state interest.[268] The articulated purpose of the HHCA is "to enable native

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[259] *See* HHCA § 209(a)(1)–(2); *Obergefell*, 135 S. Ct. at 2600; *Zablocki*, 434 U.S. at 387–88; *Loving*, 388 U.S. at 12.

[260] *See Zablocki*, 434 U.S. at 383 (citing Mass. Bd. of Ret. v. Murgia, 427 U.S. 307, 312, 314 (1976)); *see also* San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 17 (1973).

[261] ERWIN CHERMINKSY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 670 (2015).

[262] HHCA § 209; HAW. CONST. art. XII, §§ 1–3.

[263] *Zablocki*, 434 U.S. at 283.

[264] *See* HHCA §§ 201(a)(1)–(2), § 209; Galloway, *supra* note 224, at 124. A full consideration of whether the blood-quantum requirement creates a suspect classification is outside the scope of this article.

[265] HHCA § 209(a)(1).

[266] *See e.g.*, Obergefell v. Hodges, 135 S. Ct. 2584, 2598 (2015); *Zablocki*, 434 U.S. at 374; Loving v. Virginia, 388 U.S. 1 (1967); Skinner v. Oklahoma *ex rel.* Williamson, 316 U.S. 535, 541 (1942); Kitchen v. Herbert, 755 F.3d 1193, 1209 (10th Cir. 2014).

[267] *Zablocki*, 434 U.S. at 387–88.

[268] *Id.* at 383.

Hawaiians to return to their lands in order to fully support self-sufficiency for native Hawaiians and the self determination of native Hawaiians in the administration of the Act, and the preservation of the values, traditions, and culture of native Hawaiians."[269] However, this language does not identify the purpose for defining a native Hawaiian as "any descendant of not less than one-half part of the blood of the races inhabiting the Hawaiian Islands previous to 1778."[270] Furthermore, the articulated purpose of the HHCA does not specify the purpose of the blood-quantum requirement of one-quarter Hawaiian for successors to DHHL leases.[271] Moreover, the legislative purpose behind the implementation of the HHCA has been, from its inception, to rehabilitate the Hawaiian population by "returning the people to their land."[272] There was no specified intent to improve the conditions of some Hawaiians to the exclusion of others.[273]

Many theories permeate current scholarship as to the true purpose of defining Hawaiians by blood quantum. Some argue it truly was to rehabilitate the Native Hawaiian population by keeping the blood "pure" and to encourage Hawaiian interbreeding.[274] However, others insist the definition is a way to ensure the eventual elimination of qualified native Hawaiians, at which point the 203,500 acres of land that was set aside would revert back to the federal government.[275] The argument by J. Kēhaulani Kauanui is illustrative:

> It is most common for people in Hawai'i to suggest that the 50-percent rule was created because the U.S. government thought that Kanaka Maoli would die off to the point that eventually no one would count as a Hawaiian using that criterion. Because the 50-percent rule is the legacy of the colonial sugar industry in the Hawaiian Islands—where the white American controlling sugar plantations helped to establish a minimum blood-quantum requirementso they would eventually gain control over more Hawaiian land—many Kanaka Maoli assume that they also anticipated (and even hoped for) Native demise. In other words, it is thought that, by measuring identity through 50-percent blood quantum, U.S. legislators presumed Hawaiians would eventually no longer qualify for lands.[276]

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[269] HHCA §§ 201(a)(1)–(2), § 101(a).

[270] *Id.* at § 201(a).

[271] *Id.* at § 209(a)(1).

[272] *See id.* at §201(a).

[273] *Id.*

[274] *See* MACKENZIE, SERRANO & SPROAT, *supra* note 17, at 187 (citing H.R. REP. NO. 66-839, at 7 (1920)).

[275] *See* KAUANUI, *supra* note 9, at 7.

[276] *Id.*

However, this assertion is a point of contention as it garners support in certain arenas, while met with staunch criticism in others. As there is no specified purpose for the blood-quantum requirement on the face of the HHCA, this issue will likely continue to be a controversial and pervasive topic of debate.[277]

The articulated purpose explicitly incorporated into the HHCA does not specify the purpose of requiring a successor to have at least one-quarter Hawaiian blood, and therefore offers little insight as to why this "government action" is necessary to achieve the interest of the state in rehabilitating native Hawaiians.[278] In fact, commentators and legislators alike suggest the blood-quantum requirement has the opposite effect, negating the original purpose of the HHCA overall.[279] In reference to instances in which lessees lost their homes because of the blood-quantum requirement for successors, Senator Young stated that such circumstances frustrate "the intent of the Hawaiian Homes Commussion Act, which is to assist the Hawaiian people by returing them to the land."[280] Section 209 qualifies as a government action and burdens the exercise of the fundamental right to marry and procreate.[281] As the requirement creates a classification that infringes upon a fundamental right and fails to achieve a compelling government interest, strict scrutiny is the correct standard of review.[282]

The blood-quantum requirement of section 209 crumbles under strict scrutiny.[283] The HHCA fails to articulate why the blood-quantum requirement for successors is necessary to achieve the compelling interest of "enabling native Hawaiians to return to their lands in order to fully support self-sufficiency for native Hawaiians and the self determination of native Hawaiians in the administration of the Act, and the preservation of the values, traditions, and culture of native Hawaiians."[284] Further, as evidenced by the continuing need to amend the section to reduce the requisite blood quantum for successors, section 209 has the opposite effect.[285] Accordingly, section 209 of the HHCA does not satisfy the

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[277] *See* HHCA § 209.

[278] *See* HHCA § 209(a)(1); Zablocki v. Redhail, 434 U.S. 374, 383 (1978).

[279] *See* S. JOURNAL, 11th Leg., Reg. Sess., 695 (Haw. 1982) (statement of Sen. Young).

[280] *Id.* at 695.

[281] *See* HHCA § 209; *Loving*, 388 U.S. at 12; *Zablocki*, 434 U.S. at 383; *see also* Kitchen v. Herbert, 755 F.3d 1193, 1209 (10th Cir. 2014).

[282] *See* CHERMINKSY, *supra* note 261, at 670; *see also* Loving v. Virginia, 388 U.S. 1, 12 (1967); *Zablocki*, 434 U.S. at 383, 387–88.

[283] Galloway, *supra* note 224, at 125.

[284] HHCA § 101(a).

[285] *See* Act of June 18, 1982, No. 272, § 209, 1982 Haw. Sess. Laws 703 (1982) (as

requirements of the Equal Protection Clause, and is thus unconstitutional. Moreover, the stated purpose of enabling native Hawaiians to return and remain on the land, as well as preserve tradition and values, can be better achieved by repealing section 209's blood-quantum requirement entirely.

VI. CONCLUSION: PERPETUAL SUCCESSION

The one-quarter blood-quantum requirement of section 209 restricts qualified successors to procreate with individuals of a certain quantum of Hawaiian blood, infringing upon the autonomy of choice in the fundamental right to procreate. [286] Consequently, section 209 should be amended to eliminate the blood-quantum requirement for successors, allowing a home to stay in the family so long as there is an eligible successor of the original lessee who is a descendant of the aboriginal people of Hawai'i who inhabited the islands prior to the arrival of Captain Cook in 1778.[287] I propose that the amendment should read as follows:

> Upon the death of the lessee, the lessee's interest in the tract or tracts and the improvements thereon, shall vest in any one of the following relatives of the decedent: husband, wife, children, grandchildren, and brothers or sisters who are descendants of the aboriginal people of Hawai'i who inhabited the islands prior to 1778.

This definition is similar to the one used to define "Native Hawaiians" in the Hawai'i State Constitution for purposes of exercising traditional and

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approved by Congress, Act of Oct. 27, 1986, Pub. L. No. 99-557, 100 Stat. 3143 (1986)); S. JOURNAL, 11th Leg., Reg. Sess., 695 (Haw. 1982); Act of Apr. 28, 1994, No. 37, 1994 Haw. Sess. Laws 127 (1994) (as approved by Congress, Act of June 27, 1997, Pub. L. No. 105-21, 111 Stat. 235 (1997)); S.B. 780, 23rd Reg. Sess. (Haw. 2005); H.R. 451, 29th Reg Sess. (Haw. 2017).

[286] *See* Obergefell v. Hodges, 135 S. Ct. 2584 (2015); Lawrence v. Texas, 539 U.S. 558, 574 (2003); *Zablocki*, 434 U.S. at 386; *Loving*, 388 U.S. at 1; Skinner v. Oklahoma *ex rel.* Williamson, 316 U.S. 535 (1942); *Kitchen*, 755 F.3d at 1209.

[287] *See* HAW. CONST. art. XII, § 7. As of June 30, 2016, there are still 27,806 applicants on the waiting list for a Department of Hawaiian Home Lands lease. *See Applicant Waiting List Up to June 30, 2016*, DEPT. OF HAWAIIAN HOME LANDS, at 6, https://dhhl.hawaii.gov/wp-content/uploads/2017/05/2016-06-30_07-Alpha_Waitlist_A-K_268pgs.pdf (last visited Apr. 22, 2019). Amending section 209 so that the blood-quantum requirement for successors is eliminated could have an impact on the long waiting list. However, it would not frustrate the articulated purpose of the Act it would merely provide security and stability to families who have already been fortunate enough to secure a lease. During conference committee discussion on the 2017 amendment to section 209, Representative Ward rose to speak in support of the measure, stating: "This will have no effect in new applications, but it will promote maintenance and upkeep of these residents, pride in ownership, and it will also avoid the painful consequences of an eviction [sic]." H. JOURNAL, 29th Leg., Reg. Sess., 645 (Haw. 2017) (statement of Rep. Ward).

customary Native Hawaiian rights.[288] Using the arrival of Captain Cook as the threshold date properly transforms this definition to one based on lineal ancestry rather than blood quantum, adequately ensuring that Hawaiians remain in their rightful place: on the land of their ancestors.[289]

One of the articulated purposes of the HHCA is "placing native Hawaiians on the lands set aside under this Act in a prompt and efficient manner and *assuring long-term tenancy to beneficiaries of this Act and their successors*."[290] This proposed amendment to section 209 ensures just that—long term tennacy for beneficiaries of this Act *and* their successors—"preserving to posterity the valuable and sturdy traits of the race," so that no homestead family will lose their home simply because they are not "Hawaiian" enough.[291]

"He honu ka ʻāina, he mea paneʻe wale."

Land is like a turtle: it moves on.[292]

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[288] *See* HAW. CONST. art. XII, § 7.

[289] KAUANUI, *supra* note 9, at 172; *see* Jonathan Kamakawiwoʻole Osorio, *"What Kine Hawaiian Are You?" A Mo'olelo About Nationhood, Race, History, and the Contemporary Sovereignty Movement in Hawai'i*, 13 CONTEMPORARY PAC. 359, 361 (2001) ("It is generally agreed that Hawaiians are an ethnic group, today comprising the descendants of the people who settled the Hawaiian Islands before the first Europeans arrived. Hawaiians are thus defined by ancestry.").

[290] HHCA § 101(b)(2) (emphasis added).

[291] McGregor, *supra* note 1, at 15.

[292] PUKUI & ELBERT, *supra* note 19, at 68 (also translating the proverb as: "Land passes slowly but inexorably from owner to heir."). Just as Mary Kawena Pukui described the honu moving on and the ʻāina passing from owner to heir, it is the author's hope and the intention of this paper that section 209 of the HHCA be amended to reflect the suggested changes—so that the honu can move on and the homestead land can pass on from owner to heir for generations to come.

MANUSCRIPTS

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- Parallel citations are still required for cases decided by Hawai'i state courts; and
- Words of Hawaiian origin should incorporate diacritical marks ('okina and kahakō) as stated in the most current editions of *Hawaiian Dictionary* (Mary Kawena Pukui & Samuel H. Elbert eds., rev. ed. 1986), or *Place Names of Hawai'i* (Mary Kawena Pukui, Samuel H. Elbert & Esther T. Mookini eds., rev. ed. 1974).

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We strive to view issues pertinent to Hawai‘i through a broader global lens. We balance provocative articles on contemporary legal issues with practical articles that are in the vanguard of legal change in Hawai‘i and internationally, particularly on such topics as military law, sustainability, property law, and native rights.

Kūlia mākou e kilo i nā nīnau i pili iā Hawai‘i me ke kuana‘ike laulā. Ho‘okomo mākou i nā ‘atikala e ulu ai i ka hoi e pili ana i nā nīnau kū kānāwai o kēia wā a me nā ‘atikala waiwai e ho‘ololi ana i nā mea kū kānāwai ma Hawai‘i a ma nā ‘āina ‘ē, me ke kālele ‘ana i nā kumuhana like ‘ole e like me nā kānāwai pū‘ali koa, ka mālama ‘āina, nā kānāwai ona ‘āina, a nā pono o nā po‘e ‘ōiwi.

Translation by Pauahi Ho‘okano

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