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ARTICLES

Courts and the Cultural Performance: Native Hawaiians' Uncertain Federal and State Law Rights to Sue
Eric K. Yamamoto, Moses Haia and Donna Kalama 1

Enforcement of Environmental Laws in Hawai'i
David Kimo Frankel 85

AIDS Phobia: The Infliction of Emotional Distress and the Fear of AIDS
Edward M. Slaughter 143

COMMENTS

Procedural Politics and Federal Rule 26: Opting-out of "Mandatory" Disclosure 167

Pele Defense Fund v. Paty: Exacerbating the Inherent Conflict Between Hawaiian Native Tenant Access and Gathering Rights and Western Property Rights 207

United States v. Burke and Internal Revenue Code Section 104(a)(2): When Will Personal Injury Damages Be Taxed? 263

NOTES

Public Access Shoreline Hawaii v. Hawaii County Planning Commission: The Affirmative Duty to Consider the Effect of Development on Native Hawaiian Gathering Rights 303

Garcia v. Spun Steak Company: Has the Judicial Door Been Shut on English-Only Plaintiffs? 351

Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah: Reaffirming the Supreme Court's Religious Free Exercise Jurisprudence 401

RECENT DEVELOPMENTS

For Better or for Worse, in Sickness and in Health, Until Death Do Us Part: A Look at Same Sex Marriage in Hawaii 447

Even a War Has Some Rules: The Supreme Court Puts the Brakes on Drug-Related Civil Forfeitures 493

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Courts and the Cultural Performance: Native Hawaiians' Uncertain Federal and State Law Rights to Sue

by Eric K. Yamamoto,* Moses Haia** and Donna Kalama***

PROLOGUE

"Police Seize 25 in Hilo Protest: Hawaiian Confrontation at Mall." So read the news headline in September, 1993.[1] One hundred twenty Native Hawaiians in Hilo protested the State Department of Hawaiian Homelands' lease of 39 acres of trust Homelands to a non-Hawaiian commercial entity for the Prince Kuhio Plaza shopping mall. The protesting group, Aupuni O Hawai'i, demanded that the mall be bulldozed and that the land be used for Native Hawaiian farms and housing. Those Native Hawaiians arrested and later prosecuted for trespassing defended on the grounds of their "right" to occupy Hawaiian Homelands. Members of Aupuni O Hawai'i had earlier been "evicted" as squatters on nearby Homelands in the Keaukaha area of Hilo.

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[1] Hugh Clark, *Police Seize 25 in Hilo Protest: Hawaiian Confrontation at Mall*. HONOLULU ADVERTISER, October 6, 1993, at A-1. *See infra* note 32 for a discussion of the Hawaiian Homelands trust.

"[Mayor] Fasi Vetoes Homestead Tax Exemption."[2] The Honolulu mayor vetoed City Council legislation exempting Hawaiian Homelands lessees from paying real property taxes after the first seven years of their leases. The mayor's office reportedly observed that the exemption would amount to a form of city-sponsored affirmative action, and thus, would constitute "reverse racial discrimination against non-Hawaiians."[3] Lawsuits were threatened in support of and against a City Council override of the exemption.

"Hawaiians Sue to Stop OHA From Attempting to Settle Overthrow Claims."[4] The Office of Hawaiian Affairs (OHA), a state-created agency, sought to resolve Native Hawaiian claims against the state and federal governments for, among other things, breaches of the Hawaii Ceded Lands Trust.[5] Samuel Kealoha and three other Native Hawaiian trust beneficiaries filed suit to forestall a $100 million settlement until the Hawaiian people themselves created a sovereign entity that could undertake or direct negotiations. They asserted a violation of "the right of self-determination protected under international law."[6]

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[2] Pat Omandam, *Fasi Vetoes Homelands Tax Exemption*, HONOLULU STAR BULLETIN, December 11, 1993, at A-3.

[3] *Id.*

[4] Bill Meheula and Kawika Liu, *Hawaiians Sue to Stop OHA From Attempting to Settle Overthrow Claims*, KE KIA'I, March 1, 1994, vol. 5, no. 3, at 19.

[5] *See infra* note 18 for a discussion of the Hawaiian Ceded Lands trust which targets Hawaiians, among others, as trust beneficiaries.

[6] First Amended Complaint at 2, Kealoha v. Hee, Civil No. 94-0188-01 (1st Cir. Haw., filed Feb. 2, 1994). Samuel L. Kealoha, Jr., Charles Ka'ai'ai, Jonathan Kamakawiwo'ole Osorio, and Lahela Jarrett Holmwood sought to enjoin negotiations, settlement and the execution of a release by trustees of OHA "concerning claims against the United States for the overthrow of the Hawaiian government in 1893, and the redress of breaches of the ceded lands trust committed by the United States and the State of Hawaii (excluding OHA's right to revenues under Chapter 10)." *Id.* Their complaint asserted: "(a) the trustees are or would be in a conflict of interest and lack statutory authority to attempt to resolve these claims; (b) it would violate the right to self-determination protected under international law; and (c) a Hawaiian sovereign nation is the only entity that can conduct such negotiations with the United States and the State of Hawaii." *Id.*

Count V of the Amended Complaint specifically addressed the alleged "Violation of International Law." It located Native Hawaiians' rights of self-determination in, among other things: the International Covenant on Civil Political Rights, Articles I, II and XXVII, 999 U.N.T.S. 171, 6 I.L.M. 368 (1967) (ratified by United States on Sept. 8, 1992); the Draft Declaration on the Rights of Indigenous Peoples, dated August 21, 1993, prepared by the Working Group on Indigenous Populations and submitted to the United Nations Sub-Commission on Human Rights; the Universal

I. Introduction

Across the country strident debates continue about multiculturalism in education, diversity in government, and affirmative action in workplaces. Those debates, heightened by the Columbus quincentennial, have expanded popular discourse to include the effects of Euro-American colonialism on America's indigenous peoples. Grand narratives about society's treatment of outsiders—slavery, *Brown v. Board of Education*,[7] the internment,[8] and the statue of liberty immigrant experience—have been challenged as incomplete and exclusionary. They ignore the physical and cultural domination of America's indigenous peoples, including American Indians, Native Hawaiians, Eskimos and Aleuts. Stories of native peoples are now reconfiguring public discourse about race and culture, and infusing concepts of neo-colonialism, nationalism, and self-determination into discussions of equality and diversity.[9]

These dynamic debates, along with international movements discussed later, are influencing American legal discourse, albeit at the periphery. For America's indigenous peoples, rights are no longer framed entirely by the provisions of the Constitution and legislative enactments. Indigenous peoples' demands are increasingly asserted within dual frameworks. One framework is narrow. It consists of rights claims recognized by the American legal system (e.g., due process violations or breaches of trust), even though the rights, as framed, may not accurately embody the cultural, spiritual, and political experience of the group involved.[10] A second framework is expansive. It

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Declaration of Human Rights; and general principles of international law. Amended Complaint, at 20-26.

[7] 347 U.S. 483 (1954).

[8] Korematsu v. United States, 323 U.S. 214 (1944) (upholding the criminal conviction of an Japanese-American citizen who refused to be interned). *See also*, Hirabayashi v. United States 320 U.S. 81 (1943) (upholding the conviction of an Japanese-American citizen who refused to obey a racially-based curfew).

[9] *See generally* Robert Williams, Jr., The American Indian In Western Legal Thought: The Discourses Of Conquest (1980); Joseph W. Singer, *Sovereignty And Property*, 86 NW. U. L. Rev. 1 (1991); Joseph W. Singer, *Property And Coercion In Federal Indian Law: The Conflict Between Critical And Complacent Pragmatism*, 63 S. Cal. L. Rev., 1821 (1990); Williamson B. C. Chang, *The "Wasteland" In The Western Exploitation Of "Race" And The Environment*, 63 U. Colo. L. Rev. 849 (1992).

[10] For a discussion of the employment of a civil rights statute to advance a breach of trust claim by the Native Hawaiian community group concerned about control over

consists of claims of transnational moral authority cast in the language of international human rights (e.g., right to self-determination).[11] Those rights claims are rooted historically in the conquest of indigenous peoples and morally in the colonizing power's confiscation of land and suppression of culture.[12] Indigenous peoples' assertion of claims within this expanded framework performs two functions: it challenges the legitimacy of an "occupying" government's employment of its own established legal norms to decide the political and cultural rights of indigenous peoples, and it provides a beginning basis for understanding how indigenous peoples might reinterpret or transform those established norms to reflect justice under their circumstances.[13]

Employing these dual frameworks, narrow and expansive, America's indigenous peoples' are asserting claims of right in American courts.[14] *Kealoha v. Hee*,[15] described in the Prologue, is a current example. But

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homelands in its neighborhood, *see infra* notes 82-110 and accompanying text, addressing Keaukaha-Panaewa Community Association v. Hawaiian Homes Commission, 739 F.2d 1467 (9th Cir. 1984).

[11] *See* Rosen, *Law and Indigenous Peoples*, 27 LAW AND SOC. INQ. 363, 365 (1992). Rosen describes recent efforts to adopt viewpoints of indigenous peoples in addressing "rights" claims.

> (I)nternational bodies have pressed ahead with efforts to codify the rights of indigenous peoples and to distinguish their situation from that of national minorities. The result is a body of work that has proceeded on at least three vital fronts: (1) the examination of the current state of indigenous peoples and the variety of political and cultural contexts within which they operate; (2) the historical context—now much re-interpreted—that has led to the current legal status of native properties and native governments; and (3) specific proposals for re-configuration of indigenous rights within a revised set of international conventions.

Id. at 365; *see also* Mabo v. Queensland, 66 AUSTRALIAN L. J. 408 (1992) (describing the High Court's social-historical analysis and its rejection of the doctrine of terra nullius and acceptance of the doctrine of native title).

[12] *See* Chang, *supra* note 9. Professor Chang insightfully critiques the inappropriateness of standard anti-discrimination discourse to the situations of indigenous peoples, contrasting circumstances attendant to voluntary migration of a racial group with those of conquest of a once sovereign people.

[13] *See infra* note 292 (describing Ka'ai'ai v. Drake, Civ. No. 92-3742-10 (1st Cir. Haw., filed Oct. 1992) which asserted the principle of self-determination as a means for comprehending Hawaiian Homesteaders' breach of trust claims against the state to reconstitute a state-created Trust Claims Resolution Task Force that excluded independent participation by homesteaders).

[14] *See supra* note 6, *infra* notes 15-19, and 279 and accompanying text.

[15] *See supra* note 6 and accompanying text for the discussion of this case.

for what purpose? Federal courts in particular have tended to reject indigenous peoples' political-moral claims framed in the language of established rights (such as equal protection).[16] Federal and state courts also have professed lack of authority to apply international human rights norms to decide matters of what is called "domestic" law.[17] For many indigenous groups, harsh experience undermines the popular image of American courts as expositors of fundamental rights and thus agents of social justice.[18]

So why worry about federal and state court access for indigenous peoples? Why worry about Native Hawaiians' uncertain right to sue? One response, posited here, is that access to court process for indigenous peoples may have potential social-political value on multiple levels.[19]

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[16] *See, e.g.*, Gila River Pima-Maricopa Indian Community v. United States, 427 F.2d 1194 (Ct. Cl. 1970), *cert. denied*, 400 U.S. 819 (1970) (dismissing the tribe's claims under the "fair and honorable dealing" clause of the Indian Claims Commission Act as merely "moral" claims beyond the scope of the Act); Tee-Hit-Ton Indians v. United States, 348 U.S. 272 (1955) (Court recognized aboriginal title to Indian lands but also asserted the power of the federal government to extinguish native title to non-treaty land without compensation); Han v. Department of Justice, 824 F. Supp. 1480, 1486 (D. Haw. 1993) (on appeal) ("First, as a matter of law, the federal defendants have no trust responsibility to plaintiffs or other native Hawaiians under statutory or case law." *Id.* at 1486.). *See generally* WILLIAMS, DISCOURSES OF CONQUEST, *supra* note 9, at 227-232.

[17] *See generally* WILLIAMS, DISCOURSES OF CONQUEST, *supra* note 9.

[18] Professor Nell Jessup Newton observes that "[o]ne of the great contributions to the tribal rights movements of the 1960s was the development of a cause of action seeking equitable relief for breach of trust." Nell Jessup Newton, *Indian Claims In The Courts Of The Conqueror*, 41 AMERICAN U. L. REV. 753, 784 (1992) (*Indian Claims*). Newton also observes, however, that "despite the promise of [United States v. Mitchell, 463 206 (1983), commonly referred to as "Mitchell II," which recognized jurisdictional and substantive grounds for breach of trust suits against the federal government], Indian tribes have been remarkably unsuccessful in breach of trust claims in the Claims Court and the Federal Circuit." *Indian Claims* at 789. The "claimants have succeeded in only two instances of the twenty. . .cases. . .in the last ten years" primarily because the courts have dismissed most claims on statute of limitations grounds or for "lack of jurisdiction under the [Mitchell II]. . .standards." *Id.* at 790. *See infra* Part II concerning the federal court's restrictive jurisdictional rulings concerning Native Hawaiian breach of trust claims. *See generally* WILLIAMS, DISCOURSES OF CONQUEST, *supra* note 9.

[19] Eric Yamamoto, *Efficiency's Threat To The Value Of Accessible Courts For Minorities*, 25 HARV. C.R.-C.L. L.REV. 341 (1990) (*Efficiency's Threat*) (describing traditionally and critically viewed values of court access). One perspective is that Native Hawaiian rights claims in federal court have had a "useful consciousness-raising" effect. The "recent willingness of the executive, legislative, and judicial branches of the State of

The right to sue—to gain system entry and develop, define and present claims—may have value even in the absence of favorable court declarations of rights. It may have value even though favorable court declarations of rights rarely lead directly or immediately to fundamental structural and attitudinal changes.[20] Vantage point is key.

From one view, courts are simply deciders of particular disputes involving specific parties according to established norms. From another view, courts in addition are integral parts of a larger communicative process. Particularly in a setting of indigenous peoples' claims, court process is a "cultural performance."

This article, drawing on Critical Race Theory, cultural anthropology, and dispute transformation theory, offers a new look at federal courts, civil rights and civil procedure jurisprudence. As will be described, indigenous groups are using the federal and state courts not solely to establish and enforce rights, but also to help focus cultural issues, to illuminate institutional power arrangements and to tell counter-stories in ways that assist larger social-political movements. Examining indigenous peoples' use of courts as sites and generators of cultural performances sheds light on uses of law in what might be called the "post-civil rights era." It also highlights the substantive importance of "procedural rights."

In this context, the community protest in Hilo, the vetoed city tax-exemption in Honolulu and the international law challenge to the OHA settlement described in the Prologue are tied with common threads. They involve Native Hawaiians.[21] They involve lands "ceded" to the

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Hawai'i to address such issues [may] stem from a recognition, after *Keaukaha II* (*see infra* notes 108-113 and accompanying text), that a *failure* to provide a state forum would lead to increasing interference by the federal courts in the management of State lands. . . ." Letter from attorney Carl Christensen, Native Hawaiian Legal Corporation to Eric Yamamoto (November 5, 1993) (on file with authors).

[20] *See* Derek Bell, And We Are Not Saved (1987) (describing how court declarations of rights are narrowed, subverted and transformed).

[21] We use "Native Hawaiian" as an encompassing term. In doing so, we acknowledge its racially and politically constructed dimensions (see infra note 36) and our selection among a range of other possible terms. Among other terms are "native Hawaiian" (used by governmental bodies legally to denote people of at least fifty percent Hawaiian blood, people who are thereby deemed beneficiaries of the Hawaiian Homelands Trust), or "Hawaiian" (used popularly to describe people whose ancestors were the original inhabitants of the islands; also used by governmental bodies legally to denote people of some Hawaiian blood who are thereby eligible for certain entitlements), or "Kanaka Maoli" (preferred by several pro-sovereignty groups and

United States following the United States-aided overthrow of the Hawaiian government in 1893—lands now held in two trusts by the State of Hawai'i as trustee for the benefit of Native Hawaiians. They involve responses to a history of culture destruction and land dispossession.[22]

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scholars as a self-defining, non-Westernized term), or "Hawaiian native people" or "indigenous people of Hawaii" (used to emphasize culture and ancestral origin). We have selected the term "Native Hawaiian" because most readers will recognize it, because it emphasizes through the term "Native" that Hawaiian people are indigenous to the islands, and because the capital "N" in Native distinguishes the term from the term "native Hawaiian" which has been given its legal construction by the federal and state governments.

We acknowledge that our use of the term is in some respects overly broad. The term could be misleadingly construed to imply a singular Native Hawaiian group or perspective. There is no one Native Hawaiian group, or community, or perspective. There is no singular Native Hawaiian identity. Culture, class, lineage, historical memory, geography and gender are among the many factors contributing to vast differences in lifestyles, group relations, cultural practices and political outlooks. Despite these differences, we believe the use of the broad term Native Hawaiian is appropriate for this article for two reasons. First, many people with ancestral ties to the original inhabitants of the Hawaiian archipelago self-define their identity racially, culturally and politically in terms of being Hawaiian. Second, while many meaningful differences among Native Hawaiian people exist, governmental institutions, including the courts, historically and currently have tended to address Native Hawaiians as a group. This article's analytical approach addresses, in part, that collective treatment.

[22] Describing traditional Native Hawaiian social structure and culture is a problematic undertaking. *See* Davianna McGregor, Kupa'a I Ka 'Aina: Persistence on the Land, 92-94 (1989) (unpublished Ph.D. dissertation, Hawaiian Pacific Collection, Hamilton Library, University of Hawaii at Manoa). *See generally* MARTIN CHANOCK, LAW, CUSTOM AND SOCIAL ORDER: THE COLONIAL EXPERIENCE IN MALAWI AND ZAMBIA (1985) (cautioning that the concept of indigenous tradition is a colonialist construct). According to generally acknowledged Hawaiian-centered accounts, Native Hawaiian social structure was organized around a belief in the unity of people, gods and nature. Respect for nature translated into respect for, and a spiritual-familial relationship with, the land and ocean. *See* McGregor, *supra*; MELODY KAPILIALOHA MACKENZIE, NATIVE HAWAIIAN RIGHTS HANDBOOK, 3-5 (1991) (describing relationships among Hawaiian people and the land and the resulting land tenure system). *See also* LILIKALA KAME'ELEHIWA, NATIVE LAND AND FOREIGN DESIRES: PEHEA LA E PONO AI?, 23-25 (1992) (describing the spiritual-familial relationship that Hawaiians had with the land). A sizeable tract of land, "ahupua'a," stretching from mountain (mauka) to sea (kai), was farmed and fished by commoners (maka'ainana—literally, eyes of the land) who were overseen by a chief (ali'i). A commoner worked for a chief; he could, however, move to another ahupua'a if he was unfairly treated by the chief. This land-people relationship and the cultural-economic structure it supported were shaken in the early 1800s by the demise of the Hawaiian spiritual-legal "kapu" system, by Western contact, through the sandalwood and whaling industries, and by the arrival of Christian

They involve, in varying ways, present group-based claims of self-determination. And they involve, or are likely to involve, courts as forums for processing contemporary social-cultural conflicts with deep historical roots. In each situation, courts will likely be called upon to serve not only as adjudicators of claims or as expositors of law, but also as mediators among complex, often dissonant cultural narratives.[23]

These connecting threads raise questions about the judicial function—questions with descriptive and normative dimensions. How are the courts functioning as performance sites in the context of increasingly frequent and intensifying native peoples' land controversies? And how will decisions about court process, including courthouse entry, mediate or transform the often conflicting cultural messages underlying those controversies?

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"Native Hawaiians demand right to sue." So read many a news

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missionaries. Western diseases soon decimated the Hawaiian population. An expanding United States agricultural market, a coterie of American religious and political advisors to the Hawaiian King, a need for governmental capital and the existence of fertile land combined to introduce to Hawaii the concept of private fee simple property ownership. *See generally* LINDA S. PARKER, NATIVE AMERICAN ESTATE: THE STRUGGLE OVER INDIAN AND HAWAIIAN LANDS 8-10 (1989). The Mahele of 1848 and the Kuleana Act of 1850 legalized this concept of private fee simple land ownership, and, over a short period of time, ultimately led to American citizens' ownership of vast quantities of prime land in Hawaii. *See* KAME'ELEIHIWA, *id.* (describing the Mahele and its impact upon Hawaiians and their relationship to the land); Marion Kelly, *Land Tenure in Hawaii*, 7 AMERASIA J. 57 (1980) (describing the Mahele and Kuleana Act); Maivan C. Lam, *The Kuleana Act Revisited*, 64 WASH. L. REV. 233 (1989) (describing the Kuleana Act, in which fee title to land was to be distributed to commoners, and arguing that despite long-term dispossession, traditional Hawaiian land rights remain available to Hawaiians); Charles F. Wilkinson, *Land Tenure in the Pacific: The Context for Native Land Rights*, 64 WASH. L. REV. 227 (1989); Neil M. Levy, *Native Hawaiian Land Rights*, 63 CALIF. L. REV. 848 (1975). Most Hawaiian commoners, dispossessed of land, were left with a badly damaged cultural-economic structure. The United States-aided overthrow of the Hawaiian monarchy in 1893 and the annexation of Hawaii as a territory in 1898 transferred Hawaiian government and crown lands to the United States. The early 1900s found Hawaiians,. as a race, landless and devastated by poverty, disease and social alienation. MACKENZIE, NATIVE HAWAIIAN RIGHTS HANDBOOK, at 3-44. *See also* DAVID E. STANNARD, BEFORE THE HORROR: THE POPULATION OF HAWAII ON THE EVE OF WESTERN CONTACT (1989) (discussing dramatic decline in Hawaiian population through western contact); NOEL J. KENT, HAWAII: ISLANDS UNDER THE INFLUENCE (1983); Haunani-Kay Trask, *Coalition-Building Between Natives and Non-Natives*, 43 STANFORD L. REV. 1197, 1198-1205 (1991).

[23] *See infra* Part II.

headline in the late 1980s. Continuing disenfranchisement of Native Hawaiians in their homeland and long-standing federal and state governmental misuse of Hawaiian trust lands fueled Native Hawaiian movements aimed at long-term cultural resurrection and political self-determination.[24] Access to courts for redress of governmental land trust breaches became a focal point of Native Hawaiian strategies.

This article addresses ways in which legal process is transforming Native Hawaiian land trust controversies and the cultural messages underlying them. Theoretically, it frames the discussion in terms of courts' "cultural performances" in rephrasing rights and in constructing socio-legal narratives about a group's situation and relationships with others.[25] Doctrinally, it frames the discussion in terms of procedural obstacles to Native Hawaiians' right to sue.

New procedural obstacles have been erected in recent years; others fortified; still others dismantled. After fits and starts, ambiguity and inconsistency, the Ninth Circuit Court of Appeals now recognizes federal jurisdiction over Native Hawaiian breach of land trust claims cast as civil rights claims and recognizes Native Hawaiian standing to assert those claims. The court also, however, has constructed formidable civil rights immunity barriers and other procedural hurdles which preclude, in most instances, maintenance and development of claims for structural relief.[26] It has thus translated volatile, deeply-rooted cultural and political indigenous land trust controversies into civil rights issues and then largely stripped those issues of cultural and political content through the limiting language of legal process. Hawai'i's federal district courts, in entertaining these controversies, are wrestling with appellate procedural mandates.[27]

From one perspective, the federal courts appear to be struggling with process doctrines and procedural rules that are applied ordinarily in more traditional civil rights litigation settings. From another perspective, the federal courts, for a variety of possible reasons, appear to be ceding substantial power over Native Hawaiian land trust controversies to state courts.[28]

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[24] *See infra* note 32 for a description of the Native Hawaiian land trusts.

[25] *See infra* Part II.

[26] *See infra* Part III. The term "structural relief" here means judicial remedies that compel state officials to make decisions or alter decisions in ways that directly impact upon the management or use of Hawaiian trust lands, as distinguished from purely compensatory damage remedies.

[27] *See infra* Part III.

[28] *Id.*

The approach of Hawai'i state courts is mixed. In 1982 the Hawai'i Supreme Court broadly and clearly defined the nature and scope of the state's Hawaiian Homelands trust obligations.[29] It did not, however, accord Native Hawaiians access to state courts to enforce those obligations. The state legislature's 1988 Native Hawaiian Trusts Judicial Relief Act opened only the slimmest crack to the courthouse door.[30] In 1992, the Hawai'i Supreme Court, without additional legislation, appeared to swing that door wide open. *Pele Defense Fund v. Paty*,[31] in important respects, is a landmark decision. In a finely-crafted, visionary section of its *Pele* opinion, the court recognized Native Hawaiian land trust beneficiaries' implied right to bring breach of trust actions against the State in state court. It located that court access right under the provisions of the Hawai'i Constitution establishing the Homelands and Ceded Lands trusts.[32] Recognizing the restrictiveness of federal law,

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[29] Ahuna v. Department of Hawaiian Home Lands, 64 Haw. 327, 640 P.2d 1161 (1982).

[30] *See infra* Part V.

[31] 73 Haw. 578, 837 P.2d 1247 (1992), *cert. denied*, 113 S.Ct. 1277 (1993).

[32] Congress in 1920 passed the Hawaiian Homes Commission Act. The Act set aside in trust almost 200,000 acres of "government-owned" land that had been ceded to the United States upon annexation of Hawai'i as a territory. The Act's purpose was to "rehabilitate" the Hawaiian people and their culture by returning Hawaiians to the land. "[N]ative Hawaiians," defined by the Act to mean people of at least fifty percent Hawaiian blood, became eligible to lease homestead lots for 99 years at $1.00 a year for residential, pastoral, and agricultural purposes. Hawaiian Homes Commission Act of 1920 (Pub. L. No. 67-34, ch. 42 §§ 207(a), 208(2), 42 Stat. 108 (1921) ("HHCA"). The United States served as the Homelands trustee until it transferred responsibility for Homelands to the State of Hawai'i upon statehood. Hawai'i became a state in 1959 when Congress passed the Hawai'i Admissions Act. The Admissions Act constituted a compact between the United States and the newly created State. As part of that compact, the State covenanted to accept title to and trust responsibility over the Hawaiian Homelands. The Department of Hawaiian Home Lands ("DHHL"), guided by the Hawaiian Homes Commission, is responsible for administration of the Act — that is, for managing and using trust assets to place native Hawaiians on trust lands. HHCA § 202. The Act permits the DHHL to lease "surplus" lands to the public generally, by way of general leases. HHCA § 204(2). *See generally* MacKenzie, *supra* note 22, at 49-50. *See also* Federal-State Task Force on the Hawaiian Homes Commission Act, Report to the U.S. Secretary of the Interior (1983).

In the Admissions Act compact, the State also assumed title to and trust responsibility over nearly two million acres of Ceded Lands. Ceded Lands are lands formerly belonging to the Hawaiian government and monarch which, upon annexation of Hawai'i as a United States territory in 1898, were "ceded" to the United States. Admission Act of 1959, Pub L. No. 86-3 §§ 5, 73 Stat. 4 (1959). Specifically, § 5(f)

the Court declared that it would not leave Native Hawaiians "without the [state law] means to hold" the State to its "fiduciary duties and obligations as trustee."[33] Apparently concerned about the absence of a clear constitutional or statutory waiver of the State's sovereign immunity, however, the *Pele* court also transposed onto state court process federal Eleventh Amendment immunity principles and appeared to construe those principles restrictively. It thereby sharply limited the number and type of eligible state court breach of trust claims, creating uncertainty about court access.[34]

For these general reasons, developed later, this article is titled in part "Native Hawaiians' Uncertain Federal and State Law Rights to Sue." Native Hawaiian claimants must warily plan their approach to courthouse entry. The article addresses salient procedural dimensions to the assertion of Native Hawaiian land claims and the manner in which legal process handles and, in important instances, transforms those claims and their underlying cultural messages. It focuses on Hawaiian Homelands and Ceded Lands breach of trust claims.[35] Other

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of the Admissions Act provided that the Ceded Lands, and any income and proceeds therefrom must be used for (1) the support of the public schools and other public educational institutions; (2) the betterment of the conditions of Native Hawaiians, as defined in the Hawaiian Homes Commission Act of 1920; (3) the development of farm and home ownership on as widespread a basis as possible; (4) the making of public improvements; and (5) the provision of lands for public use. Until the State Constitutional Convention of 1978, the State as Ceded Lands trustee construed § 5(f) to mean that proceeds and income from the trust could be expended to serve any one of those five purposes. In fact, the State chose to expend all Ceded Lands proceeds and income on public education and nothing directly for the betterment of conditions for Hawaiian people. The State's 1978 Constitutional Convention addressed the Admissions Act's express trust provision concerning Hawaiian people. It added three new sections to the Constitution. The first explicitly named two categories of trust beneficiaries of the Ceded Lands trust—Hawaiians (defined as any person with Hawaiian blood) and the general public. HAW. CONST., art. XII, § 4. The second section created the Office of Hawaiian Affairs which became the state agency primarily responsible to Hawaiians as beneficiaries of the Ceded Lands trust. *Id.* § 5. The third section mandated, among other things, that the Office of Hawaiian Affairs receive and administer in trust a pro rata share (twenty percent) of all income from the sale or use of Ceded Lands. *Id.* § 6. *See also* 1980 HAW. SESS. LAWS 273, codified at HAW. REV. STAT. § 10-13.5 (1985).

[33] *Pele*, 73 Haw. at 601, 837 P.2d at 1261-62.

[34] *See infra* Part IVB.

[35] Both the Hawaiian Homelands Trust and the Ceded Lands Trust were created in response to the serious consequences visited upon Hawaiians and their culture by

types of Native Hawaiian claims are important. Homelands and Ceded Lands breach of trust claims nevertheless provide an appropriate focal point because they reflect a coalescence of Native Hawaiian ancestry, culture and politics and because they embody an essential aspect of expressed Native Hawaiian concerns—control over Native Hawaiian lands.[36]

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the imposition of Western culture and law. *See supra* note 32.

To date, only 38,000 acres of the nearly 200,000 acres set aside by the Hawaiian Homes Commission Act have been leased to Native Hawaiians. This comprises less than twenty percent of the "available" lands. FEDERAL TASK FORCE REPORT ON THE HAWAIIAN HOMES COMMISSION ACT, REPORT TO THE UNITED STATES SECRETARY OF THE INTERIOR AND THE GOVERNOR OF THE STATE OF HAWAII, Appendix 15 (August 1983). Much of the available land is currently unsuitable for homesteading purposes. Several Homelands areas are arid, covered by lava, or of poor soil quality. Much of the land that is inhabitable lacks infrastructure — roads, water delivery systems and the like. By one estimate, 20,000 eligible Hawaiians remain on a Homelands waiting list while many non-beneficiaries hold Homelands leases for a variety of private and public uses. *See* MACKENZIE, *supra* note 22, at 51-52. For example, 295 acres of trust land at Pohakuloa, Hawai'i is currently used by the United States Army for training exercises. The Navy continues to occupy 25 acres of trust land in Kekaha on the island of Kaua'i for storage purposes. Each paid $1.00 for 65 year leases. HAWAII ADVISORY COMMITTEE TO THE UNITED STATES COMMISSION ON CIVIL RIGHTS, A BROKEN TRUST, REPORT OF THE HAWAII ADVISORY COMMITTEE TO THE UNITED STATES COMMISSION ON CIVIL RIGHTS, 19 ("A BROKEN TRUST")(citing DEPARTMENT OF HAWAIIAN HOME LANDS, ANNUAL REPORT, 38 (1989)) (1991). *See generally* GEORGE COOPER & GAVAN DAWS, LAND AND POWER IN HAWAII (1985); ELEANOR C. NORDYKE, THE PEOPLING OF HAWAII, 134-72, 256-57 (2d ed. 1989).

On the island of Hawai'i, Parker Ranch, the country's second largest private ranching enterprise, leases 27,000 acres of Homelands at $3.33 an acre while eligible Hawaiians who desire ranch lots have waited sometimes decades for a homestead award. Susan C. Faludi, *Broken Promise: How Everyone Got Hawaiians' Homelands Except the Hawaiians*, WALL ST. J., Sept 9, 1991, at A-2. A former trustee of a major private land trust, and non-beneficiary, reportedly lived on a 9,370 acre ranch situated on Homelands. *Id.* at A-4. Other non-beneficiaries have profited from Homelands general leases while sometimes paying less than $6 per acre per year. *Id.* Meanwhile, nearly 200 beneficiaries on the island of Hawai'i already awarded lots have been unable to move onto them due to lack of infrastructure improvements. *Id.* In December 1985, State officials traded nearly 28,000 acres of ceded lands in Puna on the island of Hawai'i, for 26,000 acres of private Campbell Estate land covered by lava. The trade was made to facilitate the State's development of a geothermal plant. MACKENZIE, *supra* note 22, at 38-39. *See infra* Part IV for a discussion of the suit by Native Hawaiians to invalidate the exchange. These situations provide foundational sources for many Native Hawaiian breach of land trust claims.

[36] For many Native Hawaiians, the return of and control over Native Hawaiian trust lands is essential to Native Hawaiian self-determination. *See generally* Haunani-

II. Courts and the Cultural Performance: Indigenous Peoples' Claims in America's Post-Civil Rights Era

A. *The International Setting*

For this article we rely upon the historical accounts of other articles

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Kay Trask, *The Birth of the Modern Hawaiian Movement: Kalama Valley, Oahu*, 21 Haw. J. Hist. 126 (1987). Native Hawaiian movements to gain control over trust lands have ancestral, cultural and political-structural dimensions. These dimensions presently coalesce in constructing Native Hawaiians as a race. *See generally* Michael Omi & Howard Wigant, Racial Formation in the United States, 66-69 (1986) (describing racial formation and the creation of racial meanings); Ian Haney Lopez, *The Social Construction of Race: Some Observations on Illusion, Fabrication, and Choice*, 29 Harv. C.R.-C.L. L. Rev. 1 (1994) (describing the coalescence of ancestry, social-historical context and self-identification in the social construction of a racial group). Claims under federal and state law are ancestrally categorized. Statutorily-recognized beneficiaries of the Homelands trust are people with at least fifty percent Hawaiian blood. *See supra* notes 21 and 32. This statutory blood quantum construction of Hawaiianness draws arbitrary and highly divisive lines, irrespective of culture or identity. It separates "native Hawaiians" eligible for trust lands (fifty percent blood or more) from ineligible "Hawaiians" (less than fifty percent). Ancestral or blood categorizing also frames the discourse about "special" governmental treatment of Homelands beneficiaries vis-a-vis other groups. The Prologue briefly recounts the former Honolulu mayor's reported legal stance on property tax exemptions for Hawaiian Homesteaders. The Homelands program, which Congress created in partial response to the United States-aided illegal overthrow of the sovereign Hawaiian nation, is now viewed by powerful actors such as the former mayor as a "racial preference" that violates the civil rights of other racial groups. *See infra* note 104 (United States Justice Department's position that special funding for Native Hawaiians is an illegal racial preference.)

The struggle for control over trust lands also has a cultural dimension. For some, the continuing spiritual and cultural harm Native Hawaiians suffered from their separation from the land, see *supra*, can only be repaired through the creation of a land base for Native Hawaiians to foster the rejuvenation of essential aspects of Hawaiian culture. The struggle also has a political-structural dimension. For many Native Hawaiians, some form of self-governance is the best response to the continuing effects of colonial conquest. Without land, there can be no economic base. Without an economic base, there can be no self-governance. Recognition of rights of self-governance without land is practically meaningless. *See* Robert Blauner, Racial Oppression in America (1972) (linking land reclamation and resistance to cultural domination in theory of internal colonialism); Omi and Wigant, *supra*, at 49, 161 (critiquing the application of internal colonialism theory). In these ways, current Native Hawaiian breach of land trust claims, undergirded by political self-governance movements, reflect the social construction of Native Hawaiians as a race, coalescing ancestral, cultural and political-structural concerns.

and law reviews for specific descriptions of Hawai'i's social-political setting and current movements toward Native Hawaiian sovereignty and for general descriptions of Native American law and self-determination efforts.[37] Dramatic and sometimes explosive social structural changes throughout the world provide the broader context. Those changes warrant brief discussion as part of the framework for focused inquiry on federal and state courts and Hawaiian lands claims.

Internationally, two seemingly contradictory geo-political trends have emerged—unification and separatism. Some situations reflect separatism within unification. East and West Germany merged, with sometimes violent repercussions against "outsiders" within Germany's borders.[38] The multi-country European Community lurches toward a unified economic system in the face of increasing resistance linked in part to complex political and cultural diversity. Other situations reflect separatist movements as responses to the oppression of indigenous or minority groups. The Palestinian self-determination movement matured into an agreement with Israel over control over the Left Bank and Gaza Strip. The Soviet Union splintered into separate republics following the dissolution of the "unifying" communist party. Individual republics, such as Georgia, themselves face secessionist movements by ethnic minorities. The former Yugoslavia and Czechoslovakia in Central Europe, Spain in Western Europe, Canada in North America, and Ethiopia in Africa, among other countries, are experiencing intensifying separatist challenges to dominant powers.[39]

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[37] *See* Leslie K. Friedman, *Native Hawaiians, Self-Determination, And The Inadequacy Of The State Land Trusts*, 14 U. HAW. L. REV. 519 (1992); Mia Y. Teruya, *The Native Hawaiian Trust Judicial Relief Act*, 14 U. HAW. L. REV. 889 (1992); Williamson B. C. Chang, *Reversals of Fortune: The Hawaii Supreme Court, the Memorandum Decision, And The Realignment Of Political Power in Post-State-Hood Hawaii*, 14 U. HAW. L. REV. 17 (1992); Melody Kapilialoha MacKenzie, *The Lum Court And Native Hawaiian Rights*, 14 U. HAW. L. REV. 377 (1992); *Hawaii's Ceded Lands*, 3 U. HAW. L. REV. 101 (1981). *See also* Haunani-Kay Trask, COALITION-BUILDING, *supra* note 22. *See supra* notes 9, 16 and 18, and *infra* notes 44, 46, 50, 55, 59-60 and 64 for discussions of Native Americans and legal process.

[38] *Germans' Bitterly Divided About Unification*, HONOLULU STAR BULLETIN, October 1, 1993, at A-11.

[39] *See generally* HURST HANNUM, SOVEREIGNTY AND SELF-DETERMINATION: THE ACCOMMODATION OF CONFLICTING RIGHTS (1990) (addressing problems and possibilities of subgroup autonomy within nation-states); Adeno Addis, *Individualism, Communitarianism, And The Rights Of Ethnic Minorities*, 67 NOTRE DAME L. REV. 615-16 (1991);

The Pacific is experiencing similar movements. Integral to these movements are formerly colonized indigenous peoples' demands, cast in the language of rights, for political, economic and cultural self-determination, and for reclamation of homeland territory. Indigenous groups making such demands include the Native Hawaiians, or Kanaka Maoli, of Hawai'i, the Maoris of New Zealand, the Chamorros of Guam and the aborigines of Australia.[40] For these and other indigenous groups, 1993 marked the "Year of Indigenous Peoples Rights."[41] The United Nations Subcommission on Prevention of Discrimination and Protection of Minorities is investigating the impact of countries' laws

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Rosen, *supra* note 11.

Olara Otunnu, director of the International Peace Academy, observes two strains of separatism, or self-determination, challenges.

> One is principally a European phenomenon. There we are witnessing a resurgence of claims for self-determination in their classical form: Peoples demanding their own nation-state, their own territory, their own government. This is the kind of self-determination that colonial peoples claimed in the 1950s and 1960s.***In other parts of the world—especially Africa—I see demands not for classical self-determination but for what one might call a second generation of self-determination. Despite appearances, most of those troubles are not about redrawing boundaries. They are about having political participation, about being given economic opportunities, about being given space for expression of identity: in other words, they are about people seeking to have a better deal within existing boundaries. These two kinds of situations require different strategies.

Joshua Cohen, *An Interview with Ambassador Olara Otunnu*, BOSTON REVIEW, Vol. XVIII (June 1993).

[40] *See* DONNA AWATERE, MAORI SOVEREIGNTY (1984); Stewart Firth, *Sovereignty And Independence In The Contemporary Pacific*, 1 CONTEMP. PAC. 75 (1989); Haunani-Kay Trask, *Politics In The Pacific Islands: Imperialism And Native Self-determination*, 16 AMERASIA J. 1 (1990). For a general description of the Australian Aboriginal people's movement, *see Aborigines Strive to Find Rightful Place*, HONOLULU STAR BULLETIN, June 16, 1992, at A-6; *Blunders Depict Aborigine Struggle*, HONOLULU STAR BULLETIN, June 16, 1992, at A-6. Significantly, these movements tend to be politically rather than legally driven. International law norms address "rights" to self-determination and independence. *See* S. James Anaya, *A Contemporary Definition Of The International Norm Of Self-determination*, 3 TRANSNAT'L L. & CONTEMP. PROBS. 131 (1993); Lea Brillmayer, *Secession And Self-determination: A Territorial Interpretation*, 16 YALE J. INT. L. 177 (1991); the United Nations Working Group on Indigenous Peoples' draft "Declaration on the Rights of Indigenous Peoples," U.N. Doc. E/CN.4/Sub.2/AC.4/CRP.4 (1993). No court, however, has universally accepted jurisdiction to recognize and enforce those politically volatile rights.

[41] The United Nations General Assembly designated 1992-1993 as the "Year of Indigenous People's Rights." HAUNANI-KAY TRASK, FROM A NATIVE DAUGHTER: COLONIALISM AND SOVEREIGNTY IN HAWAI'I 41 (1993).

on particular indigenous groups, including Native Hawaiians.[42] The United Nations Working Group on Indigenous Peoples, starting with the foundational principle of self-determination, is finalizing its proposed "Declaration on the Rights of Indigenous Peoples."[43] Cast as

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[42] Those groups include Native Hawaiians, aboriginal Australians, the Gitksan, Wet'suwet'en and Lubicon Cree tribes of Canada, the Yanomami tribe of Brazil, various Guatemalan tribes, the San or Bushmen tribe of Southern Africa and the Ainu of Japan. *U.N. Group Will Do Study on Hawaiians*, HONOLULU ADVERTISER, August 5, 1993, A-3. *See also*, U.N. Sub-Commission on the Prevention of Discrimination and Protection of Minorities, STUDY OF THE PROBLEM OF DISCRIMINATION AGAINST INDIGENOUS POPULATIONS, Vol. V, U.N. Doc. G/CN. 4/Sub. 2 (1986).

[43] Draft Declaration on the Rights of Indigenous Peoples, E/CN.4/Sub.2/1993/29. International law may provide protection to Native Hawaiians in a general sense and, more specifically, as an indigenous people through the norms of decolonization and self-determination. Article 1 of the United Nations Charter provides that there shall be "friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples." U. N. CHARTER, art. 1. Article 73 of the United Nations Charter specifies a process through which non-self-governing territories, which Hawai'i was officially prior to 1959, may determine their future political status. Article 73 also mandates that states having jurisdiction over non-self-governing territories have a "sacred trust . . . to develop self-government, to take due account of the political aspirations of the peoples, and to assist them in the progressive development of their free political institutions, according to the particular circumstances of each territory and its people and their varying stages of development." U.N. CHARTER, art. 73.

The Universal Declaration of Human Rights, G.A. Res. 217A (III), U.N. Doc. A/810 (1948), and the International Covenant on Civil and Political Rights also give recognition to the right to self-determination. Article 1 of both the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social, and Cultural Rights, which is not yet ratified by the U.S. Senate, declares that, "[a]ll peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development." International Covenant on Civil and Political Rights, art. 1, 999 U.N.T.S. 171, 6 I.L.M. 368 (1967), ratified by the United States on Sept. 8, 1992; International Covenant on Economic, Social, and Cultural Rights, G.A. Res. 2200, 21 U.N. GAOR Supp. (No. 16) at 49, U.N. Doc. A/6316 (1966); *see generally* American Declaration of the Rights and Duties of Man, Pan American Union, Final Act of the Ninth Conference of American States 38-45 (1948); American Convention on Human Rights, in force July 18, 1978, signed by United States June 1, 1977.

Self-determination as a legal norm is thus recognized in the international agreements cited above. International agreements that lack the status of treaties may nevertheless be binding on the courts of the United States through the Supremacy Clause, Article VI of the United States Constitution. RESTATEMENT (THIRD) FOREIGN RELATIONS LAW OF THE UNITED STATES, § 111(1) (1987); *see also*, United States v. Smith, 18 U.S. (5 Wheat.) 153, 160-61 (1820)(courts may determine the status of the international common law by "consulting the works of jurists, writing professedly on public law;

rights, some indigenous peoples' political, cultural and homelands demands are receiving legislative attention and some are emerging in national and local courts.

B. Court Process and Cultural Performance in Post-Civil Rights America

As Gerald Torres observes, "[w]ithin a society, there are specific places where most of the activities making up social life within that society simultaneously are represented, contested, and inverted. Courts are such places."[44] This observation is reinforced by the studies of socio-legal scholars which conclude that case handling by courts can be viewed as "cultural performances, events that produce transformations in socio-cultural practices and in consciousness."[45] Especially where rights are asserted, those transformations may tend to be re-

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or by the general usage or practice of nations; or by judicial decisions recognizing and enforcing that law") (citations omitted).

Because of the "international consensus" concerning basic human rights, "international law confers fundamental rights upon all people vis-a-vis their governments," subject to further "refinement and elaboration." Filartiga v. Pena-Irala, 630 F.2d 876, 883-84, 85 (D.C. Cir. 1980). The courts of the United States thus have grounds for considering international norms of decolonization and self-governance in assessing Native Hawaiians' claims of self-determination. *See also* TRASK, COLONIALISM AND SOVEREIGNTY IN HAWAI'I, *supra* note 41 at 40-47 (describing the "growing perception that indigenous peoples should occupy a different [legal] status", and the draft Declaration codifying indigenous peoples' rights. *Id.* at 41).

[44] Gerald Torres, *Translating Yonnondio: By Precedent and Evidence: The Mashpee Indian Case*, 1990 DUKE L. J. 625, 628. While we acknowledge the existence and importance of tribal courts, our focus is on federal and state courts and their handling of indigenous peoples' claims.

[45] Sally E. Merry, *Law and Colonialism*, 25 LAW AND SOCIETY REV. 889, 892 (1991). Cultural and legal anthropologists in particular are developing theoretical insights into courts in colonial and post-colonial settings as cultural performers. *See* ANTHONY GIDDENS, CENTRAL PROBLEMS IN SOCIAL ANALYSIS (1993) (methods of dispute handling can be viewed as embedded in cultural practices); JOHN COMAROFF AND SIMON ROBERTS, RULES AND PROCESSES: THE CULTURAL LOGIC OF DISPUTES IN AN AFRICAN CONTEXT (1981); *infra* note 50 addressing the meaning of the term "cultural performance." *See generally* JUNE STARR AND JANE COLLIER, HISTORY AND POWER IN THE STUDY OF LAW: NEW DIRECTIONS IN LEGAL ANTHROPOLOGY (1989) (conceiving of institutions as forms of cultural expression illuminating the dynamics of struggle for change among elites and others); John Conley, William O'Barr and E. Allen Lind, *The Power Of Language: Presentation Style In The Courtroom*, 78 DUKE L. REV. 1375 (1978); Barbara Ygnvesson, *Making Law At The Doorway: The Clerk, The Court And The Construction Of Community In A New England Town*, 22 LAW & SOC. REV. 410 (1988); SALLY E. MERRY, GETTING JUSTICE AND GETTING EVEN (1990).

pressive, legitimating harsh imbalances of power in existing social relationships; they may tend to be liberatory, opposing or reconfiguring entrenched group images and relationships; or they may reflect some complex, shifting combination of the two. Those transformations may occur as accretions over time, little noticed; or they may emerge in the jolt of a singular case-event. Of course, relatively few court cases singularly produce transformations in socio-cultural practices and in consciousness. Those that do tend to occur when the legal dispute is reflective of a larger on-going social-political controversy. Other factors—location, media attention, community organizing, related lawsuits, or legislative initiatives—are significant.[46]

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[46] A classic example of a federal court's cultural performance involving Native Americans is described by James Clifford in his account of the Mashapee Indians land claims. JAMES CLIFFORD, THE PREDICAMENT OF CULTURE: TWENTIETH-CENTURY ETHNOGRAPHY, CULTURE AND ART (1988). The Mashapee Indians filed suit under a federal statute to reclaim valuable lands their ancestors once possessed. The court transformed the contemporary political-legal land dispute with deep historical roots into an issue of standing—finding that according to distinctly western definitions the Mashapee Indians did not constitute a "tribe" and therefore accrued no right to sue. *See also* MARTHA MINOW, MAKING ALL THE DIFFERENCE (1991) (describing the court's construction of Mashapee identity); Torres, *supra* note 44 (describing the way the court's performance inverted the Mashapee Indians claims and view of themselves). *See generally* ARNOLD KRUPAT, ETHNO-CRITICISMS: ETHNOGRAPHY, HISTORY AND LITERATURE (1992) (examining early Native American federal court cases and the submerged voices of Native American leaders).

Recent notable examples of courts' cultural performances include the initial Rodney King police brutality trial in California state court in Simi Valley. Court process and trial, including the venue and peremptory juror challenges, portrayed a largely white, middle class jury and the legal system as uncomprehending of the milieu surrounding Rodney King's beating. The *Mabo II* ruling of the Australian High Court jettisoned the doctrine of *terra nullius* and recognized historical-cultural bases for native land title, fostering far-reaching political and legal responses. *See supra* note 11. *See also* Peter Kar Yu Kwon, Facts & Fiction, Narratives & Myths (manuscript on file with authors) (discussing High Court of Australia's decision in Mabo v. Queensland). Other recent examples particular to Hawaii include the *Marcos* class action civil trial against Imelda Marcos and others in the Hawaii federal district court on grounds of torture and murder of political dissidents in the Philippines; the State v. Ganal murder prosecution in state court in which the Filipino male defendant asserted a "amok" cultural defense to the murder and attempted murder of his spouse, children, parents and others. *See* Belinda A. Aquino, A Filipino Tragedy In Hawaii (unpublished manuscript on file with authors); the Ka'ai'ai v. Drake class action litigation in state court to compel appointment of an independent representative of Hawaiian Homelands Trust beneficiaries to participate in Department of Hawaiian Homelands negotiations against the State for past misuse of Homelands. *See infra* notes 278-79.

The view of courts as dynamic sites of cultural performances is supported generally by dispute transformation theory. According to this theory, each stage of the court process in varying ways contributes to a "rephrasing" of the dispute.[47] Decisions concerning initial claim assertion followed by decisions concerning pretrial discovery, sanctions and overall case management (including motions and settlement maneuvering and legal issue formulation) redefine the claimant's understanding and framing of the controversy. The interactions among parties, attorneys, judge, court personnel, community groups and general public, through the media, and the trial itself, further contribute to this rephrasing at the trial court level. Decisions by appellate courts, more detached and, yet in some respects, more far-reaching, further solidify the court system's dispute rephrasing performance. As Professors Mather and Ygnvesson observe, a legally phrased claim is a "social construct which orders 'facts' and invokes 'norms' in particular ways—ways that reflect the personal interests and values" of the describer.[48] Concerns critical to the rephrasing process thus arise: Who has court access; who controls claim development and presentation; according to what standards; from what perspectives; who reports on the contextual facts; and according to what selection criteria? What

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[47] Drawing upon anthropology, sociology, critical theory, among other disciplines, socio-legal scholars have identified dispute transformation as an integral part of legal process. The transformation of disputes is described, in part, in terms of a contextual "rephrasing" of disputes. *See* William Felstiner, Richard Abel & Austin Sarat, *The Emergence And Transformation Of Disputes: Naming, Blaming, Claiming. . . .*, 15 LAW & SOC. REV. 631 (1980-81) (foundational socio-legal research into the ways in which disputes are transformed as they are processed through a legal system); Lynn Mather and Barbara Ygnvesson, *Language, Audience and The Transformation of Disputes*, 15 LAW & SOC. REV. 775, 780 (1980-81) (describing legal claims as social constructs). *See also* Bryant Garth, *Power And Legal Artifice: The Federal Class Action*, 26 LAW & SOC. REV. 237, 240 (1992) ("the process of moving from a social relationship of conflict to a lawsuit inevitably entails a translation into legal language. . . .The dispute [also] changes form, expands or contracts or changes in focus in response to numerous contextual factors" *Id.* at 240.); Starr and Collier, *supra* note 45.

James Boyd White provides an insightful temporal view of textual "translation" in legal process that enriches socio-legal research conclusions. He observes that the legal text, or the formally written right, "remains the same, but its translation—its being carried over—to our own time locates it in a new context of particularities which will, and should, give it a transformed meaning." JAMES BOYD WHITE, JUSTICE AS TRANSLATION, XIII (1990).

[48] Mather & Ygnvesson, *supra* note 47, at 780. *See also* Judith Resnik, *On The Bias: Feminist Reconsiderations of The Aspirations For Our Judges*, 61 S. CAL. L. REV. 1877 (1988).

cultural values collide and emerge in the interactions of judges, parties, attorneys, communities and media?[49] These concerns shape the contours and content of a court system's overall cultural performance.[50] From this view, courts in important instances not only decide disputes, they

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[49] *See* Elizabeth Schneider, *The Dialectic of Rights And Politics: Perspectives From The Women's Movement*, 61 N.Y.U. L. REV. 589 (1986) (describing ways in which legal theory can inform the interactions of litigants, attorneys, judge, community groups and media and in turn be re-formed by that interaction to further social-political movements).

[50] Differing communities, of course, will view the same performance differently. Audiences vary in time, space and composition. A particular performance will thus be viewed and interpreted by multiple, overlapping communities, and will generate multiple, varying messages. *See* JAMES SCOTT, DOMINATION AND THE ARTS OF RESISTANCE: HIDDEN TRANSCRIPTS (1990) (examining narratives of those of differing positions on the social hierarchy and identifying differing constructed meanings of events viewed in the "theatre of power"). In this sense, interpretive communities will be interactively constructing meaning not so much concerning legal texts as concerning legal events. Those events, or performances, will comprise a complex array of legal and non-legal texts, media images, word of mouth stories, and flesh and blood people, among other things. *See generally* Jo Carrillo, The American Indian And The Problem Of History (Book Review), 33 ARIZ. L. REV. 281 (1991) (observing that "every telling of a story, whether it be a general story or a self-referential story, is subject to change, to memory, to interpretation. And every single voice may, in effect, be a compilation of many voices, past and present." *Id.* at 283).

Our use of the term "performance" here is modified by the term "cultural." In using the term cultural we mean something more specific than the collective practices and values of mainstream American society. We also mean something particularized to groupings of people (whether those groups are circumscribed by race, ethnicity, language, gender, geography, history or other similar factors), but something still less tangible than the customs, religious practices and relational forms of those particular groups. We draw upon anthropological approaches. By "culture" we mean a given community's system of constructed or "inherited conceptions expressed in symbolic forms by means of which [people] communicate, perpetuate, and develop their knowledge about attitudes toward life." CLIFFORD GERTZ, THE INTERPRETATION OF CULTURES, at 89 (1973). For Renato Rosaldo, those forms provide structure "through which people make sense of their lives." RENATO ROSALDO, CULTURE AND TRUTH: THE REMAKING OF SOCIAL ANALYSIS, at 26 (1989). Although in crucial respects multi-dimensional, shifting and regenerating, a group member's culture "provides the framework, the anchor, within which a range of choices and values can be considered and evaluated." Adeno Addis, *supra* note 39, at 658.

Thus a "cultural performance," and more specifically "a court's cultural performance," as we use the term, addresses a performance (actions, interactions) that in some fashion impacts upon the ways in which often differing communities construct their frameworks, however shifting and regenerating, "within which a range of choices and values [about the subject or event portrayed] can be considered and evaluated." *Id.*

also transform particular legal controversies and rights claims into larger public messages.

Those messages can be thought of as socio-legal or cultural narratives, or stories, about groups, institutions, situations and relationships.[51] The shaping and then retelling of stories through court process can help either to reinforce or counter a prevailing cultural narrative in a given community. A prevailing, or master, narrative provides a principal lense through which groupings of people in a community see and interpret events and actions.[52] It provides a set of basic assumptions

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[51] *See* JEAN-FRANCOIS LYOTARD, THE POSTMODERN CONDITION: A REPORT ON KNOWLEDGE (1984) (describing the functioning of societal "grand narratives"); Kathryn Abrams, *Hearing The Call Of Stories*, 79 CAL. L. REV. 971 (1991) (critiquing the use of narratives in legal scholarship as means for raising silenced voices and challenging the notion of objectivity in decisional process). The term "narrative" varies in meaning and usage. Briefly stated, Lyotard's "narrative" refers to words or images that reflect a collective understanding of a situation, relationship, or event. Those words or images construct for their holders a lense through which other social situations, relationships, or events are viewed and interpreted. Abrams' "narrative" refers to the use of storytelling by legal scholars as a means for comprehending legal rules and processes, for identifying vantage points and power relations, for raising voices silenced by those rules and processes and for offering normative foundations for remaking the socially oppressive dimensions of law. Lyotard's and Abram's usages are connected. Scholars writing about law's oppression of minorities, for example, have embraced legal storytelling in part to construct oppositionist lenses (or larger counter-narratives) for destablizing and altering dominant social narratives. *See* Richard Delgado, *Storytelling For Oppositionists And Others: A Plea For Narrative*, 87 MICH L. REV. 2411 (1989) (*Storytelling For Oppositionists*). Narrative in legal scholarship has been the subject of sharp debate. *See* Daniel Farber & Suzanna Sherry, *Telling Stories Out of School: An Essay On Legal Narratives*, 45 STAN. L. REV. 807 (1993) (criticizing the use of narratives by feminist and critical race scholars without evidence of the existence of different voices); Richard Delgado, *On Telling Stories In School: A Reply To Farber And Sherry*, 46 VAND. L. REV. 665 (1993) (responding). The term "cultural narrative," as we use it, is similar to the term "social or societal narrative." We use "cultural," as defined *infra* note 50, to emphasize the context in which these narratives are produced, enhanced, contested and transformed—indigenous peoples' land claims in American courts.

[52] *See* Lyotard, *supra* note 51; Richard Delgado, *Storytelling For Oppositionists*, *supra* note 51. Addressing perceptual mechanisms for "understanding others," historian Greg Dening uses the term "model" to describe what are in essence grand narratives—prevailing language and imagery that translate perceptions and experiences of others into dominant cultural understandings, whether or not those understandings reflect the perceptions and experiences of those "others." Dening uses the term "metaphor" to describe what are in essence counter-narratives—"entry into the experience of

for evaluating social-political controversies and the relationships of the groups involved.

A counter-narrative challenges those assumptions and the vantage point from which they are made. By offering a "framework not previously accepted," the counter-narrative challenges "established categories for classifying events and relationships by linking subjects or issues that are typically separated" or by elevating previously suppressed voices, thus "stretching or changing accepted frameworks for organizing reality."[53] It thereby undermines the clarity and strength of the master narrative, infusing complexity and providing a competing perspective.[54]

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others" through language and imagery to enlarge cultural understandings.

> Understanding others, then, can have two meanings. It can mean entry into the experience of others in such a way that we share the metaphors that enlarge their experience. Or it can mean that we translate that experience into a model that has no actuality in the consciousness of those being observed but becomes the currency of communication amongst the observers. . . [M]odels are schizoid: they belong to two systems, the one they describe and the one that constructs them.

GREG DENING, ISLANDS AND BEACHES, at 93 (1980).

[53] Mather & Yngvesson, *supra* note 47, at 778-79. Mather and Yngvesson describe the concept of "expansion" in dispute transformation theory in terms that are generally applicable to the discussion of master and counter-narratives. Richard Delgado observes that oppositionist stories in a legal forum can create space for "expansion" by helping to develop counter-narratives that are "powerful means for destroying mindset — the bundle of presuppositions, received wisdom, and shared understanding against a background in which legal and political discourse takes place." Delgado, *Storytelling For Oppositionists*, *supra* note 51, at 2413.

[54] *See* RICHARD DELGADO, NARRATIVE AND THE LEGAL DISCOURSE: A READER IN STORYTELLING AND THE LAW, at 289 (David Ray Papke ed. 1991):

> For stories create their own bonds, represent cohesion, shared understandings, and meanings. The cohesiveness that stories bring is part of the strength of the outgroup. An outgroup creates its own stories, which circulate within the group as a kind of counter-reality.

Id. at 289.

> The dominant group creates its own stories, as well. The stories or narratives told by the ingroup remind it of its identity in relation to outgroups, and provide it with a form of shared reality in which its own superior position is seen as natural.

Id.; *see also* Newton, *Indian Claims*, *supra* note 18, at 760 (describing Euromyths and counter-narratives by Native Americans in legal process); Scott, *supra* note 50 (describing hidden transcripts of Native American resistance). *See generally* GERALD LOZEZ, REBELLIOUS LAWYERING 39-44 (1992) (describing legal storytelling by lay people and lawyers as a method for challenging subordinating narratives).

Historically, for example, master socio-legal narratives about indigenous groups have tended to characterize their subordinated situations as inevitable, due to the groups' inferiority, or insignificant, due to the passage of time and past remedial efforts. Nell Jessup Newton observes in the context of Native American legal claims that, "[t]he Euromyths of the dominant group . . . justify and rationalize the dispossession of Native Americans from their lands and blame them for continuing to refuse the full benefits of membership in the dominant culture."[55] Similarly, subordinating socio-legal narratives concerning Native Hawaiians have long fixed blame for their physical and cultural destruction on Native Hawaiians' inferiority and "semi-barbarous face."[56] The Congressional Record of the annexation debates following the overthrow of the Hawaiian government provides insight into how these narratives were embodied in and reproduced by law — or, as one United States Senator put it, the "legalization of the great destiny for Hawai'i."[57]

> Side by side on their islands were two civilizations, higher and a lower civilization. On the side of the higher civilization were ranged the intelligence, the progress, the thrift, the aspirations for enlarged liberty

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[55] Newton, *Indian Claims*, *supra* note 18 at 760-761. *See also* Robert A. Williams, Jr. *Encounters On The Frontiers Of International Human Rights Law: Redefining The Terms Of Indigenous Peoples' Survival In The World*, 1990 DUKE L. J. 660 (describing how earlier international law norms, particularly the doctrine of discovery, and the narratives engendered by those norms operated to destroy, or at least subordinate, American Indians); S. James Anaya, *The Rights Of Indigenous Peoples And International Law In Historical And Contemporary Perspective*, 1989 HARV. INDIAN L. SYMP. 191 (1990). *See generally* CHARLES WILKINSON, AMERICAN INDIANS, TIME, AND THE LAW (1986).

For Native Hawaiians, the question arises, what groups, or interests, have generated and continue to generate dominant societal narratives about Native Hawaiians? A response to that question requires a complex, social-historical account of Hawai'i inter-group relations that is beyond the scope of this article. That account would trace the socio-political shift from the Hawaiian monarchy of the mid 1880s, to the white American oligopoly that controlled Hawai'i economics and politics from the late 1880s through the early 1950s, to Pearl Harbor and the United States military, to the "democratic revolution" of the mid 1950s, engineered by labor and a coalition of ethnic groups, to statehood in 1959 and a booming economy and rapidly expanding state government and an emergent middle class of predominantly Japanese, Chinese and Caucasian Americans, to the present. *See generally* KAME'ELEIHIWA, *supra* note 22; LAWRENCE FUCHS, HAWAII PONO (1970).

[56] 53 CONG. REC. 1885 (1894) (recording a statement by United States Senator Johnson from Indiana in which he argues for annexation of Hawaii as a territory of the United States).

[57] *Id.*

> and for the legalization of a great destiny for Hawai'i. On the other side was ranged the monarchy, with its narrow, contracted view of human rights, with its semibarbarous face turned toward the past, unwilling to greet the dawning sun. . . From the very nature of things these two civilizations could not exist together forever. One was to survive and the other would have to perish.[58]

Court rulings have reinforced such master narratives, and harsh societal actions have been justified by them.[59] Many indigenous groups,

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[58] *Id. See* WILLIAMS, DISCOURSES OF CONQUEST, *supra* note 9 (discussing the doctrine of discovery and the master narrative concerning uncivilized Indians that justified confiscation of lands).

Where, for example, cultural-legal controversies about an indigenous group's homeland "rights" are channeled into the legal process and then disposed of consistently on procedural grounds without full story development (discovery), performance (trial) or elaboration (appellate review), a collective story is narrowly shaped and told. The story is that the group not only lacks homeland rights worthy of full institutional consideration; the story is also that the "law" deems the group's own messages about those controversies, its voice, insignificant. Several larger narratives might be supported by these stories. One might be that the legal system is ill-suited for, or at least uncomfortable with, deciding controversies of this type. Resort must be to the purely political branches of state and federal government. Another, and from the group's perspective, more invidious narrative might be subtly supported by these stories: The past is past, and, given the judicially recognized insignificance of these claims, the group's difficulties are probably linked to its own deficiencies and inability to lift itself up by its bootstraps.

In contrast, where an indigenous group is accorded access to the judicial forum and cultural-legal controversies are afforded full opportunity for development, airing and review in the judicial forum, whether cast as traditional or non-traditional rights claims, an indigenous group may look to the court process as part of its larger efforts to tell its story with complexity and humanity. It may use the power of governmental court process to help counter what it perceives to be an inaccurate, harmful prevailing master narrative—to tell a story in a formal institutional setting, for example, that counters the narratives described in the preceding paragraph; to offer a narrative about past cultural destruction and present cultural and economic resurrection and the pivotal role of homelands to actualizing the international human rights principle of self-determination. From this view, described only briefly here, master narratives and counter-narratives are lenses that shape societal perceptions of a group's actions and situations. *See supra* notes 51-55. A court's cultural performances can contribute to reinforcing prevailing narratives or to elevating countering ones. Those performances sometimes aid in the transformation of indigenous peoples' disputes into public messages, discounting or highlighting the perspective, and silencing or enhancing the voice, of the group.

[59] *See* WILLIAMS, DISCOURSES OF CONQUEST, *supra* note 9 (describing the Supreme Court's acceptance of the European doctrine of discovery concerning rights to "dis-

including Native Hawaiians, are now countering master cultural narratives with narratives of their own—not only telling stories of historical and contemporary victimization but also offering normative precepts for future social structural change.[60] These counter-narratives are rooted in history and culture.[61] And they are rooted in law.[62]

There is growing recognition of the power of legal storytelling in the construction of counter-narratives in legal process.[63] Professor Newton describes how "claims stories [by Native Americans], when broken from the dry legal recitation of the facts in the cases and placed in context, reveal powerfully the inadequacies of the dominant group's stories."[64] In this setting, indigenous groups are both asserting rights

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covered" land and the way in which the doctrine legally erased the existence of American Indians). *See also* Rennard Strickland, *Genocide-At-Law: An Historic And Contemporary View Of The Native American Experience*, 34 KAN. L. REV. 713 (1986) (describing legal mechanisms in the 18th and 19th centuries allowing United States citizens to kill American Indians, appropriate their land and destroy tribal culture); Robert A. Williams, Jr., *Documents Of Barbarism: The Contemporary Legacy Of European Racism And Colonialism In The Narrative Traditions Of Federal Indian Law*, 31 ARIZ. L. REV. 237 (1989)

[60] *See supra* note 6 discussing Kealoha v. Hee and its argument for resort to international law to guide the state and federal governments in dispute resolution proceedings involving Native Hawaiians; Frank Pommersheim, *Liberation, Dreams, And Hard Work: An Essay On Tribal Court Jurisprudence*, 1992 WIS. L. REV. 411, 445 ("International law not only provides legal insight into the struggle of indigenous people for voice and recognition, but it also helps to illuminate the constraints on that development which find their roots in certain *foundational* Indian law principles") (emphasis original). *See also* Thorstenson v Cudmore, 18 I.L.R. 6051, 6053 (1991) (in arguing the structural illegitimacy of the Bureau of Indian Affairs role in imposing particular constitutions on tribes, the Cheyenne River Sioux Tribal Court of Appeals carefully detailed how "this [restrictive jurisdictional] oddity in the Cheyenne River Sioux Tribal [Constitution]. . .does not have its roots in any considered decision of the Cheyenne River Sioux people, but rather in some gross B.I.A. oversight or self-imposed legal concern to tread cautiously when potential non-Indian interests are involved"); Pommersheim, *Liberation, Dreams, and Hard Work*, at 430 (describing Thorstenson and the "intrusive role of the Bureau of Indian Affairs in the original drafting and preparation of the tribal constitution").

[61] *See infra* note 279.

[62] *See supra* notes 18 and 279.

[63] *See* Charles Lawrence, III, *The Word And The River: Pedagogy As Scholarship As Struggle*, 65 S. CAL. L. REV. 2231 (1992); Jane Baron, *The Many Promises Of Storytelling In Law*, 23 RUTGERS L. J. 79, 97 (1991) (describing litigators' use of story-telling techniques).

[64] Newton, *Indian Claims*, *supra* note 18, at 760. *See also* Frank Pommersheim, *supra* note 60, at 429 ("Federal Indian law doctrines are grounded in 'stories' of conquest,

claims within narrow and expansive frameworks and rethinking and recasting the "cultural performance" role of federal and state courts.[65] Rethinking and recasting the role of courts for indigenous groups, described below, parallels shifting perceptions of the judicial role in civil rights litigation. It reflects in part the transformation from the civil rights activity of the mid-1960s to what some now call the "post-civil rights" era. Some at one extreme maintain that civil rights struggles are passe. They point to civil rights legislation of the 1960s and 70s and a societal mandate against overt discrimination.[66] They see the roots of current minorities' problems in preference programs, failed victim-oriented economic policies and useless discrimination litigation.[67] Some at the other extreme "trash" civil rights as safety valves controlled by society's dominant interests to relieve momentary pressure from those at the bottom, perpetuating status quo social-power relationships.[68] For them, meaningful social structural change only occurs through radical political action outside the prevailing legal system. Others view civil rights litigation with great caution, taking care not to misperceive judicial "rights" victories necessarily as harbingers of meaningful societal change, and yet viewing legal rights claims as sometimes potent vehicles for outsider challenges to en-

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cultural superiority, and a guardian/ward mentality. Tribal court narratives may seek to unravel such stories that contain a 'mindset' justifying the world as it is with tribal existence beholden to federal benevolence" *Id.* at 429).

[65] *See supra* notes 6, 46, 47, 50 and *infra* note 279 and accompanying text.

[66] Washington v. Davis 426 U.S. 229 (1976) (finding a "racially neutral" test given to police officer applicants which measured verbal ability, vocabulary, and reading comprehension rationally related to the Government's interest in upgrading the communicative skills of its employees. *Id.* at 245). The United States Supreme Court had "difficulty understanding how a law establishing a racially neutral qualification for employment is nevertheless racially discriminatory and denies 'any person . . . equal protection of the laws' simply because a greater proportion of Negroes fail to qualify than members of other racial or ethnic groups." *Id.* at 245.

[67] Thomas Sowell 139 (1984); Shelby Steele, *The New Sovereignty*, HARPERS MAGAZINE, July 1992, pp. 47.; WILLIAM JULIUS WILSON, DECLINING SIGNIFICANCE OF RACE ( ) and THE TRULY DISADVANTAGED: THE INNER CITY, THE UNDERCLASS, AND PUBLIC POLICY (1935).

[68] Richard Delgado, *The Ethereal Scholar: Does Critical Legal Studies Have What Minorities Want?*, 22 HARV. C.R.-C.L. L. REV. 301, 303-04 (1987) (summarizing certain Critical Legal Studies views: "Rights legitimize society's unfair power arrangements, acting like pressure valves to allow only so much injustice. With much fanfare, the powerful periodically distribute rights as proof that the system is fair and just, and then quietly deny rights through narrow construction, nonenforcement, or delay" (footnotes omitted) *Id.* at 303-04).

trenched authority in language that compels explanation and justification—as oppositional cultural practices that can collectivize and express the experiences and visions of outsider groups.[69]

At the risk of oversimplification, the current post-civil rights era in America might thus be generally characterized by a reconceptualizing of the role of rights litigation as part of, rather than as the pinnacle of, political strategies for social structural change; the movement away from principal reliance on narrow judicial remedies toward the additional use of courts as forums for the development and expression of counter-narratives and for the promotion of local empowerment and community control; and a rising importance of state or other local legal forums for hearing outsiders' claims.[70] The post-civil rights era might also be characterized as reflecting a significant tension about values of court process for indigenous peoples—recognizing that indigenous peoples' histories and claims to homelands often fall outside the framework of accepted civil rights principles of non-discrimination and diversity, and yet acknowledging that court challenges and rights claims sometimes help focus issues, illuminate institutional power arrangements, and tell counter-stories in ways that assist larger social-political movements.[71]

For indigenous peoples and established governments, "the times they are a changing."[72] Federal and state courts in the post-civil rights era are facing indigenous peoples' claims cast within dual frameworks. As revealed by Sam Kealoha's challenge to OHA, described in the Prologue, the evolving language of indigenous rights bespeaks both traditional legal claims and claims cast according to customary and international rights norms.[73] And state courts in particular may be, in

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[69] *See* Kimberle Crenshaw, *Race, Reform And Retrenchment: Transformation And Legitimation In Anti-discrimination Law*, 101 HARV. L. REV. 133 (1988).

[70] Mari Matsuda, *Looking To The Bottom: Critical Legal Studies And Reparations*, 22 HARV. C.R.-C.L. L. REV. 323 (1987) (describing "outsider" positioning in law).

[71] *See* John Calmore, *Critical Race Theory, Archie Shepp, And Fire Music: Securing An Authentic Intellectual Life In A Multicultural World*, 65 S. CAL. L. REV. 2129 (1992) (describing a post-civil rights era).

[72] BOB DYLAN, *The Times They Are a Changing*, on HIGHWAY 61 REVISITED (Warner Bros. Inc., 1964).

[73] In 1993, the Hawaii State Legislature acknowledged the relevance of international human rights norms in the preamble to legislation creating the Native Hawaiian Sovereignty Advisory Commission.

> The purpose of this Act is to acknowledge and recognize the unique status the native Hawaiian people bear to the State of Hawaii and to the United States

small but significant ways, faced with the task of transforming themselves in the handling of those multi-dimensional, multi-storied claims. The Hawaii Supreme Court in *Pele* embarked on the beginnings of this task indicating that it would, "in this case, clarify the role of Hawaii's courts in enforcing the terms of the public lands trust."[74] This nascent role transformation lends additional breadth to the setting for our inquiry into court process and Native Hawaiians' right to sue.

III. Native Hawaiians and Federal Court Breach of Trust Actions[75]

The Native Hawaiian federal court breach of trust cases examined here are interrelated. They involve claims by, or on behalf of, the same cultural group against the same institutional defendants. They arise out of the same historical and geographical setting and assert similar legal claims. The federal courts' procedural rulings in these cases are thus appropriately viewed collectively. They are connected culturally through social-historical context. They are connected theoretically through procedural rhetorical constructs that tend to belie value judgments about social relations. And they are connected functionally through the collective guidance they provide to those contemplating future engagement with federal legal process on behalf of Native Hawaiians specifically and America's indigenous peoples generally.

Native Hawaiians looked to the federal courts from the late 1970s through the early 1990s. In varying, though related fashions, Native Hawaiians sought the aid of federal judicial power both to reclaim wrongfully alienated or used Hawaiian Homelands and Ceded Lands and to communicate an emerging narrative about the centrality of those lands to Native Hawaiians' cultural and political resurrection.

> and to facilitate efforts of native Hawaiians to be governed by an indigenous sovereign nation of their own choosing. In the spirit of self-determination and by this Act, the Legislature seeks counsel from the native Hawaiian people on the process of:
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> (1) holding a referendum to determine the will of the native Hawaiian people to call a democratically convened convention for the purpose of achieving consensus on an organic document that will propose the means for native Hawaiians to operate under a government of their own choosing; . . .

1993 Haw. Sess. Laws 359.

[74] *Pele*, 73 Haw. at 591, 837 P.2d at 1257.

[75] Portions of Part III are drawn from substantially the same material to be published by co-author Yamamoto in another law review's article.

The legal claims—governmental breaches of trust. The source of the legal claims—the Statehood Admissions Act,[76] which explicitly recognizes the state's trust obligations to Native Hawaiians concerning management of Hawaiian Homelands and Ceded lands, and the Hawaiian Homes Commission Act (HHCA),[77] which delineates specific state responsibilities for homelands. The cultural claims—restoration of Native Hawaiians socially and economically by enabling them to regain control over the land and, for many, cultural and economic self-determination.[78]

Despite numerous case filings, the federal district courts rarely have reached the "merits" of claims involving governmental breaches of trust or fully explored the relationships in controversy.[79] Furthermore, the federal appellate courts have never affirmed a lower court finding of a trust breach. Native Hawaiians' stories, and the cultural messages underlying their claims, have rarely emerged as part of the courts' cultural performances about those claims.[80] Procedural maneuvers by governmental parties and rulings by the courts eventually blocked avenues for full development and consideration of those Native Hawaiian stories and messages. What follows is a description of those procedural maneuvers and the rhetorical constructs employed, especially

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[76] Admissions Act of March 18, 1959, Pub. L. No. 86-3, 73 Stat. 4 [hereinafter Admissions Act].

[77] 42 Stat. 108, *reprinted in* 1 HAW. REV. STAT. 167-205 (1985, Supp. 1992) [hereinafter HHCA], originally Hawaiian Homes Commission Act of 1920 (Pub. L. No. 67-34, 42 Stat. 108 (1921)).

[78] *See supra* notes 35, 36 and 40 and accompanying text. *See also* Friedman, *supra* note 37, at 526. Friedman observes:

> Native Hawaiian dignity, health, and cultural survival cannot be secured through the existing trust mechanisms. Even if the trusts functioned perfectly, state or federal government ownership and control of indigenous peoples' lands presents insoluble philosophical problems. As a first step Native Hawaiians should recover a land base, where Hawaiian self-governance would be recognized by the state and federal governments. Ultimately, they should be accorded a measure of self-determination. Native Hawaiians must be permitted to pursue the greater good of their community in their own time-tested and unique way(emphasis omitted) (citations omitted).

Id. at 526.

[79] In one instance a federal district court found a breach of trust. That decision was reversed on appeal for procedural reasons. *See infra* notes 82-101 and accompanying text.

[80] *See supra* notes 44-65 and accompanying text (concerning courts' cultural performances).

by the federal appellate courts, in reshaping the Native Hawaiian land trust controversies.

Federalism and separation of powers concerns often undergird procedural rulings that appear to demonstrate federal court reluctance to regulate state government affairs. As developed below, however, the federal courts' apparent resistance to Native Hawaiian breach of trust claims seems to extend deeper than ordinary federalism concerns about the role of federal courts.[81]

The Ninth Circuit's sweeping, largely a-contextual subject matter jurisdiction rulings erected initial barriers with long-term social consequences. The foundational case is *Keaukaha-Panaewa Community Ass'n v. Hawaiian Homes Commission*[82] (*Keaukaha I*). This Ninth Circuit opinion is discussed at some length because it sets the tone and establishes the rhetorical framework for decisions that followed.

Keaukaha I said next to nothing about the actual controversy. The opinion recited the following story. The Hawaiian Homes Commission and the County of Hawaii agreed to exchange county lands for trust lands the county needed for a flood-control project. The Hawaiian Homes Commission transferred title to twenty acres of Homelands and received nothing in return. The Keaukaha-Panaewa Community Association sued the Commission, alleging breaches of trust under the Homelands Act and the Admissions Act. Beyond doubt, and the district court so found, the Commission had violated its obligations under both acts.[83]

The Ninth Circuit reversed without considering the merits of the Community Association's claims. First, it ruled that the federal courts lacked subject matter jurisdiction over claims under the federal Homelands Act. Despite the Act's wholly federal origins and continuing federal oversight of the Homelands Trust, the court ruled that the Community Association's claims did not "arise under" federal law.[84] The court stated that, when Hawai'i acquired principal trust administration responsibility upon statehood, the rights created under the Homelands Act lost their federal "nature."[85] The "facts make it clear

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[81] *See infra* notes 102-122, 147-162 and accompanying text for a discussion about federal courts jurisprudential concerns.

[82] 588 F.2d 1216 (9th Cir. 1978).

[83] Keaukaha-Panaewa Community Ass'n v. Hawaiian Homes Commission, Civ. No. 75-0260 (D. Haw., Sept. 1, 1976).

[84] *Keaukaha I*, 588 F.2d at 1226-27, n. 11.

[85] *Id.* at 1226 (emphasis omitted).

that the rights plaintiffs seek to vindicate are state rights by nature . . ." and might thus be "most appropriate for Hawaii's laws and judicial system to deal with."[86] The court ignored the historical and continuing relationships of the United States and Native Hawaiians when it found that "facts . . . made it clear that only state rights by nature" were involved.[87]

Congress enacted the Homelands Act to return Native Hawaiians to land illegally obtained by the United States. The legislation generated a homelands base and established a federal program for administration. The program was dreadfully administered.[88] As a condition of statehood in 1959, Hawai'i incorporated the federal Homelands Act into its constitution, received title to the Homelands in trust, and assumed trust management responsibilities. The United States retained trust enforcement and program supervisory responsibilities,[89] requiring, among other things, federal approval of certain state amendments to the Homelands Act. The original federal Homelands Act has not been repealed.[90] The court nevertheless found it "clear" that legal process barred consideration of the Community Associations' claims under the Homelands Act.[91]

Next, the court held that although the Community Association's claims arose under the federal Admissions Act,[92] triggering federal court jurisdiction, the Association could not maintain those claims.[93] The Admissions Act, the court said, did not imply a private right of action in favor of trust beneficiaries.[94] The Admissions Act authorizes the United States to sue to enforce state trust obligations.[95] It is silent as to enforcement by trust beneficiaries.

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[86] *Id.* at 1227 (emphasis omitted).

[87] *Id.*

[88] *See, e.g.*, A BROKEN TRUST, *supra* note 35, at 43.

[89] Admission Act §§ 4 & 5.

[90] The original Act was deleted from the United States Code, but was never repealed by Congress.

[91] *See also* Price v. Hawaii, 764 F.2d 623 (9th Cir. 1985) (*Price I*) (self-described Native Hawaiian tribe lacks status as an "Indian tribe or band with a governing body recognized by the Secretary of the Interior" to trigger federal subject matter jurisdiction under 28 U.S.C. § 1362. *Id.* at 626).

[92] *Keaukaha* I, 588 F. 2d at 1220 (citing Admissions Act § 5(f)).

[93] *Id.*

[94] *Id.* at 631.

[95] Keaukaha-Panaewa Community Association v. Hawaiian Homes Commission, 739 F.2d 1467 (9th Cir. 1984).

The court tortuously justified its "no-right-to-sue" conclusion. It did so largely by resort to a sterile principle of statutory interpretation—*expressio unius est exclusio alterius*, or what is expressly provided for in legislation negatives what is not included.[96] That principle, taken literally, means that a court can never construe a statute with specific provisions to imply anything. The Ninth Circuit panel found that principle to reflect a "presumption" against private enforcement actions, while struggling to distinguish a recent Supreme Court decision[97] undermining its analytical approach.

The court also distinguished in a brief footnote a seemingly controlling Supreme Court case and a series of its own cases that established the "co-plaintiff" doctrine in Native American trust cases.[98] That doctrine enables trust beneficiaries to sue for trust enforcement of a federally-created trust where the United States, the designated enforcer, fails to do so.[99]

Most revealing, in foreclosing private enforcement of breach of trust claims, the court appeared to contradict itself on critical points. It first

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Section 4 of the Admissions Act provides that:

> [a]s 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 and repeal only with the consent of the United States and in no other manner.

Admission Act of March 18, 1959, Pub. L. No. 86-3, § 4, 73 Stat. 4 (1959).

[96] 588 F.2d at 1221.

[97] Cort v. Ash, 422 U.S. 66 (1975) undermined Keaukaha I's reliance upon National Railroad Passenger Corp. v. National Association of Railroad Passengers, 414 U.S. 453 (1974), as the basis for its presumption against implied rights of action absent specific evidence of legislative intent to create such implied rights. In *Cort*, the Supreme Court signaled the opposite presumption concerning legislative intent—a presumption in favor of an implied right of action absent legislative intent to the contrary. 422 U.S. at 82-83 n.14. The Ninth Circuit in *Keaukaha I* did not reconcile the analytical approach it adopted concerning legislative intent with the contrary directive of *Cort*, stating only "[w]hatever the impact of *Cort* may be. . ." 588 F.2d at 1222. The court also acknowledged the significance of the "general scheme and purposes" of the Admissions Act but failed to address them in social-historical context. *Id.* at 1224.

[98] *Id.* at n. 7.

[99] *See, e.g.*, Agua Caliente Band of Mission Indians v. County of Riverside, 442 F.2d 1184, 1186 (9th Cir. 1971), *cert. denied*, 405 U.S. 933 (1972) ("An Indian, as the beneficial owner of lands held by the United States in trust has a right acting independently of the United States to sue to protect his property interest," *id.* at 1186, relying on Poafpybitty v. Skelly Oil Co., 390 U.S. 365, 369 (1968) (the purposes of the trust "would be frustrated unless both the Indian and the United States were empowered to seek judicial relief to protect" the trust. *Id.* at 369)).

found Homelands Trust enforcement to be "purely" a state matter, thereby depriving the federal court of jurisdiction under the Homelands Act.[100] It later focused on the Admissions Act's designation of the federal government as sole trust enforcer, thereby precluding private enforcement actions by Native Hawaiian beneficiaries.[101]

In sum, the Ninth Circuit found no federal jurisdiction to consider Native Hawaiian breach of trust claims under the Homelands Act, even though that statute arguably conferred private enforcement power upon trust beneficiaries. It then found federal jurisdiction to consider those Native Hawaiian claims under the Admissions Act, but found no private right of enforcement by beneficiaries under the same statute. Catch 22. Native Hawaiian Homeland claims dismissed without further discussion.

Of special significance, the Ninth Circuit sharply rephrased this and future Homelands controversies. It did so quietly by casting its rulings in the language of process and ignoring, implicitly as irrelevant, the likely sweeping practical, political and cultural consequences.

Practically, the court's rulings left Native Hawaiians without any available legal forum despite, as the district court had found, clear trust violations, the loss of additional trust land, and the continuing harm to the 20,000 Native Hawaiians on the Homelands waiting list.[102] Politically, the court's subject matter jurisdiction ruling ("no federal involvement") laid the foundation for the United States' sharp retreat

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[100] *Keaukaha I*, 588 F.2d at 1224.

[101] *Id.*

[102] In Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978), the United States Supreme Court held that federal courts could not imply a private right of action under the Indian Civil Rights Act, 25 U.S.C. §§ 1301-1303 (1982). *Id.* at 72. A Pueblo woman and her daughter challenged the Santa Clara Pueblo's gender discriminatory membership ordinance on equal protection grounds under the Act, which provided no express private federal right of action. The Court declined to imply a right of action in deference to Congress' policy of sovereignty for and self-government by Native American tribes. 436 U.S. at 62-64. The *Santa Clara Pueblo* case raises significant issues about the role of federal courts and "how the United States' government conceives of its citizens as holding simultaneous membership in two political entities." Judith Resnik, *Dependent Sovereigns: Indian Tribes, States, And The Federal Courts*, 56 U. CHI. L. REV. 671, 673 (1989). *See also* Robert Laurence, *Thurgood Marshall's Indian Law Opinions*, 27 HOWARD L. J. 3 (1984). *Keaukaha I* apparently did not rely on *Santa Clara Pueblo* because Native Hawaiians have not been recognized by Congress as a self-governing entity and because, unlike the Santa Clara Pueblo who had a recognized tribal court system, Native Hawaiians had at the time no other available legal forum (state or "tribal") in which to bring their claims.

on Native Hawaiian matters: former President Bush's administration later relied on *Keaukaha I* to disavow any current federal trust obligations to Native Hawaiians under the Homelands Act[103] and, ultimately, to challenge the legality of federal funds and programs for Native Hawaiians.[104]

Culturally, the court's procedural rulings scripted out of existence the identity, struggles and messages of the people of the Keaukaha Community Association. The court's opinion said nothing about those Native Hawaiians concentrated in one economically struggling area of Hilo, Hawai'i, attempting to survive and preserve a culture and a community without adequate available land and housing despite designated Homelands in the area, unoccupied by Native Hawaiians. It said nothing about the spiritual harm arising from the county's use of Hawaiian Homelands amidst the Keaukaha-Panaewa community for a major flood drainage project to protect the non-Homelands property

[103] Just hours before the expiration of the Bush Administration's tenure, the Department of the Interior issued a formal opinion declaring that the United States owed no trust responsibility to Native Hawaiians. *See* Thomas L. Sansonetti, Solicitor, United States Department of the Interior, Memorandum: The Scope of Federal Responsibility For Native Hawaiians Under The Hawaiian Homes Commission Act 3 (Jan. 19, 1994); A Broken Trust, *supra* note 35, at 9-11. The Department of the Interior recently rescinded that earlier opinion. The Clinton administration's views are not as yet clearly articulated.

[104] The Justice Department, during former President Bush's administration, declared that special federal program funding for Native Hawaiians constituted an illegal "racial" preference. This declaration rested upon the administration's position that the federal government owed no trust responsibility to Native Hawaiians. Morton v. Mancari, 417 U.S. 535 (1974), upheld the constitutionality of Congressional legislation favoring Native Americans because of the trust relationship between the United States and the Native American beneficiaries of the legislation. If, as the Hawaii federal district court held in Han v. Department of Justice, 824 F. Supp. 1480 (D. Haw. 1993) (on appeal), the federal government owes no trust obligations to Native Hawaiians, then Morton v. Mancari is inapplicable and, according to the Justice Department, federal programs for Native Hawaiians may be constitutionally vulnerable. The pillar in this syllogism is the Han case. Its key holding of "no federal trust responsibility," however, is seemingly contradicted by the Hawaii federal district court's earlier ruling in Naliielua v. State of Hawaii, 795 F. Supp. 1009, 1012-13 (D. Haw. 1990), *aff'd* (mem.), 940 F.2d. 1535 (9th Cir. 1991), which upheld the constitutionality of the Hawaiian Homes Commission Act, citing Morton v. Mancari.

The resolution of this apparent puzzle will have significant social and political consequences. However it is resolved, one aspect of it is clear: *Keaukaha I's* procedural ruling concerning subject matter jurisdiction provided the foundational building block for the Bush administration's substantive position.

of others. It said nothing about Native Hawaiians' intensifying resentment toward those viewing Native Hawaiians as second-rate citizens in their homeland and nothing about the growing sentiment among many Native Hawaiians about the need to gain control of Homelands and the Homelands program. That kind of resentment and sentiment gave rise to one of the incidents described in the Prologue—Aupuni O Hawai'i's recent angry confrontation over the Department of Hawaiian Homelands continued lease of Homelands for a shopping mall just one mile from the Keaukaha area.[105] What the court's *Keaukaha I* opinion did say, in effect, reinforced a master socio-legal narrative about Native Hawaiians: Native Hawaiian claims concerning the land trusts debacle are unworthy of federal consideration, even though the United States participated in the overthrow of the sovereign Hawaiian government and later created trust rights as a partial response, even though the State in important ways continues to breach its inherited Homelands trust obligations, and even though no other forums exist to enforce Native Hawaiian land trust rights.[106]

After remand of *Keaukaha I* to the district court, but before dismissal, the Community Association sought to amend its complaint to assert a federal section 1983 civil rights claim against Hawaiian Homes Commission officials, relying on an intervening Supreme Court decision.[107]

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[105] That confrontation in the fall of 1993 occurred less than a mile from the Keaukaha homestead area. As described in the Prologue, Aupuni O' Hawai'i led a protest of 120 Hawaiians by holding a demonstration in the Prince Kuhio Plaza shopping mall in Hilo. The group protested the Department of Hawaiian Homelands' lease of a prime 39-acre Homelands site to a private business while many Native Hawaiians in the area still awaited homestead lot awards. The demonstration turned into a physical confrontation when police arrived to arrest demonstrators for trespassing. Hugh Clark, *Police Seize 25 in Hilo Protest: Hawaiian Confrontation at the Mall*, HONOLULU ADVERTISER, October 6, 1993, p. A-1. *See generally*, Davianna McGregor-Alegado, *Hawaiians: Organizing In The 1970s*, 7 AMERASIA J. 229 (1980) (describing dynamics of political organizing in Hawaiian communities).

[106] *See* Newton, *Indian Claims, supra* note 18 at 765-768. Professor Newton describes the federal government's complicity in efforts by the State of Georgia to "destroy the Cherokee Nation" and then later in efforts by the new State of Oklahoma to deprive the Cherokee Nation of valuable tribal lands held in trust by the United States. The Cherokee Tribe filed suit in 1990 against the federal government in Claims Court for "breach of fiduciary duty by mismanagement and nonfeasance." Reminiscent of *Keaukaha I*, the court dismissed the principal claims on jurisdictional grounds without reaching the merits or fully addressing the historical-cultural context of the claims. Cherokee Nation v. United States, No. 218-89L, (Cl. Ct. Mar. 5, 1992).

[107] Maine v. Thiboutot, 448 U.S. 1 (1980) (allowing a section 1983 action for

The district court allowed the amendment and nevertheless dismissed the complaint for lack of subject matter jurisdiction. On appeal, the Ninth Circuit in *Keaukaha II* reversed.[108] Judge Schroeder's opinion provided an initial glimmer of possibility for Native Hawaiians. The opinion acknowledged that the "trust obligation is rooted in federal law, and power to enforce that obligation is contained in federal law."[109] At seeming odds with *Keaukaha I*, it concluded that Congress did not in the Admissions Act itself foreclose private civil rights actions seeking injunctive relief to enforce the Act's trust provisions.[110] Subsequent Native Hawaiian section 1983 claims have relied upon *Keaukaha II*.[111]

Keaukaha II's apparent strength—its specific declaration and its short, precedent-based opinion—is also its weakness. Like *Keaukaha I*, the case essentially adopted an a-historical frame of analysis and narrowly employed a-contextual language of process to reach its result. In locating Native Hawaiian claims within a civil rights framework, *Keaukaha II* acknowledged neither the compelling historical and socio-cultural bases for Native Hawaiians land claims nor the on-going political struggle among Native Hawaiians, the state Homelands Commission and the United States concerning control over and responsibility for Homelands. Nor did the opinion recognize the failure of traditional civil rights discourse — addressing inequality of treatment of minority racial groups — to capture the self-determination and nationalism underpinnings of native peoples' homelands claims. Finally, the opinion did not address the manner in which the type of requested relief would limit the availability of section 1983 civil rights claims for Native Hawaiians.

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deprivation of a federal statutory right despite the statute's silence about a private cause of action). *Cf.* Pennhurst State Sch. and Hosp. v. Halderman, 451 U.S. 1 (1981) and Middlessex County, Sewerage Auth. v. National Sea Clammers Association, 453 U.S. 1 (1981).

[108] Keaukaha-Panaewa Community Ass'n v. Hawaiian Homes Comm'n, 739 F.2d 1467 (9th Cir. 1984) [*Keaukaha II*]. In 1984 the Ninth Circuit also reversed the district court's dismissal of a Native Hawaiian suit on qualified immunity grounds. Hoohuli v. Ariyoshi, 741 F.2d 1169 (9th Cir. 1984).

[109] 739 F.2d at 1472.

[110] *Id.* at 1471 (holding that the statute provides only for public enforcement, and this alone does not foreclose private enforcement pursuant to 42 U.S.C. § 1983).

[111] *See* Ulaleo v. Paty, 902 F.2d 1395 (9th Cir. 1990); Price v. Akaka, 3 F.3d 1220 (9th Cir. 1993) ("Akaka II"); *Price I*, 764 F.2d 623, 629 (9th Cir. 1985) (viewing § 5(f) of the federal Admissions Act as the "compact" between the United States and the State of Hawai'i giving rise to the State's trust responsibilities); *cf.* Price v. Akaka, 928 F.2d 824, 826 n.1 (9th Cir. 1990), *cert. denied*, 112 S.Ct. 436 (1991) ("Akaka I") (citing § 4 of the Hawaiian Homes Commission Act as the compact).

Keaukaha II's court access implications have been directly and indirectly whittled into oblivion. Sharp limitations on naming defendant parties, remedies, the timing of suit and the re-adjudication of administratively-found facts have blocked Native Hawaiian section 1983 civil rights claim development and presentation at practically every turn.[112] The procedural dismantling of *Keaukaha II* is reflected in the fact that since the decision ten years ago no appellate opinion has reported on the merits of a Native Hawaiian civil rights breach of trust claim. The ostensibly neutral rhetoric of legal process has enabled the courts to adopt or employ restrictive procedural rules while foregoing meaningful analysis of the content of Native Hawaiian claims and their cultural context as well as the likely social impacts of court rulings.[113]

Ulaleo v. Paty[114] is illustrative. There, the Ninth Circuit dismissed a Native Hawaiian's section 1983 civil rights suit seeking the return of trust land allegedly transfered improperly to a private geothermal power company for development in ways that desecrated Native Hawaiian religious beliefs. The suit also sought the establishment of procedures for future land transfers. The court announced that the Eleventh Amendment "bars citizen suits [in federal courts] against states, institutional arms of the state, and state officials in their official capacity when the relief requested is *retrospective* in nature."[115] The court then, in excruciating fashion, defined the type of federal court "retrospective" relief disallowed under section 1983.

Twisting a 1986 Supreme Court decision,[116] the court ruled that since the government officials' action complained of—the land transfer—occurred in the past, Ulaleo's injunctive relief request was retrospective "in nature" and therefore barred.[117] Injunctive relief is prospective only if it prevents or stops on-going legal violations by governmental officials and therefore does not possibly entail the re-

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[112] *See infra* notes 114-149 and accompanying text.

[113] *See* ROBERT COVER AND OWEN FISS, THE STRUCTURE OF PROCEDURE (1976) (discussing "substance-sensitive" procedure and the ways in which procedure impacts upon the social relationships and substantive norms in controversy); Yamamoto, *Efficiency's Threat*, *supra* note 19, at 396-398 (discussing "procedural neutrality" and the use of procedure as an "instrument of power").

[114] 902 F.2d 1395 (9th Cir. 1990).

[115] *Id.* at 1398.

[116] *Papasan v. Allain*, 478 U.S. 265, at 279 (1986). *See infra* notes 220-224 and accompanying text for a description and brief discussion of this case.

[117] *Ulaleo*, 902 F.2d at 1400.

medial expenditure of public funds.[118] The court declined to characterize Ulaleo's requested injunction as relief to stop an "ongoing violation,"[119] even though the officials' initial wrongful action in transferring land and continuing inaction in refusing to recover it meant for trust beneficiaries' ongoing deprivation. Viewed most restrictively, the court deemed "retrospective," and impermissible, all possible relief addressed to administrative decisions already made.[120]

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[118] *Id.* at 1399.

[119] The court appeared to rely rigidly on a pleading rule that is supposed to be liberally construed, indicating that Ulaleo's complaint had not specifically stated that the requested injunction sought to stop an on-going trust violation. *Id.* at 1400.

[120] Whether *Ulaleo*'s holding will be consistently viewed and applied in a restrictive fashion in the future is an open question. *See* KARL LEWELLYN, THE BRAMBLE BUSH (4th prtg. 1973) (describing how a case holding can be construed narrowly or broadly depending on the circumstances of the case to which it is being applied and the vantage point of the decisionmakers in the subsequent case). *Ulaleo* itself recognized that the distinction between retrospective and prospective relief is not always clear. 902 F.2d at 1399 (relying on Edelman v. Jordan 415 U.S. at 667).

The Hawaii federal district court's most recent ruling, in Han v. Dept. of Justice, 824 F. Supp. 1480 (D. Haw. 1993), reflects a restrictive application of *Ulaleo*. *See supra* notes 104-14 and accompanying text. Napeahi v. Paty, 921 F.2d 897 (9th Cir. 1990) appears to present a more expansive application. In *Napeahi*, the plaintiff claimed that the State had breached its duty under the Ceded Lands trust by certifying a shoreline boundary that appeared to create private land out of Ceded Land. *Id.* at 898. Plaintiff's complaint sought "injunctive and declaratory remedies." *Id.* at 899. Finding an inadequate record on which to rule, the Ninth Circuit remanded to the district court for further findings.

On remand, the State raised numerous procedural objections. In its Motion to Dismiss or For Entry of Judgment the State argued, among other things, that *Ulaleo*'s Eleventh Amendment immunity holding required dismissal of *Napeahi*. In both cases, there was a loss of land due to the action of a state official. The main issue, according to the State, was "when" the state violated its trust duty. In *Napeahi*, the State argued, the State violated its trust obligations, if at all, in the past. The relief sought by plaintiff was to restore the trust corpus—impermissible retrospective relief. Memorandum in Support of Motion for Dismissal or Entry of Judgment After Remand, or, In the Alternative, for 28 U.S.C. section 1292(B) Certification at 19-22, Napeahi v. Paty, No. 85-1523 (D. Haw. Sept. 8, 1992). The district court rejected the State's argument. According to the court, the proper focus under *Ulaleo* was not necessarily when the alleged breach occurred, but whether the relief sought is prospective or retrospective. Order at 9. *Ulaleo* had determined that the relief sought there would have required the use of state funds to replenish the trust, which, the district court agreed, was a forbidden retrospective relief. By contrast, in *Napeahi* the relief sought was an injunction to force the state to attempt to recover the property through initiation of a lawsuit against the private property owner — prospective relief even though the State would have to pay the costs of the lawsuit. Order at 9-10. The district court's fine distinctions

In practical doctrinal effect, the Ninth Circuit's *Ulaleo* ruling and supporting ruling in *Price v. State of Hawaii*[121] all but closed the door *Keaukaha II* cracked opened. *Keaukaha II* allowed section 1983 civil rights actions asserting breaches of trust by state officials. *Ulaleo* implied that once state officials have acted, any possible legal relief for Native Hawaiians will be deemed retrospective in nature and therefore beyond the permissible bounds of the Eleventh Amendment.

Viewed in this restrictive fashion, the procedural labyrinth created by *Keaukaha I and II* and *Ulaleo* left two procedural options for Native Hawaiians. Those options, however, appear to be available in theory and largely illusory in practice. One remaining option is filing a federal section 1983 suit before official state action, seeking prospective injunctive relief. That option, however, runs headlong, in most instances, into the ripeness doctrine.[122] In addition, since many administrative

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in *Han* and *Napeahi*, in an effort to wrestle with the restrictive implications of *Ulaleo*, are difficult to reconcile and operationalize.

[121] 921 F.2d 950 (9th Cir. 1990) ("Price II"). Although the relief sought in *Price II*—a declaration that the State was to be held to the high fiduciary standard of a private trustee in managing the ceded lands trust—was deemed by the court to be prospective in nature, *Price* agreed with *Ulaleo* that had the relief been retrospective, suit would have been barred. *Id.* at 958 n.4. *See also* Price v. Hawaii, 939 F.2d 702, 706 (9th Cir. 1991) ("Price III") (citing *Ulaleo*, 902 F.2d at 1398-1400, for the proposition that a suit seeking retrospective relief against state officials in their official capacity is barred by the Eleventh Amendment).

Price II also recognized another barrier to federal breach of trust suits against state officials—qualified immunity. State officials sued in their individual capacities for damages must be shown to have acted in bad faith. Officials performing "discretionary functions . . . are entitled to qualified immunity if their conduct 'does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.'" 921 F.2d at 958 (quoting Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982)). *Price II* determined that where defendant officials' alleged trust breach was based on an obligation not reasonably known at the time, the officials were entitled to immunity. *Id.* at 959. *See also* Akaka I, 928 F.2d 824, 828 (section 1983 action against state officials in their *individual* capacity is not barred by the Eleventh Amendment but is limited by doctrine of qualified immunity); Akaka II, 3 F.3d at 1220.

[122] Even though section 1983 does not require an exhaustion of administrative remedies, the ripeness doctrine and the Constitution's case or controversy requirement pose substantial hurdles to pre-agency-action filing. Edwards v. District of Columbia, 628 F. Supp. 333 (D.D.C. 1985). One argument for circumventing the ripeness hurdle exists where it can be shown that the state has engaged in a general repeated practice applicable to a class of similar actions. In that instance a declaratory relief challenge could be launched before agency action, not on grounds of likely improper agency assessment of facts, but on grounds of the agency's erroneous view of its legal obligations underlying its pattern of decisionmaking. *See generally* Joint Tribal Council of the Passamaquoddy Tribe v. Morton, 528 F.2d 370 (1st Cir. 1975).

actions are taken without or with minimal prior community notice, there is often little time for community organization of a prior legal challenge. Catch 22 again.

A second option, in the relatively rare event of a trial-type agency hearing, is filing suit and seeking prospective relief after agency adjudication but before agency action on its decision. This option, too, is illusory. *University of Tennessee v. Elliott*[123] held that determinations of factual issues by a state agency acting in a quasi-judicial capacity—even determinations unreviewed by a state court—preclude relitigation of those issues in a subsequent federal section 1983 suit.[124] The recently-adopted administrative estoppel doctrine precludes federal court adjudication as long as the party estopped from litigating had an adequate opportunity to litigate before the agency.[125] Thus, under that estoppel doctrine, the unsuccessful assertion of breach of trust claims in the administrative hearing process is likely to foreclose the one legal vehicle available to Native Hawaiians after the *Keaukaha* cases—the federal court section 1983 action for prospective relief.[126]

The apparent procedural dead-ends created by these labyrinthine rulings are buttressed by other federal court rulings in Native Hawaiian cases. For example, in *Price I*, the court rejected a Native Hawaiian

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[123] 478 U.S. 788 (1986).

[124] *Id.* at 799.

[125] *Id.* See also Butler v. City of North Little Rock, Arkansas, 980 F.2d 501 (8th Cir. 1992) (res judicata precludes litigation of a section 1983 racial discrimination claim even though Civil Service Commission excluded evidence of discrimination at the hearing since additional evidence might have been offered during appeal to state court). *Cf.* Astoria Federal Savings and Loan Ass'n v. Solimino, 501 U.S. 104 (1991) (qualifying *Elliot* and holding agency estoppel doctrine inapplicable where Age Discrimination Act scheme plainly contemplated federal suit after agency action).

[126] A slim additional option for Native Hawaiians seeking entree into federal court is to not participate in a trial-type administrative hearing, in the rare event one occurs, and file suit after agency decision but before agency enforcement action. This tact's disadvantages are several. By not participating, Native Hawaiians give up their first and most direct chance to influence the original decision and collectively confront frontline public decisionmakers. And suit might still be blocked. The federal court might well conclude that since the agency already "decided," the relief sought is still impermissibly retrospective. Or the court might apply the "virtual representation" doctrine to preclude litigation by the second suit's plaintiff even though she was not party to the first action, as long as her interests were virtually represented in the prior proceeding. *See* MacArthur v. Scott, 113 U.S. 340 (1985); Los Angeles Branch NAACP v. Los Angeles Unified Sch. Dist., 750 F.2d 731 (9th Cir. 1984) (virtual representation doctrine).

group's standing as a Native American tribe to invoke the jurisdictional reach of 28 U.S.C. § 1362.[127] In *Price II*, the federal district court imposed sanctions for frivolous filings by Native Hawaiians.[128] In another case, the court relied upon the political question doctrine to block a Native Hawaiian challenge to Ceded Lands revenue allocations.[129] In the only state suit against the United States for recovery of federally misappropriated Homelands, the court denied the state claims as time-barred.[130] The court also dismissed one case for failure to join indispensable parties and cited the Eleventh Amendment to preclude section 1983 breach of trust actions against state agencies in another.[131]

In each of these cases, the courts' "cultural performance" transformed the controversy, rephrasing Native Hawaiian claims about physical and spiritual harm to real cultural communities arising out of particularized breaches of fiduciary duty and systemic land trust failure into technical questions of jurisdiction, indispensable parties, remedy limitations and the like. The rhetorical framework of procedural neutrality established by those collective rulings largely silenced Native Hawaiian stories about culture destruction through collective separation from the land and about future Native Hawaiian self-determination

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[127] *Price I*, 764 F.2d 623 (9th Cir. 1985) (court disallowed "tribal" jurisdiction under section 1362 because the Hou Hawaiians group did not meet statutorily prescribed criteria).

[128] The district court in *Price II* imposed sanctions upon plaintiffs' counsel after denying plaintiffs' motion for reconsideration, 921 F.2d 950, 958 n.3 (9th Cir. 1990) (repetitive filing without clear grounds).

[129] Price v. Ariyoshi, Civ. No. 85-1189 (D. Haw. Feb. 23, 1987), Order Granting Defendants' Motion to Dismiss, at 6-8 (dismissing challenge to allocation of only 20 percent of Ceded Lands revenues for the benefit of Native Hawaiians, observing "[a]ny recommendation for change must be addressed solely to the Hawaii legislature"); *see also* Trustees of the Office of Hawaiian Affairs v. Yamasaki, 69 Haw. 154, 737 P.2d 446 (1987) (political question doctrine applied by Hawaii Supreme Court).

[130] Hawaii v. United States, 676 F. Supp. 1024 (D. Haw. 1988), 866 F.2d 313 (9th Cir. 1989) (claim under Quiet Title Act time barred). It would seem, however, that an action in Claims Court under the Tucker Act for prospective rents might not be time barred. The argument would be that the United State's continued possession and use of the trust asset constitutes a continuing trust breach that in effect tolls the state of limitations.. One problem with this argument is that the plaintiff State might be deemed to have split its cause of action in the initial litigation and therefore have its Tucker Act claim barred under the doctrine of res judicata.

[131] Ulaleo v. Paty, No. 88-00320 (D. Haw. 1988) (dismissing on the ground of a FED. R. CIV. P. 19 failure to join indispensable parties, among other grounds); Hoohuli v. Ariyoshi, 741 F.2d 1169, 1173 (9th Cir. 1984) (applying established section 1983 principles in precluding suit against state agencies).

through control of the trusts land base. That framework also quietly distanced the United States from its historical role and legal obligations. Not one reported opinion in the numerous Native Hawaiian federal breach of trust cases fully reached these stories of power and culture. In short, the courts' cultural performances rescripted Native Hawaiians' phrasing of their claims and thereby eviscerated the stories giving life to those claims.

The story of Native Hawaiians in federal court continues. Recent United States Supreme Court cases may permanently close the remaining crack in the courthouse door. According to arguments by the Hawaii Attorney General in recent cases, *Suter v. Artist M.*[132] forecloses Native Hawaiian section 1983 civil rights claims under the Admissions Act, and *Lujan v. Defenders of Wildlife*[133] deprives Native Hawaiian plaintiffs of standing to sue for breaches of trust.[134]

In *Price v. Akaka*[135] ("*Akaka II*"), the federal district court rejected the State's *Suter* argument.[136] On interlocutory appeal, the Ninth Circuit

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[132] 112 S. Ct. 1360, 118 L. Ed.2d 1 (1992).

[133] 112 S. Ct. 2130, 119 L. Ed.2d 351 (1992).

[134] *Suter* involved a section of the federal Adoption Assistance and Child Welfare Act of 1980. That Act made a state eligible for reimbursement of certain foster care expenses if the state submitted a plan to the Secretary of Health and Human Services which provided that "reasonable efforts" would be made to keep children in their homes and to facilitate reunification of separated families. Plaintiffs, beneficiaries under the Act, filed a class action seeking declaratory and injunctive relief, claiming the state of Illinois failed to make the requisite "reasonable efforts." Federal jurisdiction was premised on section 1983 and on an implied right of action under the federal Adoption Act. Both the district court and court of appeals found federal subject matter jurisdiction.

The Supreme Court reversed. Ignoring its established section 1983 framework of analysis, the Court announced a new approach. Whether plaintiffs could bring a section 1983 claim against state officials to enforce the Adoption Act turned upon one question: "Did Congress, in enacting the Adoption Act, unambiguously confer upon the child beneficiaries of the Act a right to enforce the requirement that the State make 'reasonable efforts' to prevent a child from being removed from his home, and once removed to reunify the child with his family?" *Id.* at 1367. The *Suter* majority deemed irrelevant its acknowledgement that the Adoption Act "may not provide a comprehensive enforcement mechanism so as to manifest Congress' intent to foreclose (private) remedies under section 1983." *Id.* at 1368. The Court focused on the opportunity for public enforcement. The term "reasonable efforts" in this context is "at least as plausibly read to impose only a rather generalized duty on the State, to be enforced not by private individuals, but by the Secretary." *Id.* at 1370.

[135] 3 F.3d 1220 (9th Cir. 1993).

[136] Order Granting in Part and Denying in Part Motion for Judgment on the

affirmed, observing that *Keaukaha II* and *Akaka I* were not inconsistent with *Suter*. The court maintained a slim crack in the federal courthouse door for Native Hawaiians, holding that the Admissions Act is a federal public trust "which by its nature creates a federally enforceable right for its beneficiaries to maintain an action [section 1983] against the trustee in breach of the trust."[137]

The State in its subsequent brief in the pending *Han v. Department of Justice*[138] appeal nevertheless continued to argue that *Suter* overruled *Keaukaha II*, asserting that *Akaka II* was restricted from overruling *Keaukaha II* by the law of the case doctrine and therefore made no *de novo* determination on the impact of *Suter*.[139] Thus, despite several rulings, an air of uncertainty still surrounds the one federal jurisdictional avenue available to Native Hawaiians to enforce trust obligations.

Additional uncertainty surrounds the issue of Native Hawaiian standing.[140] The State recently argued that, based on *Lujan*, Native Hawaiians lack federal court standing to challenge improper uses of trust

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Pleadings or in the Alternative for Summary Judgment, Price v. Akaka, No. 88-773 (D.Haw. June 12, 1992), at 10. "[I]n the absence of an overruling of prior precedent, this court cannot disregard the Ninth Circuit's ruling in *Keaukaha II*, and the direct mandate to this court that plaintiffs in this case have stated a claim under § 5(f) of the Admission Act that is enforceable via § 1983." The State raised the same *Suter* argument in its Memorandum in Support of Motion for Dismissal or Entry of Judgment After Remand, or, in the Alternative, For 28 U.S.C. § 1292(B) Certification, in Napeahi v. Paty, No. 85-1523 (D. Haw. filed Oct. 26, 1992). The district court there also rejected the State's claim that *Suter* overruled *Keaukaha II*. Noting that *Suter* did not apply the same test that had been used in earlier decisions, the court stated that *Suter* did not overrule the old test, and was in harmony with that test.

[137] *Id.* at 1225.

[138] 824 F. Supp. 1480 (D. Haw. 1993) (appeal pending). *See supra* note 120.

[139] Respondents Answering Brief, Han v. Department of Justice.

[140] The Ninth Circuit has consistently recognized Native Hawaiian standing to sue to enforce trust obligations under both the Homelands trust and the Ceded Lands trust. *See* Price I, 764 F.2d 623 (9th Cir. 1985); Akaka I, 928 F.2d 824 (9th Cir. 1990); Price III, 939 F.2d 702 (9th Cir. 1991). Despite apparently settled federal standing law, the State recently argued that a 1992 Supreme Court case, *Lujan v. Defenders of Wildlife*, deprives Native Hawaiians of federal court standing to sue to enforce the Ceded Lands Trust. *Lujan* involved an environmental group's challenge to a new regulation enacted under the Endangered Species Act limiting its geographic scope. The plaintiffs' injury for purposes of standing was indirect; it rested in part on the actions of a third person. In rejecting plaintiffs' standing, the Court observed that if plaintiffs' asserted injury resulted from the government's allegedly unlawful regulation "of *someone else*" standing is difficult to achieve.

funds or lands unless they show a direct injury to themselves.[141] The State's argument amounted to a contention that Native Hawaiians almost never have standing to sue for land trust breaches. Since Native Hawaiians usually cannot establish a State duty to act for the benefit of any *particular* Native Hawaiian group or to use or manage *particular* land for the benefit of a specific group, under the State's view of *Lujan*, Native Hawaiian plaintiffs rarely if ever would be able to establish the requisite "direct injury"[142].

In 1992, the Hawaii federal district court on remand in *Price v. Akaka*[143] rejected the State's argument. The court concluded that *Lujan* did not overrule the Ninth Circuit's past decisions conferring Native Hawaiian standing.[144] Nevertheless, in *Napeahi v. Paty*,[145] the State reiterated its lack of standing argument. Again, the district court refused to deny standing to Native Hawaiians challenging the disposition of Ceded Lands. The court, however, in both *Price* and *Napeahi*, certified interlocutory appeals. Certification suggests the district court's lingering uncertainty on the issue and the State's persistence in attempting to erect insurmountable procedural obstacles to federal court process for Native Hawaiians.[146]

Why might the State, as the acknowledged Native Hawaiian lands trustee, persist in efforts to close even the slimmest of openings in the federal courthouse doors? Some grounded speculation about State interests is in order. One answer, perhaps misleadingly simple, is that the State is acting as would any fiduciary: it is attempting to shield itself from liability. It might be doing so for economic reasons or to

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[141] Price v. Akaka, No. 88-773 (D. Haw. filed July 31, 1992) (order granting in part and denying in part motion for reconsideration, or in the alternative, for certification).

[142] *Lujan*, 112 S. Ct. at 2144, 119 L. Ed.2d at 373.

[143] Price v. Akaka, No. 88-733 (D. Haw. filed July 31, 1992). *See infra* note 146 for discussion.

[144] *Id.*

[145] No. 85-1523 (D. Haw. filed Oct. 26, 1992) (order denying defendant's motion for dismissal or entry of judgment after remand, or, in the alternative, for 28 U.S.C. § 1292(B) certification).

[146] Recently, the Ninth Circuit in Price v. Akaka, 3 F.3d 1220 (9th Cir. 1993) (*Akaka II*), upheld the district court's standing decision. The court determined that, in contrast with *Lujan*, *Akaka II* did not "involve a suit against government for promulgating an unlawful regulation or for failing to promulgate a regulation." *Id.* at 1224. Since the plaintiff was "among the class of § 5(f) beneficiaries whose welfare is the object of the action at issue[.], . . . the [trustees'] action or inaction has caused him injury, and . . . a judgment preventing or requiring action will redress it." *Id.*

assure maximum flexibility under constraining political circumstances.[147] Another answer might lie in the State administration's efforts to minimize entanglement in federal court remedial efforts while mounting its own political campaign to address Native Hawaiian demands for sovereignty and return of Hawaiian lands.[148] A third and related answer might lie in State actors' implicit concerns about control over socio-legal narratives regarding foundations for the Native Hawaiian sovereignty initiatives. Those actors might be concerned about the federal courts' "cultural performance" in rephrasing volatile Native Hawaiian land disputes.[149] Why might the federal courts, and especially the Ninth Circuit, have opened the procedural door for Native Hawaiians with one hand and all but closed it with the other? Why might the federal courts have employed procedural tools to rephrase Native Hawaiian land controversies by blocking or sharply limiting their development and telling within the judicial process? More grounded speculation is in order.

One answer simply might be the federal courts' displeasure with several factually under-developed or poorly litigated cases—cases which called for early disposition on procedural grounds. Another answer might lie in the federal courts' fealty to established procedural doctrines that are ordinarily applied in social-cultural civil rights situations markedly different, both historically and presently, from the situation of Native Hawaiians. This possibility raises the issue of the appropri-

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[147] In his legislative testimony against Native Hawaiian right-to-sue bills in 1987, the former State Attorney General stated that an expansive right to sue would bankrupt the State. Hearings on [H.R. 37 (H.D. 1), Relating to the Right to Sue by Native Hawaiian Individuals and Organizations], 14th Leg., Reg. Sess. (1987) (testimony of the Honorable Warren Price, III, Attorney General of the State of Hawaii).

[148] Former Governor John Waihee created the Hawaiian Sovereignty Advisory Commission pursuant to Act 359 of the 1993 State Legislative Session. The Act mandated that the Commission consult with the Native Hawaiian community on its concerns with respect to sovereignty. 1993 HAW. SESS. LAWS 359. The Commission held a series of statewide community meetings. A recurring theme at nearly every meeting was the concern over the state government's efforts to perhaps control the process of self-determination. As a result, the Commission took the position that the State must support the sovereignty efforts of Hawaiians while being careful not to impose any particular form of sovereignty upon them. In response, the Administration sought, through draft legislation, to transform the Commission into the "authoritative body on conducting the Hawaiian sovereignty elections." Bill Meheula, *Hawaiian Sovereignty (Advisory) Commission Report*, KE KIA'I, December 1, 1993, vol.4, no. 9, at 16-17.

[149] *See supra* note 46.

ateness of the "trans-substantivity" of procedure. The Federal Rules' drafters contemplated a single set of process rules that would be applied in similar fashion to all types of controversies and parties. Procedure was to be trans-substantive. Most judges have followed that approach. Current procedural debate questions whether this approach is insensitive to the widely varying contexts of disputes.[150]

Another answer might lie in notions of separations of power and judicial competence—a reluctance of federal courts to intervene in what is perceived by many to be a wide-ranging political dispute that should be addressed through administrative or legislative action.[151] Since the early 1980s federal courts have hesitated to fashion complicated equitable remedies in "structural governmental reform" cases, suggesting instead the appropriateness of legislative correctives.[152]

Another related answer might lie in federalism concerns—at a deep level, the inappropriateness of entangling the federal government (as adjudicator and as possible litigant) in a social-political struggle that focuses now on an indigenous group's conflicts with a state. These concerns raise the federal courts jurisprudential issue of sovereignty—that is, the "relationships among the governmental entities in the United States, and specifically, between the federal courts and the states."[153] The more commonly addressed questions about state autonomy versus federal control are complicated by Native Hawaiian claims of rights of self-governance. Those claims ambiguously introduce consideration of a third entity into the federal courts sovereignty calculus. Consideration is ambiguous because Native Hawaiian self-governance claims are both inchoate and vaguely-defined. They are inchoate because, in contrast with Native American claims of limited tribal sovereignty, Native Hawaiian claims have never received Congressional or federal executive branch recognition. Native Hawaiian claims are

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[150] *See* COVER AND FISS, *supra* note 113; Yamamoto, *Efficiency's Threat*, *supra* note 19. Trans-substantivity proponents believe that differing sets of rules should not be pre-shaped to fit differing types of claims, parties or controversies. Indeed, the FRCP's drafters opted for a single set of flexible trans-substantive procedural rules to address all types of civil litigation. Despite recent calls for substance-tailored sets of procedures, federal district courts have adhered to the Rules' drafter's philosophical approach.

[151] *See* Resnik, *supra* note 102, at 675. (describing judicial reticence sometimes as a product of separation of powers notions, and describing the "power" theme of federal court jurisprudence in terms of "allocation and constraint by separation of functions" among branches of government).

[152] *See generally* Paul Gewirtz, *Remedies And Resistance*, 92 YALE L. J. 585 (1983).

[153] Resnik, *supra* note 102, at 675.

vaguely-defined because Native Hawaiian groups have advanced widely-diverging positions and because in recent years the federal executive branch has evinced a desire to relinquish any remaining federal control over and responsibility for Native Hawaiians as a group without vesting control in Native Hawaiians themselves.[154] The federal government's apparent move to diminish relational ties with Native Hawaiians without recognizing any form of Native Hawaiian self-governance stands in stark contrast with the government's acknowledged plenary power over its "dependent sovereigns"—Native American tribes.[155]

In this setting the question arises—are the federal court's at some deep level ceding power over Native Hawaiian issues to the state generally and state courts particularly?[156] And if so, are they doing this

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[154] *See supra* note 103 and accompanying text discussing then-President Bush's administration's declaration of no federal trust responsibility to Native Hawaiians. The current administration has apologized for the United States' participation in the overthrow of the Hawaiian government in 1893. 107 STAT. 1510 (1993). However, it has at best hedged on any further federal involvement.

How to achieve self-governance, and in what form, is a continuous source of controversy and debate among Hawaiian groups. Ka Lahui Hawai'i, the largest and most widely recognized sovereignty group, has held a constitutional convention and adopted a constitution. The group's platform calls for a land base consisting of Hawaiian Homelands and Ceded Lands and federal recognition of Hawaiians as a "nation within a nation." Ka Lahui's sovereignty model is patterned after the relationship between the United States and American Indian tribes. MACKENZIE, *supra* note 8, at 92. Other groups such as Ka Pakaukau see total independence as the ultimate goal but appear willing to accept a transitional "nation within a nation" period. Still other groups seek total and immediate independence.

During its 1993 session, the Hawai'i legislature passed a state Administration bill to create the Hawaiian Sovereignty Advisory Commission. 1993 Haw. Sess. Laws 359. The Act established the Advisory Commission to advise the legislature on ways to foster Native Hawaiian self-determination. *See also* NATIVE HAWAIIANS STUDY COMMISSION REPORT ON THE CULTURE, NEEDS AND CONCERNS OF NATIVE HAWAIIANS (1983) (discussing self-governance possibilities).

[155] *See* Resnik, *supra* note 102 (describing American Indian tribes as "dependent sovereigns"); *See generally* Nell Jessup Newton, *Federal Power Over Indians: Its Sources, Scope, And Limitations*, 132 U. PA. L. REV. 195, 197-98 (discussing sources of and limits to Congress' "plenary power" over Indian tribes).

[156] Judith Resnik poses the question in terms of "[w]hat animates [occasional federal court] support for other decision centers?" Resnik, *supra* note 102, at 746. Professor Resnik sets this question within the observation that,

> [w]ith fluctuations over time, the federal government and its courts have consistently permitted other (lesser) power centers to function and sometimes even to flourish. Federal courts have crafted doctrines of comity and deference, and

for reasons of comity (deferring to state court resolutions of complex

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have ceded jurisdiction and authority to other court systems — state and tribal. *Id.* at 746-47.

That federal court deferral to state courts is "occasional" is illustrated by the *McBryde/Robinson* line of cases. In McBryde Sugar Company v. Robinson, 54 Haw. 174, 504 P.2d 1330 (1973), sugar growers brought a Hawai'i state court suit to determine their water rights to storm and freshet water in Kauai's Hanapepe River. The trial court determined the parties' private water rights and allocated water accordingly. The Hawai'i Supreme Court, *sua sponte*, appeared to rewrite state water law, which had previously recognized private water ownership. It held that the State owned all waters of the river, subject only to appurtenant and riparian rights. It also held that the waters could not be diverted outside the river's watershed. *See also* McBryde Sugar Company v. Robinson, 55 Haw. 260, 517 P.2d 26 (1973) (on rehearing reaffirming its pronouncements).

Angry sugar growers then brought suit in federal district court to enjoin enforcement of the McBryde decision on the grounds that the Hawai'i Supreme Court's decisions denied the growers federal procedural and substantive due process. Robinson v. Ariyoshi, 441 F. Supp. 559 (D. Haw. 1977). Without addressing the propriety of federal court review, the district court held that the Hawai'i Supreme Court had, in effect, "taken" the property of the parties without just compensation when it retroactively converted private property rights in water to public property rights. The district court harshly criticized the Hawai'i Supreme Court, calling *McBryde* "one of the grossest examples of unfettered judicial construction used to achieve the result desired—regardless of its effect upon the parties, or the state of the prior law on the subject." 441 F. Supp. at 568.

The Ninth Circuit held that the Hawaii Supreme Court was "well within its judicial power" when it overruled earlier Hawai'i cases. Robinson v. Ariyoshi, 753 F.2d 1468, 1474 (9th Cir. 1985). The state court could not, however, divest prior private rights without just compensation. The Ninth Circuit nevertheless dissolved the district court injunction, noting that state officers had not as yet taken steps to interfere with the parties' formerly private water rights. *Id.* Concerning the propriety of reviewing the Hawai'i Supreme Court's decision, the Ninth Circuit observed that "horizontal appeals will not lie to the United States District Courts to overturn allegedly erroneous decisions on federal constitutional questions by the highest court of a state." *Id.* at 1471. The court determined, however, that the federal constitutional questions were not (and could not have been) addressed by the Hawai'i Supreme Court in the *McBryde* cases and were therefore appropriate for federal court consideration. *Id.* at 1472 (citing Rooker v. Fidelity Trust Co., 263 U.S. 413 (1923) and District of Columbia Court of Appeals v. Feldman, 460 U.S. 462 (1983).

The federal district court's "intervention" into state court prerogatives, according to one commentator, implies that "there would be no judicial hierarchy and no finality in appellate systems." Williamson B. C. Chang, *Unraveling Robinson v. Ariyoshi: Can Courts "Take" Property?*, 2 U. HAW. L. REV. 57, 91 (1979). Another commentator criticized the district court and Ninth Circuit for attempting to assess independently Hawai'i water law. Bradford H. Lamb, *Robinson v. Ariyoshi: A Federal Intrusion Upon State Water Law*, 17 ENVTL. L. 325, 353 (1987). For subsequent history in the *Robinson*

and controversial land-sovereignty based disputes between the State and Native Hawaiians), for reasons of social policy (distancing the federal government from "special" treatment of Native Hawaiians, a move generally reminiscent of the government's earlier "termination" policy concerning Native American tribes[157]), or for other reasons? No clear answers emerge.

One possible "other reason" might be that the federal courts' recognize a state's "ability to maintain different modes from those [individualistic and atomistic modes] of the federal government."[158] Implicit in this recognition might be a sense that in smaller, community-based decisional centers "there are social ties, there is a shared history, there is a network of relatedness."[159] As Judith Resnik observes, when federal courts defer to state or tribal courts on matters concerning indigenous peoples, "[s]ome deep-seated emotional respect for group governance may be at work here, some sense that these self-contained communities are 'jurisgenerative' [communally law creating]. . .and that their traditions and customs must sometimes be respected and preserved."[160] In this speculative light, a final question arises. Are the Hawaii state courts willing to serve, and do they have the capacity to serve, in such a jurisgenerative capacity for Native Hawaiians? This question is addressed in preliminary fashion in the next section.

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cases, see Ariyoshi v. Robinson, 477 U.S. 902 (1986) (granting certiorari and vacating judgment of Ninth Circuit, and remanding for further consideration in light of Williamson County Regional Planning Comm'n. v. Hamilton Bank, 473 U.S. 172 (1985)); Robinson v. Ariyoshi, 796 F.2d 339 (9th Cir. 1986) (remanding to district court in light of Supreme Court directive); Robinson v. Ariyoshi, 676 F. Supp. 1002 (D. Haw. 1987) (upholding the district court's original finding of a ripe controversy); and Robinson v. Ariyoshi, 887 F.2d 215 (9th Cir. 1989) (vacating the district court's decision).

[157] The federal government in the 1950s adopted a policy of "termination" concerning Indian tribes, seeking to strip tribes of special status in relationship to the government and to "mainstream" them into American society. *See* H.R. CON. RES. 108, 83rd Cong., 1st Sess. (1953), in 67 Stat. B.132 (identifying termination of distinct status of Indian tribes, and the dissolution of tribes, as the long-term goals of federal Indian policies).

[158] Resnik, *supra* note 102, at 751.

[159] *Id.*

[160] *Id.* The term "jurisgenerative," along with its antinomic counterpart, "jurispathic," were coined by Robert Cover to describe the ways in which courts through language and procedure can destroy or affirm law created by communities. Robert M. Cover, *The Supreme Court, 1982 Term —Foreward: Nomos And Narrative*, 97 HARV. L. REV. 4 (1983).

Whatever the federal and state interests involved, whatever the perspectives of key actors or their underlying rationales, the federal court's process rulings in Native Hawaiian cases can be viewed cumulatively from at least two critical vantage points. Doctrinally, those rulings have all but closed federal courthouse doors for Native Hawaiians seeking injunctive or structural relief in land trust controversies. For Native Hawaiians contemplating engagement in the federal judicial process to effectuate personal claims or to further larger legal-political claims, the rulings have been prohibitory.[161] Conceptually, in terms of communicative process, those rulings have transformed the specific stories of Native Hawaiian claimants and larger narratives of Native Hawaiian movements into narrow questions of legal process and procedure. In doing so, they have generated sharply limited, and from the perspective of claimants, distorted cultural performances concerning the heart of many Native Hawaiian land trust controversies. An attorney for a Native Hawaiian law collective recently expressed this view in his comment, "We definitely avoid federal court. We get tied up in procedural knots there and the community never fully gets to say its piece."[162]

IV. Native Hawaiian State Court Breach of Trust Actions: *Pele Defense Fund v. Paty*

The procedural door to federal court appears to be all but closed for Native Hawaiian breach of trust claimants. In comparison, Hawai'i's state courts offer both considerable promise and uncertainty. The appellate courts appear to be engaged in a process of partial self-transformation. That process evinces a rethinking of the performance role of state courts in addressing Native Hawaiian rights claims. In terms of historical comparisons, the Hawai'i Supreme Court's citation to customary cultural practices to inform and transform established legal norms[163] is reminiscent of the earlier *Richardson* Court. That court, under the guidance of former Chief Justice William S. Richardson,

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[161] *See infra* Part IV for description of prohibitory effects.

[162] Interview with Alan Murakami, litigation director for the Native Hawaiian Legal Corporation (NHLC). (Interview with co-authors on December 15, 1993). Mr. Murakami and the NHLC served as counsel for plaintiffs in *Pele Defense Fund v. Paty* and co-counsel for plaintiffs in *Ka'ai'ai v. Drake* (*see infra* notes 167 and 279), among other cases.

[163] *See infra* note 179.

was noted for its contextual historical and cultural analysis.[164] In terms of current practice, the court's recent Hawaiian land pronouncements are set within accelerating Hawaiian self-determination movements.[165] Those pronouncements reveal a court uniquely poised to scrutinize prevailing views, or narratives, about the meaning of Native Hawaiians rights claims.[166] The focal point of this section is the Hawai'i Supreme Court's recent right-to-sue decision, *Pele Defense Fund v. Paty*.[167]

A. *The Federal Court Suit*

Pele involved a land exchange on the island of await' between the State of Hawai'i and the private Estate of James Campbell. On December 23, 1985 the State swapped 27,800 acres of Ceded Land for 25,800 acres of Campbell Estate land to allow geothermal development of that portion of the Ceded Land designated as a geothermal resource zone. Relying on *Keaukaha-II*,[168] the Pele Defense Fund (PDF)[169] and

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[164] In Justice William J. Brennan Jr.'s address during the tenth anniversary of the William S. Richardson School of Law, Justice Brennan spoke of the Richardson Court's progressiveness citing, "the noteworthy constitutional contribution of the Hawaii Supreme Court under Chief Justice Richardson's leadership." Justice William J. Brennan, Jr., *Address Of Justice William J. Brennan, Jr.*, 6 U. HAW. L. REV. 1, 3 (1984). *See, e.g.*, Reppun v. Board of Water Supply, 65 Haw. 531, 656 P.2d 57 (1982) (describing and accommodating customary Native Hawaiian values in its decisions concerning control over surface water); Ahuna v. Department of Hawaiian Homelands, 64 Haw. 327, 640 p.2d 1161 (1982) (defining the scope of the State's fiduciary duty to manage Hawaiian Homelands).

[165] Act 359 relating to the creation of the Hawaiian Sovereignty Advisory Commission is the State Administration's effort to help facilitate some form of native Hawaiian self-determination:

> (1) Holding a referendum to determine the will of the native Hawaiian people to call a democratically convened convention for the purpose of achieving consensus on an organic document that will propose the means for native Hawaiians to operate under a government of their own choosing; . . .

1993 HAW. SESS. LAWS 359.

[166] For a discussion of Kealoha v. Hee and the plaintiff's assertion of international human rights legal norms in state court, *see* Prologue. *See also supra* note 6.

[167] 73 Haw. 578, 837 P.2d 1247 (1992), *cert. denied.*, 113 S. Ct. 1277 (1993).

[168] 739 F.2d 1467 (9th Cir. 1984) *See supra* notes 107-113 and accompanying text.

[169] PDF is an organization comprised of Native Hawaiians who have as their purpose the revitalization and preservation of their nearly extinct culture. Their mission in this instance was to focus attention on not merely the impact land exchanges have on section 5(f) trust purposes but also on Hawaiian culture. In *Pele*, they claimed the exchange took land having religious and cultural value for Native Hawaiians and

Kaolelo Lambert John Ulaleo filed a federal section 1983 civil rights action in the United States District Court for the District of Hawai'i seeking to invalidate the land exchange. For them, private geothermal development on those specific Ceded Lands would desecrate sacred land believed to be the home of the "aumakua" (god) Pele and would harm Hawaiian cultural and religious values and practices.[170] The district court dismissed their claims.[171] The Ninth Circuit affirmed.[172] Before the Ninth Circuit's affirmance, PDF filed related claims in state circuit court.[173]

B. *The State Court Suit*

In state court, PDF advanced a federal law claim and a state law claim. PDF claimed, among other things,[174] (1) breach of the Ceded

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substituted it with Campbell Estate land substantially covered with lava having little or no such significance. PDF members therefore sought access denied them by defendants into undeveloped areas of Wao Kele 'O Puna for traditional subsistence, cultural, and religious purposes. *Pele*, 73 Haw. at 584-85, 837 P.2d at 1253-54.

[170] Interview with Alan Murakami, March 15, 1993. Mr. Murakami, as litigation director for the Native Hawaiian Legal Corporation, represented PDF and Mr. Ulaleo in Ulaleo v. Paty, No. 88-00320 (D. Haw. 1988), and PDF in Pele Defense Fund v. Paty, 73 Haw. 578, 837 P.2d 1247 (1992), *cert. denied*, 113 S. Ct. 1277 (1993).

[171] *Id.* The court dismissed on grounds that plaintiffs' claims were barred by the State's immunity under the Eleventh Amendment. The court also ruled that the State was an indispensable party to the breach of trust claims against defendants. The Hawai'i Supreme Court in *Pele* agreed and held that the State's absence as a party resulted in "no adequate remedy available for the alleged breaches." *Pele*, 73 Haw. at 613, 837 P.2d at 1268.

[172] Ulaleo v. Paty, 902 F.2d 1395 (9th Cir. 1990). The Ninth Circuit held that the suit requested retrospective relief and was therefore barred. *See supra* notes 114-120 and accompanying text.

[173] PDF filed its claims in state court on March 10, 1989. In early 1990, while the appeal was pending in the Ninth Circuit, Ulaleo died. Emily 'Iwalani Naeole, a Native Hawaiian and resident of the ahupua'a (division of land from ocean to mountain) adjoining Wao Kele 'O Puna, moved to intervene as a plaintiff. Her motion was denied on the premise that PDF adequately represented her interests. The case proceeded in the Third Circuit Court for the State of Hawai'i as *Pele Defense Fund v. Paty*. *Pele*, 73 Haw. at 588-89, 837 P.2d at 1255-56.

[174] Other claims alleged: (1) a violation of due process under the fourteenth amendment of the U.S. Constitution and article I, section 5 of the Hawai'i Constitution; (2) a violation of the right to free association under the first amendment to the U.S. Constitution and article I, section 4 of the Hawai'i Constitution; (3) a violation of article XII, section 7 of the Hawai'i Constitution by the relinquishment of state lands

Lands trust on the part of the Board of Land and Natural Resources under § 5(f) of the Admissions Act, in violation of 28 U.S.C. § 1983,[175] and (2) breach of trust by the State under Article XII, § 4 of the Hawai'i Constitution.[176] PDF requested that the court find "Campbell . . . h[e]ld the exchanged lands subject to a constructive trust for the beneficiaries of the public lands trust."[177] The circuit court granted the State's summary judgment motion for procedural reasons.[178] The Hawai'i Supreme Court affirmed the dismissal of PDF's breach of trust claims.[179] The court's decision turned on its analysis of issues of process and procedure without reaching the substantive claims.

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on which native Hawaiians customarily and traditionally exercised subsistence, cultural, and religious practices and continued denial of access into Wao Kele O' Puna to native Hawaiian PDF members who sought access for customarily and traditionally exercised subsistence, cultural and religious practices; (4) violations of HRS subsection 171-26 and 171-50; and (5) a violation of HRS chapter 195. *Pele*, 73 Haw. at 589-90, 837 P.2d at 1256.

[175] The Board of Land and Natural Resources is the executive board for the Department of Land and Natural Resources (DLNR). DLNR is charged with the administration of public lands. Public lands include those under the § 5(f) trust. Prior to the land swap, Wao Kele 'O Puna was part of the Natural Area Reserves System (NARS) which HAW. REV. STAT. § 195 defines as land containing "'unique natural resources,' [that] should be preserved 'in perpetuity.'" *Pele* 73 Haw. at 587, 837 P.2d at 1254-55. As the result of (1) an amendment to HAW. REV. STAT § 195 which, in effect, "allow[ed] alienation of NARS land for 'another public use upon a finding by the [DLNR] of an imperative and unavoidable public necessity;'" (2) "the designation of a portion of the Kilauea Middle East Rift Zone . . . , located primarily within Wao Kele 'O Puna, as a geothermal resource subzone;" (3) the affirmance in Dedman v. BLNR, 69 Haw. 255, 740 P.2d 28 (1987), *cert. denied*, 485 U.S. 1020 (1988) of BLNR's designation and "granting of a geothermal development permit;" and (4) legislative inaction, Wao Kele 'O Puna was transferred out of NARS. BLNR's contribution to this result was the basis of PDF's 42 U.S.C. § 1983 suit. *Pele*, 73 Haw. at 587-88, 837 P.2d at 1255 (quoting HAW. REV. STAT. § 195-10 (Supp. 1991)).

[176] The State in Article XII, § 4 of the Hawai'i Constitution affirms its fiduciary obligations under the § 5(f) trust. HAW. CONST. art. XII, § 4. PDF claimed the State had violated the terms of the Ceded Lands trust by permitting the land exchange. *Pele*, 73 Haw. at 601, 837 P.2d at 1261-62.

[177] *Id.* at 590, 837 P.2d at 1256.

[178] The third circuit court held that PDF's federal section 1983 claims were barred by the state's sovereign immunity, PDF's lack of standing, the statute of limitations, and the res judicata effect of *Ulaleo*, 902 F.2d 1395 (9th Cir. 1990). The circuit court dismissed PDF's state breach of trust claim stating there was no private right of action to enforce the terms of the § 5(f) trust under Hawai'i law.

[179] In addition, the court reversed the circuit court's dismissal of PDF's *Kalipi* gathering rights claim. The Court reversed in part and remanded for trial the issue

1. Section 1983 Civil Rights Claims: Federal law breach of trust claims in state court

PDF's federal law claims in state court faced numerous procedural obstacles. As mentioned earlier, the Ninth Circuit ruled in 1978 that no federal private right of action existed under the Admissions Act, although it later recognized a federal law section 1983 civil rights claim to enforce trust rights created under the Admissions Act.[180] PDF sought

of whether defendants violated Article XII, § 7 of the Hawai'i Constitution by denying access into undeveloped lands to Native Hawaiian PDF members who sought access for customarily and traditionally exercised subsistence, cultural and religious practices. *Pele*, 73 Haw. at 621, 837 P.2d at 1272. In all other respects, the court affirmed the lower court's decision. *Id.* at 622, 837 P.2d at 1273.

Kalipi v. Hawaiian Trust Company, 66 Haw. 1, 656 P.2d 745 (1982) concerned the traditional gathering rights of ahupua'a tenants. Kalipi asserted certain gathering rights enumerated in HAW. REV. STAT. § 7-1. To exercise these rights the court found that three conditions must be met: (1) the tenant must physically reside within the ahupua'a where the activity will be undertaken; (2) the activity must only take place upon undeveloped lands of the ahupua'a; and (3) the activity must entail the practice of Native Hawaiian customs and traditions. *Id.* at 7-8, 656 P.2d at 745-50.

Concerning *Kalipi*'s initial requirement of physical residence within the ahupua'a, *Pele* recognized that access and gathering rights sometimes "extended beyond the boundaries of the ahupua'a. . . ." *Pele*, 73 Haw. at 620, 837 P.2d at 1271. *Pele* modified this requirement by holding that "native Hawaiian rights protected by article XII, section 7 may extend beyond the ahupua'a in which a native Hawaiian resides where such rights have been customarily and traditionally exercised in this manner." *Id.*

The Hawai'i Intermediate Court of Appeals addressed *Pele's* extension of *Kalipi* in the agency decisionmaking setting. Public Access Shoreline Hawaii v. Hawaii County Planning Commission, 1993 W.L. 15605, 1993 Haw. App. LEXIS 2 (Haw. App. Jan. 28, 1993 (No. 15460) (PASH). *PASH* involved the proposed development of a resort complex. The ICA held that "in light of article XII, section 7,. . .all government agencies undertaking or approving development of undeveloped land are required to determine if native Hawaiian gathering rights have been customarily and traditionally practiced on the land in question and explore possibilities for preserving them." 1993 W.L. 15605 at 6. Certiorari to the Hawai'i Supreme Court has been granted.

[180] *See supra* Part III. Congress enacted 42 U.S.C. § 1983 as part of the post-Civil War Reconstruction package of legal reforms. Section 1983 was designed to protect African Americans from racist attacks under color of state law. The law has since been broadened to permit suit against state officials for actions taken under color of state law that violate an individual's federally protected rights, whether constitutional or statutory. Wilder v. Virginia Hospital Association, 496 U.S. 498 (1990). Moreover, the actions violative of federal rights can be undertaken by officials of all branches of government. "The very purpose of § 1983 was to interpose the federal courts between

declaratory and injunctive relief under section 1983 for the alleged violations of the § 5(f) trust.[181]

The Hawai'i Supreme Court in *Pele* first acknowledged plaintiffs' right to assert a substantive federal civil rights claim in state court against state officials acting in their official capacities and to prospectively enjoin alleged violations of § 5(f).[182] The court also found appropriate injury suffered by PDF to confer standing. Specifically, the court addressed PDF's standing to bring the suit as "representatives" of beneficiaries of the Ceded Lands trust, indicating expansively that its analysis would apply equally to beneficiaries of the Homelands trust.[183] The court engaged in two lines of analysis. First, it drew upon Hawai'i standing cases involving members of the public seeking to enforce "rights of the public generally."[184] "The court found that PDF met the "injury in fact" test since PDF "members [w]ere beneficiaries of the public trust who [had] been economically and/or aesthetically injured by a transfer of trust lands in contravention of trust terms;[185] the "injuries [could be traced] to the alleged breach of trust;"[186] and

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the States and the people, as guardians of the people's federal right—to protect the people from unconstitutional action under color of state law, 'whether that action be executive, legislative, or judicial.'" Mitchum v. Foster, 407 U.S. 225, 242 (1972) (citing Ex Parte Virginia, 100 U.S. 339, 346 (1879).

[181] *Pele*, 73 Haw. at 590, 837 P.2d at 1256.

[182] *Id.*

[183] *Id.* at 592 n. 8 and 604 n. 18, 837 P.2d at 1257 n. 8 and 1263-64 n. 18.

[184] *Id.* at 593, 837 P.2d at 1257.

[185] *Id.* at 594, 837 P.2d at 1258, (citing Akau v. Olohana Corp., 65 Haw. 383, at 388-89, 652 P.2d 1130, at 1134 (1982)). A plaintiff has been injured in fact when she "has suffered an actual or threatened injury as a result of the defendant's wrongful conduct, . . . the injury is fairly traceable to the defendant's actions, and . . . a favorable decision would likely provide relief for plaintiff's injury." *Pele*, 73 Haw. at 593, 837 P.2d at 1257. In Hawaii's Thousand Friends v. Anderson, 70 Haw. 276, 768 P.2d 1293 (1989), the Hawai'i Supreme Court found that Hawaii's Thousand Friends (HTF) lacked standing. The injuries sustained were not similarly suffered by the group as a whole. Individual members of HTF "would have relied differently on the alleged misrepresentation and would have suffered different injuries, necessitating different remedies." *Pele*, 73 Haw. at 593, 837 P.2d at 1258 (citing *Hawaii's Thousand Friends*). *Pele* indicated that PDF's standing depended upon whether the injury alleged was suffered by the group in general or was personalized such that other group members suffered different injuries requiring different remedies. The court viewed the alleged § 5(f) breaches as "'generalized' injuries for which relief granted to the organization would provide a remedy to any individual member." *Pele*, 73 Haw. at 594, 837 P.2d at 1258.

[186] *Id.*

"the requested relief would be likely to remedy the injuries by giving beneficial use of the exchanged land to trust beneficiaries."[187]

The court also undertook a second line of analysis. It briefly, and perhaps more significantly, discussed PDF's standing according to public trust principles citing *Kapiolani Park Preservation Society v. City & County of Honolulu.*[188] *Pele* concluded that, "unless members of the public and native Hawaiians, as beneficiaries of the trust, have standing, the State would be free to dispose of the trust res without the citizens of the State having any recourse."[189] This statement was perhaps the necessary prelude to the court's subsequent declaration, discussed later, that Article XII, § 4 of the Hawai'i Constitution creates a private right of action in state court for breach of the ceded lands trust.

Pele thus acknowledged PDF's federal section 1983 right of action in state court and recognized PDF's standing to sue. The court, without considering the merits, then deemed applicable a two-year statute limitations (rather than a six-year statute) and found PDF's section 1983 claim time-barred.[190]

The court also located other procedural grounds for dismissal. It found that PDF had "a full and fair opportunity to litigate the relevant [sovereign immunity] issues"[191] in the earlier federal court action and

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[187] *Id.* The court also found that a "multiplicity of suits" would be avoided by allowing PDF to proceed.

[188] 69 Haw. 569, 751 P.2d 1022 (1988). In *Kapiolani Park,* the City and County attempted to lease a portion of the park for a restaurant. The private Preservation Society sued the City and County as trustee of the charitable public trust owning the underlying fee interest, claiming that the lease was not permitted under the terms of the trust. Addressing the standing issue, the court intimated that the suit should have been brought by the Attorney General as parens patriae. The Attorney General, however, supported the City's action. The court held that the Preservation Society, comprised of neighbors and users of the park, had standing to bring the suit since "the citizens of this State would be left without protection, or a remedy, unless . . . members of the public, as beneficiaries of the trust, have standing to bring the matter to the attention of the court." 69 Haw. at 572, 751 P.2d at 1025.

[189] *Pele,* 73 Haw. at 594, 837 P.2d at 1258. The Intermediate Court of Appeals in *PASH,* 1993 W.L. 15605, 1993 Haw. App. LEXIS 2 (Haw. App. Jan. 28, 1993, following *Pele's* discussion of standing to sue, agreed that "Hawaii's state courts should provide a forum for cases raising issues of broad public interest [such as the rights of native Hawaiians], and that the judicially imposed standing barriers should be lowered when the "'needs of justice'" would be best served by allowing a plaintiff to bring claims before the court." 73 Haw. at 614, 837 P.2d at 1268-69.

[190] *Pele,* 73 Haw. at 595, 837 P.2d at 1259.

[191] *Id.* at 600-601, 837 P.2d at 1261.

that *res judicata* barred PDF "from asserting its breach of section 5(f) trust and Fourteenth Amendment [federal] claims brought under section 1983."[192] The court noted that PDF could not "escape the preclusive effect of the Ninth Circuit's [sovereign immunity] ruling by advancing a different remedial theory;"[193] any alternative theories merged with PDF's originally asserted theories.[194]

2. Breach of Trust Claims Under The Hawai'i Constitution: State law claims in state court

Most important, *Pele* recognized a second, and distinct, PDF breach of trust claim rooted entirely in state law. That claim can be leveled directly against the State. The State's fiduciary obligations as trustee of the public lands trust are delineated in Article XII, § 4 of the Hawai'i Constitution. The Constitution in § 7 of Article XVI also "mandates that the [§] 5(f) trust provisions 'shall be complied with by appropriate legislation[.]'"[195] These constitutional provisions provided the foundation for the Hawai'i Supreme Court's declaration, in a finely-crafted, visionary section of its opinion, that "PDF has a right to bring suit under the Hawai 'i Constitution to prospectively enjoin the State from violating the terms of the ceded lands trust."[196]

a. Right to sue under the Hawai'i Constitution

The court determined, contrary to the State's assertion, that an implied private *state* law right of action exists under the Hawai'i Constitution to enforce the State's § 5(f) trust obligations, notwithstanding the Ninth Circuit's decision that no implied private *federal* law right

[192] *Id.* The court rejected PDF's argument that *res judicata* was inapplicable because the Ninth Circuit in *Ulaleo* failed to address the merits of its breach of trust claims. 73 Haw. at 600, 837 P.2d at 1261. The Ninth Circuit in *Ulaleo* premised its dismissal on Eleventh Amendment grounds—that PDF sought impermissible retrospective relief for its section 1983 claims. *Pele* held that this Ninth Circuit finding concerning immunity from suit precluded relitigation of the same federal claim in state court. *Id.*

[193] *Id.*

[194] *Id.* at 600, 837 P.2d at 1261. The Court cited *Bolte v. Aits*, Inc., 60 Haw. 58, 60, 587 P.2d 810, 812 (1978) as authority for prohibiting "splitting a cause of action . . . or an entire claim either as to the theory of recovery or the specific relief demanded." *Pele*, 73 Haw. at 600, 837 P.2d at 1261.

[195] *Id.* at 601, 837 P.2d at 1262.

[196] *Id.*

of action emanates from the federal Admissions Act.[197] *Pele*, citing several cases,[198] held that Hawai'i courts are "not precluded from finding that the Hawai'i Constitution affords greater protection than required by similar federal constitutional or statutory provisions."[199] The court, therefore, declared that the Ninth Circuit's *Keaukaha I* [200] decision, finding no implied private right emanating from the federal Admissions Act, did not preclude the Hawai'i Supreme Court from finding such a right under state law.[201] While *Keaukaha I*'s articulated reasons for finding no private federal right "were compelling in the context of the enforceability of a federal statute, they do not support a similar finding with respect to the enforcement of article XII, § 4 of the Hawai'i Constitution."[202]

The Hawai'i Supreme Court observed that Article XII, § 4 was added to the state constitution specifically to recognize the § 5(f) trust and the State's obligations under the trust. Despite the Ninth Circuit's "findings that no purpose would be served by allowing private enforcement of the Ceded Lands trust in federal court, . . . protecting the res of the public lands trust, thereby enforcing the mandates of our constitution, is appropriate in our state courts."[203] The court thus recognized a state law right to sue to protect the corpus of the trust and the beneficiaries' interest in it.

In this respect, *Pele* is a landmark decision. It recognized a state law claim for State breaches of the § 5(f) Ceded Lands trust, and it did so without transforming Native Hawaiian claims into civil rights claims. With bracing clarity, the Hawai'i Supreme Court announced that it

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[197] *Id.* at 601-603, 837 P.2d at 1262-63. The court carefully limited this determination, observing that a private right of action in state court did not constitute "a waiver of sovereign immunity such that money damages are available." *Id.* at 605, 837 P.2d at 1264.

[198] *Id.* at 601, 837 P.2d. at 1262, (citing State v. Kam, 69 Haw. 483, 748 P.2d 372 (1988); Hawaii Housing Authority v. Lyman, 68 Haw. 55, 704 P.2d 888 (1985); State v. Tanaka, 67 Haw. 658, 701 P.2d 1274 (1985); and State v. Russo, 67 Haw. 126, 681 P.2d 553 (1984), *appeal after remand*, 69 Haw. 72, 734 P.2d 156 (1987)).

[199] *Pele*, 73 Haw. at 601, 837 P.2d at 1262.

[200] Keaukaha-Panaewa Community Association v. Hawaiian Homes Commission, 588 F.2d 1216 (9th Cir. 1978).

[201] *Id.* at 1224.

[202] *Pele*, 73 Haw. at 603, 837 P.2d at 1263.

[203] *Id.* *Cf.* Trustees of the Office of Hawaiian Affairs v. Yamasaki, 69 Haw. 154, 737 P.2d 446 (1987) (political question doctrine bars claim concerning Office of Hawaiian Affairs' allocation of Ceded Lands revenues).

"will not leave the people of Hawai'i without the means to hold" the State to its "fiduciary duties and obligations as trustee."[204] Implicit in its pronouncement was the court's recognition that state courts should be accessible to Native Hawaiians seeking to reconfigure socio-legal narratives about their historical and contemporary situations and to obtain redress for specific land trust breaches by the State.[205]

Pele is additionally significant because its right to sue holding concerning the Ceded Lands trust applies equally to Native Hawaiian claims for breach of the Hawaiian Homelands trust and because it expansively defined the fiduciary duties of the State as trustee. In *Price II*,[206] the Ninth Circuit held that in a federal court section 1983 action concerning the § 5(f) Ceded Lands trust, the State as trustee would not be held to the same high fiduciary standard applicable to private trustees.[207] *Pele*, however, relying on the Hawai'i Supreme Court's decision in *Ahuna v. Department of Hawaiian Home Lands*,[208] held differently. In state court, on a state law claim, the high fiduciary standards of a private trustee apply to the State as trustee for both the Homelands and Ceded Lands trusts.[209]

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[204] *Pele*, 73 Haw. at 601, 837 P.2d. at 1261-62. Homelands Trust beneficiaries first exercised the right to sue for trust breaches under the Hawaii Constitution in Ka'ai'ai v. Drake. *See infra* note 292.

[205] As discussed in Part 2, *supra*, later in the *Pele* opinion, the Hawai'i Supreme Court apparently substantially closed the door it opened with its implied right of action analysis, adopting what appears to be a restrictive sovereign immunity frame of analysis.

[206] Price v. State, 921 F.2d 950 (9th Cir. 1990) (*Price II*).

[207] The Ninth Circuit in *Price II* observed that it was "the apparent decision by the parties involved in the [Admissions] Act that the State and its officials would proceed with a certain degree of good faith and need not be held to strict trust administration standards." *Id.* at 956. The court also cited concern about unnecessary federal involvement in "the micro management of the government of the State." *Id.*

[208] 64 Haw. 327, 640 P.2d 1161 (1982).

[209] 64 Haw. 327, 339 (1982), cited in *Pele*, 73 Haw. at 604-605 n.18, 837 P.2d at 1263-64 n.18. *Ahuna* addressed the extent of the fiduciary duty owed by the trustees of the Hawaiian Homelands to beneficiaries of that trust. The *Ahuna* court held the government trustees to "the same strict standards applicable to private trustees." *Ahuna*, 64 Haw. at 339, 640 P.2d at 1169. This entailed administering the trust solely in the interest of the beneficiaries, using reasonable skill and care to make trust property productive, and acting as an ordinary and prudent person would in dealing with his or her own property. *Id.* at 340, 640 P.2d at 1169. (*Ahuna* did not address the threshold issue of whether trust beneficiaries had a right to sue to enforce the trustee's fiduciary obligations. It found that the defendants waived any no-right-to-sue

Pele's recognition of a state law right to sue under the Hawai'i Constitution, and its expansive definition of the trustee's fiduciary duties, promise future state court actions for state breaches of the Ceded Lands and Homelands trusts. Equally significant, they promise an evolving role of state courts in the adjudication of Native Hawaiian land claims—not only in accepting and maintaining breach of trust claims, but also in acknowledging socio-historical context and recognizing customary and contemporary cultural practices and values and possibly international law norms to inform, and transform, traditional trust law principles.

b. Sovereign Immunity

This promise, however, appears to be partially undermined by *Pele*'s adoption of federal Eleventh Amendment immunity principles as the foundation of its sovereign immunity jurisprudence. Those principles, in practical effect, sharply limit court access in many instances. *Pele* described in general terms the current status of sovereign immunity in Hawai'i's courts. The doctrine of sovereign immunity bars suit against the State for money damages "except where there has been a 'clear relinquishment' of immunity and the State has consented to be sued."[210] This immunity cannot be invoked, however, if the suit seeks only to enjoin state executive department officials from violating either the State constitution or State statutes.[211] In light of the Hawai'i Supreme

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defense by failing to assert it before the lower court. *Id.* at 333, 640 P.2d at 1065).

Pele's application of *Ahuna* to define trustee duties for the Ceded Lands trust was consistent with rulings concerning other native peoples' land trusts. *See* Plateau Mining Co. v. Utah Div. of State Lands and Forestry, 802 P.2d 720, 728-29 (Utah 1990) ("State acts as a trustee and its duties are the same as the duties of other trustees"); Trustees for Alaska v. State, 736 P.2d 324, 331-39 (Alaska 1987), *cert. denied*, 496 U.S. 1032 (1988); Oklahoma Educ. Ass'n, Inc. v. Nigh, 642 P.2d 230, 235-36 (Okla. 1982).

[210] *Pele*, 73 Haw. at 607, 837 P.2d at 1265.

[211] *Id. Pele* quoted from W. H. Greenwell, Ltd. v. Dept. of Land and Natural Resources, 50 Haw. 207, 208-09, 436 P.2d 527 (1968):

> It is the unquestioned rule that the State cannot be sued without its consent [. . .] in matters "involving the enforcement of contracts, treasury liability for tort, and the adjudication of interest [sic] in property [. . . .]" [However,] *sovereign immunity may not be invoked as a defense by state officials who comprise an executive department of government when their action is attacked as being unconstitutional.*

Pele, 73 Haw. at 607, 837 P.2d at 1265 (emphasis added). *Pele* continued, "[N]or will sovereign immunity bar suits to enjoin state officials from violating state statutes." *Id.*

Court decisions so limiting the State's sovereign immunity, PDF's state law breach of trust claim solely for injunctive and declaratory relief against BLNR officials seemed unproblematic. The Hawai'i Supreme Court in *Pele*, however, refined, or arguably reconstructed, the State sovereign immunity doctrine in cases requesting injunctive and declaratory relief.

First, the court in *Pele* acknowledged that "[t]his court has not previously tested the scope" of the sovereign immunity doctrine or its exceptions.[212] Significantly, the court did not address whether the state waived its immunity from breach of trust suits by accepting primary responsibility for the Homelands and Ceded Lands trusts as a condition of Statehood and by incorporating that responsibility into the State Constitution.[213] The court instead focused implicitly on when an injunctive relief suit against state officials would in effect be an impermissible damages suit against the State in disguise. This raised an issue of state law. The court adopted the federal case *Ex Parte Young*[214] as "relevant" authority on state sovereign immunity, observing that "the Eleventh Amendment is the federal constitutional embracement of the common law doctrine of sovereign immunity."[215] *Young* held

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[212] *Pele*, 73 Haw. at 608, 837 P.2d at 1265-66.

[213] This appears to be the initial sovereign immunity issue in *Pele*. *See* generally United States v. Mitchell, 463 U.S. 206, 224-26 (1983) (the United States trust obligation to the Quimult Tribe arose implicitly out of a federal timber management statute and the Tribe could recover damages from the United States for breach of its fiduciary duty in mismanaging trust lands and resources); c.f. Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978) ("a waiver of sovereign immunity cannot be implied but must be unequivocally expressed").

[214] 209 U.S. 123 (1908). In *Young*, the attorney general of Minnesota was enjoined from enforcing a state statute prescribing certain railroad rates. The attorney general unsuccessfully argued that the federal Circuit Court (now district court) had no jurisdiction over him because the suit was in effect a suit against the State, and thus contrary to the Eleventh Amendment. *Id.* at 132. *Pele* cited *Young* explicitly. *Pele*, 73 Haw. at 608-609, 837 P.2d at 1266. It also quoted from W. H. Greenwell, Ltd. v. Dept. of Land and Natural Resources, 50 Haw. 207, 436 P.2d 527 (1968) which also cited *Young*. *Greenwell*, however, did not discuss *Young* or why the Hawai'i Supreme Court would be citing a federal court Eleventh Amendment case in a state court action to which the Eleventh Amendment did not apply.

[215] *Pele*, 73 Haw. at 606, 837 P.2d at 1264. The meaning of *Pele's* statement concerning the "federal constitutional embracement of the common law doctrine of sovereign immunity" is uncertain. *Pele* cited Will v. Michigan Dept. of State Police, 491 U.S. 58 (1989), in support of that statement, partially paraphrasing and partially quoting from *Will* (the paraphrased portion is italicized, the quoted portion is in

that the Eleventh Amendment[216] does not bar certain *federal* suits to

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quotations):

> *In discussing whether Congress intended to abrogate eleventh amendment immunities in § 1983 actions, the [Will] Court stated that* "members of the 42d Congress were familiar with common-law principles. . .[and t]he doctrine of sovereign immunity was a familiar doctrine at common law."

Pele, 73 Haw. at 606-607, 837 P.2d at 1265. *Pele*'s paraphrased statement concerning *Will* slightly but importantly alters the meaning of the quoted passage from *Will*. The language in *Will* immediately preceding the language quoted by *Pele* indicates that the *Will* opinion was not at that juncture addressing "whether Congress intended to abrogate eleventh amendment immunities in § 1983 actions," nor was it addressing whether the "eleventh amendment is the federal constitutional embracement of the common law doctrine of sovereign immunity . . . [made] applicable to the federal courts." Instead that passage in *Will* was addressing whether the Congressional enactment of § 1983 abrogated *common-law* immunities (as distinguished from Eleventh Amendment constitutional immunities). The passage from *Will* in its entirety reads:

> *[I]n enacting § 1983, Congress did not intend to override well-established immunities or defenses under common law.* 'One important assumption underlying the Court's decisions in this area is that members of the 42d *Congress* were familiar with common-law principles, including defenses previously recognized in ordinary tort litigation, and that they *likely intended these common-law principles to obtain*, absent specific provisions to the contrary.'

Will, 491 U.S. at 67 [emphasis added]. This passage does not indicate support for the proposition that the Eleventh Amendment reflects federal constitutional incorporation of common law sovereign immunity principles.

[216] The Eleventh Amendment provides:

"The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." U.S. CONST. amend. XI.

The amendment was adopted in reaction to Chisholm v. Georgia, 2 U.S. (2 Dall.) 419 (1793). Chisolm had allowed the citizen of one state to invoke the federal court's diversity jurisdiction to sue a different state on a state law claim. As the literal wording of the amendment reveals, the amendment was directly aimed at precluding such exercises of diversity jurisdiction. *See* William A. Fletcher, *The Diversity Explanation Of The Eleventh Amendment: A Reply To Critics*, 56 U. CHI. L. REV. 1261, 1264 (1989); Lawrence C. Marshall, *The Diversity Theory Of The Eleventh Amendment: A Critical Evaluation*, 102 HARV. L. REV. 1372, 1375-78 (1989).

Hans v. Louisiana, 134 U.S. 1 (1890) (*Hans*) recast the literal meaning of the amendment and barred a citizen's suit against her own state in federal court. The Supreme Court in *Hans* located in the amendment a "broad policy against suing states in federal court." *Id.* George D. Brown, *Has The Supreme Court Confessed Error On The Eleventh Amendment? Revisionist Scholarship And State Immunity*, 68 N.CAROLINA L. REV. 867, 872 (1990). *Hans* thus effectively viewed the Eleventh Amendment as providing sweeping sovereign immunity protection for states in federal court. *See* William P. Marshall, *The Eleventh Amendment, Process Federalism And The Clear Statement Rule*, 39

enjoin as unconstitutional a state official's actions.[217] Federal cases following *Young* distinguished permissible from impermissible suits by constructing a dividing line between cases requesting prospective relief and cases requesting retrospective relief. Prospective relief against a state official in federal court is permissible even if the relief is accompanied by a "substantial ancillary effect on the state treasury."[218] If, however, the relief is "tantamount to an award of damages for a past violation" of law, the relief is retrospective and the [federal] suit is barred.[219]

Pele then looked to a more recent United States Supreme Court case for guidance on the meaning of "retrospective injunctive" relief. In *Papasan v. Allain*,[220] the federal government had granted lands to the State of Mississippi to be held in trust for the benefit of public schools. The lands set aside for the school district at issue in *Papasan* had been sold and the proceeds invested in railroads. When the railroads were destroyed during the Civil War and the investment permanently lost, Mississippi compensated the school district with "interest" on the lost

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DEPAUL L. REV. 345, 350 (1989). The *Hans* decision continues to be roundly criticized for its illiteral reading of the constitution and the "doctrinal gymnastics and legal fictions" it has spawned. Brown, 68 N. CAROLINA L. REV. at 873; Vicki C. Jackson, *The Supreme Court, The Eleventh Amendment, And State Sovereign Immunity*, 98 YALE L. J 1 (1988) ("For over a decade, Eleventh Amendment scholarship has sought to demonstrate that the amendment cannot be regarded historically or textually as embodying the doctrines of immunity attributed to it. That task has been substantially accomplished." *Id.* at 72). *See also* Atascadero State Hospital v. Scanlon, 473 U.S. 234 (1985); Welch v. Texas Dept. of Highways and Public Transportation, 483 U.S. 468 (1987); Pennsylvania v. Union Gas Co., 491 U.S. 1 (1983) (strong minority opinions calling for rejection of *Hans*).

Despite the general doctrinal confusion and scholarly and judicial dissatisfaction, two alternative theories continue to be viewed as informing the amendment. These two theories are the diversity jurisdiction theory, emanating from the reaction to Chisolm, and the sovereign immunity, theory emanating from Hans. Both theories are rooted in federalism concerns. The limited "ability of federal courts to hear suits against state governments [is an issue] crucial to defining the content of American federalism." Erwin Chemerinsky, *Congress, The Supreme Court And The Eleventh Amendment: A Comment On The Decisions During The 1988-89 Term*, 39 DEPAUL L. REV. 321-322 (1989).

[217] *Ex Parte Young*, 209 U.S. at 130.

[218] *Pele*, 73 Haw. at 609 n. 22, 837 P.2d at 1266 n. 22 and accompanying text (quoting B. H. Papasan v. Allain, 478 U.S. 265, 278 (1985), and citing Edelman v. Jordan, 415 U.S. 651, 667-68 (1974)).

[219] *Pele*, 73 Haw. at 609-10, 837 P.2d at 1266, (quoting *Papasan*, 478 U.S. at 278).

[220] 478 U.S. 265 (1986).

principal acquired from the sale of the trust lands. The amount paid to the school district was grossly inadequate in light of the value of intact trust lands in other school districts.[221] The plaintiffs, school officials and children from the affected school district, sued the State requesting injunctive relief—namely restoration of the lost trust corpus through establishment of a trust fund to pay income to, or designation of trust lands for use by, the plaintiffs.[222]

The United States Supreme Court in *Papasan*, relying on *Young*, observed that federal court relief against state officials is limited by the Eleventh Amendment. The exercise of federal judicial power over state officials is permissible only where the "violation of federal law by a state official is ongoing as opposed to cases in which federal law has been violated at one time or over a period of time in the past."[223] The Court then held that plaintiffs' requested relief amounted to a monetary award for a past breach, and "discern[ed] no substantive difference between a not-yet-extinguished liability for a past breach of trust and the continuing obligation to meet trust responsibilities asserted by the petitioners."[224]

After examining both *Young* and *Papasan*, the *Pele* court turned to the particular claims before it. It determined that PDF's request that the Ceded Land be restored by means of a constructive trust upon property held by private party Campbell was "'essentially equivalent' to a nullification of the exchange and the return of the exchanged lands to the trust res."[225] The "effect on the state treasury would be . . . unavoidable," and PDF's requested relief was "in effect, a request for compensation for the past actions of the BLNR members."[226] All PDF's claims premised on state constitutional or statutory grounds were thus deemed "retrospective" and barred by the State's sovereign immunity as defined by federal Eleventh Amendment principles.

This aspect of *Pele* is troublesome. As *Pele* recognized, the Eleventh Amendment to the United State's Constitution does not apply in state courts.[227] The purpose of the Eleventh Amendment is to prevent federal courts from adjudicating claims against states, particularly claims rooted

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[221] *Id.* at 272-73.
[222] *Id.* at 274-75.
[223] *Id.* at 277-78.
[224] *Id.* at 281.
[225] *Pele*, 73 Haw. at 611, 837 P.2d at 1267.
[226] *Id.*
[227] *Id.* at 608 n.20, 837 P.2d at 1265, n.20.

in state law.[228] Federalism concepts provide the foundation: federal courts should not be telling states how to order their affairs according to state law.[229] The Eleventh Amendment thus confers upon states a special and limited type of federal court immunity that is rooted in federal law in light of an accommodation of federal and state prerogatives.[230]

Pele deemed Eleventh Amendment immunity strictures "relevant" to its state law analysis of state immunity in state court on state law claims[231] and "adopted" the Eleventh Amendment rule in *Young* concerning a limited "exception" to state immunity.[232] By deeming Eleventh Amendment immunity strictures relevant and by adopting the rule in *Young, Pele* embraced federal Eleventh Amendment jurisprudence for the purpose of redefining or at least refining state officials' immunity from state law injunctive relief suits in state court.

The court's effort in *Pele* at demarcating limits to state liability is understandable as a general matter. Indeed, the court's approach may have been constrained by the absence of clear state constitutional or legislative guidance on the scope of the State's immunity from Native Hawaiian breach of trust suits.[233] *Pele*'s transposition of federal Eleventh Amendment principles nevertheless is problematic for specific reasons. First, Eleventh Amendment principles generally, and the *Young* line of cases particularly, are acknowledged to be "complex, confusing and often inconsistent."[234]

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[228] *See* Pennhurst State Sch. & Hosp. v. Halderman, 465 U.S. 89 (1984).

[229] Professor Chemerinsky observes that the Eleventh Amendment "bears directly on federalism, separation of powers, and the protection of fundamental rights. Specifically, because it determines the ability of federal courts to hear suits against state governments, the eleventh amendment is crucial to defining the content of American federalism." Chemerinsky, *supra* note 216, at 322.

[230] *See supra* note 216, discussing the diversity jurisdiction and sovereign immunity theories of the Eleventh Amendment and the federalism concerns underlying both theories.

[231] *Pele*, 73 Haw. at 606, 837 P.2d at 1264.

[232] *Id.* at 609, 837 P.2d at 1266.

[233] *See infra* Part V(A).

[234] Brown, *supra* note 216, at 873 (describing common perceptions of Eleventh Amendment doctrine, in part due to the uncertainties and fictions generated by *Young*.); John J. Gibbons, *The Eleventh Amendment And State Sovereign Immunity: A Reinterpretation*, 83 COLUM. L. REV. 1889, 1891 (1983) ("a hodgepodge of confusing and intellectually indefensible judge-made law." *Id.* at 1891); William A. Fletcher, *A Historical Interpretation Of The Eleventh Amendment: A Narrow Construction Of An Affirmation*

Second, *Pele* shielded the State from a range of state law breach of trust suits in state court by employing federal law sovereign immunity principles that are shaped by federalism concerns.[235] Plaintiffs' state law breach of trust claim in *Pele* did not implicate federalism concerns. Plaintiffs asserted their second claim in state court against state officials on the basis of state law.[236] There existed no federalism justification for the application of Eleventh Amendment immunity principles to limit that claim.[237] *Pele*'s sovereign immunity ruling therefore needed to be justified on some other ground.[238]

Grant Of Jurisdiction Rather Than A Prohibition Against Jurisdiction, 35 STAN L. REV. 1033, 1044 (1983) ("a complicated, jerry-built system that is fully understood only by those who specialize in this difficult field." *Id.* at 1044); Akhil Reed Amar, *Of Sovereignty And Federalism*, 96 YALE L. J. 1425, 1480 (1987).

[235] *See supra* notes 215-216, 230 and accompanying text.

[236] The *Pele* plaintiffs' initial state court claim, not the focus of discussion in this section, was a federal section 1983 breach of trust claim, which the court dismissed on *res judicata* grounds. The court did not undertake, or need to undertake, rigorous Eleventh Amendment analysis in light of its conclusion that the *res judicata* doctrine barred that claim. Some discussion here of Eleventh Amendment analysis in state court section 1983 suits, however, is relevant. As indicated, the Eleventh Amendment's purpose is to prevent federal courts from adjudicating claims against states—a federalism concern. Where a federal section 1983 claim is asserted in *state* court, as with the *Pele* plaintiff's initial claim, the Eleventh Amendment is inapplicable. Its federalism concerns, however, may continue to guide the state court. *See* Will v. Michigan Dept. of State Police, 491 U.S. 58 (1989). The state court must still determine if the defendant state officials are "persons" within the meaning of section 1983, and that determination is generally informed by Eleventh Amendment analysis. *Id.* (cited in the *Pele* opinion, 73 Haw. at 608 n.20, 837 P.2d at 1265 n.20, for the proposition that, "Noting that the eleventh amendment does not apply in state courts, the United States Supreme Court [in *Will*] addressed the question of whether a state is a "person" under section 1983").

[237] An exception to a state's Eleventh Amendment immunity from federal court suit exists where the court in a federal section 1983 action is enjoining state officials' violations of plaintiffs' federal rights. "The federal courts are [in that instance] primarily concerned with vindicating federal rights and holding state officials responsible to the supreme authority of the United States." *Pele*, 73 Haw. at 609, n.21, 837 P.2d at 1266, n.21. The supremacy of federal law is vindicated in that setting through the court's injunctive relief order without upsetting the delicate balance of federal and state authority contemplated by our dual system of governance.

That delicate balance of federal and state power is not implicated by the *Pele* plaintiffs' state law breach of trust claim. That claim was brought in state court, against state officials, according to state rights emanating from the state constitution and statutes.

[238] Some speculative reasons might have included the opening of floodgates to de facto damage suits, the public cost of defending numerous injunctive relief suits, a

Pele's reliance upon Eleventh Amendment jurisprudence is problematic for a third related reason. *Pele*, in effect, adopted the federal courts' limited exception to Eleventh Amendment state immunity based on *Young*, *Papasan* and *Ulaleo*, the federal cases discussed earlier.[239] The prospective/retrospective relief distinction drawn by those cases has been sharply criticized by many commentators.[240] As mentioned earlier, those cases can be, and have been, restrictively construed to define narrowly the scope of the immunity exception—only allowing suits that seek to stop state officials from initiating or completing acts constituting breaches of trust.[241] Indeed, *Papasan*, which *Pele* relied upon, observed that permissible prospective relief focused on law violations that are "ongoing as opposed to cases in which . . . law has been violated at one time or over a period of time in the past."[242]

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judicial order's potential undue disruption of executive branch operations, the existence of alternative legislatively-mandated avenues of legal redress—all implicating in one form or another concern about the separation of powers among the state branches of government.

[239] *See supra* notes 171-72, 178, 192, 220-26 and accompanying text.

[240] Professor Jackson addresses the "much-criticized distinction" between prospective and retrospective relief.

> The distinction . . . has been criticized on numerous grounds. First, it is unsupported by the language of the Eleventh Amendment, which does not distinguish between legal and equitable relief. Second, prospective relief requiring future payments can burden the state as much as past due monetary awards. Third, the *Edelman* distinction is unclear whether it is the compensatory purpose of the relief that is to be condemned (which might permit, for example, punitive monetary awards against the state) or whether it is any order to pay funds that is problematic . . . If both elements are required to render the relief prohibited, why does the conjunction of compensation and monetary awards make those cases "against the state" more than others? Finally, some have criticized the distinction on the ground that the dividing line between the two forms of relief is difficult to draw and has not been drawn consistently by the Court.

Jackson, *supra* note 216, at 88 n.353. *See also* Amar, *supra* note 234, at 1478 (the distinction rests on "doctrinal gymnastics and legal fictions"); William Burnham, *Federal Court Remedies For Past Misconduct By State Officials: Notice Relief And The Legacy Of Quern v. Jordan*, 34 AM. U. L. REV. 53, 74 (1984); David P. Currie, *Sovereign Immunity And Suits Against Government Officers*, 1984 SUP. CT. REV. 149, 160-61; Norman B. Lichtenstein, *Retroactive Relief In The Federal Courts Since Edelman v. Jordan: A Trip Through The Twilight Zone*, 32 CASE W. RES. L. REV. 364 (1982).

[241] *See* Brown, *supra* note 216, at 873-74 ("One view [of *Young* and its progeny in context of overall eleventh amendment analysis] is that the results are simply wrong, that the states get too much immunity. Another view emphasizes the danger of the judiciary's undermining its own legitimacy by 'formal adherence to a doctrine riddled with exceptions designed to counterbalance its evils'" (footnotes omitted)).

[242] *B. H. Papasan v. Allain*, 478 U.S. 265, at 277-78.

Pele acknowledged that the test for retrospectiveness of relief is whether the remedy "would amount to virtual compensation for the past misconduct of state officials" and found that "the effect on the state treasury would be direct and unavoidable, rather than ancillary, because imposing a constructive trust on lands now held by Campbell would require that the State to [sic] compensate Campbell for its property."[243] This language indicates focus upon whether the requested injunction would require substantial expenditures of state funds such that the injunctive relief would actually be monetary compensation in disguise. This focus, however, is rendered uncertain by language in *Papasan* and *Ulaleo* and by the *Pele* court's minimally-explained finding that the state treasury would be directly and unavoidably affected by a nullification or a constructive trust remedy. Consider the following view. If the exchange were nullified, both Campbell and the State would "reacquire their original properties"[244]—a remedy that would not impact on the State treasury. (A separate question would arise as to the improvements.) If a constructive trust were imposed, and the State in effect reacquired the Ceded Lands, the State temporarily would have the return of the Ceded Lands plus the land originally conveyed by Campbell. The State could thus (1) return Campbell's original property, or (2) exchange other state-owned non-Ceded Land property of equivalent value. Whichever option the State selected, the net cost to the State would appear to be zero. Any related state expenses would fall within what *Papasan* classified as permissible ancillary costs. PDF's requested relief could thus be viewed as not constituting "virtual [monetary] compensation."[245]

If this view is at least plausible, then *Pele* did not in actuality focus on the "impact on state treasury," and its emphasis on the "past" nature of the state officials' action becomes determinative—"PDF is not seeking prospectively to enjoin a constitutional violation in this case, but would have us turn back the clock and examine actions already taken by the state."[246]

The Hawai'i federal district court in *Han v. Department of Justice* recently adopted just such a restrictive reading of *Pele* in dismissing Native Hawaiian breach of trust claims for past administrative acts even though the remedy sought would not have impacted upon the

[243] *Pele*, 73 Haw. at 610-11, 837 P.2d at 1267.
[244] *Id.* at 611, 837 P.2d at 1267.
[245] *Id.* at 610, 837 P.2d at 1266.
[246] *Id.* at 601, 837 P.2d at 1262.

State treasury.[247] In dismissing the plaintiffs' injunctive relief claims against State officials, the district court emphasized the timing-of-breach and not the impact-on-treasury. The court found "all [plaintiffs' allegations against the State officials look to remedy the *past* problem of authorizing [third-party leases] with non-native Hawaiians."[248] The court then cited *Pele* for the proposition that plaintiffs cannot "have us turn back the clock and examine actions already taken by the state."[249] The injunctive and declaratory relief sought in *Han* involved, among other things, the invalidation of the Hawaiian Homes Commission's approval of Homelands awardees' subleases of their lots to non-Hawaiians. Significantly, a remedy of invalidation simply would have nullified the subleases. It would not have entailed any payment from the State treasury. The federal district court nevertheless relied upon the "past" breach language in *Pele,* and found the requested relief impermissibly retrospective, apparently focusing entirely on the fact that the challenged actions were past in the past.[250]

From this restrictive view, once the breaching acts are completed, the relief sought, in whatever form, will likely be deemed retrospective and therefore impermissible, despite continuing harm resulting from the acts. In practical effect, since most ostensible trust breaches occur through administrative agency decision-making, with limited notice, few suits are likely to be researched, prepared, and filed before agency action.[251]

Hawai'i courts are not bound to follow this restrictive Eleventh Amendment view. If they do, however, relatively few breach of trust suits are likely to make it through state courthouse doors.[252] This potential barrier to state courthouse entry is significant. In concert with other procedural restrictions, it could preclude development and

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[247] 824 F. Supp. 1480 (D. Haw. 1993).

[248] *Id.* at 1488.

[249] *Id.*

[250] *Id.* at 1489.

[251] Rule 11 of the Hawaii Rules of Civil Procedure requires that the signer of a court filing certify that the filing is made after reasonable inquiry and is reasonably supported by facts and is warranted by existing law or a plausible argument for change in the law. HAW. R. CIV. P. 11. In light of the sanctions levied for Rule 11 violations and due to the factual and legal complexity of many breach of Hawaiian land trusts claims, the potentially high cost of litigation, the time needed for careful research, investigation, consultation, and drafting, the filing of many breach of trust suits may be precluded before agency action takes place.

[252] *See supra* notes 121-134 and accompanying text.

presentation a wide range of current state law breach of trust claims which *Pele* earlier endorsed through its careful and path breaking implied-right-of-action analysis under Article XII, §§ 2 and 4 of the Hawai'i Constitution.[253] The creation of such a process barrier would seem to clash with *Pele*'s over-arching statements about the necessity of opening state courts for Native Hawaiians to enforce the State's trust obligations. It would also sharply constrain state court cultural performances. Indeed, the story that ultimately emerged in *Pele* muted Native Hawaiian voices on the matters about which the speakers appeared to care most, matters for them at the heart of the Ceded Lands controversy—the historical and continuing spiritual and cultural harm arising out of the desecration of sacred lands. In constraining courts' cultural performances in this fashion, such a process barrier would appear to undermine the court's movement toward reconceptualizing the judicial function in the context of Native Hawaiian land trust controversies. The uncertainty resulting from a range of doctrinal interpretations—with widely varying potential social-cultural impacts—leaves open the possibility of future clarifying judicial statements concerning the apparent restrictiveness of *Pele*'s sovereign immunity discussion.[254]

V. Other Native Hawaiian State Court Breach of Trust Actions: The Apparent Failure of Legislative Reform

Pele's uncertainty is especially significant in light of the apparent failure of the Native Hawaiian Trusts Judicial Relief Act.[255] The Act explicitly waives the State's sovereign immunity from Native Hawaiian breach of trust suits. The Act, however, is peculiarly structured and embodies severe procedural and substantive limitations. The Act's right to sue provisions thus lie dormant—untried by Native Hawaiian litigants and untested by the Hawai'i courts.

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[253] *See supra* Part IV(B)(2)(a).

[254] Clarifying options might include: explicitly awaiting delineation of sovereign immunity parameters via legislation or constitutional amendment; or, declaring that sovereign immunity cannot be invoked if the suit seeks only to enjoin state officials from violating either the State Constitution or statutes, regardless of whether the official's acts are completed or on-going; or, declaring that sovereign immunity cannot be invoked if the suit seeks "prospective" relief, meaning that the plaintiff requests injunctive relief and the State fails to carry its burden of proving with specific facts that the state treasury will be directly, substantially and quantifiably impacted.

[255] Native Hawaiian Trusts Judicial Relief Act, HAW. REV. STAT. § 673 (1988).

A. *The Native Hawaiian Trusts Judicial Relief Act (H.R.S. chapter 673)*

Amidst controversy, the 1988 Hawai'i legislature passed the Native Hawaiian Trusts Judicial Relief Act.[256] The Act offers Native Hawaiians a limited right to sue the State in state court for breaches of its fiduciary duties concerning both the Hawaiian Homelands and Ceded Lands trusts.[257] The Act bifurcates the State's waiver of immunity according to two distinct time frames.

1. *The right to sue for Homelands and Ceded Lands trust breaches occurring after June 30, 1988*

The Native Hawaiian Trusts Judicial Relief Act is codified in Chapter 673 of the Hawaii Revised Statutes. Chapter 673 consists of ten sections defining the State's waiver of sovereign immunity. Chapter 673-1 provides that "[t]he State [of Hawaii] waives its immunity for any breach of trust or fiduciary duty resulting from the acts or omissions of its agents, officers and employees in the management and disposition of trust funds and resources of" the Hawaiian Homelands and Ceded Lands. This waiver, however, is temporally limited. The Chapter authorizes suit only for claims accruing after June 30, 1988.[258] The waiver also is inapplicable to continuing violations of either trust which first arose prior to July 1, 1988.[259]

Chapter 673 claims involving the Hawaiian Homelands trust may be brought by Native Hawaiians as defined in § 201(a)(7) of the

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[256] The Native Hawaiian Trusts Judicial Relief Act was passed by the Hawaii legislature in 1988 and is codified at HAW. REV. STAT. § 673 (1988). *See* Teruya, *supra* note 37 at 890-91. *See also*, *Hawaii's Ceded Lands*, *supra* note 37 at 101.

In 1983 a federal-state task force examined the State's implementation of the Hawaiian Homes Commission Act. It recommended that legislation be crafted to allow beneficiaries access to courts. HAWAII ADVISORY COMMITTEE TO THE UNITED STATES COMMISSION ON CIVIL RIGHTS, A BROKEN TRUST; THE HAWAIIAN HOMELANDS PROGRAM: SEVENTY YEARS OF FAILURE OF THE FEDERAL AND STATE GOVERNMENTS TO PROTECT THE CIVIL RIGHTS OF NATIVE HAWAIIANS 8 (1991). *See* Teruya, *supra* note 37 at 891-904 for a concise account of the historically significant social, political and legal events and circumstances underlying the passage of the Act.

[257] HAW. REV. STAT. §§ 673-1 (1988).

[258] Note, Section 3 following HAW. REV. STAT. Chapter 673 (1988).

[259] Note, Section 4 following HAW. REV. STAT. Chapter 673 (1988) provides that "[n]o action shall be maintained under this Act for any existing projects, programs, or any other governmental activities which are continuing, and which were begun, completed, or established prior to July 1, 1988."

Hawaiian Homes Commission Act, Native Hawaiian organizations, the Office of Hawaiian Affairs, and those Hawaiians deemed eligible to succeed to a homestead lease pursuant to § 209 of the Hawaiian Homes Commission Act, as amended.[260] Chapter 673 claims involving the § 5(f) Ceded Lands trust may be brought by all of the above described claimants except eligible successors to homestead lease.[261] To be deemed a beneficiary for purposes of both trusts and thereby accrue a right to sue, a claimant must prove that she is of at least half Hawaiian blood.[262] Most Hawaiians do not satisfy this fifty percent requirement.

Chapter 673 allows a claimant to file a breach of trust claim in state circuit courts only after exhausting "all administrative remedies available ."[263] The claimant must also, at least sixty days prior to filing a claim, give written notice that unless "appropriate remedial action is taken suit shall be filed."[264] The notice and administrative exhaustion requirements have generated uncertainty. Despite a clear statutory mandate,[265] the Department of Hawaiian Home Lands ("DHHL")

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[260] HAW. REV. STAT. §§ 673-2(a) (1988). A Native Hawaiian is defined in section 201(a)(7) of the Hawaiian Homes Commission Act as one with at least fifty percent Hawaiian blood. An organization is eligible if its "purpose is to protect and uphold the Hawaiian Homes Commission Act and the Admissions Act section 5(f) . . .," and is "controlled by native Hawaiians and a majority of its members receives or can receive benefits from the trust." HAW. REV. STAT. §§ 673-2(c) (1988). A successor to a homestead lease must be a spouse, child, grandchild, brother, sister, widow or widower of a child, grandchild, or sibling, or niece, or nephew of the lessee and at least one-quarter Hawaiian. Hawaiian Homes Commission Act, § 209. As such, Hawaiians not meeting the 50% blood quantum requirement are precluded from asserting a breach of this trust except as an eligible successor or as a member of an eligible organization. Section 201(a)(7)'s legal definition of "Native Hawaiian" is one interpretation of the term. There are other definitions, albeit without current legal force. These other definitions rest on "several criteria including race, self-identification, genealogy, political considerations, culture, and geography." Friedman, *supra* note 37 at 522 n. 2.

[261] Claims involving the Ceded Lands trust may be brought by the Office of Hawaiian Affairs, Native Hawaiians as defined in section 10-2, and Native Hawaiian organizations. HAW. REV. STAT. §§ 673-2(b) (1988).

[262] *See supra* note 260.

[263] HAW. REV. STAT. §§ 673-3 (1988).

[264] HAW. REV. STAT. §§ 673-3 (1988).

[265] HAW. REV. STAT. §§ 673-3 provides, "All executive branch departments shall adopt, in accordance with chapter 91, such rules as may be necessary to specify the procedures for exhausting any remedies available." HAW. REV. STAT. §§ 673-3 (1988). Chapter 91, The Administrative Procedure Act, establishes general administrative

has thus far failed to promulgate administrative procedures for claim initiation.[266] It is therefore unclear whether a contested case hearing is an available administrative remedy that must be "exhausted" as a precondition to suit.[267]

All Chapter 673 claims are subject to a two year statute of limitations period.[268] The Chapter initially extended the limitations period for early claims. It provided that the statute of limitations for claims accruing between July 1, 1988 and July 1, 1990 would begin to run on July 1, 1990, meaning that those claims must have been filed by June 30, 1992.[269]

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procedures one must exhaust prior to invoking circuit court jurisdiction. HAW. REV. STAT. Chapter 91.

[266] One unofficial view is that the Department of Hawaiian Homelands' regular contested case hearing procedures might be applicable. Under this view, beneficiaries would be required to request a contested case hearing and file their claims with the Department of Hawaiian Homelands. The Department would then investigate the claim and submit a report and recommendation to the Hawaiian Homes Commission. If the Commission deems the case ripe for consideration it will hear it. A recommended decision would then be submitted to the Commission. An aggrieved party may then request reconsideration of the Commission's decision or appeal a final decision of the Commission to a circuit court. *Id. See* Teruya, *supra* note 37 at 906-07.

[267] Hawaii's Administrative Procedure Act, HAW. REV. STAT. §§ 91-14(a), provides generally that redress in the circuit courts of the State may not be sought until a claimant receives and is dissatisfied with "a final [administrative] decision and order in a contested case or[,]" a claimant receives "a preliminary ruling of the nature that deferral of review pending entry of a subsequent final decision would deprive appellant of adequate relief." *Id.* In light of this procedural uncertainty claimants would appear to be justified in filing their claims directly in the circuit courts after complying with the sixty day notice requirement, but without seeking administrative contested case disposition. DHHL's failure to promulgate procedural rules promptly should not jeopardize or postpone a claimant's right to judicial redress.

[268] HAW. REV. STAT. §§ 673-10 ("[e]very claim arising under this chapter shall forever be barred unless the action is commenced within two years after the cause of action accrues." HAW. REV. STAT. §§ 673-10 (1988)).

[269] The running of the limitations period is also tolled when the claim is filed with the proper administrative agency and remains tolled until ninety days after a decision is rendered. *Id.* Determining "when the cause of action accrues" is critical. The Hawaii Supreme Court has determined that a tort action against the State accrues when "the plaintiff knew or in the exercise or reasonable care should have discovered that an actionable wrong has been committed." Waugh v. University of Hawaii, 63 Haw. 117, 127, 621 P.2d 957, 966 (1980). This tort action test will likely also be used to determine whether one has timely filed an actionable claim for breach of the State's fiduciary duty under both the Hawaiian Homelands and Ceded Lands trusts. *See* Teruya, *supra* note 37, at 912-13, stating that a two year statute of limitations will likely force the bringing of questionable claims, "deter" the pursuit of others and "prevent the resolution of many individual claims." *Id.*

Most important, Chapter 673 limits available remedies. Suits may be initiated only to restore the trust corpus depleted by the wrongful alienation or use of trust lands or funds,[270] and to recover actual out-of-pocket damages sustained by individual claimants.[271] Chapter 673 does not authorize consequential damages, punitive damages, land awards or injunctive relief.[272]

2. Negotiated settlements of Department of Hawaiian Homelands claims against the state for state breaches of Homelands Trust from August 21, 1959 to June 30, 1988

Chapter 673 waived the State's immunity for breach of trust claims against the State for the State's unauthorized use of Homelands between August 21, 1959 and June 30, 1988. That waiver, however, only became operative if the governor failed to resolve those claims against the State in a timely fashion.[273] Within the statutorily prescribed three

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[270] If such funds are recovered from the State they are transferred directly to the Department of Hawaiian Home Lands. Individual plaintiffs only receive actual out of pocket damages. The probable effect of this result is to provide plaintiffs with little incentive to pursue their claims. HAW. REV. STAT. §§ 673-4(a) and (b). This section provides:

> (a) In an action under this chapter the court may only award land or monetary damages to restore the trust which has been depleted as a result of any breach of trust duty and no award shall be made directly to or for the individual benefit of any particular person not charged by law with the administration of the trust property; provided that actual damages may be awarded to a successful plaintiff.
> (b) "Actual damages," as used in this section, means direct, monetary, out of pocket loss, excluding noneconomic damages as defined in section 663-8.5 and any consequential damages, sustained by a native Hawaiian or Hawaiian individually rather than the class generally.

HAW. REV. STAT. §§ 673-4(a) and (b) (1988).

[271] *See* HAW. REV. STAT. §§ 673-4(a) and (b) (1988).

[272] HAW. REV. STAT. §§ 673-1(a) and 673-4(a) and (b) (1988).

[273] The Native Hawaiian Trusts Judicial Relief Act 395, subsections 3-5, 14th Leg., Reg. Sess. (1988), reprinted in 1988 HAW. SESS. LAWS 942, 945 provides:

> Section 3. This Act shall not apply to any cause of action which accrued, rights and duties that matured, penalties that were incurred, or proceedings that were begun, prior to July 1, 1988.
>
> Section 4. No action shall be maintained under this Act for any existing projects, programs, or any other governmental activities which are continuing, and which were begun, completed, or established prior to July 1, 1988.
>
> Section 5. The governor shall present a proposal to the legislature to resolve controversies which arose between August 21, 1959 and the date of this Act,

year deadline,[274] the governor presented a proposal entitled, "An Action Plan to Address Controversies Under the Hawaiian Home Lands Trust and the Public Land Trust."[275] The legislature approved the plan by resolution, thereby apparently forestalling any right to sue.[276]

Upon approval, the governor created a Task Force consisting of the heads of the DHHL, the Department of Land and Natural Resources, and the Office of State Planning, all advised by the State Attorney

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relating to the Hawaiian home lands trust under Article XII, sections 1, 2, and 3 of the Constitution of the State of Hawaii implementing sections 4 and 5(f) of the Admission Act (Act of March 18, 1959, Public Law 86-3, 73 Stat. 4), and the Native Hawaiian public trust under Article XII, sections 4, 5, and 6 of the Constitution of the State of Hawaii implementing section 5(f) of the Admission Act. If,

(1) both of the following occur:

(a) The governor fails to present a proposal to the legislature prior to the convening of the 1991 legislature in regular session; and

(b) No other means of resolving such controversies is otherwise provided by law by July 1, 1991; or

(2) All three of the following occur:

(a) The governor presents a proposal;

(b) A resolution calling for the rejection of the governor's proposal is adopted by two thirds vote of the house introducing such resolution; and

(c) No other means of resolving such controversies is otherwise provided by law, by July 1, 1991, then in the event of the occurrence of either (1)(a) and (b) or (2)(a), (b) and (c), notwithstanding sections 3 and 4 of this Act, a claim for actual damages under this Act which accrued between August 21, 1959, and the date of this Act may be instituted no later than June 30, 1993, provided that the filing of a claim for actual damages in an administrative proceeding before June 30, 1993, shall toll the statute of limitations until ninety days after the date the decision is rendered in the administrative proceeding.

1988 HAW. SESS. LAWS 942, 945 (1988).

One state senator who played a major role in the passage of the Act noted his disappointment in limiting the immunity waiver to prospective breaches. Many problems concerning the trusts predate and, therefore are not covered by, the Native Hawaiian Judicial Relief Act. Despite this concern, the senator expressed confidence that the Governor would propose a sufficient resolution of past abuses. Teruya, *supra* note 37, at 904.

[274] *Id.*

[275] OFFICE OF THE GOVERNOR, AN ACTION PLAN TO ADDRESS CONTROVERSIES UNDER THE HAWAIIAN HOME LANDS TRUST AND THE PUBLIC LAND TRUST (1991).

[276] Arguably, the governor's plan did not satisfy the requirements of § 5 of the Act since the plan merely proposed a "process to resolve" past breaches rather than a resolution of those breaches. Teruya, *supra* note 37, at 915.

General.[277] As a result of the first part of its deliberations, the Task Force recommended, and the Hawaii State Legislature approved, payment of $12 million in settlement for the State's illegal use of 29,000 acres of Hawaiian Homelands since statehood. *Ka'ai'ai v. Drake*[278] challenged in state court the propriety of the settlement process. The Native Hawaiian plaintiffs in *Ka'ai'ai* asserted that the Task Force's multiple internal conflicts of interest, and its exclusion of an independent representative of trust beneficiaries in the negotiation settlement process, constituted a breach of trust and a violation of the principle of Native Hawaiian self-determination.[279] As a result of the suit and

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[277] This Task Force is the entity created by the Governor's proposal. It is responsible for resolving claims against the State for the illegal use of Hawaiian home lands from August 21, 1959 to June 30, 1988. The legislature, by resolution, declared that the Task Force satisfied the conditions set forth in HAW. REV. STAT. § 673. However, if the Task Force, for whatever reason, fails in its mission, then DHHL (but not trust beneficiaries) obtains the right to sue the State for breaches occurring during this period. *See* OFFICE OF THE GOVERNOR, *supra* note 275.

[278] Civil no. 92-3742-10 (1st Cir. Haw., October 1992).

[279] Ka'ai'ai v. Drake, initiated by Homeland trust beneficiaries, resulted in an agreement that required the immediate payment of $5 million to DHHL and the appointment of an independent representative for trust beneficiaries in future Task Force negotiations of DHHL's claims against the State. *Ka'ai'ai* involved breach of trust and procedural due process claims by Charles Ka'ai'ai, Alice Aiwohi, Noelani Joy and Robert Asing against the State of Hawai'i and the Hawaiian Homelands commissioners, among others. Those claims were informed by the concept of Native Hawaiian self-determination. Ka'ai'ai, Aiwohi, Joy and Asing, Homelands Trust beneficiaries, challenged the process by which the State had been attempting to resolve DHHL claims against the State for illegal use of Homelands from Statehood to 1984. Pursuant to the Native Hawaiian Trusts Judicial Relief Act, the State administration created a Task Force to negotiate and resolve those and other related claims in lieu of conferring upon DHHL a right to sue the State. *See supra* note 277 and accompanying text. The Task Force was comprised of the Office of State Planning (representing the State as active wrongdoer in the illegal use of Homelands) and the Director of DHHL (arguably a passive wrongdoer in allowing the illegal use), both of whom were advised by the State Attorney General's office. The Task Force denied Native Hawaiian community organizations' explicit request to participate on the Task Force. When the DHHL was poised to receive payment from the State in settlement of claims, based on Task Force "recommendations," and sign a broad release waiving past and future claims, Ka'ai'ai, et. al. sued in federal court asserting the principle of Native Hawaiian self-determination in resolving trust claims against the State, and alleging a breach of trust in the exclusion of Native Hawaiian participation on the Task Force. Plaintiffs' section 1983 claim was vigorously opposed by the State on procedural grounds. See *supra* Part III for a description of the procedural obstacles faced by Native Hawaiians in federal court. During the preliminary injunction hearing, plaintiffs voluntarily

legislation, an independent representative of Homelands beneficiaries has been appointed to the Task Force. Task Force deliberations are continuing.[280]

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dismissed their suit. They then filed suit in state court, relying in principal part on Pele Defense Fund v. Paty (see *supra* Part *IV*) which had been decided by the Hawai'i Supreme Court just a few days earlier. State circuit court Judge Patrick Yim granted plaintiffs' temporary restraining order request, enjoining execution of the release and payment of the settlement amount. The State defendants thereafter, in a partial settlement, agreed to withdraw the release and to pay over the settlement amount without requiring a DHHL waiver of claims. The parties agreed to continue litigation over plaintiffs' claim for court appointment of an independent representative to the Task Force to represent Homelands Trust beneficiaries. The circuit court then granted defendants' motion for summary judgment on that claim on political question grounds. The defendants, however, agreed to defer seeking entry of a final judgment while state legislation was pending concerning authorization of the court's appointment of the independent representative. Ultimately, the legislation passed and the parties agreed to a process for the court's appointment of the independent representative and to convert the case to a class action. The class action was certified with subclasses and subclass counsel (representing beneficiaries on homestead land; beneficiaries with homestead awards who were precluded from occupancy pending infrastructure improvements; and homestead waitlist beneficiaries). On August 13, 1993, Circuit Court Judge Virginia Lea Crandall appointed Edward King as independent representative. Mr. King is the former Chief Justice of the Supreme Court of the Federated States of Micronesia.

Co-authors Yamamoto and Kalama were members of the legal team representing plaintiffs in the litigation. Co-author Haia provided research assistance to independent representative King.

[280] Individual trust beneficiaries' claims arising out of state breaches of the Hawaiian Homelands trust occurring between August 21, 1959 and June 30, 1988 are handled by Haw. Rev. Stat. § 674 (1988), *Individual Claims Resolution Under The Hawaiian Home Lands Trust.*

A "beneficiary" is defined as "any person eligible to receive benefits of homesteading and related programs from the Hawaiian Home Lands trust." Haw. Rev. Stat. §§ 674-2 (1991). Only "individual beneficiaries" are afforded the § 674 right to panel review and, subsequently, if an "individual beneficiary" becomes an "aggrieved individual claimant," the right to sue. Haw. Rev. Stat. §§ 674-1 (1991) and 674-17 (amd. 1993). This class of claimants is more limited than the class described in §§ 673-2(a) which permits actions by native Hawaiian organizations as well as individuals.

Chapter 674 establishes an individual claims review panel to evaluate post-statehood, pre-July 1, 1988 Homelands breach of "actual damage" trust claims by individual beneficiaries. Like Chapter 673, Chapter 674 precludes awards of punitive and consequential damages. All claims must be filed with the panel for review by August 31, 1993. Each individual damage claim, if not consolidated, will be heard before the five member panel. The panel, acting as a advisory body, will then transmit reports to the governor and legislature, "at least twenty days prior to the convening" of the

B. Limited Remedies, Limited Rights to Sue

At first glance Chapter 673's "right to sue" appears to provide Native Hawaiians with a statutory vehicle for redress of past trust breaches, for presently enforcing Native Hawaiian land trust rights, and for deterring future State trust breaches. Chapter 673, however, places formidable stumbling blocks on the path to the state courthouse. A continuing Homelands trust breach that arose between August 21, 1959 and June 30, 1988 is not actionable. As previously discussed, Chapter 673 assigns to the governor the task of resolving those claims.[281] Actionable claims accruing between July 1, 1988 and July 1, 1990, and not filed by June 30, 1992, are time-barred. The notice and exhaustion of administrative remedies requirements, and the immunities delineated in § 673-1(b), erect procedural and substantive defenses for State officials.[282]

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legislative sessions of 1993 and 1994, "regarding the merits of each claim . . ., including an estimate of the probable award of actual damages or recommended corrective action." HAW. REV. STAT. §§ 674-1 (amd. 1993). The legislature, after review of the panel's recommendations, may then make compensatory awards, enact further legislation, or take any other action it deems appropriate. HAW. REV. STAT. §§ 674-1(C) (amd. 1993). Chapter 674 does not mandate that the legislature follow the panel's recommended action in any case.

A claimant who is not satisfied with the action taken by the legislature with regard to his individual claim may then initiate an action in the Hawaii circuit courts. HAW. REV. STAT. §§ 674-1(2) (amd. 1993) and 674-17 (amd. 1993). Such actions must be initiated between October 1, 1994 and September 30, 1996. HAW. REV. STAT. §§ 674-17 (amd. 1993) and 674-19 (amd. 1993).

[281] *See supra* note 273 and accompanying text.

[282] HAW. REV. STAT. §§ 673-1(b) provides that "This waiver shall not apply to the following:

> (1)The acts or omissions of the State's officers and employees, even though such acts or omissions may not realize maximum revenues to the Hawaiian home lands trust or native Hawaiian public trust, so long as each trust is administered in the sole interest of the beneficiaries; provided that nothing herein shall prevent the State from taking action which would provide a collateral benefit to non-beneficiaries, but only so long as the primary benefits are enjoyed by beneficiaries, and the collateral benefits do not detract from nor reduce the benefits enjoyed by the beneficiaries
>
> (2) Any claim for which a remedy is provided elsewhere in the laws of the State; and
>
> (3) Any claim arising out of the acts or omissions of the members of the board of trustees, officers and employees of the office of Hawaiian affairs, except as provided in section 10-16.

HAW. REV. STAT. §§ 673-1(b) (1988).

Most significant, Chapter 673 remedies are sharply limited, creating disincentives to sue. Land or monetary damages resulting from trustees' breaches will be awarded only to the trust itself, that is, returned to the control of the possibly breaching trustees, and not to any individually injured beneficiary.[283] A beneficiary will only be allowed to recover "actual" damages sustained, which ordinarily will be minimal, even though that beneficiary has proven that the trust had been badly damaged.[284] Even if the beneficiary proves that the breach precluded her from receiving an award of homestead land or from moving onto land earlier awarded,[285] Chapter 673 appears to leave her remediless. For this person the breach continues. Her incentive to litigate a costly and time-consuming suit is nil.[286] Chapter 673 remedies cannot place her on a homestead lot or order the Hawaiian Homes Commissioners (or State actors as trustees of the Ceded Lands trust) to take specific structural actions for the benefit of trust beneficiaries.

At bottom, the State as trustee risks little under Chapter 673 when it breaches its fiduciary obligations to trust beneficiaries. History reveals why Native Hawaiians and other indigenous peoples in America have been appropriately wary of western-based legal systems.[287] It is perhaps for these reasons that Native Hawaiians' initial "wait and see" attitude toward the "right to sue" Act has changed. That attitude has now turned to one of apparent futility.[288]

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[283] HAW. REV. STAT. §§ 673-4(a) (1988).

[284] HAW. REV. STAT. §§ 673-4(a) and (b) (1988).

[285] Since authorized relief is limited specifically to restorative damages or a return of the illegally taken land, the extent of state court injunctive relief power is uncertain. Can the courts order injunctive relief to stop a trust breach for mismanagement of trust land, for inadequate funding of infrastructure or, for failing to properly award Homelands parcels to beneficiaries? A strong argument can be fashioned that a state court retains an inherent equitable power to issue injunctions even though injunctive relief is omitted from the list of statutory remedies. What remains uncertain, even if injunctive relief power is recognized, is the scope of that power.

[286] HAW. REV. STAT. §§ 673-5(b) (1988) does, however, allow the court, "as it deems just," to award "a prevailing plaintiff . . . a reasonable sum for costs and expenses incurred, including reasonable attorney's fees." HAW. REV. STAT. §§ 673-5(b) (1988).

[287] The Mahele of 1848, which applied private property concepts to Hawaii's communal land base, and the Kuleana Act of 1850 illustrate the consequences visited upon Hawaiians by the imposition of a western legal system. For an excellent analysis and portrayal *see* KAME'ELEIHIWA, NATIVE LAND AND FOREIGN DESIRES, *supra* note 22, at 8-16. *See also* MACKENZIE, *supra* note 22, at 3-10, (1990).

[288] Teruya, *supra* note 37, at 920 (observing "after passage of the Native Hawaiian

EPILOGUE

"Hawaiians Must Have Control Over Trust and Ceded Lands."[289] "Recent Hawaiian Land Occupations."[290] "'The Beaches Are Our

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Trust Judicial Relief Act in 1988, the Native Hawaiian community adopted a wait and see attitude.") The State's stated purpose in passage of the Native Hawaiian Trusts Judicial Relief Act, to redress past wrongs and discourage present and future abuses, loses much of its force when considered along with the State's seemingly determined litigation efforts to restrict significantly Native Hawaiians' right to sue the State. *See* Teruya, *id.* at 922. To date no claims have been litigated under Chapter 673.

Hawaii Revised Statutes §§ 661-1(1) provides a possible additional avenue for Native Hawaiian breach of trust claims. It waives the State's sovereign immunity for "[a]ll claims against the State founded upon any statute of the State; or upon any regulation of an executive department; or upon any contract, expressed or implied, with the State[.]" Haw. Rev. Stat. §§ 661-1(1) (19). In the Aged Hawaiians v. Hawaiian Homes Comm'n, Civ. No. 89-244 (3rd Cir. 19), Native Hawaiian plaintiffs argued that their claims were founded upon the Hawaiian Homes Commission Act, which is a "statute of the State" within the meaning of §§ 661-1(1), and upon the regulations governing the Hawaiian Homes Commission and Department of Hawaiian Home Lands, which are "regulations of an executive department" also within the meaning of §§ 661-1(1). They further argued that the Homeland Commission Act is a "contract, expressed or implied, with the State" as set forth in §§ 661-1(1) because the State of Hawaii adopted the Act as "a law of the State" and accepted trust provisions imposed thereunder "as a compact with the United States." The plaintiffs therefore asserted in the lower court that the State had waived its immunity from suit for Native Hawaiians' breach of trust (breach of the compact) claims.

The theory underlying the Aged Hawaiians position was that §§ 661-1(1) is analogous to the Tucker Act, 28 U.S.C. § 1491 (1992) and the Indian Tucker Act, 28 U.S.C. § 1505 (1982). In United States v. Mitchell, 463 U.S. 206 (1983), the Supreme Court held that under the latter Act the United States waived its sovereign immunity over certain claims by Indian tribes for money damages for the United States' breach of trust duties. Such a waiver of immunity under §§ 661-1(1), if recognized, would avoid the prospective/retrospective relief conundrum of Eleventh Amendment immunity analysis as well as the numerous procedural obstacles of the Trusts Judicial Relief Act. The Hawaii appellate courts have yet to rule on the possibility of a §§ 661-1(1) right to sue.

Bush v. Hawaiian Homes Commission, Haw. , P.2d (Hawaii April 5, 1994) (Appeal No. 16840) raises related questions concerning the methods under Hawaii law for bringing an after-the-fact challenge to an agency action that is arguably unlawful. *Bush* held that relief is *not* available via an administrative appeal under § 91-14 if the agency was not required, by constitutional provision, statute, or administrative rule, to have held a contested case hearing. *Bush* can thus be seen as, in some ways, the mirror image of *Punohu v. Sunn*, 66 Haw. 489, 666 P.2d 1133 (1983), in which the Hawaii Supreme Court earlier held that, where a "contested case" is mandated under statute,

Birth Sands.'''[291] "Struggle Continues Over Molokai Pipeline [across Homelands]."[292] The news headlines continue. And Native Hawaiian land controversies continue to head toward the courts. How will the courts, federal and state, perform in the context of these increasingly frequent and intensifying controversies? For the foreseeable future, the federal courts, at the State's behest, appear to have all but foreclosed Native Hawaiian breach of trust claims for meaningful structural relief. The Hawai'i Legislature's Native Hawaiian "Right to Sue" Act may now fairly be characterized as a complete failure. The Hawai'i Supreme Court's 1992 *Pele* decision focused on state constitutional provisions concerning the land trusts and opened state courthouse doors. It also signaled sensitivity to customary Native Hawaiian cultural practices by expanding gathering rights outside of the ahupua'a of residence.[293] By adopting federal immunity strictures, however, the Court in *Pele* then appeared to restrict sharply Native Hawaiians' new-found right to sue for land trust breaches.

From one vantage point, the federal courts, for a variety of possible reasons, may be indirectly ceding dispute resolution (and transformation power concerning Native Hawaiian breach of land trust claims) to the state courts. From that same vantage point, the Hawai'i state courts

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a challenge to agency action *must* proceed under § 91-14, and relief under § 632-1 is unavailable. On the other hand, Hawaii's Thousand Friends v. City and County of Honolulu, Haw. , 858 P.2d 726 (Hawaii September 16, 1993) (Appeal No. 15923), indicates that declaratory relief *is* available in an action under § 632-1 where *no* contested case hearing is mandated. Accordingly, it appears that relief under § 91-14 is available only if the agency is mandated to provide a contested case hearing (in which case that remedy *must* be used), whereas relief under §632-1 and/or § 91-7 will be available in other cases.

[289] Mililani Trask, *Hawaiians Must Have Control Over Trust And Ceded Lands*, HONOLULU STAR BULLETIN, March 9, 1994, at A-19 (letter to the editor by Mililani Trask, governor of Ka Lahui Hawaii, reacting to a proposal by the editor of the Star Bulletin, A. A. Smyser).

[290] *Recent Hawaiian Land Occupations*, THE HONOLULU ADVERTISER, February 20, 1994, at B-1.

[291] Lilikala Kame'eleihiwa, *A Hawaiian Point of View: The Beaches Are Our Birth Sands*, THE HONOLULU ADVERTISER, February 20, 1994, at B-1.

[292] *Struggle Continues Over Moloka'i Pipeline*, KE KIA'I, March 1, 1994, vol. 5, no. 3, at 10-11 (describing suit by Molokai homesteaders, residents, groups and Chamber of Commerce to stop private resort developer's installation of a large water pipeline which would deplete available ground water resources that could be used in Homelands development).

[293] *See supra* note 179 (discussing Pele's expansion of Kalipi gathering rights on undeveloped private land).

may now be struggling with reconceptualizing the appropriate state judicial function in light of dramatically changing circumstances. Amidst the accelerating Native Hawaiian self-determination movement, Native Hawaiian claimants have stoked the fires of change by asserting legal claims concerning trust lands in both traditional and expansive frameworks (which include the assertion of the relevance of international human rights norms).

A significant question raised by these changing circumstances is how decisions about court process, including courthouse entry, will mediate or transform the often conflicting cultural messages underlying Native Hawaiian land trust controversies.[294] This question in turn implicates the cultural performances of state courts in handling such controversies. Will the stories developed and told there lift up hidden voices and portray the complexity of history and culture? And with what impacts on decisional outcomes, dominant societal narratives and existing power arrangements? Will the courts be able to serve a jurisgenerative function?[295] Or should Native Hawaiians turn to, or create, some other law center for addressing their historically and culturally-rooted land claims?

Nell Jessup Newton, in writing about the future of Native American stories and the legal process, broadens the context for these questions. We have substituted "Native Hawaiian" for "Indian" in her passage quoted below to emphasize the appropriateness of her observations to Native Hawaiians, without, we believe, changing her meaning.

> [T]he cases represent stories not just of individual persons but of peoples who continue to struggle to maintain their right to exist separately in a

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[294] As Nell Jessup Newton points out, court access alone for indigenous groups assures little over time. How claims are handled and transformed are also salient issues. The

> "single greatest influence on the development of modern Indian law was the opening of the federal courts to Indian tribes in 1965. . .The federal district courts [during the heyday of judicial activism] provided forums willing to listen to new doctrines in Indian law. . .Some of these cases, in turn, had a salutary impact on Indian claims in the claims courts. This impact, however has not been far-reaching enough to result in significant changes for aggrieved tribes. Widening the array of courts to which Indians can bring their claims has simply not erased the rules that, by twists and turns, seem so often to result in no recovery for Indian tribes."

Newton, *Indian Claims*, *supra* note 18, at 851-52.

[295] *See supra* note 160 (describing Robert Cover's use of the term "jurisgenerative," meaning affirming law created by communities, and its antithesis, "jurispathic," meaning destruction of community created law).

world still waiting for them to assimilate. The claims from which these stories spring represent ancient grievances as well as recent wrongs. By listening to these stories carefully and relating them to those in power, it may be possible to begin to work through to real resolutions of [Native Hawaiian] grievances, resolutions that involve some land and recognition of real power.[296]

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[296] Newton, *Indian Claims*, *supra* note 18, at 854. Newton also poses essential questions about the process and structure of alternative forums.

> "To make these strategic decisions, it is necessary to consider not only the substantive law applied in each court, but also the structure of that court and the process employed within it. . .[I]f the old system appeared biased in favor of the Government. . ., does the new system remove the appearance or reality of bias, either because of the way it has been constituted or because of the procedures adopted? If not, should tribes try to avoid these courts even more than they do now? Or, is the alternative similarly flawed?"

Id. at 839.

Enforcement of Environmental Laws in Hawai'i

by David Kimo Frankel*

I. Introduction

For years, Hawaiian Western Steel illegally spewed up to 200 pounds of hazardous dust containing high levels of cadmium and lead into the skies each night. Cadmium dust, which can cause lung and kidney disease, exceeded Environmental Protection Agency ("EPA") limits by five times. Lead, which can cause reproductive problems and affect brain development, was found at levels 100 times more than EPA allows.[1] For decades, the State of Hawai'i's Department of Health ("DOH") cited Hawaiian Western Steel's operations for polluting the air (1974, 1979, 1981, 1991). Despite orders requiring the company to comply with the law, follow-up inspections repeatedly found violations continuing. As of June 1993, Hawaiian Western Steel had not paid a penny in fines for violating Hawai'i's Air Pollution Control Act.[2]

In 1990, the state discovered more than a thousand barrels of used oil in the Maili area. Four hundred of these barrels were leaking badly. The oil, contaminated with chlorinated solvents and lead, posed a

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[1] Alicia Brooks, *EPA: Oahu polluter got off the hook: Claims Justice Department blocked prosecution of Western Steel Company*, Hon. Advertiser, Sep. 11, 1992, A1.

[2] Patricia Tummons, *Despite Hazardous Emissions, Steel Plan Escapes Penalties*, 3 Env't Hawai'i 9 (1993). In a related matter, the EPA, has sued the company for violating federal hazardous waste laws. United States v. Hawaiian Western Steel Limited, Civ. No. 92-00587. In addition, Hawaiian Western Steel agreed to pay $141,636 in fines for operating a hazardous waste landfill without a permit. In the Matter of Hawaiian Western Steel, Docket No. RCRA-IX-87-0006 (Jan. 25, 1993). Collection of these fines is subject to bankruptcy proceedings, however.

serious threat to public health and jeopardized drinking water.[3] The criminal case against the man charged with illegally dumping the oil was dismissed after he promised to perform 160 hours of community service, including cleaning up the contaminated sites. He was allowed to continue to operate his business, picking up and storing used oil.[4]

In 1983, the City and County of Honolulu cited a Palolo temple for various violations of its building and zoning codes.[5] By 1988, community members complained loudly that this immense structure was an eye-sore and demanded that the temple comply with the law. Among other problems, the temple's seventy-six foot height exceeded old height limits by seven feet and current height limits by approximately forty-four feet. In defending the violations, the temple's attorney explained that people often violate zoning rules, taking the chance of seeking after-the-fact variances.[6] Reacting to the citizens' complaints, the city criminally prosecuted the temple, its abbot and contractor for some of the violations. In 1990, they were fined $7,000 each, ordered to perform 280 hours of community service and to tear down some of the illegal portions of the building.[7] As of June 1993, illegal portions of the temple remained standing.[8] The city has not yet taken action on the height violation.

In each of these cases, violators of Hawai'i's land use and environmental laws threatened the health, safety and welfare of Hawai'i's people as well as the integrity of our environment. These violations continued unabated long-after the damage had occurred. And in each case, the punishment was arguably insufficient to deter others from engaging in similar illegal conduct.

This paper will describe the extent to which enforcement has been deficient in ensuring compliance with environmental and land use laws in Hawai'i and propose solutions to these problems. It begins by describing enforcement theory, including the importance of enforcement

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[3] Kevin Dayton, *Contaminated oil taken from nine Maili sites*, HON. ADVERTISER, Nov. 21, 1990, A3.

[4] *Oil dumping defendant gets clean-up duty*, HON. ADVERTISER, Feb. 23, 1991, A9.

[5] Interview with Fred Benco, attorney for Concerned Citizens of Palolo, in Honolulu, HI (July 20, 1993).

[6] Terry Lawhead, *Palolo residents told temple here to stay*, HON. ADVERTISER, Feb. 11, 1988, A3.

[7] *City to scrutinize steps taken by Palolo temple*, HON. STAR-BULLETIN, March 29, 1991, A5.

[8] Kris Tanahara, *Temple again seeks city height variance: Neighbors want edifice dismantled*, HON. ADVERTISER, June 5, 1993, B4.

and the goals which enforcement seeks to achieve. It then explains the enforcement process. Because it is impossible to quantify the degree to which enforcement is failing to detect and deter non-compliance,[9] this paper relies on other indicators. The deterioration of the quality of Hawai'i's environment is attributable, in part, to lax enforcement. Violations detected by environmental agencies, reported by the media, and prosecuted by enforcement officials since 1988 demonstrate that existing enforcement programs have not led to universal voluntary compliance—far from it. Hawai'i's enforcement efforts suffer from inadequacies in the government's ability to detect and sanction violators. Other problems include the bureaucratic organization, indefinite political will and insufficient citizen participation. In order to increase compliance, the state and counties will have to increase funding, change attitudes and adopt some of the enforcement tools used in other jurisdictions.

II. ENFORCEMENT THEORY

Perhaps the violations by Hawaiian Western Steel, the oil dumper and the Palolo Temple most eloquently speak to the need for a vigorous enforcement program. On a more theoretical level, enforcement is necessary to fulfill the promise of environmental planning.[10] Because society cannot rely on the market to maintain environmental quality, the government must enact environmental laws to protect public health and safety, maintain our quality of life, preserve aesthetic values, and protect natural resources.[11] Environmental and land use laws are not

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[9] One would have to secretly observe (with extreme precision) what all the pollution sources do when agency officials are absent (most of the time). CLIFFORD RUSSEL, ET AL., ENFORCING POLLUTION CONTROL LAWS, 5-6 (1986).

[10] Enforcement is one of the most important factors in bringing about compliance. Other factors include the clarity and reasonableness of environmental regulations, the consistency with which they are applied, and the degree to which they are communicated. Joseph DiMento, *Can Social Science Explain Organizational Noncompliance with Environmental Law?*, 45 J. OF SOCIAL ISSUES 109-129 (1989). For the most part, these other factors are beyond the scope of this paper. In addition, this paper does not consider the efficacy of other regulatory approaches (e.g., market-based permits rather than command-and-control regulations). Whatever approach government takes requires some form of enforcement.

[11] Of course, the suggestion that enforcement is important begins with the premise that the laws to be enforced are good. Although the merits of the various environmental and land use laws are beyond the scope of this paper, the author contends (as have

effective unless individuals, businesses and governments comply with them. Degradation caused by illegal structures, activities and pollution will only continue unless the laws are obeyed. As the former Attorney General of Connecticut stated:

> the passing of good environmental laws is only half of the challenge. Obviously the second half is to make sure that they're enforced. We need both good laws and good enforcement if we're going to have a decent environment.[12]

Effective environmental management requires active enforcement.

Not only does enforcement ensure that the benefits of environmental laws are realized, but it also promotes fairness. By bringing about compliance, enforcement ensures that everyone is playing by the same rules. So long as everyone is complying with the laws, no one firm has an unfair advantage over the competition. Enforcement also fosters respect for the rule of law. Government and the law are taken more seriously when their edicts are enforced.[13]

Punishment may serve other goals as well. It may incapacitate the lawbreaker, thereby restraining the offender from breaking the law again. It may simply satisfy society's need for retribution; that it is right for the wicked to be punished. Finally, denunciation of the offense

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the U.S. Congress, the Hawai'i State Legislature and the County Councils, which speak for the people) that all of Hawai'i's environmental and land use laws are essential to protect the integrity of our environment. What is more, enforcement against permit violations involves regulations which the permittee has accepted and agreed to obey.

If anything, these laws often do not go far enough in protecting the environment. Events have proven again and again that society has under-regulated to the detriment of the environment: Love Canal (M. BROWN, LAYING WASTE: THE POISONING OF AMERICA BY TOXIC CHEMICALS (1981)), Bhopal India (P. SHRIVASTAVA, BHOPAL: ANATOMY OF A CRISIS (1987)), the Exxon Valdez (A. DAVIDSON, IN THE WAKE OF EXXON VALDEZ: THE DEVASTATING IMPACT OF THE ALASKA OIL SPILL (1990)), DDT and other pesticides (SILENT SPRING REVISITED (Marco 1987)). *See also infra*, section IV.

[12] U.S. Senator Joseph Lieberman before the Senate Committee on Environment and Public Works, S. Hrg. 101-735, April 24, 1990 at 4. Similarly, Albuquerque's zoning code supervisor Douglass Crandall concluded, "It's becoming clear that the quality of enforcement is not up to the quality of plans. At some point, there's no longer any use in planning." Todd Bressi, *Throwing the Book at Zoning Violators*, 54 PLANNING 4 (Dec. 1988).

[13] Cheryl E. Wasserman, *Federal Enforcement: Theory and Practice*, *in* INNOVATION IN ENVIRONMENTAL POLICY: ECONOMIC AND LEGAL ASPECTS OF RECENT DEVELOPMENTS IN ENVIRONMENTAL ENFORCEMENT AND LIABILITY, 22 (Tietenberg 1992).

may allow society to express important values about itself and the offense, thereby promoting social cohesion.[14]

These theoretical goals, however, generally remain in the background of two more pragmatic goals: remediation and deterrence. The need to correct environmental problems and prevent others from violating the law have led to the development of two enforcement strategies: accommodative and adversarial. While the two strategies are not mutually exclusive, they occupy opposite ends of a continuum of enforcement approaches.[15] The central question is whether punishment is the best method to ensure compliance with the law.

Those who favor a conciliatory approach characterize the distinction between the two enforcement models by asking: What is ultimately more important, punishing the violator or stopping the illegal activity, thereby preventing the harm? Those who subscribe to the adversarial model ask: What strategy is more likely to work in the long run, assisting violators to comply with the law or deterring them from violating the law in the first place?

Accommodative theorists assume people are inherently willing to comply with the law—so long as rules are reasonable and comprehensible.[16] Their approach is remedial rather than punitive. They look to negotiation to attain conformity with the law rather than adjudication. They suggest that a conciliatory approach allows enforcement authorities to gain greater access to facilities and obtain better information from the regulated community.[17] They believe that technical difficulties, cost of compliance, potential for error, and the stigmatization caused by strict enforcement make bargaining a better means of obtaining compliance. Brandishing a "big stick" may render polluters uncooperative and suspicious.[18] At least in England, the experience of water pollution control officers suggests that the imposition of sanctions risks continued intransigence from the guilty polluter.[19]

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[14] JOHN KAPLAN & ROBERT WEISBERG, CRIMINAL LAW: CASES AND MATERIALS, 5-55 (1968).

[15] *See* KEITH HAWKINS, ENVIRONMENT AND ENFORCEMENT: REGULATION AND THE SOCIAL DEFINITION OF POLLUTION, 3-15 (1984); BRIDGET HUTTER, THE REASONABLE ARM OF THE LAW? THE LAW ENFORCEMENT PROCEDURES OF ENVIRONMENTAL HEALTH OFFICERS, 3-14, 156 (1988).

[16] *Id.*; Wasserman, *supra* note 13, at 24-31.

[17] Hawkins, *supra* note 15, at 45-46.

[18] *Id.* at 115.

[19] *Id.* at 131.

While this approach may lead to compliance, as a strategy it suffers from weaknesses. Because sanctions are rarely imposed, the integrity of the enforcement program is threatened. If polluters' technical violation of monitoring or reporting requirements go unpunished, the agency's ability to accurately monitor environmental degradation is jeopardized. Furthermore, the failure to employ sanctions reduces an official's bargaining position. Often, these officials have to resort to bluffing. Without a credible threat of punishment, polluters need not comply or even bargain.[20] Finally, if the violator expects no consequence from noncompliance (except being ordered to do what was expected in the first place), it has no incentive to spend money complying with the law before getting caught.[21] As even an advocate of this approach admits, "the result is that a degree of leeway is normally granted to dischargers, and a certain amount of pollution allowed to occur with impunity. . . . *Non-compliance with standards is thus organizationally sanctioned.*"[22]

Although the accommodative strategy may work in England, noncompliance in the U.S. demonstrates that an adversarial strategy is necessary to enforce the law.[23] Instead of sanctioning municipal violators, the EPA promoted compliance with the Safe Drinking Water and Clean Water Acts. EPA's compliance-promotion, in the face of numerous violations, proved ineffective.[24] Similar cooperative approaches taken by hazardous waste regulators in New Jersey and Pennsylvania proved to be ineffective. Regulators were simply duped into allowing

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[20] *Id.* at 151-154. In fact, one of the reasons to employ a conciliatory approach is the lack of severe penalties in the law. *Id.* at 153. After completing a comprehensive enforcement program review, the U.S. General Accounting Office's Director of Environmental Protection Richard Hembra concluded that once violators recognize that government is "unlikely to take them to court, they are less likely to settle on terms favorable to the government. In the long run, this can undermine the goal of having penalties serve as a deterrent to violations. *EPA fines not hitting hard enough, says GAO*, 2 ENV'T TODAY 13 (July/August 1991).

[21] Wasserman, *supra* note 13, at 41.

[22] Hawkins, *supra* note 15, at 27.

[23] The different enforcement approaches in the two countries may reflect fundamental differences in the societies themselves. American society and law are far more adversarial. In addition, America's strong emphasis on individual rights may predispose people not to comply with the state's demands unless threatened with punishment. Finally, the environmental movement is far stronger in the U.S. than in England. Hutter, *supra* note 15, at 175, 191.

[24] Wasserman, *supra* note 13, at 30.

violations to be overlooked.[25] EPA Administrator Ann Gorsuch Burford's non-confrontational, highly accommodative approach toward superfund cleanups proved to be a disaster.[26]

Evidence of non-compliance belies the claim of accommodative theorists that businesses and individuals willingly comply with environmental regulations. A 1979 U.S. General Accounting Office ("GAO") study revealed that of 921 sources considered to be in compliance with permit conditions, only 22 percent of them actually were. A 1990 GAO report suggested that far more than 14 percent of major air pollution sources (EPA's official estimate) were in violation of permit conditions.[27] Furthermore, the EPA estimates that one out of seven companies producing hazardous waste illegally dumps it on a regular basis.[28]

In fact, the EPA's new aggressive deterrence strategy appears to be encouraging business to comply with the law in ways former strategies did not. Because the threat of serious sanctions is real, attorneys are advising corporate officials to develop compliance plans and aggressively seek out, detect, report and prevent violations.[29] Corporations are following this advice by investing in major compliance assurance programs.[30] In particular, the threat of criminal prosecution has significantly affected company policies, resulting in greater compliance with environmental laws.[31]

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[25] DONALD REBOVICH, DANGEROUS GROUND: THE WORLD OF HAZARDOUS WASTE CRIME 97-98 (1992).

[26] Harold C. Barnett, *Political environments and implementation failures: the case of Superfund enforcement*, 12 LAW AND POLICY, 225-46 (July 1990). Reagan EPA appointee Rita Lavelle, chastised the EPA's counsel for prosecuting companies that dumped hazardous waste illegally, claiming the policy was "alienating . . . the primary constituency of this administration, big business." JOSEPH PETULLA, ENVIRONMENTAL PROTECTION IN THE UNITED STATES: INDUSTRY, AGENCIES, ENVIRONMENTALISTS 94 (1987).

[27] Wendy Naysnerski and Tom Tietenberg, *Private Enforcement of Federal Environmental Law*, 68 LAND ECONOMICS 40. (1992).

[28] Fredrick Barnes, *Environmental Crime: Case Study of Divergent Interpretations of the Scienter Requirement in RCRA's Criminal Provision*, 5 TEMPLE ENV. L. & TECH. J. 3,4 (1986)

[29] Judson W. Starr, *Avoiding the Government's Tough New Criminal Enforcement of the Environmental Laws*, *in* CRIMINAL ENFORCEMENT OF ENVIRONMENTAL LAWS 12-18 (1992).

[30] NAT'L L.J., March 16, 1992, at S6; Wasserman *supra* note 13, at 63. Some suggest, however, that because the results of compliance audits may be used against corporations, EPA's prosecutorial zealousness creates a substantial disincentive to conducting such audits and other self-policing programs. Jim Moore, *Environmental Criminal Statutes: An Effective Deterrent?*, *in* CRIMINAL ENFORCEMENT OF ENVIRONMENTAL LAWS, 154 (1992).

[31] Judson Starr, before the Senate Committee on Environment and Public Works,

Without the real threat of punishment, some individuals, businesses and governments will violate the law because of economic self-interest, immorality, amorality or incompetence. While these factors may overlap, economic concerns often motivate businesses.[32] Vigorous enforcement makes non-compliance less profitable. One study depicts the average hazardous waste offender as an entrepreneur who, thanks to harsh competition and lax enforcement, resorts to crime. Such an offender has more in common with Ivan Boesky than with Don Corleone.[33] As U.S. Supreme Court Justice Oliver Wendell Holmes once observed,

> A man who cares nothing for an ethical rule which is believed and practiced by his neighbors is likely nevertheless to care a good deal to avoid being made to pay money, and will want to keep out of jail if he can.[34]

This sentiment was echoed by an associate director of a mainland state health department:

> Politicians don't help much. They pass laws, then don't give us money to enforce them. If we don't enforce the laws, let me tell you that nobody will keep them out of the kindness of their heart to the ecology. . . . Industry gets away with whatever it can, and we're doing whatever we can get away with to enforce the law.[35]

Punishment ensures that violators do not profit from their activities, thereby deterring violators.[36] Deterrence and economic theory suggest that compliance with the law is furthered by public recognition of (1) the likely detection of violations, (2) swift enforcement action and (3) severe sanctions.[37] Deterrence may even work against the incompetent

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S. Hrg. 101-735, April 24, 1990 at 45-46. His conclusion reflects his experience with Fortune 500 Companies as a private attorney.

[32] Wasserman *supra* note 13, at 24-25. Hawkins cites repeated cases of non-compliance and notes the assumption that manufacturers purposefully pollute, altering "the quality and quantity of their effluents virtually at will, as economic considerations dictate." Hawkins, *supra* note 15, at 92. He also notes the presence of "deviant" occupations which pollute without compunction. *Id.* at 217, n.19, 110-118.

[33] REBOVICH, *supra* note 25, at 59.

[34] OLIVER WENDELL HOMES, COLLECTED LEGAL PAPERS 170 (1921).

[35] PETULLA, *supra* note 26, at 93.

[36] Clifford Russell, *Monitoring and Enforcement*, *in*, PUBLIC POLICIES FOR ENVIRONMENTAL PROTECTION 244 (Portney 1991).

[37] Wasserman, *supra* note 13, at 23.

violator. The recognition of serious sanctions should encourage proactive preventative measures.

In the U.S., the goals of enforcement are generally to stop illegal activities, remediate environmental damage, deter others from breaking the law, and punish the specific violator.[38] No one goal is subsumed by any of the others. These goals are achieved through an enforcement process which provides the government with numerous opportunities to elicit compliance.

III. The Enforcement Process

Effective enforcement involves detection, correction and punishment.

Traditionally, detection of environmental degradation came from community members. Today's environmental statutes have shifted much of the burden of detection from the public to environmental agencies with professional staff and technical equipment. Depending on the availability of resources and the significance of environmental problems, environmental agencies rely on a variety of monitoring techniques to gauge compliance.

Monitoring ranges from the simple review of self-monitoring reports submitted by the permittee,[39] to a more time-consuming, yet-cursory examination of a company's facilities and records, to a thorough inspection of a firm's operations and effluent samples.[40] Regulators monitor initially (i.e., inspections before a permittee is allowed to proceed) and continually during operation. In addition to monitoring a site or a specific source, regulators may monitor ambient conditions to detect whether someone, somewhere, is harming the environment.[41]

Once a violation has been detected, environmental agencies attempt to correct the problem. The corrective measures vary based on the severity of the violation.[42] An agency may not respond to what it

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[38] Thomas Hookano, *Private watchdogs: Internal auditing and external enforcement: three perspectives*, 17 Env. L. Rep. 10261 (July 87); Samuel Silverman, *Federal Enforcement of Environmental Laws*, 75 Mass. L. Rev. 95, 96 (Sep. 1988).

[39] Self monitoring reports are standard in many environmental regulations, but are unusual in land use regulations. Permittees are required to submit reports which reveal the extent to which they have complied with their permit conditions.

[40] Wesley A. Magat & Kip Viscusi, *Effectiveness of the EPA's Regulatory Enforcement: The Case of Industrial Effluent Standards*, 33 Law & Economics 338 (1990).

[41] Russell, *supra* note 36, at 244-45.

[42] *See generally* Wasserman, *supra* note 13, at 37-38; Silverman, *supra* note 38, at 95.

considers insignificant violations. Agency personnel may visit, phone or write an informal letter to the violator asking that the problem be fixed. If that does not work or the violation is sufficiently serious, the agency may send a formal Notice of Violation (NOV) which not only orders compliance, but may also impose a civil fine. The violator may choose to comply with the order, challenge it (thereby delaying its effect), or negotiate an agreement with the agency. In fact, a vast majority of all such administrative cases are settled through negotiations. The agreement (sometimes called a "consent decree," "consent order," "consent agreement and final order" or a "settlement agreement") may include a compliance schedule as well as civil fines. Violation of the compliance schedule theoretically leads to more fines.

If these administrative proceedings do not work, particularly when dealing with uncooperative violators, an agency may go to court to enjoin the problem. Courts may order a violator to not only obey the law, but also to repair damage to the environment. Violation of a court order may lead to fines and incarceration. These civil proceedings require the violator and the agency to expend more resources and time than the administrative processes.

Because these administrative and judicial processes may not allow an agency to act quickly to remedy environmentally degrading activities, Congress and many states have provided agencies with extraordinary powers to address environmental crises.[43] The Comprehensive Environmental Response, Compensation and Liability Act (CERCLA)[44] allows the EPA to order potentially responsible parties to clean up the release of a hazardous substance immediately—without the opportunity for an administrative hearing or judicial review until after the cleanup is completed. If the potentially responsible party fails to cooperate, the EPA can use its Superfund to correct the problem and clean up the environment. Later, the EPA can recover its costs and seek substantial fines against the polluter.

Finally, if the warnings, orders and sanctions from the agencies and the courts fail to remedy a problem, polluters face the threat of liability. The specter of unlimited liability may force polluters to fix the cause of environmental degradation, restore the damaged environment and pay for the harm they caused.[45]

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[43] *See generally* David Kimo Frankel, *An Analysis of Hawai'i's Superfund Bill, 1990*, 13 U.HAW.L.REV. 301 (1991).

[44] 42 U.S.C. §§ 9601-9657.

[45] Liability may be established through tort law, CERCLA, or the Oil Pollution Act.

The threats of administrative and judicial civil sanctions should not only stop environmental degradation by a particular individual or business, but they should also deter others from violating the law. Thus, the threat of sanctions encourages both remediation and deterrence. Often, however, monetary sanctions are not sufficient to deter lawbreakers who abuse natural resources and jeopardize human health and welfare. Since fines are unlikely to be high enough to overcome the low likelihood of detection, criminal sanctions are often required.[46] Individuals and corporations may have insufficient assets in any case, making the civil penalties an inadequate threat. Furthermore, criminal prosecution may damage a firm's reputation,[47] thereby hurting business.[48] Finally, as enforcement officials explain, "Jail time is one cost of doing business that cannot be passed along to the consumer. That makes the EPA criminal enforcement program an effective deterrent."[49]

Criminal proceedings require more time and effort than either civil or administrative proceedings. The government has a far higher standard of proof ("beyond a reasonable doubt" rather than "the preponderance of the evidence"). On the other hand, criminal proceedings are the only means of sending a violator to jail. While more costly than civil or administrative proceedings, a well-publicized criminal case can persuade many businesses to comply with the law.[50] The imposition of criminal penalties is intended primarily to deter other violations of the law rather than to correct existing problems.

Thus, violators of environmental laws face the threat that the government will fine them, impose liability for damages or incarcerate them. These penalties may be applied through administrative, civil and/or criminal proceedings. These proceedings may also result in settlements and orders which require the violator to engage in new practices which further protect the environment.

In addition, if the government is unable or unwilling to enforce the law, citizens can sue for injunctive relief, damages and for penalties.

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[46] Wasserman, *supra* note 13, at 25.

[47] Hawkins, *supra* note 15, at 116-17.

[48] Mark Cohen, *Criminal Penalties*, *in* INNOVATION IN ENVIRONMENTAL POLICY, *supra* note 13, at 90.

[49] Paul Thompson, *Doing Time for Environmental Crimes*, ENVTL. F. 32-33 (May-June 1990). Thompson is EPA's Deputy Assistant Administrator for Criminal Enforcement.

[50] *See generally* Kathleen Segerson & Tom Tietenberg, *Defining Efficient Sanctions*, *in* INNOVATION IN ENVIRONMENTAL POLICY, *supra* note 13, at 53-73.

They can resort to traditional common law suits or use newly created statutory and constitutional remedies.[51]

While in theory this comprehensive enforcement scheme should both deter violations and correct environmental degradation, in Hawai'i enforcement has been problematic. Government has been unable to ensure compliance with its environmental and land use laws. This non-compliance is reflected in the deteriorating quality of Hawai'i's environment.

IV. Hawai'i's Environmental Crises

The evidence is clear: We have seriously degraded Hawai'i's environment in recent years.[52] The causes are many: bad planning, population growth, economic development, careless resource management, inadequate funding of environmental programs and lax enforcement of environmental and land use laws.

Our beaches are disappearing. Since 1928, approximately eight to nine miles of beach on O'ahu—close to fifteen percent of the sand shorelines studied—have disappeared or have been negatively impacted by shoreline stabilization.[53] Since 1975 alone, over two miles of combined beach were lost at Iroquois Point, Kahala Beach, Lanikai, Punaluu and Mahie Point.[54] On Maui, shoreline walls and revetments have caused between 2.8 to 6 miles of beach loss.[55]

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[51] *See infra* section VI E of this paper.

[52] This perception is shared by business leaders, environmentalists and research scientists. Stanley Hong, then president of the Hawaii Visitor Bureau, noted "the beautiful Hawaii we know and love may be in very serious jeopardy." Ilene Aleshire, *HVB's chief warns: Hawaii is facing ecological disaster*, Hon. Advertiser, Sep. 7, 1990, A17. Jay Hair, President of the National Wildlife Federation, warned, "Hawaii has a lot of environmental stress, probably more than any other state." *Isles may lead U.S. in stress on environment, observer says*, Hon. Advertiser, Jan. 26, 1990, D6. According to research scientist Lee Alverson, "We are beginning to foul our nest." Helen Alton, *Hawaii environment under siege*, Hon. Star-Bulletin, Apr. 7, 1989, A6.

[53] Dennis Hwang & Charles Fletcher, Beach Management Plan with Beach Management Districts (June 1992) ii. This report demonstrates that shoreline structures are responsible for significant beach loss. Its conclusions were reconfirmed by the U.S. Geological survey of Kaua'i beaches after Hurricane Iniki. *Iniki study links seawalls, erosion*, Sunday Star-Bulletin & Advertiser, Dec. 13, 1992, A36. Many of the structures which are causing beach loss are illegal. *See infra* note 88.

[54] Hwang, *supra* note 53, at 6.

[55] *Id.* at 39.

Native species are disappearing. Nearly forty percent of endemic birds are extinct and nearly seventy-five percent of the remaining birds are threatened or endangered. Forty percent of Hawai'i's native plants are officially listed as endangered species or considered potentially endangered.[56] We have destroyed more than two thirds of Hawai'i's original forests.[57]

Formerly remote areas have been overexploited.[58] Developers have built subdivisions in last-of-a-kind ecosystems such as dry coastal forests. Highways and powerplants invade endemic forests. Helicopters buzz hikers in remote valleys. Motorboats fill sea caves with smog. Throughout the state, our activities threaten valuable land and water ecosystems, with a great potential for irreversible damage.[59]

We have seriously degraded our streams and ocean waters. The State has designated fourteen waterbodies that cannot reasonably be expected to attain or maintain the State's water quality standards.[60] We have spilled millions of gallons of raw or partly treated sewage into our streams and oceans.[61] In 1990, beach waters exceeded state

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[56] NAT. RESOURCES DEF. COUNCIL, EXTINCTION IN PARADISE: PROTECTING OUR HAWAIIAN SPECIES 1 (April 1989).

[57] THE NATURE CONSERVANCY, HAWAII LAND AND WATER CONSERVATION ALLIANCE 1 (1991).

[58] *See generally* JOHN CULLINEY, ISLANDS IN A FAR SEA: NATURE AND MAN IN HAWAII 352-363 (1988).

[59] HAW. ENVTL. RISK RANKING STUDY, ENVIRONMENTAL RISKS TO HAWAII'S PUBLIC HEALTH AND ECOSYSTEMS 2 (Sep. 1992).

[60] DEP'T OF HEALTH, HAWAII'S ASSESSMENT OF NONPOINT SOURCE POLLUTION WATER QUALITY PROBLEMS V-1 (Nov. 1990).

[61] A power outage and a failed backup system in 1991 forced the city to dump almost 40 million gallons of raw sewage into Waiawa and Waimalu streams. Hundreds of thousands of gallons of raw sewage poured into Kewalo Basin and Kakaako streets. Richard Sale & Stu Glauberman, *State to probe city sewage fiasco; flow halted*, HON. ADVERTISER, April 13, 1991; Andy Yamaguchi and James Dooley, *First outage, now sewage: Huge spill into streams, Pearl Harbor continuing*, HON. ADVERTISER, April 11, 1991, A1. Between 1987 and 1990, some 283 million gallons of raw or partly treated sewage spilled into O'ahu waterways. Peter Wagner, *Sewage system yields another leak*, HON. STAR-BULLETIN, June 14, 1990, A5. Three million gallons of raw sewage spilled into the Kaanapali Resort Lagoon in 1991. Edwin Tanji, *Bypass stops Maui resort sewage flow*, HON. ADVERTISER, Aug. 3, 1991, A4. In the first four months of 1992, more than 2 million gallons of raw sewage had spilled into Maui's waters. Since 1986, Maui has faced more than 30 million gallons of sewage spills. Peter Wagner, *Ocean spills put a stench on a favorite tourist spot: An ecological nightmare darkens a paradise island*, HON. STAR-BULLETIN, June 22, 1993, A1.

bacteria standards 342 times.[62] Over a million tons of sediment erode from cropland each year, winding up in our streams and coastal waters.[63] Such sedimentation harms aquatic habitats and diminishes both the aesthetic and recreational values of our waters.[64] These sediments may also carry pollutants, such as pesticides, with them.[65] Excess nutrient discharges caused eutrophication and deterioration of the Kaneohe Bay in the late 1960s and early 1970s.[66] Algae blooms, probably caused by excess nutrients from sewage or golf course runoff, plague Maui.[67] These algae blooms may cause ciguatera fish poisoning. In 1991, over 900 people, a record number, suffered from ciguatera fish poisoning.[68]

In 1990, 556 oil spills were reported to the U.S. Coast Guard—up 200 percent in ten years.[69] While most spills are small, a 120-gallon spill closed a Kauai beach in 1984 and required forty workers six days to clean the coastline.[70] Since 1986, three substantial oil spills hit our shores: 42,000 gallons of Bunker C fuel in the Moloka'i Channel, 120,000 gallons of jet fuel into the Middle Loch of Pearl Harbor and 33,800 gallons of crude oil off Barbers Point.[71] These spills damaged marine life (including endangered species) and soiled beaches.[72] A much smaller land-based fuel-oil spill which drained into the ocean made at least two surfers ill.[73]

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[62] Officials closed beaches only 22 times, and then only in response to sewage spills, ignoring other forms of pollution. NAT. RESOURCES DEF. COUNCIL, TESTING THE WATERS: A NATIONAL PERSPECTIVE ON BEACH CLOSINGS 35 (July 1992).

[63] DEP'T OF HEALTH, *supra* note 60, at III-3.

[64] DEP'T OF HEALTH, *supra* note 60 at III-1. An EPA Report on the Evaluation of Wastewater Discharges from Raw Can Sugar Mills on the Hilo-Hamakua Coast of the Island of Hawaii, Aug. 11, 1989, concluded that "the existing discharges cause substantial environmental impacts including elimination of coral and other benthos in areas surrounding the discharge points at both mills[.]"

[65] DEP'T OF HEALTH, *supra* note 60, at III-2.

[66] DEP'T OF HEALTH, *supra* note 60, at III-5.

[67] Lila Fujimoto, *Fears raised by rapid algae growth off Maui*, HON. STAR-BULLETIN, Aug. 15, 1991, A22.

[68] Michale Tsai, *Fish-poison cases soar in Islands: Record ciguatera outbreak this year*, HON. ADVERTISER, June 4, 1991, A1.

[69] U. HAW. SEA GRANT COLLEGE PROG., OIL SPILLS AT SEA: POTENTIAL IMPACTS ON HAWAII 9 (Pfund 1992).

[70] U. HAW. SEA GRANT PROG., *supra* note 69, at 9.

[71] U. HAW. SEA GRANT PROG., *supra* note 69, at 66.

[72] U. HAW. SEA GRANT PROG., *supra* note 69, at 66.

[73] Thomas Kaser, *Waikiki spill fouls ocean: Fuel slick makes two surfers sick*, HON. ADVERTISER, Dec. 13, 1991, A6. In the course of writing this paper, tar balls covered the author in oil while boogey boarding at Makapuu (June 12, 1993).

Toxic chemicals pollute our water, soils, air and wildlife. Heavy levels of lead and PCBs contaminate the Ala Wai Canal.[74] In Hilo, the arsenic in the Waiakea Pond is 600 times higher than that typically found in Hawaiian soils.[75] Pesticides have contaminated the Kapalama Canal (chlordane and dieldrin), Pearl Harbor and Manele Harbor (DDT).[76] The EPA has designated Pearl Harbor a Superfund site because its hazardous wastes potentially pose some of the greatest long-term threats to public health and the environment.[77] The Harbor itself, once home to dozens of fishponds with an abundance of mullet, oysters, clams and mussels, is polluted with some of the most toxic chemicals known to man.[78] Nearly five hundred gallons of potentially carcinogenic EDP spilled near a well in Kunia in 1977.[79] Toxic chemicals have contaminated our drinking water.[80] By 1985, the DOH closed fifteen public wells on O'ahu; five private wells were also contaminated.[81] Over 200 underground chemical storage tanks are leaking—threatening groundwater.[82] Fish in Manoa Stream contain high levels of lead and pesticides.[83] In several harbors, boat paints have left significant levels of tributyltin, a deadly contaminant of marine biota.[84] In 1990 alone,

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[74] DEP'T OF HEALTH, *supra* note 60 at III-8.

[75] DEP'T OF HEALTH, *supra* note 60 at III-8.

[76] DEP'T OF HEALTH, *supra* note 60 at III-7 and III-8.

[77] Jon Yoshishige, *EPA puts Pearl on hazardous waste site list*, HON. ADVERTISER, Oct. 14, 1992, A4. The contamination includes pesticides, PCBs, mercury waste oil and solvents. Nationwide there are 1208 superfund sites.

[78] Patricia Tummons, *Remember Pearl Harbor: A Call to Arms for Environmentalists*, ENV'T HAWAI'I, Dec. 1991, at 1.

[79] Shannon Tangonan, *Hazard list for Kunia pine plant?*, HON. ADVERTISER, May 8, 1993, A4.

[80] DEP'T OF HEALTH, HAWAII GROUNDWATER QUALITY PROTECTION STRATEGY, VII-3, VII-4, VIII-3-VIII-7 (1990); Peter Wagner, *Testing on Maui turns up higher TCP levels*, HON. STAR-BULLETIN, July 26, 1991, A6; *Pesticide DBCP found in Maui wells*, HON. STAR-BULLETIN, March 24, 1992, A3.

[81] HON. STAR-BULLETIN, July 9, 1985, A1.

[82] Jon Yoshishige, *200 chemical storage tanks found leaking: 1,000 more underground containers feared faulty*, HON. ADVERTISER, April 22, 1991, A1.

[83] According to Dr. Anderson, Deputy Director of Environmental Health, "Fresh-water fish in Manoa Stream contained the highest concentration of lead, dieldrin, chlordane, and heptachlor epoxide in the nation in 1984." Jeanne Mariani, *Manoa Stream tested for lead: The lead content of its fish topped that of 117 U.S. streams*, HON. STAR-BULLETIN, April 21, 1991, A1; Kevin Dayton, *Manoa Stream fish worse than '84: Level of cancer-causing chemicals may be rising*, HON. ADVERTISER, Oct. 21, 1992, A6. DEP'T OF HEALTH, *supra* note 60, at III-7.

[84] DEP'T OF HEALTH, *supra* note 60, at III-9.

3.4 million pounds of toxins were disposed in Hawai'i. 1.3 million were dumped down the sewers where they are not specially treated.[85] Another 612,051 pounds were discharged into the air. 63,346 pounds were known or suspected carcinogens and 227,917 pounds were known or suspected of causing birth defects.[86]

The response to this environmental degradation will require passage of new laws, better resource management and more funding of existing programs.[87] It will also require greater enforcement. Illegal pollution, unpermitted construction and other unauthorized activities have all contributed to the degradation of the environment.

V. Non-Compliance in Hawai'i

By all indications, many individuals, businesses and governmental bodies are not complying with Hawai'i's existing environmental and land use laws. On O'ahu, nearly five hundred illegal structures dot the shoreline.[88] Government officials and the public have commented on the significant violations of the coastal zone management act and

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[85] Alicia Brooks, *Isle industry dumps 38% of toxins in sewers: But report says total amount of such waste in state relatively low*, Hon. Advertiser, E7, Oct. 30, 1991.

[86] Harold Morse, *Study hits 10 firms for toxic waste: The report says 1.2 million pounds were dumped here*, Hon. Star-Bulletin Sep. 30, 1992, A1.

[87] In 1986, the state spent slightly more than nineteen dollars per capita for environmental activities. The national average was thirty seven dollars. Less than one percent of the state's budget in 1986 was spent on environmental protection—less than half the national average. Hawai'i was ranked the fortieth most effective state in terms of environmental protection in 1987. Richard Tobin & Dean Higuchi, Environmental Quality in America's Tropical Paradise, Politics and Public Policy in Hawai'i 126 (Smith and Pratt eds.) (1992). In 1988, less than one percent of the state's expenditures went to environmental health and natural resources programs. Dep't of Envtl. Protection Task Force, Report on Act 293, SLH 1991, Relating to a Department of Environmental Protection (1992), Attachment I. In 1992, the Department of Health estimated that it was short over $4.1 million; the Department of Land and Natural Resources projected a $3.4 million shortfall; and the Department of Agriculture needed an extra million dollars. *Id.* at Attachment II.

[88] Michael Parke, Shoreline Erosion Management in Hawai'i: A Call for a New Paradigm 32 (1992). *See also*, David Waite, *Land-use director finds illegal seawall*, Hon. Advertiser, Sep. 4, 1989, A3; Rod Thompson, *Kona surfing site wall is removed: But surfers say other walls still limit shoreline access*, Hon. Star-Bulletin, Jan. 29, 1991, A3. Many of these structures are causing beach loss. *See e.g.*, Chip Fletcher and Dennis Hwang, *Shall we save these beaches?*, Hon. Advertiser, June 27, 1993, B1; *Lanikai woman fills a hole in beach erosion dispute*, Hon. Star-Bulletin, Feb. 6, 1993, A4.

the permits issued pursuant to the act.[89] Unauthorized grading is extensive.[90] Developers have violated other county and DOH regulations as well.[91] Similarly, critics have pointed to numerous land use violations in the conservation district.[92] A number of streams have been altered and diverted illegally.[93] Pet shops and residents have illegally smuggled alien species into the state, including: piranhas, scorpions, eels, snakes, ferrets, a cougar and an alligator. [94] People have illegally

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[89] OFFICE OF STATE PLANNING, RECOMMENDATIONS FOR IMPROVING THE HAWAII COASTAL ZONE MANAGEMENT PROGRAM, 7, 20-21 (Jan. 1991). *See also* Patricia Tummons, *Big Isle House, Private Park Mock Shoreline Access*, ENV'T HAWAI'I, Jan. 1992, at 4, 8.

[90] DEP'T OF HEALTH AND THE HAWAII ASSOCIATION OF CONSERVATION DISTRICTS, NONPOINT SOURCE POLLUTION PROGRAM RESEARCH PROJECT: HOW EFFECTIVE ARE THE COUNTY GRADING ORDINANCES? (Feb. 1993); JEFFERSON FOX & WILLIAM FREEMAN, MANAGEMENT PLAN FOR THE ALA WAI CANAL WATERSHED, 43-44 (Oct. 1992); *Ag, conservation districts: Owners must clear permits before land*, HON. ADVERTISER, Aug. 14, 1992, A15; June Watanabe, *Olomana Farms cited for alleged land grading: The neighbors are worried about flooding*, HON. STAR-BULLETIN, Sep. 2, 1992, A3.

[91] Patricia Tummons, *Builder Is Lacking Permits and Access—But Not Chutzpah*, ENV'T HAWAI'I, Apr. 1993, at 6; *Putting Out Fires at Pu'uwa'awa'a*, Aug. 1991, at 5; "*ounty Permits? For Bohnett?*, March 1991, at 6; Joan Conrow, *Heiau, fishing shrines destroyed: Milolii residents will be liable, county says*, HON. ADVERTISER, June 10, 1993, A4.

[92] FRANKEL, OTSU & MINATOYA, HAWAII'S CONSERVATION DISTRICT: A REVIEW OF THE PERMITTING PROCESS, (1992). The articles by Patricia Tummons in ENVIRONMENT HAWAI'I are particularly informative: *DLNR Won't Let Ag Use Die in Protective Subzone of Hanalei*, Apr. 1993, at 5; *Post-Mortem of Kawao Park: Death by Murder at Hands of City*, Sep. 1992, at 1; *DLNR Seeks Fines of $13 Million For Violations Along Wai'oli Stream*, Apr. 1992 at 1; *Pu'uwa'awa'a Report Evades Tough Questions*, March 1992, at 4; *DLNR Winks at Private Cabin On State's Land in South Kona*, March 1992, 1; *Big Isle House, Private Park Mock Shoreline Access*, Jan. 1992, at 4-5; *Kaua'i Charter Boats Leave Confusion, Discord in Wake*, Sep. 1991, at 1; *Putting Out the Fires at Pu'uwa'awa'a*, Aug. 1991, at 5-6; *Pu'uwa'awa'a Burns And the DLNR Fiddles*, March 1991, at 1-8; *Showdown on Mount Olomana*, Sep. 1990, at 4. *See also* Rod Thompson, *Developer faces fines for land-use infractions: The illegal acts on the Big Island include paving over a state historic site*, HON. STAR-BULLETIN, June 25, 1993, A3; Hugh Clark, *Motorola fined for antenna violations*, HON. ADVERTISER, Sep. 9, 1989, A5.

[93] Patricia Tummons, ENV'T HAWAI'I, *Years Late, Hamakua Seeks Stream Alteration Permits*, Oct. 1992, at 11; *DOT Alters Document in Application For Roadwork in Natural Area Reserve*, Apr. 1993, at 9 (DOT sought two after-the-fact permits for stream channel alterations); *DLNR Seeks Fines of $13 Million For Violations Along Wai'oli Stream*, Apr. 1992, at 1. *See also* William Kresnak, *Trotter firm ordered to put meander back in stream*, HON. ADVERTISER, Jan. 5, 1989, A3; Stu Glauberman, "State fines Olomana developer: $1000-a-day penalty for unauthorized work on stream," HON. ADVERTISER, Feb. 4, 1993, A1.

[94] *Six more piranhas seized; 10 more may still be loose*, HON. ADVERTISER, May 22, 1992,

harassed endangered species, occasionally prompting a response from the authorities.[95]

The government's prosecution of many cases demonstrates that laws are not being obeyed. The federal government proved beyond a reasonable doubt that two former wastewater treatment managers illegally and secretly dumped tons of partially treated sewage sludge into the waters off Sandy Beach in 1988-89.[96] They were the first people convicted for violating the federal Clean Water Act in Hawai'i. Another employee of the sewage plant pled guilty. A local wood treatment company and its general manager pled guilty in federal court to knowingly storing hazardous wastes (a pesticide-copper chromium arsenate) without a Resource Conservation and Recovery Act permit.[97]

In early 1993, a federal grand jury indicted Hamakua Sugar President Francis Morgan and four of his employees for knowingly violating the Clean Water Act. According to the indictment, Hamakua employees discharged muddy waste water into a gulch leading into the ocean, bypassing required treatment processes. The EPA found that these discharges were destroying coral in the area.[98]

A3; *HPD nets 30 illegal animals*, HON. ADVERTISER, June 12, 1992 A3; Kris Tanahara, *Gotcha: a tarantula, two pythons, lizard*, HON. ADVERTISER, Jan. 25, 1992, A5; *3 snakes found over 10 days: One boa believed to be still in Kaimuki*, HON. ADVERTISER, Dec. 10, 1991, A3; David Oshiro, *Discovery of alligator sounds alert about unwanted animals: Zoologists warn of the harm the animals can cause if let loose*, HON. STAR-BULLETIN, April 27, 1991, A1; Harold Morse, *Baby cougar kept as a pet in Oahu home: An anonymous tipster led officials to the banned animal*, HON. STAR-BULLETIN, Sep. 25, 1991, A1.

[95] Charles Memminger, *Monk seal killer freed while verdict appealed*, HON. STAR-BULLETIN, March 3, 1990, A8; *Man arrested in monk seal harassment*, HON. ADVERTISER, May 4, 1991, A5; Edwin Tanji, *Errant kayaker up the creek: Man being sought for illegally approaching humpback whale*, HON. ADVERTISER, March 27, 1992, A2; Hugh Clark, *Isle wildlife police hunt turtle killers: Young one found hacked to death*, HON. ADVERTISER, March 26, 1992, A3.

[96] Ken Kobayashi, *2 guilty of waste dumping: First convictions here under Clean Water Act*, HON. ADVERTISER, Oct. 3, 1991, A1.

[97] Information supplied by Charles McKinley, Chief, Hazardous Waste Branch, Office of Regional Counsel, EPA, Region IX, responding to a Freedom of Information Act request by the author.

[98] Kris Tanahara, *Hamakua's Morgan, 4 others indicted: Federal charges cite violations of the Clean Water Act*, HON. ADVERTISER, Feb. 25, 1993, A1. On January 3, 1994, a former Hamakua Sugar superintendent admitted in federal court that he knowingly violated the Clean Water Act by allowing untreated waste to be dumped in the ocean. The former superintendent agreed to testify against other Hamakua officials. HON. STAR-BULLETIN, Jan. 4, 1994, A3.

The EPA's successful prosecution of these three criminal cases represents the tip of the iceberg. Since 1988, the EPA also filed thirteen civil actions, collecting $547,168 in fines, with one case pending. In twenty administrative actions taken against Hawai'i facilities, the EPA has assessed $1,226,806 in fines, with two cases pending. These cases include violations of asbestos regulations (ten cases), excessive air emissions, the failure to timely dispose of toxic sludge, improper storage of hazardous waste, inadequate monitoring of potential ground water contamination, the failure to properly monitor air emissions, and record keeping violations. Although violators generally are small facilities and contractors, large entities such as Hawaiian Electric Company, Hawaiian Independent Refinery, Chevron and government bodies have also been fined.[99]

The State too has prosecuted and fined violators of environmental laws. The only criminal case since 1988 was the prosecution of the waste oil handler for the unlawful discharge of oil and criminal solicitation for dumping 200 to 300 barrels of used oil.[100] Although DOH has filed no more than a couple civil suits, it has collected administrative fines in 32 cases. Altogether, DOH has collected over $283,000 in fines from 1988 through 1992.[101] These cases include fines against Puna Geothermal Ventures for repeatedly releasing excessive levels of hydrogen sulfide from their wells,[102] cruise ships repeatedly for polluting

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[99] Information supplied by Charles McKinley, Chief, Hazardous Waste Branch, Office of Regional Counsel, EPA, Region IX, responding to a Freedom of Information Act request by the author. *See also*, Peter Wagner, *Feds: PRI company bogged down on toxic sludge: The EPA plans to fine the refinery over a pond of oily muck*, HON. STAR-BULLETIN, May 31, 1991, A3; *Refinery to pay EPA fine*, HON. ADVERTISER, Jan. 15, 1993, A2; *Unitek fined for cleanup failures*, PAC. BUS. NEWS, Nov. 4, 1991, 45; *Three Isle firms settle with EPA on toxic-waste charges*, HON. ADVERTISER, July 26, 1993, A4.

[100] Prior to 1988, the state filed three cases against American Hawaii Cruises for polluting island waters. Conversation with Lawrence Goya, head of the Criminal Division, Department of Attorney General (June 24, 1993).

[101] Letter from John Lewin, Director, Department of Health to Representative Cynthia Thielen (July 9, 1993); Interview with Deputy Attorney General Larry Lau (August 6, 1993).

[102] Hugh Clark, *Puna Geothermal fined $9,300*, HON. ADVERTISER, Dec. 12, 1992, A2; Rod Thompson, *Puna Geothermal fined $3,000 for infractions*, HON. STAR-BULLETIN, Sep. 19, 1991; Hugh Clark, *State to fine geothermal firm $20,000*, HON. ADVERTISER, Dec. 28, 1991, A1. *See also* Rod Thompson, *Toxic gas leak forces close of geothermal well: Hydrogen sulfide levels are 'pretty high' in neighboring subdivision*, HON. STAR-BULLETIN, Feb. 9, 1993, A1; Hugh Clark, *Geothermal well is plugged: May never reopen; others may be used*, HON. ADVERTISER, Nov. 5, 1992, A3; Hugh Clark, *Puna Geothermal now facing stiff fines for*

coastal waters,[103] construction firms for not controlling dust,[104] and sewage plant operators for spills.[105]

Since the City and County of Honolulu initiated a civil fine system in 1988, the Department of Land Utilization has issued orders and imposed fines in 1385 zoning cases, collecting $319,322. Approximately forty percent of these were violations of the sign ordinances with the remainder divided between violations of use standards and structural requirements (such as construction in a setback area).[106] For every case in which orders and fines are issued, there may be another six for which building inspectors' warnings bring about compliance. In addition, the Building Department issues over two hundred orders and fines for building code, housing code and sidewalk violations annually.[107] The Department of Public Works has issued 163 NOVs for grading ordinance violations between 1988 and 1992.[108] The Honolulu Prosecutor's Office criminally prosecutes approximately three to five zoning violations a month.[109]

Private parties are not the only ones failing to obey the law; the government has violated the law as well. Recently, Federal District Court Judge Harold Fong held that the city committed 104 sewage bypass and reporting violations and 1645 violations of secondary treat-

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violating rules, HON. ADVERTISER, Aug. 21, 1992, A3; *Geothermal well springs leak*, HON. ADVERTISER, Sep. 11, 1991, A4; Rod Thompson & Linda Hosek, *Puna rocked by well explosion: Dozens of residents flee geothermal blast*, HON. STAR-BULLETIN, June 13, 1991, A1.

[103] On March 22, 1991, American Hawaii Cruises admitted to polluting waters and paid a $1000 fine. In March 1988, it spilled fuel off Kaua'i. In 1986, the State fined the company for dumping sewage in neighbor island harbors. Lester Chang, *Isle cruise-ship company fined for polluting Nawiliwili Harbor*, HON. STAR-BULLETIN, May 1, 1991, A4.

[104] *Construction firm fined $20,000 for Waialae Iki Dust*, SUNDAY HON. STAR-BULLETIN AND ADVERTISER, Sep. 6, 1991.

[105] Peter Wagner, *State raises a big stink over Turtle Bay odor*, HON. STAR-BULLETIN, July 4, 1990, A4.

[106] Interview with Larry Watanabe, Department of Land Utilization planner (July 20, 1993).

[107] Interview with Sadao Kaneshiro, Chief Building Inspector, Building Department, City and County of Honolulu (July 20, 1993). While the Department of Land Utilization had readily accessible figures, the numbers from the Building Department represent Mr. Kaneshiro's best guess.

[108] Interview with Weston Wataro, service engineer, Division of Engineering, Department of Public Works (July 21, 1993).

[109] Interview with Doug Woo, Assistant to the Prosecutor (July 22, 1993).

ment requirements.[110] Federal Judge David Ezra ruled that the city's frequent discharges of raw sewage into Enchanted Lake were illegal.[111] Early in 1992, the EPA criticized the City and County of Honolulu for its apparent violations of the Clean Water Act, citing over one hundred sewage spills, overflows and bypasses, and the city's failure to ensure pretreatment of industrial chemicals and toxins entering the sewage system.[112] The State cited Maui for spills at the Wailuku-Kahalui sewage treatment plant and at the Napili pump station.[113]

While the counties' inability to properly treat sewage has been well-publicized, other government agencies have failed to comply with other environmental procedures.[114] The State's Department of Transportation (DOT) engaged in Kahalui airport improvements without first preparing a proper environmental impact statement.[115] The DOT also apparently constructed a road in a natural area reserve without following environmental procedures.[116] DOT's improper removal of asbestos at the Honolulu Airport resulted in an EPA lawsuit against the agency.[117] Hawai'i county improperly gave a special management area permit to a botanical garden.[118]

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[110] Hawaii's Thousand Friends v. City and County of Honolulu, Civ. Nos. 90-00218, 91-00739. The city also settled claims that operation of the Sand Island sewage treatment plant had violated the Clean Water Act. Patricia Tummons, *Settlement Gets City Off the Hook For Violations at Sand Island Plant*, ENV'T HAWAI'I, Oct. 1991, at 1.

[111] David Waite, *Sewage controversy grows in court, political arena*, HON. ADVERTISER, July 29, 1992, A7. *See also* SUNDAY HON. STAR-BULLETIN & ADVERTISER, Nov. 25, 1990, A2.

[112] Peter Wagner, *EPA orders city to fix up its aging sewer system: The federal agency is requiring officials to come up with a plan for repairs this month*, HON. STAR-BULLETIN, Jan. 17, 1992, A1; Stu Glauberman, *More EPA city sewage violations bared*, HON. ADVERTISER, Jan. 24, 1992, A3.

[113] Lila Fujimoto, *Maui scrambling to reduce $870,000 sewer-spill fine*, HON. STAR-BULLETIN, May 11, 1992, A10; Edwin Tanji, *Maui fined $8000 for '90 spill*, HON. ADVERTISER, Feb. 24, 1993, D1. DOH proposed the $870,000 fined for spills between 1989 and 1992 at the Wailuku-Kahului sewage plant. Maui County agreed to pay an $8,000 fine for the Napili spill.

[114] Andy Yamaguchi, *Lung Association criticizes agencies: Faults state, city on project air quality standards*, HON. ADVERTISER, Oct. 24, 1989, A6.

[115] Patricia Tummons, *DEIS for Airport Expansion Finds No Impact, No Growth*, ENV'T HAWAI'I, Feb. 1992, at 5.

[116] Patricia Tummons, *DOT Alters Document in Application For Roadwork in Natural Area Reserve*, ENV'T HAWAI'I, Apr. 1993, at 9.

[117] *EPA sues the state over airport asbestos disposal*, HON. ADVERTISER, Nov. 13, 1991, A9.

[118] Patricia Tummons, *Questionable Actions At Garden Bring Expansion Plans to a Halt*, ENV'T HAWAI'I, March 1992, at 6-7.

The federal government has often failed to comply with environmental laws as well.[119]

The deteriorating quality of our environment and the extent of noncompliance indicate a failure in enforcement. Critics may argue that our environment has been plagued by other problems, the least of which has been lax enforcement. Similarly, they may point to the enforcement cases to illustrate the success of enforcement efforts in Hawai'i. Such a conclusion, however, ignores the evidence of continuing non-compliance and its destructive impact.[120] While some prosecutions have put a stop to specific environmentally damaging practices and no doubt deterred others, the enforcement program has not arrested noncompliance. A detailed examination of the enforcement process demonstrates that the enforcement system is badly in need of repair.

VI. Problems in and Proposals to Improve Enforcement

Hawai'i's environmental and land use laws are being flouted and the government has not been able to stem the tide of illegality. Industry attorneys declare that "Hawaii is still 10 years behind the Mainland when it comes to active enforcement of environmental regulations."[121] According to one report, Hawai'i was seventh among states in percentage of factories, mills and sewage treatment plants violating the Clean Water Act in the last quarter of 1990.[122] Six facilities (two

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[119] Blue Ocean Society, et. al. v. Watkins, 767 F. Supp. 1518 (D. Haw. 1991) (halting federal involvement in the geothermal development and ordering completion of an environmental impact statement); Patricia Tummons, *Army Displays its Brass at Schofield Barracks*, Env't Hawai'i, Oct. 1991,at 5 (alleging wastewater treatment violations); Peter Wagner, *Isle plants added to endangered list: 186 new ones resulted from a Sierra Club lawsuit*, Hon. Star-Bulletin, July 23, 1990, A1 (settlement between environmental groups and U.S. Fish and Wildlife Service for the Service's failure to add 186 native Hawaiian plants to the threatened.or endangered species list as required by law).

[120] *See, e.g.*, supra notes 5-8, 88-92; *infra* note 130.

[121] Scott Whiting, an associate with Case & Lynch, quoted by Christine Rodrigo in *Environment is hot topic in real estate market*, Pac. Bus. News, Feb. 24, 1992, B18. Similarly, Craig Wright, a consultant for Covenant Environmental declared: "Community Right-To-Know and Spill-Response Contingency Planning for facilities with Hazardous materials/wastes are not being enforced or reviewed. . . . Commercial property transfers of contaminated soils regulated by the 'Superfund' statutes show little 'Due-Diligence'. Loads are transported to non-permitted sites without manifests or labortory [sic] documentation." Letter to the Sierra Club, May 4, 1993.

[122] Peter Wagner, *State has to clean up its water act: A national group says Hawaii is among the worst offenders*, Hon. Star-Bulletin, June 19, 1991, A1.

private, one federal and three county) discharged unacceptably high levels of contaminants into the ocean late in 1990. The EPA has complained that understaffing in DOH and the attorney general's office has crippled the enforcement program.[123] In addition, enforcement of violations along the shoreline has been lax. Despite the nearly five hundred illegal shoreline structures on O'ahu, the City and County has initiated only about two dozen enforcement actions in the past decade.[124] Kauai has taken no action on the eleven illegal structures there.[125] DLNR's failure to enforce the law in the Conservation District has been heavily criticized.[126]

These shortcomings in enforcement may be overcome by adopting the approaches taken in other jurisdictions. Improved enforcement will require better detection, more effective sanctioning mechanisms, appropriate bureaucratic organization, political will and citizen participation. These improvements will require changes in the law, increased funding, more staff and changes in attitude.

A. Detection

Violations of environmental laws are not subject to correction and punishment until they have been detected. Detection requires citizen participation, a well-funded monitoring program, a vigorous inspection program, and a trained, dedicated staff.

1. Citizen Participation

Traditionally, detection of environmental degradation came from community members. Before the passage of modern environmental law, community members would directly suffer the consequences of pollution. They sued polluters over the accumulation of soot from factories in their homes and headaches from impure air.[127] Today, while environmental agencies may have aggressive monitoring programs, the

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[123] U.S. ENVIRONMENTAL PROTECTION AGENCY, END-OF-YEAR EVALUATION FISCAL YEAR 1991: CLEAN WATER GRANTS SECTION 106, 205(j)(2) AND 604(B); Appendix A of a letter by Harry Seraydarian, Director Water Management Division, EPA, to Dr. John Lewin, Director of Department of Health, State of Hawaii, (Feb. 18, 1992).

[124] Parke, *supra* note 88, at 33.

[125] Parke, *supra* note 88, at 33.

[126] *See supra* note 92.

[127] Bove v. Donner-Hanna Coke Corp. 236 App.Div. 37, 258 N.Y.S. 229 (1932); Richard's Appeal, 57 PA 105 (1868).

public still detects a substantial portion of environmental offenses.[128] A comprehensive study of sixty-two hazardous waste crime cases on the East Coast found that well over a third were initiated by citizen complaints.[129] A number of instances of environmental degradation in Hawai'i have been reported by citizens rather than through an aggressive monitoring and inspection program.[130]

Because environmental agencies cannot hope to have enough staff and money to detect all the violations of the law, many agencies actively encourage citizen participation in detecting non-compliance. The Federal Clean Air and Comprehensive Environmental Response Compensation and Liability Acts, for example, provide opportunities for rewards of up to $10,000 to those who furnish information which leads to the criminal conviction of, or imposition of a civil or administrative fine on, a violator.[131] California mandates that any person whose information materially contributes to the imposition of a civil or criminal fine in a hazardous waste or clean air case receive a reward equal to ten percent of the fine, but not more than $5,000.[132] New Jersey's rewards are not as generous, but still provide an incentive for citizens to help the government detect violations. Rewards for violations of hazardous waste regulations are capped at $250.[133]

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[128] Hawkins, *supra* note 15, at 96-97.

[129] Rebovich, *supra* note 25, at 77. Similarly, citizen complaints were the source of about a third of environmental health violations in England. Hutter, *supra* note 15, at 97-98.

[130] Environmentalists blew the whistle on the dumping of toxic fluids in the Kona landfill by a scrap metal salvage contractor. Rod Thompson, *Kona junk dealer broke zoning laws in California*, HON. STAR-BULLETIN, June 11, 1993, A4; Letter from Jerry Rothstein to Hawai'i County Mayor Steven Yamashiro (May 24, 1993). Environmentalists brought to light the illegal paving over of a historic site and other infractions in the conservation district. *Developer faces fines for land-use infractions: The illegal acts on the Big Island include paving over a state historic site*, HON. STAR-BULLETIN, June 25, 1993, A3. Community members spotted trucks hauling petroleum contaminated soil into their neighborhood. Kevin Dayton, *State will kill oily-soil facility*, HON. ADVERTISER, Dec. 11, 1992 A3. Residents complained about and filmed the illegal alteration of Makawao Stream. Stu Glauberman, *State fines Olomana developer: $1000-a-day penalty for unauthorized work on stream*, HON. ADVERTISER, Feb. 4, 1993, A1. A Lanikai woman stopped the filling of an area behind an illegal seawall. *Lanikai woman fills a hole in beach erosion dispute*, HON. STAR-BULLETIN, Feb. 6, 1993, A4. Neighbors were the first to detect violations of hydrogen sulfide limits from the Puna Geothermal Venture plant. Hugh Clark, *Puna Geothermal now facing stiff fines for violating rules*, HON. ADVERTISER, Aug. 21, 1992, A3.

[131] 42 U.S.C. § 7413(f); 42 U.S.C. § 9609(d).

[132] CAL. HEALTH & SAFETY CODE, §§ 25191.7(a), 42405.1(a).

[133] Rebovich, *supra* note 129, at 117.

These reward programs heighten community awareness of the need to protect the environment and deter violators who may be able to more easily avoid government oversight. They also are cost-effective. Violations are detected by citizens—not paid staff members—and rewards come from the fines—not the state budget. Hawai'i should adopt a version of California's law, capping rewards at a level sufficient to generate community attention.

2. *Funding and Staffing*

While citizen participation can help, agency monitoring is essential to detect non-compliance with environmental laws. After all, citizens generally do not have access to private facilities. Nor do they have the technical skills and tools to carefully examine operations and emissions. The study of hazardous waste crime cases on the East Coast found that nearly a quarter of the crimes were discovered through routine inspections. Investigations of curious activities comprised almost twenty percent of the cases.[134]

Perhaps the greatest problem monitoring programs face is a lack of resources. To date, monitoring programs throughout the country have been inadequate. The failure to monitor encourages widespread violations.[135] A lack of funding may induce environmental agencies to rely too heavily on self-monitoring reports rather than inspections.[136] Unfortunately, exclusive reliance on these reports is risky. While self-reporting of taxes to the IRS may work well, environmental agencies do not have access to a complete, independent record of discharges; once the discharges have been emitted, they generally leave no record for enforcement purposes.[137] Polluters may simply lie on these reports, making detection more difficult.[138] Inspections are particularly important in enforcing land use regulations which rarely—if ever—use self-monitoring reports. Inspections may also encourage businesses to pay

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[134] Rebovich, *supra* note 129, at 79. Another 16% came from employee whistleblowing.

[135] Russell, *supra* note 36, at 243.

[136] Agencies infrequently audit sources to verify the accuracy of the self-monitoring reports. A decade ago, emissions from major sources of air pollution were inspected and measured only once every eight and a half months; major water sources every five. Russell, *supra* note 36, at 250.

[137] CLIFFORD RUSSELL, ET AL., ENFORCING POLLUTION CONTROL LAWS, 4-5 (1986).

[138] For example, one hazardous waste hauler simply forged signatures and dumped wastes in a wooded area. Rebovich, *supra* note 129, at 90.

close attention to environmental regulations. For example, one study revealed that pulp and paper plants significantly and permanently reduced their effluent discharges after federal and state inspections.[139] Not only did inspections lead to greater compliance with discharge permits, but they also led to increased filing of self-monitoring reports.

In Hawai'i, because agencies charged with monitoring environmental degradation have not been adequately funded, the State has failed to detect violations. The federal court has criticized the lack of proper government oversight. In sentencing two former Hawaii Kai sewage plant officials for the illegal dumping of sewage sludge, Federal Judge David Ezra scolded government watchdogs for failing to deter their actions:

> The importance of this case lies not in the convictions of these men, . . . [but in the lesson that] better oversight at all levels of government might well have dissuaded the defendants from believing that they could conceal their activities. . . . The evidence in this case was overwhelming that the individuals were left to their own devices without adequate and sufficient government oversight.[140]

The EPA appears to agree with Judge Ezra's conclusions. While praising recent improvements in its water pollution control program, the agency noted that, because of insufficient staff, DOH failed to perform a requisite number of inspections. "Also, many inspections were performed in an abbreviated manner; inadequate to determine compliance with permit requirements."[141]

The State's Attorney General also claims that the Clean Water's enforcement program gets bogged down because of insufficient DOH staff.[142]

The Clean Air Program faces similar problems. Staff members recognize that the present inspection program is inadequate, particularly because they cannot engage in surprise inspections:

> The department would have to increase the manpower resource to assure that things are being done properly. Surprise audits and stack testing would be conducted. A good set of personnel will be required to perform the tests and also to monitor very closely all the tests that are done now.

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[139] Magat & Viscusi, *supra* note 40, at 331-60.

[140] Andy Yamaguchi, *Pair get prison terms in sludge dumping case*, HON. ADVERTISER, Feb. 5, 1992, A3.

[141] *See supra* note 123.

[142] Interview with Attorney General Robert Marks (June 2, 1992).

> Like I stated last time, the way we are doing it right now is very superficial. We normally look for the gross errors and not the fine details. We have a lot of problems right now in what we see. We haven't pursued any challenges because we can't afford the time or the manpower. There is a percentage of a test results that should be thrown out but we don't although we do make our concerns known to the applicant and the tester.[143]

Although the State successfully prosecuted one oil dumper, it has not caught the dozens—or maybe even hundreds—of other potential violators of its used oil law. The one oil dumper prosecuted claimed he could easily identify 200 violators of the state's oil dumping regulations whom DOH ignores.[144] In noting that only a small percentage of the five million gallons of oil imported annually is recycled, Dr. Bruce Anderson, Deputy Director of Environmental Health, concluded, "The rest we assume is improperly disposed of."[145]

Because of inadequate resources, the Department of Land and Natural Resources has no idea what the extent of compliance is with its conservation district use permits.[146] County governments recognize that the effectiveness of the special management area permit (for uses along the shoreline) has been undermined by the lack of enforcement capacity.[147] The inability to prevent violations of shoreline setback provisions has caused major coastal zone management problems.[148] Similarly, Honolulu's building department has too few inspectors.[149]

Environmental programs require greater funding for monitoring. Many states fund their environmental programs through fees paid by the regulated community.[150] A few programs in Hawai'i are supported

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[143] Wilfred Nagamine, Acting Clean Air Branch Chief, State of Hawaii Department of Health, Air Advisory Committee Meeting Minutes, Feb. 26, 1993, at 10.

[144] Kevin Dayton, *Accused calls oil dumping charge unfair: Maili man charges state ignores worse violators*, HON. ADVERTISER, July 8, 1990, A1.

[145] Jon Yoshishige, *Dumped waste oil poses a health hazard at Maili*, HON. ADVERTISER, July 7, 1990, A1.

[146] FRANKEL, ET AL., *supra* note 92, at 24.

[147] OFFICE OF STATE PLANNING, RECOMMENDATIONS FOR IMPROVING THE HAWAII COASTAL ZONE MANAGEMENT PROGRAM 7 (Jan. 1991).

[148] OFFICE OF STATE PLANNING, *supra* note 147, at 7.

[149] Interview with Sadao Kaneshiro, *supra* note 107.

[150] Forty-three states rely on 272 different fees. Almost 75 percent of fee revenues is dedicated to environmental programs. HAW. OFF. OF ADMIN. AND RESOURCES MGMT., FUNDING STATE ENVIRONMENTAL PROGRAM ADMINISTRATION: THE USE OF FEE-BASED PROGRAMS 7 (1992).

by such fees.[151] The State and counties should increase their funding of monitoring programs by enacting more environmental fees and by devoting more general revenues to these programs.

3. *Vigorous Inspection Program*

Inspection programs need more than adequate funding; they also need to be structured to actually detect violations. A vigorous inspection program should include inspections when violations are likely to occur. Inspections should be conducted when permit holders are operating under standard conditions or when the environment is most at risk. One of the best means of detecting violations is through surprise inspections.[152] Environmental officials' failure to inspect premises by surprise allowed hazardous waste offenders on the East Coast to avoid detection.[153]

In Hawai'i inspection programs are often not targeted to finding violations. Monitoring of compliance with Honolulu's grading ordinance presents a classic example. Inspectors from the building section of the Department of Public Works visit sites after construction has begun—after most of the potential environmental damage is likely to occur.[154]

Similarly, inspections under the clean air program are done while sources operate under non-standard conditions. The comments of one DOH staff member, speaking to representatives from industry are revealing:

> One of the problems that we do have when people do have source testing over here is that they often have a tune-up before they even start the source testing. They'll clean out their stack, clean out every piece of equipment to make sure that it is running at an exact percent of 02 where normally they wouldn't. It is running under a certain type of situation under optimum conditions. They do a major tune-up which is not representative of the source.
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> . . . .
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> We don't really dictate the time of testing. . . . Actually, you tell us when to show up at your door to observe the test. We don't pick your

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[151] For example, the clean air program (HAW. REV. STAT. § 342B-29), the solid waste program (Act 312, 1993 Haw. Sess. Laws) and programs dealing with releases of oil (Act 300, 1993 Haw. Sess. Laws) will soon receive funding through such fees.

[152] Hawkins, *supra* note 15, at 93.

[153] Rebovich, *supra* note 129, at 36-38.

[154] Fox, *supra* note 90, at 44.

> source test time or testers. At times we don't know whether they are EPA trained or certified.
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> . . . .
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> If you say it is representative, we have to kind of go along with that a lot of times because we are not familiar with your particular equipment. . . . [The source test is done] after the manager comes out there and takes a look at the equipment, the stack test operator that is familiar with the equipment will tell him that the stack looks a little brown and I don't think you should test today. They provide all those services. I know for a fact, I've gone to enough stack tests in this state to know that that occurs on a regular basis.[155]

Testing of H-Power's emissions, for example, has been conducted under conditions which are not standard.[156]

Monitoring programs should be re-organized to ensure that inspectors are better able to detect violations.

4. *A Trained, Dedicated staff.*

A vigorous inspection program requires a trained, dedicated staff. On the east coast, hazardous waste criminals have successfully eluded detection because inspectors were unfamiliar with treatment systems or failed to inspect diligently.[157]

Unfortunately, in Hawai'i inspectors do not always have the expertise to detect violations. For example, engineers in the clean air program are not always familiar with a source's equipment or the way it's operated.[158] DLNR's inspectors are trained in game regulation rather than in land use, building design or natural resource management.[159] Training for these inspectors is essential. In addition, the state could train a multi-disciplinary investigation unit.

Trained staff should also be dedicated to upholding the law. Dedicated inspectors will not only uncover illegal emissions, but also be less susceptible to bribery. In other jurisdictions, bribery attempts are not unknown.[160] The federal bribery conviction of Marvin Miura for

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[155] Tyler Sugihara, Clean Air Branch engineer, State of Hawaii Department of Health, Air Advisory Committee Meeting Minutes, Jan. 28, 1993, at 16-18.

[156] *Id.*; Patricia Tummons, *H-Power Emissions Pass Test—For What It's Worth*, ENV'T HAWAI'I, Oct. 1990, at 4.

[157] Rebovich, *supra* note 25, at 35-37; *see also*, Russell *supra* note 36, at 262.

[158] Tyler Sugihara, *supra* note 155, at 16-18.

[159] FRANKEL, ET AL., *supra* note 92, at 24.

[160] Rebovich, *supra* note 25, at 39; Hawkins, *supra* note 15, at 32, 59, 121-122.

his activities while the Director of the Office of Environmental Quality Control demonstrates that Hawai'i is not immune to this problem.[161] The State's failure to prosecute the case (then Attorney General Warren Price suggested that the federal prosecution was politically motivated),[162] indicates that the state may not be taking this threat to the integrity of the environmental programs seriously.

A more subtle problem that environmental agencies face is that of co-option. Across the nation, businesses hire officials after they leave their regulatory positions.[163] The prospect of a higher paying job with industry may temper the zeal with which inspectors and other regulatory officials enforce the law. It is unclear to what extent this problem afflicts Hawai'i. Just recently, however, the head of the Clean Air Branch retired and joined Brewer Environmental, a company DOH regulates. No one has suggested any wrongdoing.

More disturbing than the prospect of enforcement officials being co-opted is the possibility that an enforcement official may violate the law which he is charged with enforcing. A former member of the Board of Land and Natural Resources, charged with enforcing the conservation district law, himself violated the law while on the Board.[164]

While dedication may be best achieved through the inculcation of values and by keeping departmental morale high, other measures may need to be adopted to maintain the integrity of environmental enforcement programs. The State prohibits agencies from entering into contracts with former employees and their new employers under certain limited conditions.[165] It also prohibits employees, for one year after leaving an agency, from working for someone on matters in which the employee participated while working for the State.[166] Nor may the employee, for a year after leaving an agency, represent anyone before that agency.[167] While these provisions help to avoid some conflict of interest issues, they do not address the potential problem of employees under-regulating and under-enforcing permittees in the hope of a future

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[161] Benjamin Seto, *Miura pleads guilty to 3 federal counts: He faces prison for fraud, bribery and tax evasion*, HON. STAR-BULLETIN, June 3, 1993, A1.

[162] *Id.*

[163] Rebovich, *supra* note 25, at 38-39, 98.

[164] James Dooley, *Arata resigns from land board: Move follows disclosures about past lease, rent irregularities*, HON. ADVERTISER, Aug. 22, 1993, A1.

[165] HAW. REV. STAT. § 84-15(b).

[166] HAW. REV. STAT. § 84-18(b).

[167] HAW. REV. STAT. § 84-18(c).

job. Government employees could be prohibited from working for a company they were formally charged with regulating for two years after leaving the employ of the state. In addition, those with regulatory responsibilities could be prohibited from engaging in activities which may come under their own purview.

Enhanced detection through increased funding and staffing, citizen participation, an improved inspection program and better staff training should encourage increased compliance. Those who are caught violating the law should face an effective sanctioning scheme.

B. *Sanctions*

Traditionally, enforcement action rarely included penalties. Agencies focused on getting violators to agree to comply with regulations based on a negotiated schedule. Recently, however, agencies have significantly increased the use of penalties in enforcement actions.[168] The effectiveness of these penalties is dictated by the capabilities of the enforcement staff, the size of the civil penalties, the use of criminal penalties, whom they are directed against, the ease with which they can be used, and the use of other kinds of sanctions. Because the enforcement tools used by specific state and county agencies vary significantly, discussion of each one would be prohibitively long and complicated. Instead, this section primarily examines sanctioning by DOH.

1. *Staffing*

Environmental agencies not only need more staff to detect violations, but they also need access to personnel who can sanction the violators. EPA's civil sanctions are pursued by attorneys within the civil Environmental Enforcement Section of the Department of Justice (DOJ). The Environmental Crimes Section of the DOJ, relying on over sixty-five EPA criminal investigators and more than a hundred FBI special agents, is dedicated to criminal prosecutions. In addition, U.S. Attorneys Offices prosecute environmental crimes.[169] Because expertise is critical in enforcement, the DOJ provides training to state officials in

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[168] Wasserman, *supra* note 13, at 39.

[169] Joseph Block, *Environmental Criminal Enforcement in the 1990's*, 3 VILLANOVA ENVTL. L. J. 33 (1992).

environmental crime prosecution. The EPA offers scholarships for training investigators as well.[170]

Insufficient staffing has stymied both civil and criminal enforcement of environmental health laws in Hawai'i. With much fanfare, the State Attorney General's Office created a new environmental enforcement unit in 1990. The unit, staffed with one attorney general and one EPA lawyer, concentrates on civil actions.[171] Despite this move, two years later the EPA chastised the state for not sufficiently funding the Attorney General's environmental enforcement program. "Continued under-staffing of the Attorney General's Office has brought the outstanding progress of [the Health Department's] enforcement programs to a virtual standstill."[172] The former Attorney General concurred with the EPA's assessment, concluding, "[W]e could use six to ten deputies working full-time on a whole range of environmental pollution control cases."[173] Since then, the Attorney General's Office has devoted four attorneys to work on environmental health issues, although none are working exclusively on enforcement issues.[174]

If the civil enforcement program is anemic, the criminal enforcement program is virtually non-existent. Since 1988, only one criminal case has been prosecuted. The Attorney General's Criminal Justice Division does not have enough people with technical environmental expertise to prosecute cases. In fact, the division has chosen not to prosecute environmental crimes because of a lack of adequate staffing.[175] In order for the Division to effectively prosecute environmental crimes, it will need an attorney trained in criminal environmental law as well as trained criminal investigators.

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[170] Helen Brunner, *Environmental Criminal Enforcement: A Retrospective View*, 22 ENVTL. LAW 1315 (1992).

[171] Kevin Dayton, *New environmental enforcement unit will sue polluters*, HON. ADVERTISER, June 11, 1990, A3.

[172] *See supra* note 123.

[173] David Waite, *EPA: State is botching water pollution control; It says shortage of funds, staffers hurting effort*, HON. ADVERTISER, April 9, 92, A1.

[174] Testimony of the State Attorney General on SCR 148/SR 122, before the Senate Committee on Government Operations, Environmental Protection & Hawaiian Programs and the Committee on the Judiciary, April 6, 1993.

[175] Conversation with Lawrence Goya, head of the State of Hawaii Attorney General's Criminal Justice Division (June 24, 1993). John Lewin, Director of the State of Hawaii Department of Health concurred: "[N]one of our programs possess the requisite training, knowledge or resources to prosecute criminal matters." Letter to Representative Cynthia Thielen (July 9, 1993).

If the Legislature wants compliance with the laws it passes, it will have to increase funding of the Attorney General's Office. The current Attorney General vowed, "I intend to seek additional resources for this department for environmental enforcement in the 1994 legislature."[176]

2. *Size of Civil Penalties*

Where penalties are too low, environmental agencies resort to bluffing.[177] They also may be an ineffective deterrent, allowing polluters to write off penalties as the cost of doing business. A GAO study pointed to one mainland facility which was fined $15,000 for emission violations while profiting over $231,000 for its noncompliance.[178]

DOH claims that its civil penalties under the clean water law are too low. In 1991, an angry Bruce Anderson, Deputy Director of Environmental Health, vowed that the owners of three sewage treatment plants that dumped more than two million gallons of raw sewage would be fined. "There will certainly be fines, he said. "There are times when I wish we had larger penalties."[179] In fact, the maximum civil penalty for violating Hawai'i's clean water[180] and hazardous waste[181] laws ($10,000) is lower than that which the EPA or citizens groups can recover under federal law ($25,000).[182]

Fines for violations of the conservation district law were long criticized as being too low.[183] This year the Legislature increased them from $500 to $2000.[184] The Legislature needs to increase civil penalties for violating other environmental laws to ensure that they have a deterrent effect and are consistent with federal law.

3. *Severity of Criminal Penalties*

While high civil penalties are an important deterrent, they are often insufficient.[185] In fact, Ohio's early experience exclusively relying on

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[176] Letter from Attorney General Robert Marks to the author (April 9, 1993).

[177] Hawkins, *supra* note 15, at 151.

[178] *EPA fines not hitting hard enough, says GAO*, 2 ENV'T TODAY 13 (July/August 1991).

[179] Christopher Neil, "Health official vows fines in three sewage dumpings" SUNDAY HON. STAR-BULLETIN & ADVERTISER, Aug. 18, 1991, A8.

[180] HAW. REV. STAT. § 342B-30.

[181] HAW. REV. STAT. § 342J-9.

[182] 33 U.S.C. § 1319(d), 42 U.S.C. § 6928(g).

[183] FRANKEL, ET AL., *supra* note 92, at 43-44.

[184] Act 90, 1993 Haw. Sess. Laws.

[185] *See supra* notes 46-49 and accompanying text.

civil penalties failed to sufficiently deter violations. Its subsequent use of criminal penalties and the concomitant fear of incarceration and criminal stigma have proven effective.[186] California, too, has relied on criminal prosecution to punish and deter toxic dumpers.[187] While criminal sanctions alone may sufficiently stigmatize harmful conduct, they must also be severe enough to match the crime.

Violators of federal hazardous waste regulations face fines of up to $50,000 and five years in prison.[188] In contrast, violations of some Hawai'i hazardous waste regulations are subject to maximum penalties of only one year in jail and $25,000 in fines upon the first conviction.[189] Even more remarkable, those who fail to comply with a hazardous waste permit do not even face criminal sanction under state law.

Although DOH has not yet encountered problems with these deficiencies in the hazardous waste law, it has expressed its dissatisfaction with the feckless criminal penalty provisions in the used oil law.[190] Violations are treated as a petty misdemeanor[191] with a maximum penalty of thirty days in jail.[192] Enforcement officials claimed that this penalty was insufficient for the businessman who dumped 200 to 300 barrels of used oil. The oil, contaminated with chlorinated solvents, threatened drinking water and exposed the public to toxic chemicals.[193]

The Legislature needs to carefully examine the criminal provisions in the environmental laws and strengthen them to make them consistent with federal law and to serve as a needed deterrent. The Legislature should also ensure that all those who are in some way culpable face criminal penalties, particularly when the environment is seriously endangered.

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[186] Anthony Celebrezze, et al., *Criminal enforcement of state environmental laws: the Ohio solution*," HARV. ENV. L. REV. 217 (Winter 1990).

[187] William Bedsworth, *The Verdict*, SIERRA, May/June 1993, at 83. Bedsworth is a superior-court judge in Santa Ana, California.

[188] 42 U.S.C. § 6928(d). A number of states similarly treat knowing offenses of hazardous waste regulations seriously. *See*, ALA. CODE § 22-30-19(e); CONN. GEN. STAT. ANN. § 22a-131a(b); FLA. STAT. § 403.727(3)(b); GA. CODE ANN. § 12-8-82(a); ILL. ANN. STAT. ch. 111 1/2 para. 1044 § 44; TENN. CODE ANN. § 68-46-114(a)(2); TEX. REV. CIV. STAT. ANN. art. 4477-7 § 8(b)(1); W. VA. CODE § 20-5E-15(a).

[189] HAW. REV. STAT. § 342J-9(c).

[190] Informal conversations with officials in the Attorney General's and the Hazard Evaluation and Emergency Response Offices.

[191] HAW. REV. STAT. § 34N-8(b).

[192] HAW. REV. STAT. § 701-107 (Commentary).

[193] HON. ADVERTISER, Nov. 21, 1990, A3.

4. *The Lawbreaker's Culpability*

One of the most controversial issues in the application of criminal penalties is the culpability of the defendant. Courts inquire as to the *mens rea* or "state of mind" of the lawbreaker. Did s/he act intentionally, knowingly, recklessly or negligently? Acts in which the results are intended are generally punished more severely than acts done knowing the results are practically certain to occur. Acts done knowingly are punished more than those acts done recklessly (i.e., consciously disregarding a substantial and unjustifiable risk that the conduct will cause the result). Reckless acts are punished more than those engaged negligently (i.e., disregarding substantial and unjustifiable risks the reasonable person would be aware of).[194] Finally there are some acts which could so significantly harm the public that they are strict liability crimes, requiring no proof of culpability to convict. Those acts which the perpetrator engages in with less culpability are easier for the prosecution to prove. Laws for which the culpability is lower increase the burden on the regulated community to ensure compliance with the law.

Although one of the earliest environmental laws, The Refuse Act of 1899,[195] made discharge of refuse into navigable waters a strict liability crime, recent environmental legislation targets those who are culpable.[196] Most of these environmental statutes require that the government prove that the defendant acted knowingly.[197] Two federal environmental statutes, however, criminalize negligent activities: the Clean Water[198] and Clean Air Acts.[199] While those convicted of these negligent offenses face up to a year in prison, knowing or intentional violators may face up to fifteen years in prison and massive fines, depending on the applicable statute.[200]

Proving a violator's knowledge can be extraordinarily difficult. In addition, the requirement that environmental defendants acted "knowingly" may create an incentive for hazardous waste handlers to remain ignorant of legal requirements and toxicity levels. In response, some

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[194] HAW. REV. STAT. § 702-206.
[195] 33 U.S.C. § 407.
[196] CHRISTOPHER HARRIS, ET AL., ENVIRONMENTAL CRIMES 5-10 (1992).
[197] Harris, *supra* note 196, at 5-2
[198] 33 U.S.C. § 1319(c)(1).
[199] 42 U.S.C. § 7413(c)(4)
[200] *See, e.g.*, the Clean Air Act, 42 U.S.C. § 7413(5) and RCRA, 42 U.S.C. 6928(e).

federal courts have held that under the Resource Conservation and Recovery Act,[201] the government need only prove that the defendant disposed of chemical waste he knew had the potential to harm others or the environment. It is irrelevant whether defendant knew that the material he disposed was classified as "hazardous waste," knew that he lacked necessary permits or knew that he was violating the law.[202] Some federal courts, however, have used a stricter standard, requiring the government to more clearly establish the defendant's culpability.[203]

Because the federal courts are divided as to what "knowing" actually means, and because a strict standard makes prosecution difficult, a number of states have found it necessary to lower the culpability requirement, particularly when hazardous wastes are involved. Ohio enforcement officials, for example, have successfully prosecuted those who recklessly violate hazardous waste requirements.[204] New Jersey and Arizona similarly threaten harsh sanctions for those who recklessly violate their hazardous waste laws.[205] Other states also punish the negligent violators of their hazardous waste laws.[206] In some states,

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[201] 42 U.S.C. § 6901 *et seq.*

[202] U.S. v Hoflin, 880 F.2d 1033 (9th Cir. 1988), *cert denied*, 110 S.Ct. 1143 (1990); U.S. v Dee, 912 F.2d 741 (4th Cir. 1990), *cert. denied*, 111 S.Ct. 1307 (1991); U.S. v. Baytanke Houston Inc., 934 F.2d 608 (5th Cir. 1991). *See also* U.S. v. Weitzenhoff, 1 F.3d 1523, 1529 (9th Cir. 1993) (holding that knowingly engaging in conduct that results in a permit violation, regardless of whether the polluter is cognizant of permit requirements or the existence of the permit, constitutes a "knowing" violation of the Clean Water Act).

[203] United States v. Johnson & Towers, 741 F.2d 662 (3d Cir. 1984), *cert. denied sub nom.*, Angel v. United States 469 U.S. 1208 (1985) (holding that while knowledge can be inferred, defendants must know that the waste material is hazardous); United States v. Hayes Int'l Corp. 786 F.2d 1499 (11th Cir. 1986) (government must prove defendant acted with knowledge of permit status).

[204] OHIO REV. CODE § 3734.99. Celebrezze, et al., *supra* note 186, at 217. In one case, the judge held that:

> acting without educating oneself would be in and of itself conduct which would be construed as reckless under the legislative definition of reckless. To pump or order pumping [water contaminated with hazardous waste into a creek] without the advice of the regulatory agencies would be reckless. . . . *Id.* at 233.

See also, Ohio § 3734.02.

[205] N.J. STAT. ANN. §§ 2C: 17-2, 43 and 13:1E-9; ARIZ. REV. STAT. ANN. §§ 49-925(A), 13-701(C)(5), 13-801(A); FLA. STAT. ANN. § 403.727(3)(b). *See generally* Harris, et al., *supra* note 196.

[206] ALA. CODE § 22-30-19(e); ALASKA STAT. § 46.03.790; IND. CODE § 13-7-13-3;, MINN. STAT. § 609.671 Subd. 6 (gross negligence); NEV. REV. STAT. § 459.600; N.Y. ENVTL. CONSERV. §§ 27-0913, 71-2710.

violators are strictly liable.[207] The Pennsylvania Legislature adopted perhaps the most imposing sanctions. Reckless violators of the hazardous waste law face fines of $500,000 a day and 20 years imprisonment. More significantly, all hazardous waste violators, regardless of the violator's state of mind, face $100,000 per day in fines and imprisonment of up to ten years. The legislative purpose is to "impose absolute liability for such offenses."[208] Because these substances are so dangerous, those who handle them must take incredible precautions to protect the public and avoid criminal sanctions. They must consult with regulators before they act and cannot complain that they were unaware of their duties.

In contrast to these lower *mens rea* requirements of other states, Hawai'i's hazardous waste and superfund laws require that the violator act knowingly. In order to more effectively ensure proper handling of toxic substances, the State could punish those who act recklessly or negligently. What is more, these laws are somewhat inconsistent with violations under Hawai'i's clean air and water laws which subject negligent violators to criminal penalties.[209]

Another anomaly in Hawai'i's law is that civil penalties under Hawai'i's environmental response, or superfund, law, are only assessed against those who act "willfully, knowingly or recklessly."[210] Civil penalties are generally applied strictly, regardless of the defendant's state of mind. Criminal law is the only law in which a violator's *mens rea* is relevant. In fact, the violators' state of mind is not referred to in any other civil penalty section of any federal or Hawai'i environmental law. The violator's culpability is considered in determining the size of the penalty to be assessed, but it is not part of the government's burden of proof for the assessment of civil penalties.

By lowering the *mens rea* requirements of the hazardous waste and superfund laws as well as eliminating references to an actor's state of

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[207] ARK. CODE ANN. §§ 8-7-306(a), 404(a)(1) CAL. HEALTH & SAFETY CODE § 25190; COLO. REV. STAT. § 25-15-310; KAN. STAT. ANN. § 65-3441; MASS. GEN. L. 21C § 10; MICH. COMP. LAWS § 299.548; NEB. REV. STAT. § 81-1508(1); OR. REV. STAT. § 466.995; S.C. CODE ANN. § 44-56-130; VT. STAT. ANN. 10 § 6612.

[208] 35 PA. CONS. STAT. ANN. § 6018.606 (Purdon 1993). The Pennsylvania courts have upheld the constitutionality of this provision. Baumgardner Oil Co. v. Com., 606 A.2d 617 (Pa.Commw. 1992), *appeal denied*, 612 A.2d 986; Com. v. Parker White Metal Co., 515 A.2d 1358 (Pa. 1986).

[209] HAW. REV. STAT. §§ 342B-49(c), 342D-32.

[210] HAW. REV. STAT. § 128D-8(b).

mind in the civil penalty section of the superfund law, the State can ensure that those who handle hazardous waste and toxic substances act responsibly.

5. Other forms of sanctions

While the goal of criminal sanctions is deterrence, other sanctions may more directly correct and prevent environmental problems. These sanctions include listing, suspension and debarment, and bad actor provisions. Convicted violators of the Clean Water and Air Acts are automatically put on a list which bans them from federal contracting until they satisfactorily remedy the condition(s) of noncompliance.[211] While under the Clean Water Act this listing only applies to the facility at which the violation took place, under the Clean Air Act, the EPA may extend the ban to other facilities. The EPA may also suspend or bar anyone indicted under any environmental statute from contracting with the federal government.[212] EPA can use listing, suspension and debarment to ensure that corrective action is taken quickly.

The bad actor laws of twenty-two states prohibit those convicted of environmental crimes from operating solid, infectious or hazardous waste facilities.[213] These laws protect the state from unscrupulous operators at the same time that they punish violators. Rehabilitated individuals and businesses may receive permits, however. Investigations of permit applicants in New Jersey revealed that individuals with criminal backgrounds attempted to enter the hazardous waste business. These investigations have discouraged other undesirable applicants from pursuing a career in hazardous waste management.[214]

A Hawai'i bad actor law might have prevented the release of toxic substances at the Kona landfill. Hawai'i county contracted with a scrap metal dealer to dispose of junked cars. Residents later alerted the state that the contractor was dumping toxic fluids in the landfill. They also informed government officials that the contractor had previously operated an illegal junkyard in California. A bad actor law may have

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[211] 33 U.S.C. § 1368; 42 U.S.C. § 7606; 40 C.F.R. § 15. A number of states have debarment provisions as well. *See, e.g.*, CONN. GEN. STAT. § 4A-63.

[212] 40 C.F.R. § 32.100 *et seq.*

[213] Celebrezze, et al., *supra* note 204, at 225. *See, e.g.*, OHIO REV. CODE § 3734.40-47.

[214] James Stroch & Brian Runkel, *Environmental Bad Actors and Federal Disqualification*, 15 HARV. ENVTL. L. REV. 529, 555 (1991).

allowed government officials to learn about the contractor's background and prevent the dumping from occurring.[215]

6. *Environmental Auditing and Compliance Assurance Programs*

As an alternative to sanctioning strategies, industry attorneys propose "Environmental Excellence" programs. These programs integrate compliance and pollution prevention. Companies that implement a comprehensive compliance assurance system and a pollution prevention program aimed at reducing pollution below permitted levels, would face reduced government oversight, public recognition and expedited permitting.[216] A compliance assurance program includes corporate standards regarding environmental compliance, a high-level corporate official responsible for compliance, clear lines of communication in the event of problems, adequate funding, personnel and resources committed to compliance, employee training over and above that required by regulation, a disciplinary system for employees who violate company environmental standards and environmental auditing. The environmental audits would identify and prevent future noncompliance.[217] Because these audits can reveal information regarding non-compliance, industry attorneys argue that the audits should not be used against the company. Punitive enforcement actions should only be taken if a violation was willful, harmful to the environment, not resolved appropriately or not detected quickly.

On the other hand, EPA advocates that all businesses use environmental auditing as standard practice anyway. The EPA Penalty Policy increases penalties for those companies which have not implemented an environmental auditing program.[218] The EPA also may require an audit after discovering violations. It may require contractors convicted of a crime under the Clean Air or Clean Water Acts wishing to be

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[215] Rod Thompson, *Kona junk dealer broke zoning laws in California*, HON. STAR-BULLETIN, June 11, 1993, A4; Letter from Jerry Rothstein, Sierra Club, Hawai'i Chapter, Conservation Chair, to Mayor Yamashiro (May 24, 1993).

[216] Jim Moore, *Environmental Criminal Statutes: An Effective Deterrent?*, *in* CRIM. ENFORCEMENT OF ENVTL. LAWS 139, 157-161 (1992).

[217] James Banks, *Developing and Implementing an Environmental Corporate Compliance Program*, *in* CRIM. ENFORCEMENT OF ENVTL. LAWS 109 (1992).

[218] Terrel Hunt, *EPA Civil Penalty Policy: Negotiating To Enhance Compliance and Protect the Environment*, 1 J. OF ENV. PERMITTING 539, 543 (Autumn 1992).

"delisted" to implement an auditing and disclosure program.[219]

The State currently has no policy of encouraging these audits. Because audits can decrease enforcement costs and increase compliance,[220] the State should encourage the use of these audits while maintaining its right to prosecute when necessary.

In order to increase the deterrent value of its laws, the State will need to hire more enforcement staff, increase civil penalties, strengthen criminal penalties and adopt new kinds of sanctions.

C. *Bureaucratic Organization*

Government cannot effectively detect, correct and punish violations unless it is well-organized. On the federal level, lack of coordination among agencies responsible for environmental enforcement is one of the greatest impediments to a successful enforcement program.[221] Governmental bureaucracy makes it difficult to bring enforcement actions. Senior enforcers describe decisionmaking as "disjointed and inefficient." These decisions are "so balkaninized that timely decisions are tortuously difficult to obtain," and are often resolved in the midst of "turf battles."[222]

This lack of coordination in enforcement efforts has been criticized in Hawai'i as well.[223] One solution may be the creation of a comprehensive Department of Environmental Protection.[224] A department

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[219] EPA, POLICY REGARDING THE ROLE OF CORPORATE ATTITUDE, POLICIES, PRACTICES, AND PROCEDURES, IN DETERMINING WHETHER TO REMOVE A FACILITY FROM THE EPA LIST OF VIOLATION FACILITIES FOLLOWING A CRIMINAL CONVICTION, (Oct. 31, 1991).

[220] Patrick Ennis, *Environmental Audits: Protective Shields or Smoking Guns? How to Encourage the Private Sector to Perform Environmental Audits and Still Maintain Effective Enforcement*, 42 J. OF URBAN AND CONTEMPORARY LAW 389 (1992).

[221] John DeCicco and Edward Bonanno, *A Comparative Analysis of the Criminal Environmental Laws of the Fifty States: The Need for Statutory Uniformity as a Catalyst for Effective Enforcement of Existing and Proposed Laws*, 9 CRIM. JUST. Q. 216 (1988).

[222] Barry Breen, *Citizen Suits for Natural Resource Damages: Closing a Gap in Federal Environmental Law*, 24 WAKE FOREST L. REV. 851, 874-75 (1989).

[223] Patricia Tummons, *Footdragging Agencies No Match for Runaway Boats*, ENV'T HAWAI'I, Sept. 1991, at 2. In 1987 and 1991, Waimanalo Dairy's illegal wastewater discharges violated the conditions of its conservation district permit (administered by DLNR) and its wastewater permit (administered by DOH). Neither department took serious enforcement action.

[224] *See generally* DEPARTMENT OF ENVIRONMENTAL PROTECTION TASK FORCE, REPORT ON ACT 293, SLH 1991, RELATING TO A DEPARTMENT OF ENVIRONMENTAL PROTECTION, Attachment I (Jan. 1992).

which integrated the efforts of various state agencies to protect ground water, surface waters, the shoreline and other precious natural resources might do a better job in ensuring that non-compliance does not slip through the cracks.

While the creation of such a department may facilitate enforcement efforts against private parties, it may have no affect on violations by government agencies. In fact, government is a frequent violator of environmental laws.[225] Another type of bureaucratic reform may be necessary to ensure that the government does not violate environmental and land use laws.

Wisconsin has adopted an innovative approach to ensuring that the government complies with the law. The Legislature created an office of public intervenor whose mandate is to protect public rights in water and other natural resources.[226] Authorized to intervene in administrative proceedings and to initiate administrative or judicial proceedings,[227] the intervenor ensures that state agencies comply with the law. Currently, the Wisconsin intervenor is seeking to prohibit variances for certain types of on-site sewage systems, contesting a permit for expansion of a dredge spoil disposal site, and challenging landfill approvals in recreational areas, among other things.[228] Enforcement of conservation and environmental laws against private parties remains with the Wisconsin Department of Justice.

The creation of a Department of Environmental Protection and an Office of the Public Intervenor could increase compliance with Hawai'i's environmental and land use laws.

D. *Political Will*

The best tools (be they sufficient staff, multiple sanctioning mechanisms, or an efficient bureaucratic organization) will not work unless an

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[225] Federal Facilities Compliance Act of 1989, Report of the Committee on Energy and Commerce, HR REP. No. 101-41, 101st Cong., 1st Sess. 3-40 (1989). Without proper oversight, The Departments of Defense and Energy have created some of the most toxic sites in the country. Clifford Russel, *Environmental Enforcement*, *in* INNOVATION IN ENVIRONMENTAL POLICY: ECONOMIC AND LEGAL ASPECTS OF RECENT DEVELOPMENTS IN ENVIRONMENTAL ENFORCEMENT AND LIABILITY 219 (Tietenberg 1992). In England, regional water authorities in charge of detecting pollution and enforcing regulations were also in charge of sewage treatment. Enforcement against these sewage plants—often the worst polluters—was dismal. *Id.*; Hawkins, *supra* note 15, at 18. *See also* supra notes 110-118.

[226] WIS. STAT. § 165.07.

[227] *Id.*; § 165.075.

[228] Letter from Thomas Dawson, Wisconsin Public Intervenor to the author (June 4, 1993).

agency has the will to use them. After all, enforcement is in the environmental agency's discretion.[229] A lack of political will can lead to a failure to adequately enforce environmental laws.[230] In fact, environmental agencies are often loathe to enforce environmental regulations which may harm important economic interests—particularly when those interests are at risk of going out of business.[231]

Hawai'i's experience is similar to that of other jurisdictions. Despite an EPA report that Hamakua Sugar Company's discharges were wiping out coral and other reef life, DOH accepted the situation as a the cost of keeping the sugar industry alive. According to Dr. Bruce Anderson, Deputy Director of Environmental Health, "In this case, the social benefits outweigh the alternative: closure of the mills."[232] Not only was the department unwilling to jeopardize economic interests, but it was also unwilling to punish offenders.[233]

Agencies may also avoid prosecutions for fear of offending political sensibilities.[234] The recent federal prosecution of Hawai'i Kai sewage plant managers raised suspicions as to whether the plant was allowed to continue its illegal practices because of the plant's owners connections with James Kumagai, former deputy director of DOH and chairman of the Democratic Party.[235] Similarly, DOH refused to crack down on the Waimanalo Dairy's illegal wastewater discharges while Rick Egged, a well-connected Democrat, ran it.[236]

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[229] Hawkins, *supra* note 15, at 22.

[230] *See, e.g*, Harold C. Barnett, *Political environments and implementation failures: the case of Superfund enforcement*, 12 LAW AND POLICY, 225-46 (July 1990); THE CENTER FOR HAZARDOUS WASTE MANAGEMENT, THE GOALS AND INDICATORS OF PROGRESS IN SUPERFUND: REPORT I-1 19 (Sep. 1989). *See also supra* note 26 and accompanying text.

[231] Hawkins, *supra* note 15, at 9.

[232] Peter Wagner, *Reef life pays price for dumping: Discharge from Big Isle sugar firms is wreaking havoc*, HON. STAR-BULLETIN, Nov. 7, 1989, A1.

[233] Peter Wagner, *Audit: Isles lax in enforcing pollution laws: But the state health director disputes the report, insisting Hawaii is doing a good job*, HON. STAR-BULLETIN, Sep. 19, 1989, A3. Dr. Lewin expressed DOH's philosophy of wanting to correct pollution problems, not punish offenders.

[234] Hawkins, *supra* note 15, at 182.

[235] Patricia Tummons, *Friends in High Places*, ENV'T HAWAI'I, Nov. 1991, at 4.

[236] Department of Health vs. Waimanalo Dairy, DOH Docket Nos. 87-PIE-EOW-8 (Feb. 26, 1987) and 91-CW-EO-4 (1991) record numerous discharges. DOH action took no substantive action on these violations. Some of Egged's political connections are mentioned in an article by Linda Hosek, *Farmer hopes to milk profits from his dairy with state help: He wants to increase his income by 10 cents a gallon*, HON. STAR-BULLETIN, March 26, 1990, A3. The Waimanalo Dairy was later sold to Meadow Gold. DOH later took action against only Meadow Gold. *See infra* notes 248-250 and acoompanying text.

Community activists have also complained that the DLNR has failed to vigorously pursue enforcement actions.[237] DLNR routinely grants after-the-fact permits.[238] One of the more publicized cases involves a landowner who has illegally occupied public beachfront lands at Diamond Head for twenty-five years. Although fines have been levied on the wealthy landowner, none have been collected. Instead of ending the illegal occupation, the DLNR attempted to negotiate a compromise which would have left the beach subject to massive erosion. Only after massive public outcry were these negotiations suspended.[239]

Palolo residents complain that politics may have delayed enforcement action against the Palolo temple. Despite outstanding violations, the city issued the temple a new building permit in 1986—just after the mayor received a $2000 campaign contribution.[240]

Until the late 1980s, DOH demonstrated little leadership in enforcing environmental laws. An EPA audit in 1989 concluded that between 1986 and 1988, DOH had problems in enforcing water pollution regulations and in levying fines. In fact, the audit reported that the department rarely imposed fines and even more rarely collected them despite repeated violations. According to the report, "Facilities that discharge water and air pollutants in violation of requirements have been able to do so without concern that significant enforcement actions would be taken against them."[241] From 1985 through 1989, DOH collected only $40,000 in fines from sewage treatment plants not counting fines that were immediately refunded.[242] The lack of any real deterrence allowed violations to continue.

Since then, DOH and the Attorney General's Office have made significant improvements. In conjunction with the creation of the new environmental enforcement unit, Dr. Anderson announced a new DOH strategy shifting from a program emphasizing cooperation and education to one that emphasizes sanctions through civil suits and criminal actions.[243] In 1988, the State collected eighty-two percent of its fines

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[237] *See supra* note 91.

[238] Parke, *supra* note 88, at 33.

[239] Andy Mirikatani & Bruce Jorgenson, *Beachgoers say heed Supreme Court's ruling*, HON. ADVERTISER, May 23, 1993, B1.

[240] Interview with Fred Benco, *supra* note 5.

[241] Wagner, *supra* note 233.

[242] Patricia Tummons, *Promise of Clean Water Unkept by Department of Health*, ENV'T HAWAI'I, Nov. 1991, at 2.

[243] *Id.*

up from eight percent in 1986.[244] In 1989, the Health Department collected more than $800,000 in fines—more than the previous 10 years combined.[245]

Despite these improvements, evidence persists indicating that the department is not dedicated to vigorously enforcing the law. Dr. Anderson maintains, "We would much rather work with business than act as an enforcer of regulations."[246] This attitude may allow violators to avoid sanctions. When tests of H-Power's emissions revealed that lead emissions exceeded permit levels, a re-test was done.[247]

DOH's failure to vigorously pursue violators is illustrated by the controversy over Meadow Gold Dairies' illegal discharge of wastewater into Inoaole stream. Only after the Sierra Club Legal Defense Fund (SCLDF) threatened to sue Meadow Gold for its discharges, did the State issue a fine. The state initially imposed a $38,000 fine, with $42,000 held in abeyance assuming future compliance.[248] SCLDF protested the fine was too low and that the problems had not yet been fixed. In fact, as the State's consent order was being finalized, more wastewater illegally flowed into the stream. The State and Meadow Gold then re-negotiated their consent decree, increasing the fine to $48,000, requiring a $40,000 study and once again setting $42,000 in abeyance.[249] Once again, SCLDF protested that DOH had settled for too little. After SCLDF challenged the agreement in court, the consent order was once again renegotiated. The settlement now calls for Meadow Gold to donate $130,000 for study of Waimanalo's water quality, as well as requiring increased sampling, notification and access rights.[250] SCLDF's ability to significantly strengthen the consent decree (requiring Meadow Gold to expend three times more than DOH had originally accepted) demonstrates the weakness in DOH's enforcement posture.

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[244] Wagner, *supra* note 233.

[245] Dayton, *supra* note 171.

[246] HAW. INV., April 1992, at 14. He repeated these sentiments at a Steering Committee Meeting on Environmental Enforcement for the 1993 Legislature's Energy and Environmental Summit, June 8, 1993: "I would rather use the word 'compliance' than 'enforcement because it is less scary."

[247] Patricia Tummons, *If at First You Don't Succeed: H-Power Gets Second Chance*, ENV'T HAWAI'I, July 1992, at 5.

[248] Peter Wagner, *Suit threat takes Waimanalo dairy by surprise*, HON. STAR-BULLETIN, June 27, 1993; HON. STAR-BULLETIN, Aug. 16, 1991, A4.

[249] HON. STAR-BULLETIN, March 27, 1992.

[250] Yvette Fernandez, *Meadow Gold to give $130,000 toward Waimanalo water cleanup*, HON. ADVERTISER, June 30, 1993, A6.

Another indicator, either of DOH's lack of the political will to take vigorous enforcement action or of its insufficient prosecutorial support, is the number of cases handled administratively. Administrative proceedings constitute eighty-eight percent of the EPA's enforcement actions and comprise an average of ninety-one percent of states' environmental enforcement activity.[251] In Hawai'i, however, since 1988 other than the one criminal case filed against the oil dumper and one civil case, every DOH enforcement action has been handled administratively.[252] Such deviation from national standards is hard to justify in light of the serious environmental degradation and continuing noncompliance with environmental laws.

The City and County of Honolulu appears to be taking a more aggressive stand than DOH. Don Clegg, director of the Department of Land Utilization, announced upon his appointment that enforcement would be a top priority:

> My policy is going to be tear it down. . . . We're not going to say: "You shouldn't have done that." We're going to have them tear it down at their expense. And the civil fines process allows us to go in and do that. . . For every day that it's not torn down, its another $200 or whatever it may be. That structure is going to come down in a hurry. I guarantee it.[253]

Clegg followed through on his commitment, citing twice as many zoning violations and successfully ordering the demolition of a structure exceeding height limits by two feet.[254] Although Clegg's strategy has not led to the collection of any fines from owners of illegal shoreline structures, a number of these structures have been removed.[255]

All government agencies charged with enforcement may need to renew their commitment to protecting the public. Their words should be matched with deeds.

E. *Citizen Suits*

Because government may be unwilling to enforce environmental laws, citizens need to be able to participate in enforcement. In fact,

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[251] Naysnerski and Tietenberg, *supra* note 27, at 29-30.

[252] Interview with Deputy Attorney General Larry Lau (August 6, 1993).

[253] Jeanne Mariani, *Deeper shoreline setbacks, strict policy on zoning codes vowed by Whalen, Clegg*, HON. STAR-BULLETIN, Dec. 29, 1989, A5.

[254] Lucy Young, *Get zoning P's and Q's in right order*, HON. STAR-BULLETIN, May 26, 1990, A8.

[255] *City director rules against illegal seawalls*, SUNDAY HON. STAR-BULLETIN & ADVERTISER, Nov. 11, 1990, E2; Parke, *supra* note 88, at 33.

traditionally, government agencies were not responsible for protecting the environment. The only way to protect the environment was for citizens to sue polluters in court. Relying on the common law theories of nuisance, trespass, strict liability they sought court orders to stop pollution.[256] Often, however, the courts granted inadequate relief.[257] The courts' interpretation of nuisance theory generally favored economic development at the expense of environmental protection.

Today, community members affected by environmental degradation no longer need to rely soley on the common law to redress their grievances. Not only has the government's role in protecting the environment increased, but so too has the ability of citizens to enforce environmental laws. On the federal level, over a dozen environmental statutes allow citizens access to the courts to enforce statutory requirements against the regulated community for its violations and the government for its failure to act properly.[258] Congress recognized that the government did not have sufficient time or resources to provide sufficient enforcement of these new, comprehensive environmental laws.[259] In addition, government bureaucracy may interfere with prompt enforcement action.[260] Congress, therefore, provided citizens with the ability to easily enforce the law for the government through so-called citizen suit provisions.

These citizen suit provisions have proven to be necessary not only when the government is unable to enforce the law, but also when it is

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[256] *See, e.g.*, Bove v. Donner-Hanna Coke Corp., 236 App.Div. 37, 258 N.Y.S. 229 (1932).

[257] *Id.* (refusing to grant relief from the dirt, soot and odors emanating from a coke oven); Boomer v. Atlantic Cement Co., 257 N.E.2d 870 (1970) (payment of damages ordered instead of injunctive relief halting pollution from cement plant).

[258] Clean Air Act, 42 U.S.C. § 7604, Federal Water Pollution Control Act, 33 U.S.C. § 1365, Marine Protection, Research and Sanctuaries Act, 33 U.S.C. § 1415(g), Noise Control Act, 42 U.S.C. § 4911, Endangered Species Act, 16 U.S.C. § 1540(g), Deepwater Port Act, 33 U.S.C. § 1515, Resource Conservation and Recovery Act, 42 U.S.C. § 6972, Toxic Substance Control Act 15 U.S.C. § 2619, Safe Drinking Water Act 42 U.S.C. § 300j-8, Surface Mining Control and Reclamation Act, 30 U.S.C. § 1270, Outer Continental Shelf Lands Act, 43 U.S.C. § 1349(a), Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U.S.C. § 9659, and Emergency Planning and Community Right to Know Act, 42 U.S.C. § 11046. Other federal agency action (such as the failure to prepare an environmental impact statement) can be challenged through the use of the Administrative Procedure Act, 5 U.S.C. § 701 *et. seq.*. Attorney fees for such suits can be awarded through the Equal Access to Justice Act, 28 U.S.C. § 2412.

[259] Naysnerski & Tietenberg, *supra* note 27, at 30-31.

[260] *See supra* notes 221-222.

unwilling to do so.[261] During the Carter administration, one citizen suit was brought for every six actions by the EPA.[262] In contrast, during the Reagan years when environmental enforcement actions taken by the federal government slowed to a trickle, environmental groups sued to enforce the law more frequently than did the federal government.[263] Thus, where the government is unwilling or unable to aggressively enforce the law, citizen suits are needed to fill the void.

Finally, citizen suits are necessary because, too often, government itself violates the law.[264] The federal government, for example, is a major violator of its own laws.[265] Despite serious violations by government agencies, enforcement has been ineffective.[266] Private parties are the only effective means of ensuring governmental compliance with environmental laws.[267]

A California judge summarized the need for citizen suits:

> The proliferation of Federal, State and local agencies, elected by no one, and responsible to no one in the absence of judicial scrutiny, the inhibitions on attorney generals' offices imposed by restricted funding, a centralized bureaucracy, frequent conflicts of interest, the all too human pride of opinion which forbade the public acknowledgement of error, led to the frequent departure from Congressionally stated policies. It did not take a Nixon administration, with its impoundments and other lawless acts, to produce a widespread feeling of frustration and concern whether a democratic form of government could really function in a manner that would carry out the will of the electorate as expressed in the law of the land.[268]

Citizen suits have proven to be remarkably successful. Of 507 sampled citizen suit cases, the defendant prevailed in only four.[269] A

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[261] *See supra* notes 230-252 and accompanying text.

[262] Miller, *Private Enforcement of Federal Pollution Control Laws*, (pt. 1) 13 ELR 10313 (1983).

[263] *Id.*

[264] *See supra* note 225.

[265] Federal Facilities Compliance Act of 1989, *supra* note 225.

[266] Marcia Glepe, *Pollution Control Laws Against Public Facilities*, HARV. ENVTL. L. REV. 13 (Winter 1989).

[267] Naysnerski & Tietenberg, *Private Enforcement*, *in* INNOV. IN ENVTL. POLICY 123 (1992).

[268] Rich v. City of Benicia, 5 ELR 20205 (Cal. Super. Ct. 1974). *See also*, J. Sax, DEFENDING THE ENVIRONMENT (1971), in which Professor Sax argues that organization-based responses to the environmental crisis are ineffective and doomed to failure. Governmental institutions are unable to respond quickly to environmental challenges and the desires of citizens.

[269] Naysnerski & Tietenberg, *supra* note 259, at 38.

comprehensive study by the Environmental Law Institute concluded that citizen suits provide both a goad and an alternative to government enforcement.[270] An EPA study of Clean Water suits in 1984 found that many of the citizen suits involved significant violations.[271] EPA officials, environmental advocates and even some business executives agree that these suits have led to greater compliance.[272]

The Environmental Law Institute study concluded that few citizen suits are filed frivolously.[273] In addition, citizens did not sue when the government was taking judicial action—although prior administrative enforcement did not preclude citizen suits.[274]

In Hawai'i, the failure of government to ensure compliance with the law has required private citizens to sue a number of times.[275] Bringham Young University and Zion Securities agreed to a twelve million dollar settlement in a suit over the Laie sewage treatment plant's spilling of half a million gallons of sewage a day into a marsh.[276] Similarly, groups sued Meadow Gold Dairies for its pollution of streams and coastal waters. The groups claimed that repeated complaints to regulators had produced no action and that the Dairy had broken promises to remedy the situation.[277] Even after the government acted, its proposed fines were so low that environmentalists successfully challenged the settlement.[278]

When Kauai Electric Company's expanded transmission line development threatened endangered Newell shearwater and dark-rumped petrels, environmentalists brought suit, halting its construction until completion of a thorough study of the birds.[279] The Conservation

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[270] J. MILLER, CITIZEN SUITS: PRIVATE ENFORCEMENT OF FEDERAL POLLUTION CONTROL LAWS 14 (1987).

[271] EPA OFFICE OF WATER ANALYSIS AND EVALUATION, SECTION 505 CITIZEN SUIT ANALYSIS, *cited in* Miller, PRIVATE ENFORCEMENT OF FEDERAL POLLUTION CONTROL LAWS (pt. 3), 14 ELR 10407, 10425 (1984).

[272] Naysnerski & Tietenberg, *supra* note 267, at 122. *See also* EPA Administrator William Ruckelshaus' letter to the Natural Resources Defense Council, supporting the effort of citizen suits "to bring instances of non-compliance to our attention and to support EPA efforts to reduce that non-compliance." Miller, *supra* note 271.

[273] MILLER, *supra* note 270, at 127.

[274] EPA OFFICE OF WATER ANALYSIS AND EVALUATION, SECTION 505 CITIZEN SUIT ANALYSIS, *cited in* 14 ELR 10425 (1984).

[275] Tummons, *supra* note 242.

[276] HON. ADVERTISER, Sept. 14, 1990, A12.

[277] Wagner, *supra* note 248. *See generally supra* notes 248-50 and accompanying text.

[278] Fernandez, *supra* note 250.

[279] Lester Chang, *Settlement's mainly for the birds*, HON. STAR-BULLETIN, March 27, 1992, A5.

Council for Hawaii and other environmental groups settled a suit against the U.S. Fish and Wildlife Service for its failure to add 186 native Hawaiian plants to the threatened or endangered species list as required by law.[280]

Despite the success of citizen suits, the U.S. Supreme Court has not always been receptive to them. In fact, the U.S. Supreme Court has never ruled in favor of an environmental group in a suit to compel the federal government to comply with National Environmental Policy Act.[281] The Court has also refused to imply private rights of action under statutes which do not have citizen suit provisions,[282] and has narrowed the scope of federal common law protection of interstate resources.[283] Far more threatening to environmentalists, however, is Justice Scalia's explicit hostility to giving them access to the courts.[284]

Because of the hostility of the federal courts, access to state courts has become increasingly important. In addition, states have specifically created rights which are only redressable in a state court.

In 1970, Michigan became the first state to expressly authorize environmental citizen suits. The Michigan Environmental Protection Act (MEPA) gives citizens easy access to the courts to protect "the air, water and other natural resources and the public trust therein from pollution, impairment or destruction."[285] Commentators describe

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[280] Peter Wagner, *Isle plants added to endangered list: 186 new ones resulted from a Sierra Club lawsuit*, HON. STAR-BULLETIN, July 23, 1990; A1.

[281] Yost, *NEPA's Promise Partially Fulfilled*, 20 ENVTL. LAW 533, 539 & n.31 (1990) ("[T]he United States Supreme Court has undone much of the promise of NEPA." *Id.* at 549). *But see* Shilton, *Is the Supreme Court Hostile to NEPA? Some Possible Explanations for a 12-0 Record*, 20 ENVTL. LAW 551 (1990).

[282] Middlesex County Sewerage Authority v. National Sea Clammers Association, 453 U.S. 1 (1981) (holding the enforcement provisions of environmental statutes precluded private rights of action).

[283] City of Milwaukee v. Illinois, 451 U.S. 304 (1981) (Clean Water Act preempts federal common law of nuisance).

[284] *See* Lujan v. Defenders of Wildlife, 112 S.Ct. 2130 (1992); *NWF v. Lujan: Justice Scalia Restricts Environmental Standing to Constrain the Courts*, 20 ELR 10557 (1990); Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 SUFFOLK U. L. REV. 881 (1983). *See also* Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation, Inc., 484 U.S. 49 (1987). The court in *Gwaltney* precluded citizen suits to assess penalties against wholly past violations based on the specific statutory language of the Clean Water Act. In a concurring opinion, Justice Scalia declared that citizens should never be able to sue to assess penalties for wholly past violations of the law.

[285] MICH. COMP. LAWS ANN. § 691.1202

the MEPA as a success.[286] Suits filed under the MEPA have preserved unique sand dunes,[287] eliminated or minimized siltation of local streams and protected forests, wildlife habitat and special trees.[288] These suits also stimulate consideration of mitigating alternatives.[289] Such cases are rarely found to be frivolous or vexatious.[290] Nor do such suits overwhelm the courts. Suits filed under MEPA have not overwhelmed the courts. They constitute less than .02% of all civil cases filed. Often citizen suits lead to quick out-of-court-settlements.[291] A number of states have patterned legislation after the Michigan statute.[292]

Although Hawai'i has not followed the Michigan model, in 1978 citizens voted to amend the Constitution to give every person a right to a clean and healthful environment:

> Each person has the right to a clean and healthful environment, as defined by laws relating to environmental quality, including control of pollution and conservation, protection and enhancement of natural resources conservation. Any person may enforce this right against any party, public or private, through appropriate legal proceedings, subject to reasonable limitations and regulation as provided by law.[293]

At first glance, this provision appears to grant citizens easy access to the courts to protect the environment. The Committee Report on this provision specifically states that the provision gives individuals the

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[286] Abrams, *Threshold of Harm in Environmental Litigation: The Michigan Environmental Protection Act As Model Of A Minimal Requirement*, 7 HARV. ENVTL. L. REV. 107, 117 (1983).

[287] Haynes, *Michigan's Environmental Protection Act in its Sixth Year: Substantive Environmental Law from Citizen Suits*, 53 J. OF URBAN LAW 589, 603-05 (1976).

[288] Abrams, *supra* note 286, at 120; *New Growth in Michigan's Environmental Protection Act: State Supreme Court Enjoins Oil Development in Wilderness*, 9 ELR 10144 (1979).

[289] Slone, *The Michigan Environmental Protection Act: Bringing Citizen-Initiated Environmental Suits into the 1980s*, 12 ECOLOGY L. Q. 271, 300 (1985)

[290] Slone, *supra* note 289, at 300; Abrams, *supra* note 286, at 118.

[291] Abrams, *supra* note 286, at 118.

[292] *See*, DiMento, *Asking God to Solve Our Problems: Citizen Environmental Legislation in the Western States*, 2 UCLA J. OF ENVTL. L. 169 (1982). These states include California, Connecticut, Florida, Indiana, Maryland, Massachusetts, Minnesota, Nevada, New Jersey and South Dakota. CAL. GOVT. CODE § 12600-12612; CONN. GEN. STAT. ANN. § 22a-14—22a-20; FLA. STAT. ANN. § 403.412; IND. CODE ANN. §§ 13.6-1-1—13.6-6; MD. NAT. RES. CODE ANN. §§ 1-501—1-508; MASS. GEN. LAWS ANN. ch. 215 § 7A; MINN. STAT. ANN. §§ 116B.01—116B.13; NEV. REV. STAT. §§ 41.540—41.520; N.J. STAT. ANN. §§ 2A:35A-1—2a:35A-14; S.D. COMP. LAWS §§ 34A-1—34A-15.

[293] HAW. CONST. art. XI, § 9.

right to "directly sue public and private violators of statutes, ordinances and administrative rules relating to environmental quality."[294]

Unlike the Michigan statute, this constitutional provision does not create any substantive right. In other words, all our environmental rights are defined by statutes, administrative rules and ordinances. The courts cannot define further environmental rights (through the common law of environmental quality which has developed in Michigan) under this constitutional provision. As the Committee report on this provision explained, it "adds no new duties but does add potential enforcers."[295]

This provision was intended to be self-executing. In fact, Article XVI § 16 declares that all the constitutional provisions are self-executing to the fullest extent possible. The plain language and history of the provision declare that citizens have the right to sue, but that this right can be limited and regulated by the Legislature.

Unfortunately, one federal district court[296] held that the provision does not give individuals a right to sue—at least under Hawai'i's Endangered Species Act.[297] The court held that where a statute contains a specific enforcement provision (i.e. giving the state the authority to enforce the law) no private right of action exists. The effect of such a holding is to preclude all lawsuits under the constitutional provision unless a statute specifically authorizes citizen suits.

The court's opinion is of dubious weight, however. Federal courts do not make final determinations of Hawai'i law. Furthermore, the holding flies in the face of the intent of the drafters. The right to sue is subject to legislative limitations and regulations, but the court seemed to hold that the Legislature always bars citizen suits unless it specifically authorizes them. The constitutional provision allowed the Legislature to narrow the constitutional right, but did not require it to act affirmatively to grant the right which is supposed to be self-executing. The State Attorney General concludes that "no legislation is needed to enable citizens to exercise that right."[298]

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[294] STAND. COMM. REP. No. 77, COMMITTEE ON ENVIRONMENT, AGRICULTURE, CONSERVATION AND LAND, I PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF HAWAI'I 685, 690 (1978).

[295] *Id.*

[296] Stop H-3 Association v. Lewis, 538 F.Supp. 149 (D. Haw. 1982).

[297] HAW. REV. STAT. § 195D

[298] Testimony of the State Attorney General on SCR 148/SR 122, before the Senate Committee on Government Operations, Environmental Protection & Hawaiian Programs and the Committee on the Judiciary, April 6, 1993.

Assuming the constitutional provision allows citizens to enforce the environmental laws, citizens may still face obstacles using it. On the federal level, private enforcement actions are filed far more often when the citizen suit provisions explicitly authorize the courts to grant injunctive relief and levy penalties.[299] The Clean Water Act, is typical:

> The district court shall have jurisdiction . . . to enforce such an effluent standard or limitation, or such an order, or to order the Administrator to preform such act or duty , as the case may be, *and to apply any appropriate civil penalties under section 1319(d) of this title.*[300]

It is unclear, however, whether Hawai'i's Constitution allows citizens to sue violators for the collection of penalties.[301] Although penalties are not mentioned in the constitutional provision, the Attorney General maintains citizens may sue polluters for money penalties for past violations.[302]

A more formidable obstacle to using the constitution to enforce the law is the need to pay for the lawsuit. Litigation is expensive. An Environmental Law Institute study found that citizen suit costs range from $4,000 to $200,000.[303] In the early 1980s, it cost about $10,000 to fully litigate citizen suits in Michigan.[304] Because community members are unlikely to be able to raise enough money to sue, federal environmental citizen suit provisions authorize the award of attorneys' fees to successful plaintiffs. At least twenty-one states authorize the awarding of attorneys' fees under their laws as well.[305] These attorneys' fee reimbursement provisions have proven to a be a major stimulant of private enforcement activity.[306]

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[299] Naysnerski & Tietenberg, *supra* note 267, at 36.

[300] 33 U.S.C. § 1365(a) (emphasis added).

[301] These penalties are not the same as damages that individuals may suffer at the hands of a polluter. Property damage, personal injury claims and emotional distress claims can be recovered under ordinary tort law. Rather, they are fines assessed by the government at a rate determined by statute.

[302] "[W]e believe that the right also includes authority to sue polluters for money penalties for past violations, as these remedies already exist in some statutes enforced by the State." Testimony of the State Attorney General, *supra* note 298.

[303] ENVIRONMENTAL LAW INSTITUTE, CITIZEN SUITS: AN ANALYSIS OF CITIZEN ENFORCEMENT ACTIONS UNDER EPA-ADMINISTERED STATUTES, V-25-27 (1984).

[304] Abrams, *supra* note 286, at 119.

[305] *State Attorney Fee Shifting Statutes: Are We Quietly Repealing the American Rule?*, 47 LAW AND CONTEMP. PROBLEMS 321 (1984).

[306] Naysnerski & Tietenberg, *supra* note 267, at 38.

Hawai'i lawmakers recognized that high cost of litigation places substantial burdens on the public which discourages them from exercising their constitutional standing.[307] The Legislature, therefore, provided for the award of attorneys' fees in very limited circumstances.[308]

Unfortunately, there are a number of problems with this statute.[309] First, it awards attorneys' fees where a polluter or developer does not have a permit or approval as required by law. It may not, however, award attorneys' fees when a permittee has violated the conditions of a permit already granted.[310] Second, it only allows for the recovery of attorneys' fees in suits for injunctive relief and not in cases to assess penalties against violators. Third, it does not allow for the recovery of attorneys' fees in suits against the State. Fourth, citizens must give forty days notice before filing suit. If the violator obtains a permit within thirty days after notice, attorneys' fees cannot be obtained for the time spent preparing the case and sending the notice. Fifth, it requires citizens post a $2,500 bond—a hefty amount for non-profit citizen groups.[311]

Finally, the attorneys' fees provision in H.R.S. § 607-25 may be a double-edged sword. It provides that fees may be awarded to the prevailing party. Thus, citizens bringing suit to enforce environmental laws may wind up not only paying their own attorneys' fees, but also those of the other party.[312] It is also unclear whether courts will always award fees to the winner.

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[307] S.R. STAND. COMM. REP. No. 450-86 on S.B. 2268; H.R. STAND. COMM. REP. No. 766-86 on S.B. 2268.

[308] HAW. REV. STAT. § 607-25. In addition to this environmental fee-shifting statute, a brief glance at the index of H.R.S. reveals that there are well-over a dozen fee-shifting statutes in the state. They range from antitrust suits and the collection of debts to bringing claims for violations of breach of the Hawaiian home lands and native Hawaiian public trusts.

[309] Conversations with the few environmental attorneys in the state, Skip Spaulding, Anthony Rankin, Isaac Hall, Alan Burdick, Arnold Lum and Fred Benco suggest that attorneys' fees have never been awarded under this statute.

[310] A circuit court further narrowed the applicability of HAW. REV. STAT. § 607-25. It held that a commercial boating operation which violated DLNR and DOT rules regarding anchoring, commercial uses and illegal uses of structures was not the type of activity requiring a permit under § 607-25. Interview with attorney Isaac Hall (Dec. 4, 1991).

[311] One court interpreted this provision in a manner making such suits even more difficult. The ten organizations suing (as co-plaintiffs) the developer of the Aloha Motors convention center site were ordered to post $2500 bond each. Interview with attorney Fred Benco (Dec. 6, 1991).

[312] A California court appears to have interpreted a similarly worded statute to

Under federal citizen suit provisions, fees go to "any party whenever the court determines such award is appropriate."[313] The federal courts have generally awarded fees to plaintiffs when the relief obtained furthered the goals of the statute and such an award was fair.[314] The Supreme Court has held that an analogous attorneys' fees statute under the Civil Rights Act allows for the award of such fees to prevailing defendants only if the plaintiff's claims were frivolous, unreasonable, groundless or conducted in bad faith.[315] The court reasoned that it should be easier for prevailing plaintiffs to recover their fees than for prevailing defendants. After all, prevailing plaintiffs vindicate public policy and losing defendants violated the law.

The Hawai'i courts may follow the federal standard. They may, however, apply a different standard that is indicated in the Committee Reports of H.R.S. § 607-25. The Committees declared that the fees would "discourage frivolous actions by a plaintiff and intentional abuses by a potential defendant."[316] While the frivolous standard should not discourage citizen suits, it may be difficult to obtain attorneys fees if plaintiffs need to prove intentional abuses by the defendant.

In fact, the ambiguity of the statute has discouraged citizens from enforcing the law. In 1988, community leaders in Maunawili and Kailua considered suing Y.Y. Development for failing to obtain the proper shoreline management permit for its golf course on the slopes of Mount Olomana. The group was discouraged from bringing suit by the prospect of having to pay $20,000-$30,000 in legal costs. But more importantly, the possibility of paying Y.Y. Development's legal costs if they lost proved intimidating.[317] Awards—or the threat of such awards—to prevailing defendants, absent a showing of the plaintiff's bad faith, have a chilling effect on public interest litigation.[318]

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award prevailing defendants attorneys' fees on the same basis as those to plaintiffs. Seibert v. Sears, 120 Cal. Reptr. 233 (Cal.Ct.App. 1975).

[313] *See, e.g.*, Clean Air Act, 42 U.S.C. § 7604(d).

[314] MILLER, *supra* note 271. Interestingly, however, attorneys' fees awards in these federal environmental citizen suits are less than those awarded in antitrust and security citizen suits. MILLER, *supra* note 270, at 127.

[315] Christiansburg Garment Co. v. E.E.O.C., 434 U.S. 412, 423 (1978).

[316] S.R. STAND. COMM. REP. No. 450-86 on S.B. 2268; H.R. STAND. COMM. REP. No. 766-86 on S.B. 2268.

[317] Interview with Alan Burdick (December 2, 1991).

[318] *See Prevailing Defendant Fee Awards in Civil Rights Litigation: A Growing Threat to Private Enforcement*, 60 WASH. U. L. Q. 75 (1982); Staff Studies Prepared for the National Institute for Consumer Justice on Consumer Class Action (1977); Williams, *Fee Shifting and Public Interest Litigation*, 64 A.B.A. J. 859 (1978).

The Legislature should clarify this provision and broaden its applicability. The law should say that the court

> may allow the prevailing party, other than the state, a reasonable attorney's fee as part of the costs. Prevailing plaintiffs should recover fees unless special circumstances render an award unjust. Prevailing defendants should recover fees in exceptional circumstances, such as vexatious, frivolous, unreasonable or harassing suits instigated without substantial justification.

Such a double standard is not uncommon. A number of federal statutes codify this double-standard.[319] A comprehensive study in 1984 of state fee shifting statutes found that fifty-four percent awarded fees to prevailing plaintiffs, and only nineteen percent awarded them to the prevailing party.[320]

Five other statutes affect citizens' ability to sue to protect the environment. The 1991 Legislature gave citizens the right to sue for the collection of penalties from violators of the Environmental Response Law.[321] Successful suits against violators and against the government for failing to fulfill its responsibilities may be awarded attorneys' fees. Such suits are limited by certain notice and time restrictions, however. Suits against violators are entirely precluded if the state issues an NOV letter.

The 1991 Legislature also greatly restricted citizens' ability to bring suit under the Hazardous Waste law.[322] As envisioned by the Sierra Club, the bill would have allowed citizens to bring suit for the collection of penalties and recoup attorneys' fees. Unfortunately, as enacted, the law not only does not allow for the award of attorneys' fees or the collection of penalties, but it also imposes time limits restricting access to the courts. On the other hand, the law does allow citizens to sue anyone who is causing "an imminent and substantial endangerment to health or the environment."[323] The term is left for the court to define (i.e., there is not statutory standard) and thus enables the courts to develop a common law of environmental protection. The provision

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[319] Williams, *supra* note 318.

[320] *Supra* note 305.

[321] HAW. REV. STAT. § 128D-21. This provision may not prove to be very effective, however. *See also*, Gaba & Kelly, *The Citizen Suit Provision of CERCLA: A Sheep in Wolf's Clothing?* 43 Sw L. J. 929 (1990).

[322] HAW. REV. STAT. § 342J-10.7

[323] *Id.*

automatically expires at the end of 1996, unless it is reauthorized.

The 1992 Legislature enacted a new Air Pollution Control Chapter containing a citizen suit provision modelled after the federal clean air act's citizen suit provision.[324] This provision allows for the imposition of injunctive relief, collection of penalties and the award of attorneys' fees. The language facilitates citizen suits more so than do the Hazardous Waste and Environmental Response Laws.

The Conservation Easement statute allows organizations to sue to protect the natural, scenic, forested, or open-space condition of land in which they have a conservation easement.[325] They are entitled to injunctive relief, damages and attorneys' fees.

Finally, Chapter 91 of the Hawai'i Administrative Procedure Act allows interested persons to challenge the validity of any agency rule and any agency decision which affects their legal rights.[326] The statute does not provide for attorneys' fees to environmental groups.[327]

The use of common law theories and constitutional and statutorily created citizen suit rights allow private parties to sue to stop illegal activities, impose penalties and obtain special relief. Citizen suits play an essential role in enforcing environmental laws. In order to complement federal citizen suit provisions, the state needs to facilitate citizen access to state courts. Statutory reform is necessary to ensure that successful plaintiffs are compensated for their efforts.

VII. Conclusion

If the government wants individuals, businesses and all government bodies to comply with its laws, it must have a vigorous enforcement program. The extensive amount of non-compliance has already led to significant degradation of our environment. Hawai'i's lax enforcement programs will have to be strengthened by increasing funding for monitoring and sanctioning, rewarding citizen participation, improving

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[324] Haw. Rev. Stat. § 342B.

[325] Haw. Rev. Stat. § 198-5.

[326] Agency decision which affect legal rights has been liberally construed. Mahuiki v. Planning Commission, 65 Haw. 680 (1976); Town v. Land Use Commission, 55 Haw. 538 (1974); Chang v. Planning Commission, 64 Haw. 431 (1982). These cases appear to hold that citizens have the right to challenge agency decisions which affect their interests in some way.

[327] Small businesses are entitled to attorneys' fees, however. Haw. Rev. Stat. § 661-12.

inspections, training staff, protecting the integrity of regulatory programs, increasing penalty provisions, implementing bureaucratic changes, adopting a more aggressive enforcement posture and facilitating citizen enforcement.

Only by improving enforcement of our laws can we ensure that the Hawai'i's industrial polluters, oil dumpers and developers comply with our environmental and land use laws.

AIDS Phobia: The Infliction of Emotional Distress and the Fear of AIDS

by Edward M. Slaughter*

Introduction

The AIDS virus has attacked millions of people worldwide. It is a general concern of modern life.[1] However, when a person suspects she has actually been exposed to the virus, that general concern may become fear and severe emotional distress. When that fear is caused by the intentional or negligent conduct of another, the victim may present a claim for damages sounding in AIDS Phobia.

AIDS Phobia is a cause of action for fear of future harm which is analyzed under the rubric of negligent infliction of emotional distress. The analysis is difficult not only because AIDS Phobia is a novel theory, but also because the jurisprudence of emotional distress is itself still developing.

This paper must begin with a relatively searching review of the law of emotional distress. First, the general concerns regarding recovery for psychic injury will be discussed and then the specific approaches courts have taken in the negligent infliction cases will be analyzed. The AIDS Phobia jurisprudence, sparse as it is, can only be understood in the light of the courts' general view toward psychic injury.

The discussion of AIDS Phobia will center around the requirement of "actual exposure" that many courts have applied to limit the fear

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[1] *See* Michael Closen et al., AIDS Cases and Materials (Supp. 1992), for a complete introduction to the evolving AIDS related jurisprudence.

of AIDS claim. The specific legal elements of exposure will be analyzed in light of the policy concerns that have caused courts to set up barriers to recovery for AIDS Phobia and emotional distress generally.

The paper will next examine those cases that have recognized AIDS Phobia absent any proof of "actual exposure." These cases apply general principles of tort law in resolving the AIDS Phobia claims without resort to any artificial limitations, but they do not signal the ultimate resolution of the questions remaining regarding plaintiffs' right to recover.

The paper will close with an observation regarding the potential impact of the AIDS Phobia jurisprudence on the general application of negligent infliction of emotional distress and fear of future harm claims.

§ 1 Negligent Infliction of Emotional Distress

I. Psychic Injury Generally

"The exemption from liability for mere fright, terror, alarm, or anxiety does not rest on the assumption that these do not constitute an actual injury."[2] Emotional distress is an actual harm, but courts have been reluctant to find liability for such harm because of the difficulties, both perceived and real, with adjudicating the claims. The general objections against allowing recovery for emotional harm have been dealt with and largely resolved over the last century[3], but the spectre of these arguments still haunts many current opinions.

The courts have objected to compensation for emotional harm, citing tenuous causal relations, difficulty in quantification of harm, lack of precedent, and potential increases in litigation.[4] The first, and perhaps most important, objection to compensation for emotional harm is that fright, shock or other distress does not follow proximately from a defendant's negligence.[5] An early jurist commented that, "[d]amages

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[2] Spade v. Lynn & B.R. Co., 47 N.E. 88 (Mass. 1897).

[3] *See generally* Bohlen, *The Right to Recover for Injury Resulting from Negligence Without Impact*, 41 Am. L. Reg., N.S. 141 (1902); Goodrich, *Emotional Disturbance as Legal Damage*, 20 Mich. L. Rev. 497 (1922).

[4] W. Page Keeton et al., Prosser and Keeton on The Law of Torts §54, at 363 (5th ed. 1984).

[5] Victorian Railway Commissioners v. Coultas, 13 A.C. 222, (House of Lords 1883); Mitchell v. Rochester Railway Co., 45 N.E. 354, (N.Y. 1897); Chittick v. Philadelphia Rapid Transit Co., 73 A. 4 (Pa. 1909).

arising from mere sudden terror unaccompanied by any actual physical injury, but occasioning a nervous or mental shock, cannot under such circumstances. . . be considered a consequence which, in the ordinary course of things, would flow from the negligence. . . ."[6] The courts saw emotional distress as an independent condition or operation of the mind which had the legal effect of an intervening cause.[7]

However, emotional distress is not an intervening cause.[8] "[T]hough there comes between the negligence and injury, a condition or operation of the mind on the part of the injured [plaintiff], the negligence is nevertheless the proximate cause of the injury."[9] Mental distress flows naturally from certain types of negligence.[10] Further, "[g]reat emotion may, and sometimes does, produce physical effects."[11] The defendant's negligence is the proximate cause of the plaintiff's harm so long as the consequences proceed in an unbroken sequence without an independent intervening cause.[12] The proximate cause objection breaks apart when it is recognized that negligence can cause distress which may, in turn, cause additional harm.

The early decisions also reflected the concern that the courts could not provide redress for mental harm because it could not be quantified.[13] Commentators quickly pointed out that damages could be awarded based upon those manifestations of emotional distress which were objectively determinable.[14] Furthermore, courts and juries already assign value to life and limb in the course of other legal analyses. The value of mental tranquility is no more elusive than the value of life itself. Quantification is a difficult, but not insurmountable task.

The transparency of the proximate cause and quantification arguments forced early jurists to buttress their objections with predictions of increased litigation.[15] The courts argued that if the right of recovery

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[6] Coultas, 13 A.C. at 225.

[7] *See* KEETON, *supra* note 4, at 363.

[8] Purcell v. St. Paul City Ry. Co., 50 N.W. 1034 (Minn. 1892); Simone v. Rhode Island Co., 66 A. 202 (R.I. 1907).

[9] *Purcell*, 50 N.W. at 1035.

[10] *Id.*

[11] *Simone* 66 A. at 205.

[12] *See* Beale, *The Proximate Consequences of an Act*, 33 HARV. L. REV. 633 (1920); Edgerton, *Legal Cause*, 72 U. PA. L. REV. 211, 343 (1924); Seidelson, *Some Reflections on Proximate Cause*, 19 DUQ. L. REV. 1 (1980).

[13] Lynch v. Knight, 9 H.C.L. 577, 598, 11 Eng.Rep. 854, (1861).

[14] Goodrich, *Emotional Disturbance as Legal Damage*, 20 MICH. L. REV. 497, (1922).

[15] *See, e.g.*, Spade v. Lynn & B.R. Co., 47 N.E. 88, 89 (Mass. 1897).

for emotional distress were recognized, it would open a wide door for innumerable claims which would burden defendants as well as courts.[16] The question should not be whether a particular harm is extremely common, but whether the general principles of tort law provide redress for that harm. More importantly, the fact that injury of a particular type is prevalent in our society is no reason for the courts to deny redress.[17]

Finally, the courts resorted to the doctrine of stare decisis in support of their aversion to recognition of the claim of emotional distress.[18] However, lack of precedent for a specific claim is not grounds for denial of access to the courts. "If general legal principles impose liability, the denial of liability must be an exception to the application of the principles."[19] Even in the absence of precedent, the courts should determine whether general legal principles require redress for an injured plaintiff.

These general complaints have been made by courts and commentators in rejecting the extensions of liability for any psychic injury, but they have been generally abandoned in favor of less dogmatic limitations on recovery.

II. Doctrinal Limitations

There are at least two principal concerns that continue to foster judicial caution and doctrinal limitations on recovery for emotional distress. Courts have fashioned arbitrary, bright-line rules to deal with two perceived problems: (1) that emotional harm is often temporary and trivial, and (2) that claims of mental harm will be falsified or imagined.[20]

A. *Parasitic Damages*

Initially, emotional distress was only compensable incident to an established tort. The principle of awarding damages for emotional distress arising in the context of the breach of a traditional tort duty

[16] *Id.*

[17] If this were a rational limitation on redressability, persons injured in auto accidents would be without resort to the courts.

[18] Lehman v. The Brooklyn City Railroad Co., 47 Hun. 355, 356 (N.Y. 1888).

[19] Chuichiolo v. New England Wholesale Tailors, 150 A. 540 (N.H. 1930).

[20] Keeton, *supra* note 4, at 361.

can be traced back to twelfth century England.[21] Where the defendant's negligence causes a contemporaneous physical injury, the courts have allowed compensation for the emotional elements accompanying it.[22] The effect is that the cause of action (i.e. the duty) is based upon the physical injury so that the court may award damages for the emotional element without recognizing an independent duty to protect plaintiffs from emotional harm.

Traditionally, emotional distress damages have been awarded where the plaintiff suffered contemporaneous physical injury as a result of a defendant's breach of an existing tort duty,[23] but the presence of other duties may explain awards for emotional distress where physical injury was absent. Damages for emotional distress "are recoverable in a negligence action when they result from the breach of a duty owed the plaintiff that is assumed by the defendant or imposed on the defendant as a matter of law, or that arises out of a relationship between the two." [24]

The bulk of emotional distress law has developed around the line of cases that began with recognition of the emotional element only in the presence of contemporaneous physical injury. That line initially softened to allow compensation where the injury was not contemporaneous, but

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[21] I de S & W v. W. de S, 22 Edw. III, f. 99, pl. 60 (1348).

[22] *See* KEETON, *supra* note A, at 363; Ferrara v. Galluchio, 152 N.E.2d (N.Y. 1958) (fear of cancer).

[23] KEETON, *supra* note 4, at 363.

[24] Marlene F. v. Psychiatric Med. Clinic, 770 P.2d 278, 282, (Cal. 1989). The abuse of a therapeutic relationship will support damages for emotional distress. In *Marlene*, the California Supreme Court explained that although the court appeared to recognize an independent tort of negligent infliction of emotional distress in Molien v. Kaiser, 616 P.2d 813 (Cal. 1980), it merely eliminated the physical consequences requirement. It explained that the recognized duty in *Molien v. Kaiser* was the doctors' "duty to warn" or at least the duty to convey accurate information once he undertook to warn his patient's husband of her infection.

Recovery for emotional distress due to the negligent transmission of sensitive telegraph messages and the mishandling of corpses has been allowed absent breach of any existing tort duty. These decisions had been thought to represent a move toward the recognition of an independent tort of emotional distress, but courts may see the underlying contractual duty as the basis for the claims. *See, e.g.*, Relle v. Western Union Telegraph Co., 55 Tex. 308 (1881); Russ v. Western Union Telegraph Co., 23 S.E.2d 681 (1943); Western Union Telegraph Co. v. Redding, 129 So. 743 (1930); Chelini v. Neri, 196 P.2d 915 (Cal. 1948); Clark v. Smith, 494 S.W.2d 192(N.C. 1949); Allen v. Jones, 104 Cal.App.3rd 445 (1980). *See also Marlene*, 770 P.2d at 278, note 7.

followed from the emotional distress.[25] Importantly, where the harm is not contemporaneous, there is no host tort to which the court can attach the emotional damages. Thus, it would appear that when the courts began to recognize damages for emotional distress absent contemporaneous injury, they recognized an independent duty not to negligently cause emotional distress.

Where the physical harm is not contemporaneous, but follows later as a result of the emotional distress, the courts have applied different rules to limit recovery.[26] The courts have developed and refined different doctrinal limitations to deal with emotional distress absent contemporaneous physical harm beginning with the impact rule.

B. *The Impact Rule*

The impact rule provides that a cause of action for emotional distress can only be maintained where there is proof of actual physical impact upon the plaintiff.[27] It represents the sentiment that "there should be reasonable proof of causal relation between the negligence and the injuries, and that physical impact is an essential of such proof."[28] The theory appears to be that "impact" is an assurance that the mental disturbance is not feigned.[29] Initially, a large number of American states refused to permit recovery for emotional distress unless there had been some "impact" upon the person of the plaintiff.[30]

Presumably due to its harshness, the impact rule began to erode as soon as it was announced. For instance, the courts have found "impact" in minor contacts with the plaintiff that often played no part in causing the real harm.[31] The courts appear to be turning away from the harsh burdens and arbitrary limitations imposed by the impact rule. In fact, the great majority of jurisdictions have now abandoned

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[25] KEETON, *supra* note 4, at 363.

[26] *Id.*

[27] *See* Throckmorton, *Damages for Fright*, 34 HARV. L. REV. 260, 260 (1921); Victorian Raliway Commissioners V. Coultas, 13 A.C. 222, 225-26 (House of Lords 1883).

[28] Chiuchiolo v. New England Wholesale Tailors, 150 A. 540, 543 (N.H. 1930).

[29] KEETON, *supra* note 4, at 363 n.43-53.

[30] Bosley v. Andrews, 142 A.2d 263 (1958); Brisboise v. Kansas City Public Service Co., 303 S.W.2d 619 (Mo. 1957); Spade v. Lynn & B.R. Co., 47 N.E. 88 (Mass. 1897); see generally Annot., 64 A.L.R.2d 100 (1959).

[31] KEETON, supra note 4, at 363 and n.43-53.

the impact rule in favor of somewhat less onerous requirements.[32]

C. The Physical Harm Rule

"[W]hen recovery is sought for negligent . . . infliction of emotional distress, evidence must be introduced that the plaintiff has suffered physical harm."[33] The harm need not be contemporaneous so long as there is a causal connection between the distress and the resulting harm.[34] The great majority of states have recognized a general duty to refrain from negligent infliction of emotional distress and have allowed recovery where physical injury was present to provide a guarantee of genuineness.[35]

The specific requirements of the physical manifestation rule have evolved and eroded in several jurisdictions.[36] The general movement seems to be away from actual injury and towards guarantees of

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[32] See generally, KEETON, supra note 4, at 364.

[33] Payton v. Abbott Labs, 437 N.E.2d 171, 180 (Mass. 1982).

[34] *Id.*

[35] Traditionally, many courts have required a showing of physical harm as a precondition to recovery for emotional distress. *See* M.B.M. Co. v. Counce, 596 S.W.2d 681 (Ark. 1980); Keck v. Jackson, 593 P.2d 668 (Ariz. 1979); Robb v. Pennsylvania R.R., 210 A.2d 709 (Del. 1965); Gilper v. Kiamesha Concord, Inc., 302 A.2d 740 (D.C. Ct. App. 1973); Hatfield v. Max Rouse & Sons N.W., 606 P.2d 944 (Ida. 1980); Charlie Stuart Oldsmobile, Inc. v. Smith, 357 N.E.2d 247 (Ind.App. 1976), vacated in part, 369 N.E.2d 947 (Ind.App. 1977); Clemm v. Atchison T & S.F. Ry., 268 P. 103 (Kan. 1928); Daley v. LaCroix, 179 N.W.2d 390 (Mich. 1970); Orkina v. Western Corp., 165 N.W.2d 259 (Minn. 1969); Sears, Roebuck & Co. v. Young, 384 So.2d 69 (Miss. 1980); Fournell v. Usher Pest Control Co., 305 N.W.2d 605 (Neb. 1981); Falzone v. Busch, 214 A.2d 12 (N.J. 1965); Umbaugh Pole Bldg. Co. v. Scott, 390 N.E.2d 1190 (Ohio 1979); Jines v. Norman, 351 P.2d 1048 (Okla. 1960); Melton v. Allen, 580 P.2d 1019 (Or. 1978); D'Ambra v. United States, 338 A.2d 524 (R.I. 1975); Padgett v. Colonia Wholesale Distrib. Co., 103 S.E.2d 265 (S.C. 1958); Chisum v. Behrens, 283 N.W.2d 235 (S.D. 1979); Kent v. Barrows, 397 S.W.2d (Tenn. App. 1965); Farmers & Merchants State Bank v. Ferguson, 617 S.W.2d 918 (Tex. 1981); Hughes v. Moore, 197 S.E.2d 214 (Va. 1973); Vaillancourt v. Medical Center Hosp. of Vt., Inc.,'425 A.2d 92 (Vt. 1980); Hunsley v. Giard, 553 P.2d 1096 (Wash. 1976).

Courts of other jurisdictions have allowed recovery where the emotional distress is objectively evident. *See* Towns v. Anderson, 579 P.2d 1163 (colo. 1978); Barnhill v. Davis, 300 N.W.2d 104 (Iowa 1981); Vicnire v. Ford Motor Credit Co., 401 A.2d 148 (Me. 1979); Vance v. Vance, 408 A.2d 728 (Md. 1979); Corso v. Merrill, 406 A.2d 300 (N.H. 1979).

[36] *Id.*

genuineness. The Fifth Circuit has held that where a dormant bacteria had infected the plaintiff's body, the physical harm requirement was satisfied.[37] Similarly, the Tennessee Supreme Court has held that the requirement of physical injury is satisfied where plaintiffs ingested water known to contain toxins even though there was no physically manifested injury.[38] The Maryland Court of Appeals has held that the physical injury requirement is satisfied where "the injury for which recovery is sought is capable of *objective determination*."[39] The requirement will likely continue to erode until it is no requirement at all.

Importantly, these courts see the physical harm requirement as proof of genuineness and they do not discuss the origin of the duty owed to plaintiff.[40] The general movement of the courts is toward recognizing a duty to plaintiff, but limiting recovery to claims where there is a guarantee of genuineness whether it be by physical harm or other objective determination. This is, of course, an implicit recognition of the general duty protecting plaintiffs from negligently inflicted emotional distress. Guarantees of genuineness go not to whether there is a duty, but to whether the duty has in fact been breached by the defendant's negligence.[41]

III. Abandoning Physical Harm

A. *Parasitic Damages & Retrenchment*

Several courts have abandoned the requirement of physical harm or manifestation, but only some of their decisions have been recognized

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[37] Plummer v. United States, 580 F.2d 72, 73 (3rd Cir. 1978).

[38] Laxton v. Orkin Exterminating Co., 639 S.W.2d 431 (Tenn. 1982).

[39] Vance v. Vance, 408 A.2d 728, 734 (Md. 1979).

[40] The results in *Laxton* and *Vance* may be based on the contract and special relationship theories of duty respectively. See infra Section III-A.

[41] However, the requirement of physical manifestation has been cited as an element of foreseeability. The Massachusetts court in Payton v. Abbott Labs, 437 N.E.2d 171 (1982), stated that "emotional distress is reasonably foreseeable when there is a causal connection between the physical injuries suffered and the emotional distress alleged." The court held that "plaintiff's physical harm must either cause or be caused by the emotional distress alleged. . . ." This analysis goes not to whether the distress is feigned, but whether a duty arises out of the physical manifestation. Duty should not be subjected to such a hindsight analysis, but decisions like that of the Payton court suggest the presence and perhaps extent of physical harm will weigh in the court's decision as to whether a duty exists in the first place.

as establishing an independent duty to refrain from the negligent infliction of emotional distress.[42] After abandoning the physical harm rule, California and Texas have now reasserted the requirement that plaintiffs show the defendant breached an established duty owed to the plaintiff.[43] Contrary to logic, the abandonment of the physical harm rule does not, per se, amount to the recognition of an independent duty to refrain from the infliction of emotional distress.[44]

The California Supreme Court seemed to recognize an independent cause of action in *Molien v. Kaiser* when it allowed damages for negligent infliction of emotional distress absent any physical harm[45]. However, nine years later the same court held that while physical harm was no longer necessary, some established duty was still required.[46] The court said the duty in *Molien* was that which arises out of a physician-patient relationship.[47] The California Supreme Court specifically stated that it had not recognized an independent cause of action.[48] Similarly, the Texas Supreme Court dispensed with the physical harm requirement in *St. Elizabeth Hospital v. Garrard.*[49] Five years later the court noted *Garrard* had recognized an independent right to recover for negligently

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[42] The cases recognizing the independent cause of action have been overruled or limited in Texas and California. *See, e.g.*, St. Elizabeth Hosp. v. Garrard, 730 S.W.2d 649 (Tex. 1987)(overruled Boyles v. Kerr, 61 U.S.L.W. 353277)(Tex. 1992); Molien, 616 P.2d 813(limited by Marlene F. v. Psychiatric Med. Clinic, 770 P.2d 278 (Cal. 1989)).

The cases recognizing the independent tort remain standing in Ohio, Missouri, and Hawaii. *See* Schultz v. Barberton Glass Co., 447 N.E.2d 109 (Ohio 1883); Bass v. Mooney Co., 646 S.W.2d 765 (Mo. 1983); Rodrigues v. Hawaii, 472 P.2d 509 (Haw. 1970).

[43] Boyles v. Kerr, 855 S.W.2d 593 (Tex. 1993); Marlene F. v. Psychiatric Med. Clinic, 770 P.2d 278 (Cal. 1989).

[44] This development does not follow in the logical progression of the law. When the courts began to recognize emotional distress without contemporaneous injury so long as some physical manifestation followed, they implicitly recognized an independent duty not to negligently cause emotional distress. The requirement of physical manifestation goes to proof of breach, not the initial duty. The courts are now abandoning the proof of breach requirement (physical manifestation) and replacing it with a requirement that emotional distress damages will, once again, only be allowed as parasitic damages. This is a significant retrenchment of tort law.

[45] Molien v. Kaiser, 616 P.2d 813 (Cal. 1980).

[46] Marlene F. v. Psychiatric Med. Clinic, 770 P.2d 278, 281 (Cal. 1989).

[47] *Id.*

[48] *Id.*

[49] St. Elizabeth Hosp. v. Garrard, 730 S.W.2d 649, 653 (Tex. 1987).

inflicted emotional distress, but then expressly overruled that holding.[50] Those decisions represent a significant retrenchment in the direction of parasitic damages.

Where courts have abandoned the physical harm requirement, they may search for some other recognized duty to which the emotional distress damages can be attached. Damages may be attached to any underlying duty that arises as a matter of law.[51] The duty may arise from a statute, the common law, or the actions of the parties.[52] It could even arise from a special relationship such as that between a physician and her patient.[53] The important point is that some courts will require a specific showing of an established duty even though the physical harm requirement has been abandoned.

B. The Independent Tort

At least one court has fully recognized an independent cause of action for negligent infliction of emotional distress without any additional limitations. The Hawai'i court has specifically stated that "there is a duty to refrain from the negligent infliction of serious mental distress."[54] The court does not require physical manifestation or any of the other doctrinal limitations. The duty is, as in all negligence cases, limited by foreseeability.[55] "[T]he defendant's obligation to refrain from particular conduct is owed only to those who are foreseeably endangered by the conduct and only with respect to those risks or hazards whose likelihood made the conduct unreasonably dangerous."[56]

The Hawai'i Supreme Court recognized that the law has always protected the interest in freedom from emotional distress when the court was convinced that distress was both genuine and serious.[57] The doctrinal limitations that have been applied by the courts should not be seen as restrictions on the plaintiff's right to recover. They are standards which have been used to test the genuineness and seriousness

[50] Boyles v. Kerr, 855 S.W.2d 593, 596 (Tex. 1993).
[51] Marlene F. v. Psychiatric Med. Clinic, 770 P.2d 278, 281 (Cal. 1989).
[52] *Boyles*, 855 S.W.2d at 596.
[53] *Marlene F.*, 770 P.2d at 281.
[54] Rodrigues v. Hawaii, 472 P.2d 509, 520 (Haw. 1970).
[55] *Id.* at 521.
[56] *Id.*
[57] *Id.* at 519.

of emotional distress claims.[58] This can be accomplished without arbitrarily restricting access to the courts.

The requirement of genuineness in emotional distress claims is no different from that in other contexts. "In judging the genuineness of a claim of mental distress, courts and juries may look to 'the quality and genuineness of proof and rely to an extent on the contemporary sophistication of the medical profession. . . .'"[59] The potential for fraudulent claims in this area is not sufficient to bar recovery by application of arbitrary rules such as impact or physical manifestation. Courts and juries are perfectly competent to weigh the relevant evidence and to weed out the majority of fraudulent claims.[60]

Even though emotional injury should be generally on the same footing as other injury, "there are compelling reasons for limiting recovery of the plaintiff to claims of serious mental distress."[61] The law should not impose upon society a duty which cannot be discharged. The conduct of everyday interaction between civilized persons is bound to cause emotional distress. It cannot be avoided. The great bulk of this distress is ordinary, trivial, and sometimes even beneficial. The Hawai'i court addressed this concern by providing redress only for serious emotional distress.[62]

"*Serious* mental distress may be found where a reasonable man [sic], normally constituted, would be unable to adequately cope with the mental stress engendered by the circumstances of the case."[63] Of course, it may be argued that this is no requirement at all because different juries and courts will interpret the requirement differently. The definition of "serious" is as elusive as the reasonable person herself, but that standard has been applied throughout the common law and it is no less applicable in this area.

The requirements of the independent tort adequately screen out fraudulent and trivial claims without the harsh rigidity of the doctrinal limitations applied in other jurisdictions. The courts' concens over fraudulent and trivial claims are not without merit, but neither are these claims limited to the regime of psychic injury. Such claims are brought and adjudicated regarding all sorts of injury and the courts

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[58] *Id.* at 519.

[59] *Id.* at 519 (quoting Ferrara v. Galluchio, 152 N.E.2d 249 (1958).

[60] *Id.*

[61] *Id.* at 520.

[62] *Id.*

[63] *Id.*

apply the general principles of tort along with the judgement of the fact finder to weed out those claims. Application of these principles is equally effective in the psyschic injury regime.

§ 2 AIDS PHOBIA

I. AIDS PHOBIA: COMPENSABLE AS FEAR OF FUTURE HARM

AIDS Phobia is a compensable form of emotional distress[64]. It is the present fear that one will develop future AIDS as a result of a defendant's negligent conduct.[65] While there may be no permanent, tangible effect in AIDS Phobia claims, the fear should be compensable because it represents an actual harm caused by the negligence of another. The limited AIDS Phobia jurisprudence makes it necessary to look to other fear of future disease cases for initial instruction. Generally, a plaintiff's fear of future disease is compensable where the defendant's negligence gave rise to that fear.[66]

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[64] *See* Burk v. Sage, 747 F. Supp. 285 (E.D. Penn. 1990); Marchia v. Long Island R.R., 810 F. Supp. 445 (E.D.N.Y. 1993); Poole v. Alpha Theraputic Corp., 698 F. Supp. 1367 (N.D. Ill. 1988); Transamerica Ins. Co. v. Doe, 840 P.2d 198 (Cal. 1992); Baranowski v. Torree, 1991 W.L. 240460 (Conn. 1991); Faya v. Almaraz, 620 A.2d 327 (Md. 1993); Doe v. Doe 519 N.Y.S.2d 597 (N.Y. Sup Ct. YEAR); Doe v. State of New York, 588 N.Y.S.2d 698 (Ct.Cl. 1992); Ordway v. County of Suffolk, 583 N.Y.S.2d 1014 (N.Y. Sup. Ct. 1992); Petri v. Bank of New York, 582 N.Y.S.2d 608 (N.Y. Sup. Ct. 1992); Castro v. New York Life Ins. Co., 588 N.Y.S.2d 695 (N.Y. Sup. Ct. 1991); Hare v. State of New York, 570 N.Y.S.2d 125 (N.Y. Sup. Ct. 1991); Carroll v. The Sisters of Saint Francais Health Services, 1992 W.L. 276717 (Tenn. Ct. App. 1992); Funeral Serv. By Gregory v. Bluefield Community Hosp., 413 S.E.2d 79 (W.Va. 1991).

[65] *Id.*

[66] *See generally* Annot., 71 A.L.R.2d 338 (1960); *See also* Hayes v. New York C. R. Co., 311 F.2d 198 (N.Y. 1962); Coover v. Painless Parker, Dentist, 286 P. 1048 (Cal. App. 1930); Figlar v. Gordon, 53 A.2d 645 (Conn. 1947); Warner v. Chamberlain, 30 A. 638 (Del. 1884); Eagle-Picher Industries Inc. v. Cox, 481 So.2d 517 (Fla. App. 1985); Heider v. Employers Mut. Liability Ins. Co., 231 So.2d 438 (La. App. 1970); Berry v. Monroe, 439 So.2d 465 (La. App. 1983), cert. denied 443 So.2d 597 (La. 1983); Buck v. Brady, 73 A. 277 (Md. 1909); Hoffman v. St. Louis Public Serv. Co., 255 S.W.2d 736 (Mo. 1953); Herbert v. John-Mansfield Corp., 785 F.2d 79 (N.J. 1986); Alley v. Charlotte Pipe & Foundry Co., 74 S.E. 885 (N.C. 1912); Ayers v. MacOughtry, 117 P. 1088 (Okla. 1911); Plummer v. United States, 580 F.2d 72 (Pa. 1978); Gideon v. John-Mansfield Sales Corp., 761 F.2d 1129 (Tex. 1985).

For example, the court in *Gideon v. John-Mansfield Sales Corp.* said that the plaintiff could recover for fear of future cancer that would likely develop as a result of his inhalation of asbestos fibers.[67] The plaintiff alleged that he had inhaled asbestos fibers while working with the defendant's defective products, that this had done physical damage to his lungs, and that he feared he would develop cancer.[68] Damages for fear of future disease were recognized as generally compensable.[69]

In *Anderson v. Welding Testing Laboratory Inc.*, the Louisana Supreme Court held that where the plaintiff had been exposed to dangerous radiation, his fear of losing his fingers and hand was compensable regardless of the low probability that his fear would be realized.[70] The court stated that while the medical probability of the future harm was so minimal as to be scientifically impossible, the plaintiff's real fears were nonetheless compensable.[71] Fear of future harm is a present injury in the form of emotional distress. The reasonableness of the fear, and not the probability of future harm, is at issue.[72]

Recognizing that fear of future disease such as HIV/AIDS is generally compensable, the distinctions among the courts have emanated from their concerns over reasonableness and causation. While these concerns are by no means new, the courts have sounded divergent responses in the AIDS Phobia regime. Courts hearing AIDS Phobia claims have applied different criteria ranging from proof of plaintiff's seropositivity, to proof of actual exposure to HIV/AIDS, to evidence that the fear is objectively reasonable. The first two requirements will prove to be arbitrary tools of judicial convience. The third is merely a reference to the general principle of tort law.

II. Seropositivity

The requirements of recovery for fear of future harm in the AIDS context have differed widely among the courts. A few courts have actually indicated that AIDS Phobia will not be compensable unless

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[67] *Gideon*, 761 F.2d 1129. The court did not reach the issue of whether recovery could be had where the injuries were not highly probable because in this case they were likely to a medical certainty.

[68] *Id.*

[69] *Id.*

[70] Anderson v. Welding Testing Laboratory, Inc., 304 So.2d 351 (La. 1974).

[71] *Id.*

[72] *Id.*

the plaintiff has tested HIV positive.[73] The Supreme Court of New York County, in dicta, stated that "[s]omeone who has been exposed to HIV infection but has not come down with it has not suffered a physical injury for which a recovery in damages is allowed."[74] The court explained that the law has not often compensated claims for emotional damage for fear of future illness absent physical basis for the fear. The court saw the emotional distress as too speculative and remote absent proof of HIV infection.

Perhaps most important is the fact that whether one will become seropositive can not be ascertained with any certainty for over six months.[75] It is during this period of uncertainty that reasonable persons may be genuinely fearful that they have contracted HIV/AIDS. When it becomes reasonably certain that plaintiff is not seropositive, the reasonable fear is extinguished.[76] However, that should not preclude compensation for the emotional distress suffered over the previous months.

"[F]ear of developing a future condition or disease is a proper element of damages, even when the alleged fear proves mistaken.[77] A fear must be reasonable, but need not be based on a high probability.[78] The seropositivity requirement goes beyond that of reasonableness and imposes a harsh restriction on the plaintiff's right to

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[73] *See, e.g.*, Petri v. Bank of New York, 582 N.Y.S.2d 608 (N.Y. Sup. Ct. 1992); Transamerica Ins. Co. v. Doe, 840 P.2d 288 (Cal. 1992).

[74] *Petri*, 582 N.Y.S.2d at 613.

[75] Faya v. Almaraz, 620 A.2d 327, 332 (Md. 1993) *4 (Md. 1993) (citing Morbidity & Mortality Weekly Report, July 21, 1989, V. 38, No. S-7).

[76] Plaintiff's fear that she has contracted HIV/AIDS (and defendant's liability) cannot continue indefinetly. Where it has been established to a medical certainty that the plaintiff has not contracted the disease, her *reasonable* fear ends. The effect is that damages for AIDS Phobia may be limited to the period during which seroconversion may occur. Medical authority may differ on this point, but it appears that 95% of those infected will test HIV positive within six months. *See generally* Hornsburg et al., *Duration of the Human Immunodeficiency Virus Infection Before Detection of Antibody*, THE LANCET, Sept. 16, 1989, at 637-40.

[77] Gale, F. and Goyer, *Recovery for CancerPhobia and Increased Risk of Cancer*, 15 CUMB. L. REV. 723 (1985).

[78] The fear of future harm is a present injury. The compensation sought is for plaintiff's present fear that he will develop AIDS in the future. There may be a separate, distinct cause of action for the increased likelihood of AIDS caused by defendants' negligence. For purposes of this paper it is only important to know that these are two distinct theories and that increased likelihood of contracting AIDS is not required in proving damages for fear of future harm.

recover for a defendant's tortious conduct. Recognizing the harshness of the seropositivity requirement, most courts have employed less restrictive limiting devices.

III. Actual Exposure

The majority of courts wishing to impose limitations on recovery for AIDS Phobia have done so by requiring that the plaintiff prove that he was actually exposed to the virus. A two part requirement has been espoused by several courts and justified on multiple grounds. Because the requirement of actual exposure is a central issue in AIDS Phobia jurisprudence, the requirement and its justifications must be examined with care.

A. The Requirements of Proof

The plaintiff must offer proof as to the possibility of contracting AIDS under the specific circumstances of his case.[79] The courts have developed what amounts to a two part test to determine whether the plaintiff has been exposed to HIV/AIDS. The plaintiff must plead (1)that he has come into contact with a dangerous instrumentality, and (2)that the contact was of a dangerous nature. Only where the plaintiff can offer proof of each of these components will the requirement of "actual exposure" be satisfied.

1. Proof of Dangerousness of Instrumentality

The plaintiff must first show that he has come into contact with a person or instrument that is infected or contaminated with HIV/AIDS. The claimant must show that the person or instrument is dangerous, not merely that there is some likelihood of dangerousness.[80] Whether the instrumentality is an allegedly infected person or contaminated instrument, the courts that require proof of actual exposure have been strict in applying the requirement of infection or contamination.

Where it is alleged that the plaintiff's fear of future AIDS was caused by contact with a person, the plaintiff must prove that the person was an HIV carrier. In *Doe v. Doe*, a New York trial court held that the

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[79] Hare v. State of New York, 570 N.Y.S.2D 127 (N.Y. Sup. App. 1991).
[80] Doe v. Doe, 519 N.Y.S.2d 595 (Sup. 1987).

plaintiff could not establish "actual exposure" by pleading that she had had sexual intercourse with her spouse after his recent homosexual affair with an AIDS infected person.[81] The court indicated that she would have to introduce evidence that her spouse was, himself, infected with the AIDS virus.[82] The courts require proof of *actual* exposure, not that exposure was possible or that the plaintiff's fear was reasonable.

Similarly, where that plaintiff's fear is caused by contact with a needle or other instrument, the plaintiff must show that the instrument was, in fact, contaminated.[83] In *Burk v. Sage*, the Pennsylvania District Court held that a plaintiff stuck by a used hypodermic needle could not recover for AIDS Phobia without proof that the needle had been used on an AIDS patient.[84] The court held that plaintiff's allegations that there were several AIDS patients on the hospital floor where the hypodermic was used was insufficient to satisfy the requirement of actual exposure.[85] Again, the courts require proof of *actual* exposure, not that exposure was possible or that the plaintiff's fear was reasonable.

This requirement of the actual exposure calculus poses serious difficulties for plaintiffs and the courts. Plaintiffs are charged with a duty to preserve evidence at the moment of the traumatic event. Imagine that the plaintiff goes to visit a patient at the defendant's hospital and that the defendant negligently causes her to be stuck by a used hypodermic needle. The plaintiff, fearing that she has just been exposed to HIV/AIDS, must collect and preserve that hypodermic or her claim is lost regardless of the reasonableness of her fear. Worse still, imagine that the plaintiff is stuck, but does not become fearful until the next day when she learns that the needle may have been used on an AIDS patient. With the evidence now lost, her claim will be difficult to prove. This rigid requirement of actual exposure is a harsh restriction on plaintiff's right to recover for the very real fears that the defendant negligently caused.

2. *Proof of Dangerous Contact*

The plaintiff must also establish that the contact that engenders her fear is of the sort that could cause transmission of HIV/AIDS. The

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[81] *Id.*
[82] *Id.* at 598.
[83] Burk v. Sage, 747 F. Supp. 285, 287 (E.D. Penn. 1990).
[84] *Id.* at 286.
[85] *Id.*

decisions give very little guidance on this element of the actual exposure calculus. The great majority of the AIDS Phobia claims have been predicated on sexual intercourse or bodily intrusion by sharp objects, such as hypodermic needles.[86] These are the two quintessential methods of AIDS transmission and neither has been questioned by the courts.[87] Where the claim is predicated on some other type of contact, the courts may be more restrictive.

Two courts have adjudicated claims where the plaintiff had been bitten by an allegedly infected person. In *Hare v. State of New York*, the court did not reach the question of whether biting constituted a legally dangerous contact.[88] In *Johnson v. West Virginia University Hospital*, the court recognized the infliction of a bite as an incident of actual exposure, but made note of the special circumstances.[89] The court gave weight to the fact that the plaintiff was bitten by an individual who had AIDS and had first bitten himself. The presence of AIDS infected blood around the biter's mouth was important to the court's decision. Whether biting alone, not to mention the myriad other forms of human contact, is a legally dangerous contact is yet to be determined.

B. *The Function of Actual Exposure*

Where the courts have required proof of actual exposure to support claims of AIDS Phobia, they have cited different reasons for their judicial skepticism. The courts have required proof of actual exposure to satisfy their concerns over issues of reasonableness and causation of AIDS Phobia claims. Each of the courts requiring proof of actual exposure has cited one or both of these concerns as the reason for the requirement.

1. *Reasonableness*

Some courts have held that fear of AIDS is not objectively reasonable in the absence of a specific traumatic event amounting to actual

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[86] See *supra*, note 65.

[87] See Faya v. Almaraz, 620 A.2d 327, 332 (Md. 1993)(citing Weber, Jonathon N. & Robin A. Weiss, *HIV Infection: The Cellular Picture*, Sci. Am., Oct. 1988, at 100-109; Haseltine, William A. & Flossie Wong-Stall, *The Molecular Biology of The AIDS Virus*, Sci. Am., Oct. 1988, at 52-62).

[88] Hare v. State of New York, 570 N.Y.S.2d 127(N.Y. Sup. App. 1991).

[89] Johnson v. W. Va. Univ. Hosp., 413 S.E.2d 889 (W.Va. 1991).

exposure.[90] The Supreme Court of West Virginia has held, as a matter of law, that "if a suit for damage is based solely upon the plaintiff's fear of contracting AIDS, but there is no evidence of an actual exposure to the virus, the fear is unreasonable, and the court will not recognize a legally compensable injury."[91] The inference is that a reasonable person of ordinary intelligence would not fear that he would develop AIDS unless he had proof that he had actually been exposed to the virus. This is contrary to common experience, however.

The better rule for determining whether plaintiff has a cause of action is to look to whether the defendant should have foreseen that his negligent conduct would be likely to engender such a fear.[92] Among the most important functions of tort law is to encourage cautious behavior. That is better accomplished by reference to the defendant's knowledge and conduct. Should the hospital have foreseen that someone might develop a fear of AIDS if she were stuck with an improperly disposed needle? Of course. The hospital should have known that an ordinary person might develop a fear of AIDS after such an event and that such fear would continue until it could be affirmatively put to rest.[93] Requiring the plaintiff to affirmatively prove that she has been exposed to the virus is a harsh restriction on recovery for the defendant's negligence.

2. Causation

The actual exposure requirement has also been applied in the proximate cause analysis. The Court in *Burk v. Sage* held that AIDS Phobia is not compensable unless it is demonstrated that the fear arises out of an incident of actual exposure.[94] Absent such a "linkage" between the fear and an event of exposure, the court refused to hold that plaintiff's negligence caused defendant's fear.[95] The court said that "while injuries stemming from a fear of contracting illness after exposure to a disease causing agent may present compensable damages, injuries stemming from the fear of exposure do not."[96] Similarly, in *Doe v. Doe*, the court

[90] *See e.g.*, Funeral Serv. By Gregory v. Bluefield Community Hosp., 413 S.E.2d 79 (W.Va. 1991).
[91] *Id.* at 84.
[92] Ayers v. Township of Jackson, 461 A.2d 184, 189 (N.J. 1983).
[93] See *supra*, note 75.
[94] Burk v. Sage, 747 F. Supp. 285, 287 (E.D. Penn 1990).
[95] *Id.*
[96] *Id.*

held that plaintiff could not state a claim against her husband who admitted to having homosexual affairs.[97] The court said the claim was "a possibility, based on a potential, based on a possibility."[98] The causal link was seen as too tenuous.[99]

The court's concern over proximate cause is neither new, nor particularly convincing. The defendant's negligence is the proximate cause of the plaintiff's fear so long as the consequences of that negligence proceed in an unbroken sequence without an independent intervening cause.[100] Where the defendant's conduct would foreseeably cause the plaintiff to fear that plaintiff had been exposed to AIDS, it naturally follows that she would fear developing AIDS. The causal link between a defendant's negligence and plaintiff's fear is not automatically too tenuous to be legally proximate merely because the plaintiff cannot prove that she was actually exposed to the virus.

IV. Independent Recognition

Application of general tort principles is sufficient to resolve AIDS Phobia claims. Several courts have recently recognized a cause of action for AIDS Phobia without requiring any proof of seropositivity or actual exposure.[101] Where the defendant should have foreseen that his negligence could cause a reasonable person of ordinary intelligence to fear the development of AIDS, the plaintiff's claim will be compensable.[102] This is the better rule. As discussed above, the seropositivity and actual exposure requirements unnecessarily impose harsh burdens upon the plaintiff. The question should not be whether the plaintiff can prove he was exposed to the virus, but whether the defendant should have been more cautious in his conduct.

The Tennessee Court of Appeals held in *Carroll v. Sisters of St. Francais Health Services* that the plaintiff could state a cause of action for AIDS

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[97] Doe v. Doe, 519 N.Y.S.2d 595 (N.Y. Sup. Ct. 1987).

[98] *Id.* at 599.

[99] *Id.*

[100] See supra, note 14.

[101] Faya v. Almaraz, 620 A.2d 327 (Md. 1993); Marchia v. Long Island R.R., 810 F. Supp. 445 (E.D. N.Y. 1993); Carroll v. Sisters of St. Francais Health Services, Inc., 1992 W.L. 276717 (Tenn. Ct. App. 1992); Baranowski v. Torree, 1991 W.L. 240460 (Conn. Super. 1991); Castro v. New York Life Ins. Co., 588 N.Y.S.2d 695 (N.Y. Sup. Ct. 1991).

[102] *Id.*

Phobia where she could not prove that she had been exposed to the virus. The plaintiff was pricked by a used needle while in defendant's hospital and developed AIDS Phobia, but she could not offer evidence that the needle was contaminated. The court held that where the plaintiff could show that her fear was reasonable under the circumstances, she could recover for negligent infliction of emotional distress. While this is the better rule, the decision is on shaky ground.[103]

The decision in *Carroll* was based on a liberal reading of precedent from the Tennessee Supreme Court. The Supreme Court had held in *Laxton v. Orkin Exterminating Co.* that the plaintiff could state a cause of action for negligence where she had ingested an uncertain amount of dangerous chemicals even though she could not prove any harmful effects. The *Carroll* court did not interpret this precedent as requiring proof of actual exposure, but merely as establishing a standard of reasonableness. While the Tennessee Supremem Court later decided that the Court of Appeals' view represented a misstatement of Tennessee law, it is the better rule.[104]

The Maryland Court of Appeals has also recently addressed a claim for AIDS Phobia where the plaintiff could not show seropositivity nor actual exposure to HIV. In *Faya v. Almaraz*, the defendant surgeon operated on the plaintiff without informing her that he was HIV positive.[105] The plaintiff pleaded neither that she had tested HIV positive nor that she was even actually exposed to HIV.[106] Furthermore, there was no proof of any incident during the surgery which could

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[103] The Tennessee Supreme Court has subsequently overturned the Court of Appeals' decision in *Carroll*, 1992 W.L. 276717 (1992). As the author predicted, the Supreme Court held that the lower court had misapplied *Laxton v. Orkin Exterminating Co.*, 639 S.W. 2d 431 (Tenn. 1982).

[104] In a closely analogous line of cases, the courts have awarded damages for fear of future hydrophobia and lockjaw without actual proof that the plaintiff had been exposed to rabies. *See e.g.*, Warner v. Chamberlain, 30 A. 638 (Del. 1884); Serio v. American Brewing Co., 70 So. 998 (La. 1917)(overruled on other grounds Holland v. Buckley, 305 So.2d 113 (La. 1917)); Buck v. Brady, 73 A. 277 (Md. 1909); Godeau v. Blood, 52 Vt. 251 (1880). For example, in *Godeau*, the Vermont trial judge charged a jury that a person who had been bitten by a dog not known to be rabid would suffer under the apprehension that he would contract hydrophobia and die as a result. *Godeau*, 52 Vt. 251 (1880). The court said that this was a proper matter for the jury's consideration in awarding damages. *Id.* This reflects the rule that damages could be awarded for any fear that a reasonable person would suffer under the circumstances.

[105] Faya v. Almaraz, 620 A.2d 327 (Md. 1993).

[106] *Id.*

have transmitted the virus.[107] The plaintiff nonetheless feared that she had contracted HIV/AIDS as a result.

The Maryland Court applied the fundamental principles of tort law in holding that AIDS Phobia could be compensable without a showing of seropositivity or proof of actual exposure.[108] The court began by recognizing that "[t]o state a cause of action in negligence, a plaintiff must allege that the defendant had a duty of care which he breached, and that the breach proximately caused legally cognizable injury."[109] The court further explained that the concept of duty emanates from the general obligation to exercise reasonable care to avoid unreasonable risks of harm to others.[110] The central element of the duty analysis is foreseeability.[111] Where a reasonable person should have foreseen that his conduct would cause the plaintiff to develop a fear of AIDS, the defendant may be liable for damages.

This case is instructive because it applies the general principles of tort law and reaches the result that AIDS Phobia is a generally compensable form of negligent infliction of emotional distress.[112] However, it may be easily distinguished by courts wishing to reach a contrary result. The physician-patient relationship, like other special relationships, may give rise to a heightened standard of care.[113] Plaintiffs looking to *Faya* for guidance in the general application of AIDS Phobia claims may find that the decision is closely tied to the facts.

Similarly, the Supreme Court of New York County held in *Castro v. New York Life Insurance Co.* that a cleaning person who was pricked by a negligently disposed hypodermic could present a cause of action for AIDS Phobia without seropositivity or proof of actual exposure.[114] This court also looked to general principles of tort law in recognizing that the plaintiff's fear of AIDS is a legally compensable harm.[115] The court stated that to recover for negligence "the plaintiff must establish the existence of a duty owed to her . . . breach of that duty, a

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[107] *Id.*

[108] *Id.* at 336.

[109] *Id.* at 333 (citing Pennwalt Corp. v. Nasios, 550 A.2d 1155 (Md. 1988); Jacques v. First National Bank of Maryland, 515 A.2d 756 (Md. 1986); Cramer v. Housing Opportunity Comm'n., 501 A.2d 35 (Md. 1985)).

[110] *Id. Faya*, 620 A.2d at 333.

[111] *Id.*

[112] *Id.* at 336.

[113] See *supra*, Section III-A; note 46 and related text.

[114] Castro v. New York Life Ins. Co., 588 N.Y.S.2d 695 (N.Y. Sup. Ct. 1991).

[115] *Id.* at 696.

reasonably close causal connection, . . . and actual loss, harm, or damage."[116] Additional requirements of actual exposure or seropositivity are not necessary within this scheme.

Plaintiffs looking to *Castro* for support of the proposition that AIDS Phobia is a generally compensable tort may find that it can be easily distinguished as well. The defendant's disposal of the hypodermic that pricked the plaintiff was in violation of a state statute prohibiting discarding such waste in an ordinary waste container.[117] The court found the defendant's duty in this statute.[118] Where the plaintiff can not point to a specific recognized duty of care, the courts may be hesitant to endorse a general duty not to negligently inflict emotional distress.[119]

Application of general tort principles is adequate to resolve AIDS Phobia claims, but the courts must ultimately announce whether there is a general duty not to negligently cause AIDS Phobia. The answer seems obvious, but the courts have avoided a direct holding on this issue. Although *Carroll*, *Faya*, and *Castro* appear to recognize the independent duty, they may be of little general precedental value because of the basis of the decision in *Carroll* and the special facts in the others.

AIDS Phobia is a real harm and it should be compensable without reference to artificial barriers of proof. The movement of the courts away from the requirements of seropositivity and actual exposure is a step in the right direction. The courts should specifically recognize a duty not to negligently cause AIDS Phobia.

V. Conclusion

The AIDS Phobia jurisprudence may have a signifigant effect upon the general redressability of psychic injuries. The general movement of the AIDS Phobia decisions is away from doctrinal limitations on recovery and towards application of the general principles of tort law. These decisions should be of some guidance to the courts in deciding other claims sounding in negligent infliction of emotional distress. The courts are moving in the right direction, but plaintiffs still do not enjoy full protection from AIDS Phobia or negligent infliction of emotional distress generally.

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[116] *Id.* at 697.
[117] *Id.* at 696.
[118] *Id.*
[119] See *supra*, Section III-A.

The courts should clearly announce that defendants have a legal duty to avoid causing emotional distress and AIDS Phobia specifically. Duty is not sacrosanct. At center, duty represents the policy that each of us should use reasonable care to avoid unreasonable risk to others. This should apply to cases of psychic injury with the same force as it does in other regimes. Duty should not be subjected to artificial limitations. Courts must begin to put psychic injury on the same footing as other injury so that negligence does not escape redress.

Procedural Politics and Federal Rule 26: Opting-out of "Mandatory" Disclosure

By Eric K. Yamamoto* and Joseph L. Dwight IV**

I. Introduction

The legal profession has long labored with a sullied public image. Whatever its genesis, public distaste often has been tempered by perceptions of the necessity and worth of law, lawyers and a stable legal system.[1] Those tempering perceptions, however, appear to have faded. Harsh criticisms, and sometimes derision, emanate from legislators, attorneys, clients, community groups, and study committees.[2] The breadth and intensity of the criticism is perhaps unparalleled in modern legal history.[3] Congress,[4] the federal executive branches, state

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[1] Stephen Landsman, *Adversarial Process* (1985) (describing traditional views of the adversarial legal system and recent criticisms).

[2] *See* Dan Quayle, *Civil Justice Reform*, 41 Am. U. L. Rev. 559 (1992), [Hereinafter Quayle, *Civil Justice*].

[3] *See Vox Populi, The Public Perception of Lawyers: ABA Poll*, ABA B. J. 60, (Sept. 1993) (revealing that lawyers had received a 40% approval rating and that 56% of the respondents had volunteered an unfavorable impression of lawyers). *See generally* Roscoe Pound, *The Scope and Purpose of Sociological Jurisprudence*, 25 Harv. L. Rev. 498, 516 (1912) (as an early critic of the modern legal system, criticizing employment of "the whole energy of our judicial system. . .in working out a consistent, logical, minutely precise body of [precedent]" without reference to larger social impacts).

[4] Jeffrey Stempel, *New Paradigm, Normal Science, Or Crumbling Construct? Trends In Adjudicatory Procedure*, 59 Brook. L. Rev. 659, 683 (1993) (discussing trends affecting our understanding of adjudicatory procedure).

Congress has not been a completely silent partner of the judiciary in the

legislatures, bar associations and community law groups have responded by offering a plethora of litigation reforms.[5] Federal and state judiciaries also have responded by offering their own far-reaching packages of reform. How are we to understand these overlapping, seemingly uncoordinated, initiatives? Are they generated by groups with appropriate authority and expertise? Will they fundamentally restructure the way lawyers lawyer and judges judge? The way lawyers and clients relate? The way disputes are resolved, and the kind of justice delivered?[6]

The recent adoption of the mandatory disclosure amendments to Federal Rule of Civil Procedure 26 provides an apt focal point for discussion of these questions. These amendments, effective December 1, 1993, eliminate formal deposition-interrogatory-document discovery at the front end of the pretrial process. They mandate a party's *disclosure* of relevant information.[7] No discovery requests are required or allowed before disclosure. These amendments may well fundamentally change the structure and tenor of civil litigation discovery procedure.[8] For

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> formulation of litigation policy. In fact, in the area of substantive law Congress has been quite active, by reversing or modifying Court decisions-particularly regarding civil rights statutes-thought to be insufficiently sensitive to statutory rights. Congress similarly enacted comprehensive copyright legislation in response to perceived problems of copyright infringement unremedied through litigation. But in the area of procedural law, Congress has ordinarily been less active, usually deferring to the judicially led rulemaking process or responding to judicially initiated calls for statutory reform.
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> Even before the current ferment, however, there were notable exceptions to my posited world of judicially centered mechanism of court reform.

Id.

[5] "Adjudicatory procedure is the means by which particular litigation is administered. Litigation reform is the means by which aspects of the litigation process, including adjudicatory procedure, are altered, marginalized, reduced in importance, bypassed, eliminated or changed." Stempel, *supra* note 4, at 693-94.

[6] Professor Jeffrey Stempel believes that the current changes in adjudicatory procedure evidenced by the civil rules amendments will affect litigants disproportionately. "I conclude that, on balance, the new order (or disorder) in litigation reform, like the new order in adjudicatory procedure, weighs more in favor of the socioeconomically advantaged that did its predecessor." Stempel, *supra* note 4, at 695.

[7] *See infra* Part III. *See also* Ralph K. Winters, *In Defense of Discovery Reform*, 58 Brook. L. Rev. 263 (1992) (supporting the mandatory disclosure provision to amended Rule 26(a)(1); William H. Schwarzer, *Query: Slaying the Monsters of Cost and Delay: Would Mandatory Disclosure Be More Effective Than Discovery?*, 74 Judicature 178 (1991) (favoring disclosure over discovery); Linda S. Mullenix, *Hope Over Experience: Mandatory Informal Discovery and the Politics of Rulemaking*, 69 N.C. L. Rev. 795 (1991) (hereinafter "Hope Over Experience") (supporting mandatory disclosure).

[8] *See infra* Part III.

some courts, that is. Fifty-two federal district courts have in some fashion opted-out of the most significant amendments to Rule 26.[9] Why have more than half the district courts opted-out? Why the disuniformity nationwide?

The Rule 26 mandatory disclosure amendments have been embroiled in controversy[10] since their inception.[11] The Federal Judicial Center[12] forcefully urged adoption of the amendments both before the Supreme Court (the Court promulgated the amendments with three justices sharply dissenting)[13] and before Congress (the House voted to veto the

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[9] *See infra* note 25.

[10] *Symposium Reinventing Civil Litigation: Evaluating Proposals For Change*, 59 BROOK. L. REV. 655 (1993). ("The many judges, academics and practitioners who support the recent amendments long have criticized the civil litigation system as a failure in need of drastic reform, branding it costly, slow and ineffective. But others see the amendments as yet another instance in a growing trend to reduce access to the federal courts, particularly for the disenfranchised, who arguably face the greatest need for access.")

[11] *See infra* Part IV.

> An objective description of the disclosure amendments might well be "incremental" or "a first step" or "barely non-trivial." They require the disclosure of nothing that is not mandatory under the present rules.

Winters, *supra* note 7, at 271. The conceptual underpinnings of the amendments emerged in two articles. One was authored by magistrate judge Wayne Brazil, a member of the Federal Rules Advisory Committee, and the other by retired judge William Schwarzer, now the director of the Federal Judicial Center. *See* Wayne D. Brazil, *The Adversary Character of Civil Discovery: A Critique and Proposals for Change*, 31 VAND. L. REV. 1295, 1348 (1978); William W. Schwarzer, *The Federal Rules, the Adversary Process, and Discovery Reform*, 50 U. PITT. L. REV. 703, 721-23 (1989) [hereinafter Schwarzer *Rules*].

[12] *See* 28 U.S.C. § 620 (1990) (creating and defining the duties of the Federal Judicial Center). The Center is currently funded by an appropriation of $17,795,000 and employs a permanent staff of 134 employees. Federal Judicial Center, About the Federal Judicial Center 1 (May 1992).

[13] Amendments to the Federal Rules of Civil Procedure, 146 F.R.D. 507 (1993) (Scalia, J., dissenting, joined by Thomas and Souter, JJ).

> In particular [the justices] disliked the additional layer of discovery practice provided by required "disclosure" under new Rule 26. They also saw the disclosure mechanism as undermining the traditional adversary method of civil litigation to the extent that it required counsel to do work on behalf of their opponents. Additionally, the dissenters saw the discovery changes as "premature" in light of the Civil Justice Reform Act of 1990 . . . , which requires that each federal district court craft a Delay and Expense Reduction Plan, thus endorsing a period of experimentation with discovery that could be thwarted by nationwide changes in the Rules.

Stempel, *Trends*, *supra* note 4, at 680 (discussing trends affecting our understanding of adjudicatory procedure).

amendments, the Senate did not[14]).[15] The rest of the legal community joined in almost universal opposition.[16] Of the 264 written submissions to the Judicial Center on the proposed rule amendments, 251 opposed the amendments.[17] Despite strong and strident opposition, repeated statements about the proposed amendment's impending demise[18] proved to be, in Mark Twain's words about his own reported death, "greatly exaggerated."

In its recent status report the Federal Judicial Center, perhaps unintentionally, aptly captured the shifting, contingent nature of the mandatory disclosure amendments.

> Rule 26(a)(1). . . has been rejected more often than the other disclosure subsections of the rule. . . .52 courts have exempted cases. . . . of these, however, sixteen require disclosure through local rules or under the C.J.R.A. plan, and thirteen specifically give individual judges authority to require initial disclosure. Cases in thirteen of those courts would also be exempt from expert and pretrial disclosure.

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[14] Randall Samborn, *Rules For Discovery Uncertain*, NATIONAL LAW JOURNAL, Dec. 20, 1993, at 1 (reporting the House veto of the mandatory disclosure amendment via H.R. 2814 and the Senate's failure to pass a veto resolution). *See also* Randall Samborn, *A Bill To Stop Change Dies*, NATIONAL LAW JOURNAL, Dec. 6, 1993, at 3 (reporting on the demise in the Senate of a House-approved measure that would have eliminated the mandatory disclosure provision from amended Rule 26 and placing the blame for this on 11th-hour pressure from plaintiff's and civil rights lawyers who additionally sought to remove the limits on depositions and interrogatories).

[15] Stempel, *Trends*, *supra* note 4, at 681 (discussing the mechanics of Congressional action on the rule's amendments).

[16] Reinette Cooper Dreyfuss, Speech at the 1994 annual meeting of the American Association of Law School Civil Procedure and Litigation Sections Seminar on Amended Rule 26. Most judges, the bar, academia, community watchdog groups, the defense bar, and the civil rights bar were opposed to the changes. There is always some opposition to rules changes. However, the sheer volume of opposition to the changes to Rule 26 was unprecedented. Randall Samborn, *New Discovery Rules Take Effect*, NATIONAL LAW JOURNAL, Dec. 6, 1993, at 3. *But see* Winters, *supra* note 11, at 275 ("I did not, and do not, regard the Bar as universally opposed to the proposals. [I]mportant segments of the organized Bar have little incentive to lessen the cost of litigation by reducing the need for unnecessary legal services. Those who seek to reform discovery are, therefore, unlikely to ever find their proposals commanding enthusiastic support among the organized Bar.").

[17] Alfred W. Cortese and Kathleen L. Blaner, *A Change In the Rules Draws Fire*, NATIONAL LAW JOURNAL, Oct. 18 1993, at 25.

[18] Winters, *supra* note 11, at 274 ("I am convinced that discovery reform is doomed to much organized resistance and little organized support").

On the other hand—and, again, if current decisions regarding the federal rule amendments hold and if local disclosure requirements continue in effect—in two-thirds of the courts parties may face initial disclosure requirements: 32 courts where the federal rules are fully in effect and 34 courts where the local rules or C.J.R.A. plan require it or the individual judge may order it.[19]

How have the Federal Rules, the centerpiece of modern federal courts, reached this apparent state of "primordial ooze?"[20] Why has the multi-faceted push to reform a troubled civil justice system left the federal courts and practitioners, at least temporarily, in this suspended state of ambiguity and uncertainty?[21] More questions have been raised than

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[19] Federal Judicial Center, *Implementation of Disclosure in Federal District Courts with Specific Attention to Courts' Responses to Selected Amendments to Federal Rule of Civil Procedure 26* (March 1, 1994).

[20] United States District Court Judge Norma Shapiro, Speech at the annual meeting of the American Association of Law Schools Civil Procedure and Litigation Section's Seminar on Amended Rule 26. Notes and audio on file with authors. *See* Randall Samborn, *Rules For Discovery Uncertain*, *supra* note 14, at 1.

[21] Civil justice reform has taken many forms. Congress created the Federal Courts Study Committee (FCSC), which issued the *Report of the Federal Courts Study Committee* (1990). The FCSC was created pursuant to the Judicial Improvements and Access to Justice Act, Pub. L. No. 100-702, 102 Stat. 4642., Title I: Federal Courts Study Act, 102 Stat. 4644. The FCSC report analyzed the problems of the federal courts over a fifteen-month period and proposed detailed recommendations to Congress. *Id.* at 3. The FCSC report findings were an instrumental building block in the Congressional formulation of the Civil Justice Reform Act (CJRA). The report found that the annual number of civil and criminal cases filed in the federal district courts since 1958 have trebled while the annual number of appeals filed in the courts of appeals have increased more then tenfold. *Id.* at 5. The FCSC report proposed changes to the civil justice system that, if adopted, were projected to reduce filings in appellate courts by 16 percent and in district courts by about 37 percent. *Id.* at 27.

Civil justice reform also emerged on another front. In 1989, Senate Judiciary Chair Joseph Biden requested that the Brookings Institution and the Foundation for Change assemble a diverse task force to study the civil justice system. The task force's report, *Justice For All: Reducing Costs and Delays in Civil Litigation*, provided another foundational pillar for the CJRA. Civil Justice Reform Act of 1990, Pub. L. No. 101-650, 104 Stat. 5089 (codified at 28 U.S.C. §§ 471-482 (Supp. II 1990)). The Civil Justice Reform Act is Title I of the Judicial Improvements Act of 1990, Pub. L. No. 101-650, 104 Stat. 5089 (codified in various sections of 28 U.S.C.). *See also* S. Rep. No. 416, 101st Cong., 2d Sess. 13 (1990), reprinted in 1990 U.S.C.C.A.N. 6802, 6853; H.R. REP. NO. 733, 101st Cong., 2d Sess. 11 (1990). The CJRA requires the ninety-four federal district courts to assess their dockets in order to promulgate procedures for decreasing the expense and delay involved in civil lawsuits. Mandatory disclosure is one of the primary suggested reforms of the CJRA. Grass-roots advisory committees

answered by mandatory disclosure reforms and each district court's prerogative to opt-out. May the federal district courts opt-out of some but not all of the changes in the discovery rules? Was it contemplated that by opting out of mandatory disclosure without opting out of deposition-discovery limits, district courts might restrict overall discovery and shift litigation power? How do opt-out orders and the Rule amendments interface with the litigation reforms mandated by Con-

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were created to advise every district court on appropriate procedural reform. *See also* Joseph R. Biden, Jr., *Equal, Accessible, Affordable Justice Under Law: The Civil Justice Reform Act of 1990*, 1 CORNEL J. LAW. PUB. POL. 1 (1992), *but see* Linda S. Mullenix, *Unconstitutional Rulemaking: The Civil Justice Reform Act and Separation of Powers*, 77 MINN. L. REV. 1283 (1993) (hereinafter "Unconstitutional Rulemaking") (criticizing the Civil Justice Reform Act).

The proposed Access to Justice Act is an extension of former Vice President Quayle's legal reform effort. The act addresses several areas of federal litigation, most notably mandatory disclosure and the adoption of the "English rule" on attorneys' fees (loser pays).

The Bush administration, through a 1991 Executive Order #12778, implemented a form of civil justice reform within the Executive Branch. The order seeks "reforms in the methods by which attorneys for the government conduct discovery, seek sanctions, present witnesses at trial, and attempt to settle cases." *See* Memo of preliminary guidance on Implementation of the litigation reforms of Executive Order no. 12778, 57 Fed. Reg. 3640, 3640-41 (1992).

A populist litigation reform movement has also surfaced. *See* Margalynne Armstrong, Book Review, *Legal Breakdown: 40 Ways to Fix Our Legal System*, 32 SANTA CLARA L. REV. 297 (1992). The populist legal movement centers on self-help as a means of employing "non-attorneys to represent themselves in simple legal matters." *Id.* at 301. Populist legal movements have two general goals: "(1) simplifying and improving access to justice and (2) decreasing the number of attorneys and eliminating barriers to legal access imposed to protect the financial interests of attorneys." *Id.* at 301-2.

Within this setting of the Congressional, Executive, and Populist reform movements, the mandatory disclosure amendments emerged. In 1992 the Advisory Committee and Federal Judicial Conference proposed, and in 1993 the Supreme Court promulgated and Congress declined to veto, sweeping amendments to Federal Rules 4 (service), 11 (sanctions), 16 (pretrial conference), 30 (depositions), 33 (interrogatories), and 37 (discovery sanctions). Discovery reform formed the heart of the amendments and Rule 26's mandatory disclosure formed the heart of the reform. Fed. R. Civ. P. 11, 16, and 26, 1993 Amendments. Changes to Rule 11 include removing the sanctions for discovery abuse and placing them within Rule 37. Also, Rule 11 now provides a "safe harbor" for litigants during which sanctions will not be levied if proper action is taken.

Rule 16, the pretrial scheduling conference rule, is now linked to the discovery process. The rule requires that the judge issue a scheduling order and in some instances hold a conference with representatives of all parties. The changes to the rule allow the judge expanded powers to control the litigation through the pretrial conference.

gress' Civil Justice Reform Act—pursuant to which every district court is to reduce delay and cost by adopting a procedural reform plan and rules tailored to its needs and priorities?[22] To what extent are the effectiveness of all of these changes contingent upon judges and magistrate judge's commitment to active discovery management? As one commentator observed, "the [procedural reform] process has been tortured and the fight is far from over."[23]

The recent amendments to Rule 26, mandating disclosure of relevant information without the need for traditional party-initiated discovery, are set within a multitude of efforts to remedy the oft-described ills of the civil justice system.[24] As context for our inquiry into what many perceive as fundamental changes in the discovery process and, in turn, lawyer-client relationships, Part II briefly describes the Temporary "Opt Out" Order of the Hawai'i federal district court. Part III addresses the mandatory disclosure amendments, their underlying bases and accompanying criticisms. Part IV describes how that particular reform emerged and some of the political considerations at play. Part V offers a glimpse of the future.

II. The Hawai'i Federal District Court's Temporary "Opt-Out" Order

By Temporary Order dated November 30, 1993,[25] the Hawai'i federal district court stepped into an uncertain discovery future by

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[22] A related state court question is, should the Hawai'i Supreme Court adopt the federal mandatory disclosure amendments as part of the state rules of procedure? 28 U.S.C. §§ 471-82 (1988 & Supp. II 1990).

[23] John K. Chapin, *Major Changes In The Federal Rules Become Effective*, *Federal Litigator*, vol. IX, no. 1 (Feb. 1994), at 4. See also, Randall Samborn, *Bill to Stop Change Dies*, *supra* note 14, at 3 (discussing the prospects for Congressional repeal of amended Rule 26).

[24] *See supra* note 21. *See also* Stempel, *supra* note 4, at 659 (discussing change within the adjudicatory system).

[25] *Temporary Order Regarding Discovery Procedures*, Nov. 30, 1993 In The United States District Court For the District of Hawai'i.

PREAMBLE

> On April 22, 1993 the Supreme Court of the United States referred to the Congress of the United States various proposed amendments to a number of the Federal Rules of Civil Procedure. Until the time Congress adjourned on November 24, 1993, it was uncertain as to whether Congressional approval would be given to all, some, or none of the proposed amendments prior to the

opting-out of some, but not all,[26] of the recently promulgated discovery

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effective implementation date of December 1, 1993. Although the United States House of Representatives passed a bill making some modifications, the United States Senate adjourned without taking any action. Accordingly, the proposed amendments will take effect as of December 1, 1993.

Sections (a), (b), (d), and (f) of 26 Fed. R. Civ. P. provide that a district court may by order or by local rule modify or "opt out" of certain provisions of Rule 26. It is the opinion of this Court, and supported by recommendations from the Advisory Group appointed pursuant to the Civil Justice Reform Act, that certain of the proposed modifications contained in Rule 26 are neither desirable nor consistent with the manner of practice in this District. In view of the uncertainty as to what action, if any, Congress would take as to Rule 26, and the lack of time for this Court to duly consider the final form of Rule 26 prior to its implementation date of December 1, 1993, it is the decision of this Court, to the extent of its authority, to maintain the status quo under the provisions of Rule 26 as they are of this date as supplemented by this District's Local Rules, and to determine within a reasonable period after December 1, 1993 which provisions, if any, together with such modifications as may be deemed appropriate, should be adopted by this District by way of amendments to this District's Civil Justice Reform Act Plan and Local Rules.

TEMPORARY ORDER

Therefore, the Court hereby promulgates the following Temporary Order. IT IS HEREBY ORDERED that this District will "opt out" of the proposed amendments to Rule 26, to the extent authorized under Fed. R. Civ. P. 26 (a), (b), (d), and (f), to the effect that the provisions of Rule 26 as they are of this date as supplemented by this District's Local Rules and this District's Civil Justice Reform Act Plan shall remain in full force and effect. All other Federal Rules of Civil Procedure that make reference to Rule 26 shall be construed as referring to the appropriate section of Rule 26 as it is of this date.

Dated: Honolulu, Hawai'i, this 30th day of November, 1993.

Order Establishing Guidelines For The Application Of The Amendments To The Federal Rules Of Civil Procedure To Existing Cases, Jan. 10, 1994 In The United States District Court For The District of Hawai'i.

Effective December 1, 1993, the Federal Rules of Civil Procedure have been amended substantially. On November 30, 1993, this Court filed a TEMPORARY ORDER REGARDING DISCOVERY PROCEDURES which temporarily "opt-out" of the application in the District of Hawai'i of the new amendments to Fed. R. Civ. P. 26(a), (b), (d), and (f). However, this Order did not negate the effectiveness of the substantial changes to Rules 1, 4, 5, 11, 12, 15, 16, 28, 29, 30, 31, 32, 33, 34, 36, 37, 38, 50, 52, 53, 54, 58, 71A, 72, 73, 74, 75, and 76 of the Federal Rules of Civil Procedure, did not negate the adoption of a new Rule 4.1 of the Federal Rules of Civil Procedure, and did not negate the effectiveness of the substantial changes to Rule 26(c)(e) and (g) of the Federal Rules of Civil Procedure.

The Order enacting these changes also provides that these amendments shall govern, "insofar as just and practicable", all proceedings in the civil cases

amendments.[27] The Temporary Order's opt out on the mandatory disclosure and its "opt-in" on other discovery changes, in cumulative effect, sharply limit discovery for some, and perhaps many, cases. The Order leaves in place the amendments to Rules 30 and 33 that limit depositions to 10 per *side* and interrogatories to 25 per party including subparts. Those limitations on formal discovery at the back end were to be the *quid pro quo* for the Rule 26 informal disclosure of information at the front end. Opting out of the Rule 26 front end disclosure while accepting the Rules 30 and 33 deposition-interrogatory limits may well shift the balance of litigation power in discovery. On the one hand, presumptive limits on formal discovery may discourage wasteful deposition and interrogatory practices. On the other hand, plaintiffs may be prejudiced in multi-party or complex cases where the defendants possess most of the relevant evidence.[28] For certain types of cases, the Temporary Order thus may involve regular motions to or conferences

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pending on December 1, 1993 and thereafter. This Court is aware it must provide some guidance to litigants and practitioners concerning how this Court will apply these amendments to cases filed prior to December 1, 1993.

IT IS THEREFORE ORDERED that (1) all amendments to the Federal Rules of Civil Procedure except the discovery amendments (as designated hereinbelow) shall apply immediately to all civil actions, (2) the amendments to Rules 26(c), (e), and (g), 28, 29, 30, 31, 32, 33, 34, 36, 37, 38 of the Federal Rules of Civil Procedure ("the discovery amendments") shall apply completely to all pending civil actions in which an initial scheduling conference is held on or after December 1, 1993 before a Magistrate Judge pursuant to Fed. R. Civ. P. 16, and (3) the discovery amendments shall be applied to other civil actions already pending on December 1, 1993 only upon order of the Court and only to the extent ordered by the Court.

Dated: Honolulu, Hawai'i, this 10th day of January, 1994.

[26] The Temporary Order does *not* opt-out of the 1993 amendments to sections c, e and g of Rule 26, nor does it opt-out of the Rules 30 and 33 limits to depositions and interrogatories.

[27] Authority for the district courts to opt-out lies in FED. R. CIV. P. 26 (a)(1) (Initial Disclosures): "*Except* to the extent otherwise stipulated or directed *by order or local rule*, a party shall, without awaiting a discovery request provide to other parties . . . ." According to the Advisory Committee, authorization of local variations in mandatory disclosure "is, in large measure, included in order to accommodate the Civil Justice Reform Act of 1990 [see infra note], which implicitly directs districts to experiment during the study period with differing procedures to reduce the time and expense of civil litigation." Committee Notes, *supra* note . The Committee also observed that disclosure "will not be appropriate for all cases [citing social security reviews and government collections as examples], and it is expected that changes in these obligations will be made by the court or parties when the circumstances warrant." *Id.*

[28] *See infra* Section III.

with magistrate judges requesting waivers of the deposition-interrogatory limits according to as yet undefined criteria.[29]

The Local Rules Committee of the Hawai'i federal district court is undertaking a thorough evaluation of the court's Temporary Order and its impact on civil discovery.[30] Four alternative paths are manifest at this time: (1) finalize the Temporary Order in its current form, eliminating mandatory disclosure without altering deposition-interrogatory limits and thereby limiting overall discovery; (2) rescind the Temporary Order, thereby "opting-in" to the Rule 26 mandatory disclosure amendments with all their attendant problems (discussed in Section III); (3) issue a new order (or promulgate a local rule) rejecting the blanket applicability of the Rule 26 mandatory disclosure requirements while authorizing judges or magistrate judges to order disclosure without discovery requests on a case specific basis;[31] or (4) alter the Temporary Order to reject in entirety the 1993 discovery changes to Rules 26, 30, 31 and 33, thereby reverting to the pre-amendments' discovery scheme which provided for judicial control over discovery through prior Rules 16, 26(b)(1), 26(c), 26(f) and 26(g). These alternative paths will be addressed in Part V in light of the discussions in Parts II, III and IV.

III. Rule 26 Amendments: From Discovery to Disclosure

This Part describes salient changes to Rule 26 and varying critiques of those changes.

A. *Mandatory Disclosure*

Mandatory disclosure is the most striking change to Federal Rule 26.[32] Rule 26 now requires the parties to disclose certain "core"

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[29] Fed. R. Civ. P. 30 limits depositions taken without leave of court to 10 per side, and Fed. R. Civ. P. 33 imposes a limit of 25 interrogatories per side including subparts.

[30] Co-author Yamamoto is a member of the Hawai'i federal district court Local Rules Committee. He was appointed after this article was substantially completed.

[31] As this article goes to the press, the Local Rules Committee of the Hawai'i Federal District Court is recommending to the court that the Temporary Order be rescinded and that the court's Local Rules be amended to authorize judges or magistrate judges to order disclosure on a case specific basis.

[32] Fed. R. Civ. P. 26(a)(1) provides:

information without formal discovery requests. The Federal Rules Advisory Committee conceived of the mandatory disclosure provisions as the functional equivalent of court ordered interrogatories and document production requests.[33] The primary purpose of disclosure is efficiency—to "accelerate the exchange of basic information about the case and to eliminate the paper work involved in requesting such information."[34] Its purpose is also to "eliminate certain discovery, [and] help focus the discovery that it needed."[35] According to the Advisory Committee, the "disclosure requirements should, in short, be applied with common sense in light of the principles of Rule 1, keeping in mind the salutary purposes. . .[of] the rule."[36] Section B of

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(a) Required Disclosures; Methods to Discover Additional Matter.

(1) *Initial Disclosures.* Except to the extent otherwise stipulated or directed by order or local rule, a party shall, without awaiting a discovery request, provide to other parties:

(A) the name and, if known, the address and telephone number of each individual likely to have discoverable information relevant to disputed facts alleged with particularly in the pleadings, identifying the subjects of the information;

(B) a copy of, or a description by category and location of, all documents, data compilations, and tangible things in the possession, custody, or control of the party that are relevant to disputed facts alleged with particularity in the pleadings;

(C) a computation of any category of damages claimed by the disclosing party, making available for inspection and copying as under Rule 34 the documents or other evidentiary material, not privileged or protected from disclosure, on which such computation is based, including materials bearing on the nature and extent of injuries suffered; and

(D) for inspection and copying as under Rule 34 any insurance agreement under which any person carrying on an insurance business may be liable to satisfy part or all of a judgment which may be entered in the action or to indemnify or reimburse for payments made to safisfy the judgment.

Unless otherwise stipulated or directed by the court, these disclosures shall be made at or within 10 days after the meeting of the parties under subdivision (f). A party shall make its initial disclosures based on the information then reasonably available to it and is not excused from making its disclosures because it has not fully completed its investigation of the case or because it challenges the sufficiency of another party's disclosures or because another party has not made its disclosures.

See FED. R. CIV. P. 26 Advisory Committee Notes in commentory suggesting disclosure amendments.

[33] Advisory Committee Notes.

[34] *Id.*

[35] *Id.*

[36] *Id.*

Part III addresses whether the Rule is likely to satisfy its stated purposes. The remainder of this section generally describes the disclosures mandated by the amended rules.

1. Initial Disclosures

Witnesses

Section 26(a)(1)(A) of the amended rule requires a party to identify the name, address and telephone number of those individuals "likely to have discoverable information relevant to disputed facts alleged with particularity in the pleadings."[37] The party is also required to identify the type of information these individuals are likely to possess. The party is required to identity witnesses whether or not their testimony will be supportive of the disclosing party's position.[38]

Documents

Section 26(a)(1)(B) requires disclosure of, "a copy of, or a description by category and location of, all documents, data compilations, and tangible things in the possession, custody, or control of the party that are relevant to disputed facts alleged with particularity in the pleadings."[39] The disclosure must produce relevant documents or be of sufficient specificity to "enable opposing parties (1) to make an informed decision concerning which documents might need to be examined, at least initially, and (2) to frame their document requests in a manner likely to avoid squabbles resulting from the wording of the

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[37] FED. R. CIV. P. 26(a)(1)(A).

[38] *Id.* All parties who make disclosures and later learn that the disclosure is erroneous or incomplete are required to supplement their initial disclosure with a corrective *disclosure*. Advisory Committee Notes. However, if the target party of the disclosure has been made aware of the error or incompleteness of a party's disclosure, and has received the corrective or additional information through other methods, the disclosing party is not required to supplement. Experts are required to supplement both their report and any testimony given in a deposition that is either erroneous or incomplete. *Id.* This duty to supplement must be carried out before the party's required pretrial disclosures are made.

[39] FED. R. CIV P. 26(a)(1)(B). Disclosure includes "all potentially relevant items then known to the party whether or not supportive of its contentions in the case." Advisory Committee Notes.

requests."[40] Section 26(a)(1)(B) encourages the actual production of documents, or at the very least, an accurate cataloguing and accounting of the documents.[41] By cataloguing documents the party does not waive objections based on privilege or work product immunity.[42] The party also preserves the right to object to the later production of listed documents on the grounds that the expense and burden of production is outweighed by the documents' minimal relevance.[43]

A party's obligations to disclose witness identities and document information are linked to the specificity and clarity of the factual allegations in the pleadings.[44] Disclosure is limited to information relevant to "disputed facts alleged with particularity in the pleadings."[45] Section 26(a)(1) envisions two aids to the determination of the appropriate scope of disclosure: first, heightened fact pleading by the parties, and second, the parties' refinement of issues at the Rule 26(f) discovery plan meeting prior to disclosure.[46] If an opposing party serves a broad pleading filled with conclusory allegations, and issues and disputed facts are not specifically identified at the discovery plan meeting, the responding party need not ascertain all "relevant" possibilities, do exhaustive research and respond in detail.[47]

Once relevancy is defined, the Rules contemplate a cooperative attorney and party inquiry into the party's files. The Advisory Committee lists factors to aid counsel in delimiting the scope of that inquiry, including the complexity of the issues, the location, nature and number and availability of witnesses and documents and the time remaining

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[40] *Id.*

[41] *Id.*

[42] FED. R. CIV. P. 26(b)(5). The disclosing party must, however, list all protected documents "otherwise discoverable."

[43] *Id.*

[44] FED. R. CIV. P. 26(a)(1)(A). "The greater the specificity and clarity of the allegations in the pleadings, the more complete should be the listing of potential witnesses and types of documentary evidence." Advisory Committee Notes.

[45] FED. R. CIV. P. 26(a)(1)(A).

[46] Advisory Committee Notes.

[47] *See* Advisory Committee Notes. The defendant is required to disclose only that material gathered through the preparation of its answer that is relevant to matters "alleged with particularity" in the complaint. Virginia Hench, *Can Mandatory Disclosure Curb Discovery Abuse? The 1993 Amendments to the Federal Discovery Rules and the Just, Speedy and Inexpensive Determination of Every Action*, 67 TEMP. L.REV. 401, 420 (1994). "The defendant is not required to read all of their documents, and may still produce 'properly identified' files as they are maintained in the ordinary course of business in accordance with the provisions of the pre-1993 rule 33." *Id.*

for compliance.[48] Another factor is the "extent of past working relationships between the attorney and the client particularity in handling related or similar litigation."[49] Attorneys with long-standing client litigation relationships bear a more extensive duty of inquiry. The controlling principle overall is that a party should disclose information "then reasonably available to it."[50]

Damages and Insurance

Section 26(a)(1)(C) of the amended Rule requires a claimant to compute all categories of damages and provide supporting documents.[51] Section 26(a)(2) requires defendants to provide "for inspection and copying as under Rule 34 any insurance agreement under which any person carrying on an insurance business may be liable to satisfy part or all of a judgment."[52] A defendant thus must now reveal not only the contents of its liability insurance policy, as required under former Rule 26(b)(2),[53] it must also provide the insurance agreement itself.[54]

Expert Testimony

Section 26(a)(2) significantly alters the discovery treatment of experts.[55] The section envisions the elimination of courtroom surprises. Premised on the notion that an informed party, with a realistic assessment of the likelihood or potential failure of its claims at trial, will be more likely to settle, the rule mandates early and firm disclosure of an expert's intended testimony.[56]

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[48] Advisory Committee Notes.

[49] *Id.*

[50] *Id.*

[51] "Computation of any category of damages claimed by the disclosing party, making available for inspection and copying as under Rule 34 the documents or other evidentiary material, not privileged or protected from disclosure, on which such computation is based, including materials bearing on the nature and extent of injuries suffered." FED. R. CIV. P. 26(a)(1)(C).

[52] FED. R. CIV. P. 26(a)(1)(D).

[53] *Id.*

[54] *Id.* This disclosure does not make the insurance information admissible into evidence at trial.

[55] FED. R. CIV. P. 26(a)(2).

[56] Advisory Committee Notes. "Experts" are defined with reference to Rule 702 of the Federal Rules of Evidence. Advisory Committee Notes.

The section's most significant provision requires the trial expert to prepare a formal report prior her now mandated deposition.[57] The expert's report must detail, (1) opinions, (2) bases for the opinions, (3) all material "*considered*"[58] by the expert. This report preparation requirement is significant because it will likely change customary expert behavior. Attorneys rarely ask an expert to prepare an early report. Such a report tends to lock the expert into opinions and subject her to limiting cross-examination. The requirement is also significant because, as the Advisory Committee Notes indicate, disclosure of all material "considered" means the expert must disclose attorney work product given to the experts, including material provided as general background.

> Given this obligation of disclosure, litigants should no longer be able to argue that materials furnished to their experts to be used in forming their opinions—whether or not ultimately relied upon by the expert—are privileged or otherwise protected from disclosure when such persons are testifying or being deposed.[59]

This represents a sharp departure from the prevailing standard which requires an expert to disclose only documents that *impacted* upon her testimony or that she *relied* upon in forming her opinion.[60] The party with the burden of proof on an issue must make the initial disclosure of its expert's report and testimony before other parties are so obligated.[61]

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[57] FED. R. CIV. P. 26(a)(2)(B).

[58] *Id.* This includes any data, treatises or case assessments the witness considered in forming her opinions. The qualifications of the witness must also be listed, including a list of all publications authored by the witness within 10 years of the date of the intended testimony. The witness must also disclose other cases, in the past four years, in which her testimony was used. Finally, the witness must also disclose the compensation she is receiving for her testimony. *Id.*

[59] Advisory Committee Notes.

[60] *See* Berkey Photo, Inc. v. Eastman Kodak Co., 74 F.R.D. 613 (S.D.N.Y. 1977).

[61] FED. R. CIV. P. 26 (a)(2)(B) and Advisory Committee Notes. In addition to the initial disclosures a party must disclose information in preparation for trial. FED. R. CIV. P. 26(a)(3). This disclosure includes the identity of each trial witness. *Id.* A party must indicate which witness' testimony is to be presented by deposition transcript. *Id.* If the deposition was not stenographically recorded, then the party must provide a transcript of the portions to be used. The party must also categorize its exhibits as to those it intends to offer into evidence and those it plans to use when necessary. *Id.* In the absence of contrary court order, these disclosures are to be made at least 30 days before the trial. *Id.* Unless the court orders otherwise, a party must object to the

2. *Disclosure Mechanics*

Meeting of Parties

Amended Rule 26(f) requires the parties to meet and discuss the issues in the case with an eye toward early settlement and toward framing discovery.[62] At this meeting the parties also are directed either to make the disclosures mandated by the Rule or to arrange for those disclosures.[63] All parties entering an appearance are required to attend the meeting in person or through a representative.[64] The parties must work in good faith towards a mutually-agreed upon disclosure and discovery plan.[65] A written report outlining the plan must be submitted to the court within ten days following the meeting.[66] The Advisory Committee Notes contemplate that the "report will assist the court in seeing that the timing and scope of disclosures. . .and the limitations on the extent of discovery under these rules and local rules are tailored to the circumstances of the particular case."[67]

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admissibility of the other party's disclosed list of exhibits, and object to the use under Rule 32(a) of a deposition designated under Rule 26(a)(3)(B), within 14 days after receiving the required pretrial disclosures. *Id.* If the party fails to do so, the court will deem those objections waived in the absence of a good cause showing. *Id.*

[62] *Id.* FED. R. CIV. P. 26(f). The discovery meeting triggers the deadline for the mandatory disclosure. Disclosure must be made within 14 days of the meeting. *Id.*

[63] *Id.*

[64] *Id.*

[65] FED. R. CIV. P. 26(f)(1),(2),(3) and (4). This plan is to include any agreed upon deviations to the scheme of disclosure mandated by the Rule and the time at which the disclosures are due to the parties. *Id.* The plan is also to designate those issues which require discovery and the timetable for discovery. *Id.* Any changes to the discovery limitations imposed by the Rule and any additional restrictions the parties stipulate to impose upon their discovery abilities. *Id.*

[66] *Id.*

[67] Advisory Committee Notes. Former sub-section (f) of Rule 26 created a device for optional, party-initiated discovery conferences involving attorneys and the judge. The device was sparingly used. *Id.* The amendment to section (f) makes the conference, now called a meeting, mandatory among the parties. The judge does not participate in that meeting. The meeting must occur before disclosure and before the Rule 16 pretrial scheduling conference/order.

The Advisory Committee Notes state that changes in sub-section (f) do "not signal any lessening of the importance of judicial supervision. Indeed, there is a greater need for early judicial involvement to consider the scope and timing of the disclosure requirements . . . and the presumptive limits on discovery." *Id.* The Committee Notes contemplate that this early judicial supervision authority and responsibility is "more properly included in Rule 16, which is being revised to highlight the court's powers regarding the discovery process." *Id.*

The Certification Requirement

Amended Rule 26(g)[68] requires that every disclosure be signed by an attorney, "reminding the parties and counsel of the solemnity of the obligations imposed."[69] The signing attorney certifies that disclosure is complete and correct at the time it is made.[70] Counsel and parties are thereafter required to supplement initial disclosures.[71] All discovery requests, responses or objections also must be signed.[72] For all papers signed and filed during discovery, the signatory certifies compliance with essentially a Rule 11 reasonableness standard.[73] For Rule 26(g) violations, the court is authorized to impose an "appropriate sanction" upon the signing party or attorney.[74] The sanction may include attorneys fees.[75]

3. Limits On Disclosure

Privileged material need not be disclosed.[76] A party claiming a privilege or work product immunity, however, must explicitly describe the information withheld.[77] The party is required to indicate the basis of the claimed protection and describe the information withheld in

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[68] FED. R. CIV. P. 26(g). The standards set forth in Rule 26(g) remain essentially the same as in the version of the rule prior to the 1993 amendments.

[69] Advisory Committee Notes.

[70] FED. R. CIV. P. 26(g)(1).

[71] FED. R. CIV. P. 26(e).

[72] FED. R. CIV. P. 26(g)(1).

[73] FED. R. CIV. P. 26(g)(2). The party is certifying that after reasonable inquiry, to the best of the signer's knowledge, information, and belief, the response, request, or objection is:

> (A) consistent with these rules and warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law; (B) not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation; and (C) not unreasonable or unduly burdensome or expensive, given the needs of the case, the discovery already had in the case, the amount in controversy, and the importance of the issues at stake in the litigation.

Id.

[74] FED. R. CIV. P. 26(g)(3).

[75] *Id.*

[76] FED. R. CIV. P. 26(b)(5).

[77] *Id.*

detail.[78] The description must be complete enough for the other parties to gauge the validity of the claimed privilege or immunity.[79]

B. *Criticisms Concerning Gamesmanship, Satellite Litigation, Cost and Missing the Mark*

This section summarizes principal criticisms of the mandatory disclosure amendments to Rule 26. These criticisms focus on, gamesmanship, satellite litigation, costs, and missing the mark.

Gamesmanship, Satellite Litigation and Cost

Some commentators believe that the Rule 26 mandatory disclosure scheme is based on a wish and a prayer.[80] Mandatory disclosure embodies no incentives and few disincentives for altering the ethical and economic-driven behavior of attorneys in an adversarial system.[81] Yet the scheme is premised on just such a behavioral metamorphosis. According to these commentators, mandatory disclosure, instead of defusing tensions and equalizing the playing field, will likely fuel adversary passions and gamesmanship. Experience has demonstrated that some attorneys in an adversarial system cannot be left to police themselves.[82] In the absence of vigorous case management by judges, blanket mandatory disclosure requirements will likely fail to reform modern adversarial litigation and may well exacerbate its faults. Satellite

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[78] *Id. See* Advisory Committee Notes.

[79] *Id.* In addition, parties moving for protective orders must now certify to the court that they have first made a good faith effort to resolve the discovery dispute with opposing parties. FED. R. CIV. P. 26(c). The Hawai'i federal district court's Temporary Order, *supra* note 25, does *not* opt-out of this requirement.

[80] Hench, *supra* note 47, at 429. ("Merely requiring disclosure, without a more effective system of case management, will not eliminate these problems, nor will wishful thinking about summon[ing] lawyers to the highest decree of professional conduct.")

[81] *Id.*

[82] This is not to state broadly that all or even most attorneys are unscrupulous; rather it is a statement of general perceptions of segments of the public and scholars. Meade, *Discovery Abuse And a Proposed Reform*, *supra* note 99; Schwarzer, *supra* note 7; Lawrence M. Frankel, *Disclosure in the Federal Courts: A Cure for Discovery Ills?* 25 ARIZ. S. L.J., 249; Paul Lowell Haines, Comment, *Restraining the Overly Zealous Advocate: Time For Judicial Intervention*, 65 IND. L.J. 445 (1990) (detailing many of the abusive behaviors of overly zealous attorneys and concluding that attorneys need greater judicial supervision).

litigation will likely be an immediate consequence in some cases.[83] The zealous advocate is likely to exhaust all strategic avenues available to her client. The Rule's operative standard—requiring disclosure of material relevant to facts pleaded with particularity—encourages time-consuming and costly motions for clarification[84] for parties seeking to forestall meaningful disclosure.[85] According to Professor Virginia Hench, "[t]he 1993 discovery amendments will provide an obstinate litigant with fresh new sources of dilatory tactics. . .[leading to] endless rounds of 'satellite proceedings'."[86] From this perspective satellite litigation alone is likely to undermine any benefits achieved through across-the-board application of the mandatory disclosure rules.

Commentators thus predict an increase in pretrial costs. Even for the non-obstinate litigant, costs may well increase. Many conclude that the only way an attorney and party can safely avoid sanctions under the mandatory disclosure scheme is wasteful over-disclosure.[87] Over-disclosure would increase compliance costs as well as protective motions practice.[88]

In addition, for some, the Rule 26 amendments attempt to shape reform with a sledge-hammer rather than a scalpel. Mandatory disclosure blankets all cases. It may work well in some cases. It is unlikely, however, to work well in all cases. Rule 26 mandates disclosure without regard to the needs of the particular case, the relationship of the attorneys involved or the nature of the issues presented. For many cases, even where attorneys and litigants act in good faith, disclosure requirements will likely add another layer of disputation/negotiations/motions to the discovery process, thereby driving up costs. Mandatory disclosure may work well where parties and attorneys are cooperative and documents or other information are readily identifiable.[89] Otherwise, according to critics, mandatory disclosure promises to increase costs and time for attorneys and their clients.

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[83] *See, e.g.*, Jeffery J. Mayer, *Prescribing Cooperation: The Mandatory Pretrial Disclosure Requirement of Proposed Rules 26 and 37 of the Federal Rules of Civil Procedure*, 12 REV. LITIG. 77, (1992). *See also* Hench, *supra* note 47, at 420.

[84] Schwarzer, *supra* note 7, at 178.

[85] Hench, *supra* note 47, at 420.

[86] *Id.*

[87] *Id.* at 433-34.

[88] Griffin Bell, *Automatic Disclosure in Discovery—The Rush to Reform*, 27 GA. L. REV. 1 (1992).

[89] *See supra* note 181.

Missing The Mark

Another principal criticism of the Rule 26 mandatory disclosure amendments is that "automatic disclosure will not correct the dysfunction [within the civil justice discovery system], nor will it somehow transform the system into a model of cooperation."[90] Mandatory disclosure misses the mark.[91] Replacing "discovery with what amounts to an honor system of information exchange, is unlikely to reduce significantly the more prevalent forms of abuse."[92] From this perspective, Rule 26 now attempts to engraft cooperation onto an adversary system of civil justice without altering the fundamental oppositional structure of the system.[93]

First, the amendments to the Rule adopt an extremely broad relevance standard for triggering mandatory disclosure. "[T]he result of this vagueness will inevitably be confusion, disagreement, cost, and delay."[94] As discussed, this in turn will likely heighten attorney gamesmanship rather than minimize it. There is a sharp fear expressed that the overbreadth of the relevancy standard will lead to dramatic problems especially in complex tort and securities cases.[95]

Second, from this perspective, the amendments' hope for a "change [in] the culture of adversariness"[96] is based on a wishful view of reality

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[90] Bell, *Automatic Disclosure in Discovery*, *supra* note 88, at 1. Bell's article, cited by Justice Scalia in his dissent to the Rule 26 amendments, discusses the resounding opposition to the amendments, and concludes that "while there might be problems with the existing system, the Committee's proposal was likely to exacerbate rather than solve them." Bell, *supra* note 88, at 1.

[91] Hench, *supra* note 47, at 432 ("Besides adding another layer to the existing discovery structure, the 1993 amended rules, like their predecessors, leave untouched (and may even encourage) such common discovery abuses as over-response to legitimate discovery requests, evasive or misleading responses, frivolous objections to requests for discovery, and failure to respond, which have frequently been directed by the party with greater resources against the party with fewer resources").

[92] *Id.*

[93] Bell, *supra* note 12. *But see* Michael E. Wolfson, *Addressing The Adversarial Dilemma of Civil Discovery*, 36 CLEV. ST. L. REV. 17, 64 (1988) (mandatory disclosure is an "intentional erosion of the adversary process. . .which promotes fairness, efficiency and credibility, and thus strengthens the adversary system by confining it to its proper role of testing the facts and issues at trial").

[94] Bell, Automatic Disclosure.

[95] *Id.* Complex cases such as the toxic torts, product liability, patent and securities class actions present the specter of a virtually unlimited documents disclosure. *Id.*

[96] Bell, *supra* note 88, at 13; Minutes of the Advisory Committee on Civil Rules 2 (Dec. 1, 1990) (quoting Committee members James Powers, Mariana R. Pfaelzer and Wayne D. Brazil).

and a tinge of irony. Magistrate Judge Wayne Brazil and former Federal Judge William Schwarzer, key architects of the Rule 26 changes, in past articles decried the economic and professional forces encouraging lawyer overzealousness in discovery.[97] Judge Brazil asserted that reforms would be ineffectual without a fundamental transformation in the current business realities of client representation.[98] The mandatory disclosure amendments, however, leave unaddressed the essential economic and professional forces driving much lawyering behavior in litigation.[99] Indeed, the amendments appear to allow or even foster sharp practices. "One who does not want to give information is also doing the interpretation of what has to be given."[100]

Amended Rule 26 thus seeks to replace the culture of adversary discovery with a cooperative informal scheme of disclosure, employing "appropriate sanctions" to ensure cooperativeness.[101] In light of most judges desire to avoid refereeing discovery disputes,[102] this scheme appears to rely on a flimsy stick. Without strong incentives or disincentives, "the misuse and overuse [of discovery devices would] continue to represent a viable and, at times, even appropriate expression of a lawyer's role as a zealous advocate."[103]

In addition to a flimsy stick and the absence of carrots, the Rule's hope for cooperativeness is seemingly undermined by the limiting

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[97] Brazil, *supra* note 11, and Schwarzer, *supra* note 7.

[98] Brazil, *supra* note 11.

[99] *See* Meade W. Mitchell, *Discovery Abuse and a Proposed Reform: Mandatory Disclosure*, 62 MISS. L. J. 743, 746-7 (1993) (listing the forms of discovery abuse and many of the motivations for such abusive attorney behavior). *See also* Schwarzer, *supra* note 7, (strongly advocating the replacement of discovery with mandatory disclosure to remedy discovery abuse). Judge Schwarzer defines discovery abuse as the use of discovery "as a weapon to burden, discourage or exhaust the opponent, rather than to obtain needed information." *Id.*

[100] Stephen Subrin, Panel Presentation on Amended Rule 26, Annual meeting of the American Association of Law Schools Civil Procedure and Litigation Sections (January 1994) (tapes on file with authors). Professor Subrin also points out that procedural reformers have blind spots. They have a tendency not to listen to criticisms of others regarding the rough edges of their reforms. These blindspots are due in part to the zeal and steadfastness present in all procedural reformers. The reformers also tend to become adversaries with those who disagree with the reforms. *Id.*

[101] Advisory Committee Notes.

[102] *See* Wayne D. Brazil, *Views from the Frontlines: Observations by Chicago Lawyers About the System of Civil Discovery*, 1980 AM. B. FOUND. RES. J. 219, 246 (explaining the view of many attorneys that judges dislike ruling on discovery disputes).

[103] Wolfson, *supra* note 93. The sanctioning scheme, however, is vaguely defined and appears to provide little concrete encouragement of cooperativeness.

structure of the amendments. What is the likely effectiveness, commentators ask, of an attempt to supplant one early portion of the adversary process with a cooperative ethic when the rest of the litigation process is untouched? Can a "lawsuit be squeezed of its adversariness during [one phase of] pretrial preparation and then be allowed to run at full adversarial throttle during [other phases and at] trial?"[104]

C. *Criticisms Concerning a Revival of Fact Pleading and Diminished Court Access*

The Advisory Committee modified the operative language of Rule 26(a) several times, settling on "material relevant to disputed facts alleged with particularity." What "particularity" means is still unclear. The Advisory Committee's suggestion of a sliding scale definition has failed to clarify the concept.[105]

In addition to problems of vagueness, the particularity requirement is perceived by many as a back door attempt to revive fact pleading. The Federal Rules and the United States Supreme Court have explicitly rejected fact pleading in favor of notice pleading.[106] The 1993 amendments to Rule 11 also specifically endorse generalized notice pleading, allowing parties to plead on information and belief even without particularized factual support provided that discovery is likely to reveal supporting evidence.[107] Some commentators are concerned about potentially deleterious effects of an indirect revival of fact pleading. Heightened fact pleading thresholds tend to discourage court access for individual plaintiffs suing institutional defendants and for resource-poor claimants.[108]

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[104] *Id.*

[105] *See* Hench, *supra* note 47, at 429 (discussing the continuing problems surrounding the particularity standard).

[106] *See* FED. R. CIV. P. 8(a) (notice pleading); FED. R. CIV. P. 9(b) (requiring pleading with particularity for claims of fraud or mistake). *See* Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit, 113 S.Ct. 1160, 1163 (1993) (rejecting fact pleading in section 1983 civil rights complaints against municipalities and reaffirming the liberal notice pleading).

[107] FED. R. CIV. P. 11.

[108] *See* Eric K. Yamamoto, *Efficiency's Threat To The Value of Accessible Courts For Minorities*, 25 HARV. C.R.-C.L. L.REV. 341 (Summer 1990). *See infra* Section III C for a discussion on procedural reform impacts upon court access.

Mandatory disclosure may likely impact negatively upon those most in need of ready access to courts.[109] One "reason for the severe flaws in the 1993 amendments is that they rest on the myth that procedural rules are neutral, *i.e.*, that they transcend the substantive law of any given case, affecting all litigants equally."[110] Professor Hench expresses concern about the, "effect of the rule makers' efforts [in denying] plaintiffs effective access to the courts by cutting them off from the discovery needed to prove, for example, a defendant's knowledge of a product's danger, or discriminatory intent or discriminatory practices in civil rights cases."[111] Although both plaintiffs[112] and defendants[113] lobbying groups opposed the amendments, individual plaintiffs may stand to lose the most. This is because plaintiffs often start from a disadvantaged informational position and a sharp reduction in infor-

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[109] Hench, *supra* note 47, at 421-22.

> The most serious problem with the 1993 amendments is that even if they were to promote efficiency in 'disposing of' cases, efficiency, in and of itself, does not assure fairness for all litigants, and does not ensure that public interest and minority interests will be treated equally with the interests of more mainstream and powerful litigants. Judge Schwarzer dismisses this concern, arguing that traditional discovery is unnecessary and can be dispensed with in favor of mandatory disclosure because "[p]arties have available to them a range of investigatory resources and techniques which should be utilized before the burdens of adversary discovery are imposed upon the courts and parties."
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> This is of course, theoretically true, but this argument is overly simplistic in that it ignores the realities of cases between parties with grossly unequal financial and informational resources.

See Yamamoto, *supra* note 108 (describing the efficiency trend in procedural reform and its effects of diminishing court access for minorities).

[110] *See also* Yamamoto, *supra* note 108, at 397 (discussing developments in procedural theory that challenge the notion of the inherent neutrality of procedure). *Cf.* Richard L. Marcus, *Of Babies and Bathwater: The Prospects for Procedural Progress*, 59 BROOK. L. REV. 761 (1993) (arguing that we should continue to endorse the pursuit of a neutralist rulemaking process).

[111] Hench, *supra* note 47, at 10 ("The amended discovery rules will have the effect, whether intended or not, of advancing a conservative agenda by sharply limiting the ability of non-institutional litigants to protect their rights in court").

[112] The American Trial Lawyers Association (an organization representing the plaintiff's personal injury bar) objected to the Rule 26 amendments stating, "[T]he proposed 'voluntary disclosure' will not reduce the cost of litigation . . . , it is difficult to see how this proposal will reduce the cost of litigation." Bell, *supra* note 88, n. 111.

[113] "On the other side of the aisle, the American Corporate Counsel Association also criticized the rule as 'unworkable' for corporate defendants." Bell, *supra* note 88, n. 111 (listing 61 corporations submitting individual comments in opposition to amending Rule 26(a)(1)). Winters, *supra* note 7, at 267, n. 6.

mational access at the outset cannot be easily compensated for later.

Mandatory disclosure functions under the assumption of equality of litigation power among the parties.[114] Numerous inequalities exist, however, among parties to litigation. An information poor plaintiff under the new discovery scheme depends upon the defendant to provide harmful information through good faith disclosure.[115] From this perspective, the plaintiff's fortunes thus may well turn on the self-interested defendant's willingness to disclose. If the defendant makes a calculated decision to risk sanctions and withhold information on the belief that the plaintiff will therefore be deprived of grounds to compel or seek further discovery, the plaintiff is caught in a game of "hide the ball." As the defendant will be reluctant to release damaging information voluntarily without first being specifically asked for it, the scheme creates an incentive for the defendant to withhold information and little disincentive for such behavior.[116] Without the information and with deposition-interrogatory limits to formal discovery, the plaintiff is precluded from building its case and is much more susceptible to a defendant's summary judgment motion. Under the new rules "the party seeking discovery will have to carry a heavy burden of persuasion in order to justify inquiring further, and will pay severe penalties if it is less than completely successful."[117] According to Judge Schwarzer,

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[114] Hench, *supra* note 47, at 421-24.

[115] *Id.* at 423-24. "A plaintiff who has been terminated wrongfully may not know at the outset whether the reason was age, race, gender, disability, or some other factor. Before December, 1993, discovery in such a case would frequently disclose facts supporting valid claims that the plaintiff was unable to plead at the outset because of lack of documentation. Under the 1993 amendments, however, such a plaintiff will effectively be barred from obtaining the factual support necessary to amend the complaint to additional, valid claims that would have been revealed by legitimate discovery." *Id.*

[116] Hench, *supra* note 47, at 425-26. Assertions to the contrary, "seem to rest on several unwarranted assumptions. If a company is, in fact, engaging in illegal discrimination or other tortious conduct, it seems foolish to suppose that it will be ethical in complying with mandatory disclosure rules, particularly in light of the concurrent restriction on the plaintiff's right to inquire further through legitimate discovery. Now that the plaintiff's right to probe these areas is effectively curtailed, defendants will be able to find out what plaintiff already knows, and then destroy or 'lose' inculpatory material the existence of which the plaintiff is unaware of with little concern that their misconduct will come to light. Expecting such a defendant voluntarily to disclose inculpatory material is as unrealistic as expecting it to contact victims of its past discrimination and offer reparations without the need for the victims to bring suit." *Id.*

[117] Hench, *supra* note 47, at 424; *see also* Subrin, *supra* note 100.

now the director of the Federal Judicial Center, a party should be allowed additional discovery following disclosure only upon a showing of "particularized need."[118] In this light, it cannot be realistically presumed that henceforth all tort defendants, for example, will ethically comply with disclosure requirements where damaging information otherwise would remain hidden. As one attorney expressed it, "we don't get what's there [now] through discovery. . . . The idea that [defendants] are just going to tell us everything we need to know to win our lawsuits just doesn't seem very practical."[119] The mandatory disclosure amendments appear to disadvantage the information poor plaintiff.

Defendants also have expressed several important, albeit different, doubts about mandatory disclosure.[120] For those defendants, any diminishing of court access for certain plaintiffs groups is offset by likely adverse impacts on defendants and their attorneys. "Repeat player" defendants, like plaintiffs, criticize as mistaken the notion that parties bring "knowledge of relatively equal usefulness at the outset of the litigation which they can share with their opponents to reduce costs."[121] Their concern, however, differs from plaintiffs' concern about lack of information access. Their concern is that defendants will be doing most of the heavy disclosing.[122] In addition, some are concerned that the vagueness of the disclosure standard leaves ethical defense counsel in a quandary. On the one hand, it appears that over-disclosure is required to avoid possible rule violations and sanctions.[123] On the other hand, over-disclosure nullifies the scheme's intended benefits—cheaper quicker and less burdensome discovery for clients.[124] For conscientious defense counsel, good faith compliance with Rule requirements seems inevitably to undermine the Rule's purpose.

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[118] Schwarzer, *supra* note 7.

[119] American Trial Lawyers of America President Roxanne Barton Conlin, a Des Moines, Iowa, sole practitioner. Randall Samborn, *Derailing the Rules*, NATIONAL LAW JOURNAL, May 24, 1993, at 1. "Mandatory disclosure without unlimited discovery won't work. We don't think people will fully disclose information that will hurt them voluntarily unless they know it will be discovered eventually." Arthur H. Bryant, executive director of Trial Lawyers for Public Justice (a national public-interest law firm) in opposition to Rule 26, 30, 31, 33 amendments. *Id.*

[120] *See* Gerald G. MacDonald *Heisiod, Agesilaus and Rule 26: A Proposal for a More Effective Initial Disclosure Procedure*, 28 WAKE FOREST L. REV. 819 (1993) (criticizing the amendments and proposing an alternative model).

[121] Hench, *supra* note 47, at 12.

[122] Winters, *supra* note 7, at 267.

[123] *Id. See also* Winters, *supra* note 7, at 267.

[124] Hench, *supra* note 47, at 432-33.

Perhaps even more significant, defense counsel are concerned about diminished access to their clients. They worry about the impact of mandatory disclosure on attorney-client relationships.

D. *Criticisms Concerning Impacts On Attorney-Client Relationships*

Commentators have said relatively little about the likely impact of the mandatory disclosure amendments upon key litigation relationships. One such relationship is the attorney's relationship with her client.

Mandatory disclosure may threaten to undermine the attorney-client relationship by driving a sharp wedge between an attorney's loyalty to her client and loyalty to the court. Attorneys are ethically bound to represent zealously their clients.[125] They are also ethically bound as officers of the court to serve the interests of fairness and justice. A balancing is required. The Rule 26 mandatory disclosure amendments, however, may place attorneys in situations where they are unable to fulfill either obligation.[126] The defense attorney, in particular, at critical junctures appears to be required to advocate against her client's interest.[127]

The scenario unfolds in this way. The attorney is obligated by amended Rule 26(a) to demand that her client disclose extremely sensitive and damaging information to an opponent, even though the opponent knows nothing about the information and did not specifically request it, and even though the information may subject the client to compensatory and punitive damages. The client understandably will strongly resist that demand. The information is highly damaging to the client's position and may not otherwise be discovered. Or it may be information that would only be discovered after expensive and time-consuming discovery by the opponent—the mere prospect of which might impel a favorable settlement without production of the information. It is unrealistic to assume that the client will be amenable to its attorney's disclosure justification cast in terms of judicial efficiency

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[125] Canon 7 of the Model Code of Professional Responsibility mandates that "a lawyer should represent a client zealously within the bounds of the law." Model Code of Professional Responsibility Canon 7 (1980).

[126] Hench, *supra* note 47, ("The 1993 amendments will put ethical defense attorneys into an intolerable dilemma by forcing them to use their professional skills to help the opposition").

[127] Winters, *supra* note 7, at 267.

and overall systemic fairness.[128] From the client's perspective, the client is paying the attorney to further the client's interests, not to aid its opponent.[129] A client may thus be tempted to say, "Do what we say or we'll get another attorney." What are the attorney's ethical and practical options at that juncture? For these reasons, many opposed to the Rule 26 amendments believe that mandatory disclosure conflicts with the realistic culture of the practicing bar concerning (1) the zealous representation of clients, and (2) the economic reality of client demands on attorney behavior.[130] One defense counsel expressed his worry in the following fashion:

> I still have a problem that perhaps is just my problem endemic to defense lawyers. But I have a problem that I am supposed to give up what I am supposed to disclose to my adversary, and that just really seems to be contrary to everything that I have done in my practice. . . . So don't believe that you, you know, a free for all disclosing—everybody disclosing at the same time. I think that the plaintiff, by God, has the burden of proof.[131]

Further, even if the attorney demands full disclosure and the client complies, the attorney may no longer enjoy the close confidences of the client in the future. The client may find it necessary to screen what the attorney knows to prevent future "gratuitous" disclosures. This in turn will hamper the quality of legal service by the malinformed attorney and a heightened possibility of later imposed sanctions upon the client. When the client must worry about how much to tell its attorney or about whether its attorney might in actuality sink the ship, distrust inevitably is cleaved into the attorney-client relationship.

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[128] "My client should perceive me as his or her trusted and vigorous advocate and not some doubtful agent of an officious bureaucracy dedicated to imposing its altruistic ideal of harmony at the expense of my client's interests." Samuel B. Witt, Statement at the Public Hearing of the Advisory Committee 75-76 (Feb. 19, 1992) as cited in Bell, *supra* note 12, at 175.

[129] Bell, *supra* note 88, at n. 176 ("Such a mandatory disclosure system threatens to interfere in the relationship between attorney and client by requiring an attorney to make disclosures based upon her assessment of the bases of her opponent's case").

[130] The economic and professional factors that magistrate Brazil identified as driving attorney behavior are still present and conflict with assumptions of cooperation that the rule now embraces. Brazil, *supra* note 11.

[131] Statement of James Bianchi; Record of Public Hearing of the Advisory Committee at 48-49 (Nov. 21, 1991) (cited in Bell, *supra* note 12, n. 177).

IV. Politics of Procedural Reform: The Rule 26 Phoenix

Mandatory disclosure truly is the phoenix of federal rules reform. In light of the criticisms described in Part III, many viewed the rule as all but dead during several stages of the rulemaking process. Mandatory disclosure, however, is the reform that would not "go quietly into the good night."[132] Given the almost universal opposition to the Rule 26 amendments, how did the amendments emerge from the Federal Judicial Conference and Supreme Court, and how did Congressional veto efforts fail to derail them? [133]

A broad societal view is needed. The mandatory disclosure amendments to Rule 26 emerged in the larger context of litigation reform movements set in motion by the remarks of former Chief Justice Warren Burger and Harvard president Derrick Bok. Each "strongly and repeatedly attacked the U.S. legal profession and the role of litigation in our society. Their remarks and those of other influential commentators portray lawyers as distrusted and lawsuits as social pathology."[134] The passions of the populace were stirred more recently by the Quayle Commission on Competitiveness. Former Vice President Quayle spoke publicly of a litigation explosion and the overwhelming costs of civil litigation.[135] These passions, along with Brookings Institute and Federal Judicial Center studies,[136] fueled a juggernaut of litigation

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[132] Randall Samborn, *New Discovery Rules Take Effect* , *supra* note 16. In Feb. 1992 the Advisory Committee, faced with strong opposition to the proposed mandatory disclosure changes, withdrew the proposal. Instead of shelving the idea, the Advisory Committee at Judge Ralph K. Winters' urging authored a modified version of the rule, catching significant portion of the legal community unaware. *Id.*

[133] *Id.* Professor Stempel states that: "[d]espite its ease of passage in the House, the bill was not voted upon in the Senate due to the objections of Senator Howard Metzenbaum, who refused to let the bill be considered by unanimous consent prior to the holiday recess. Consequently, the new civil rules took effect December 1, 1993, as promulgated by the Supreme Court." Stempel, *supra* note 24, at 681.

[134] Theodore Tetzlaff, *Federal Courts, Their Rules and Their Roles*, 18 Litig. 1, 68 (Spring 1991); Eric K. Yamamoto, *Case Management and the Hawai'i Courts: The Evolving Role of the Managerial Judge*, 9 U. Haw. L. Rev. 395, 397 (1987) (discussing former Chief Justice Burger's perception of a litigation explosion). *See supra* note 21. Marcus, *supra* note 110, at 762 (describing the ostensible litigation boom image and "the related notion that lawyers are the cause of many, if not most, of America's woes").

[135] *See* Deborah R. Hensler, *Taking Aim at the American Legal System: The Council on Competitiveness's Agenda for Legal Reform*, 75 Judicature 244 (1992) (describing the litigation reform movement and illustrating the fraility of the statistical underpinnings relied on by many reformers); Stempel, *supra* note 24, at 687-88.

[136] *See supra* note 21.

reform. The question often seemed to be not whether reform would occur but by whom and in what form?[137] Proponents of mandatory disclosure reform occupied the rhetorical high ground, employing terms of "professionalism," "cost and delay reduction," and "active case management."[138] They also cast opponents onto the rhetorical low ground in describing the present state of discovery in employing terms of "over litigation," "wastefulness," and "abuse".[139]

The Rule 26 amendment process can be viewed from several perspectives. From one vantage point, litigation issues have become increasingly and potentially destructively politicized.[140] People and institutions affected by the litigation process translate their personalized political agendas into global policies for reform that further their particular interests. The "reality appears to be that many in the legal community fear that *any* change comes with a malign hidden agenda"[141] because "people are approaching proposed reforms primarily in terms

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[137] As Professor Marcus observes, "the crisis . . . , relates to control over innovation and, more specifically, the rules for handling litigation. There is an intrinsic and unresolved tension about where the power to make procedural rules should rest." Marcus, *supra* note 110, at 764.

[138] *Id.*

[139] Schwarzer, *supra* note 7.

[140] Stempel, *supra* note 24, at 662. There has been an increase in "ad hoc activity [from] various interest groups, including the bench and the organized bar, primarily pursued through the official organizations such as the Judicial Conference, the Federal Judicial Center, the American Bar Association, and the American Law Institute. Traditionally, of course, judges and lawyers have lobbied Congress and state legislatures for litigation change, as demonstrated by the saga of the Rules Enabling Act. But, the legal profession's more recent 'political' activity regarding litigation reform differs from the traditional model." *Id. See also* Mullenix, *Unconstitutional Rulemaking*, *supra* note 21.

> [T]he profession has become more chronically active and more "political" in its activity. The more developed general and special interest bar groups provide their members with tools that encourage and enhance their political activity: publications, newsletters, lobbyists, researchers, hot lines, form letters, fundraisers, PACS and other trappings of the institutionalized political participant.
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> Across the spectrum of interests ranging from the American Tort Reform Association (a manufacturers group seeking more favorable product liability laws) to the Leadership Conference on Civil Rights (a liberal group seeking to protect or expand civil rights laws), America's political actors have increasingly become involved in matters of litigation procedure.

Stempel, *supra* note 24, at 668-9.

[141] Marcus, *supra* note 110, at 811.

of whether they will be winners or losers."[142] The judiciary too has become more politicized. The "modern, more institutionalized judiciary displays both greater capacity to generate litigation proposals and increased ability to react to the initiatives of others."[143] Business, concerned about economic impacts, also has increasingly participated in the politics of litigation reform.[144]

The reform process itself has opened to the public[145] and "the individuals and organizations providing input into the law reform process have become more diverse."[146] Increased participation in the reform process reflects an understanding by many that systemic change implicates political agendas.[147] As Professor Stephen Burbank observes,

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[142] *Id.* at 810. See Paul D. Carrington, *The New Order in Judicial Rulemaking*, 75 JUDICATURE 161, (1991) ("if the interests of the National Association of Process Servers can alter or supplant the rules process, what self-interested mischief could more powerful and wealthier political players accomplish?).

[143] Stempel, *supra* note 24, at 662 ("A relatively small number of 'insider' judges . . . , seem to exert great influence, through their appointment to important positions in the judicial establishment, but also because of prestigious reputations or sustained activity in litigation reform").

[144] Economic forces have served to drive the pace and shape of litigation policy over the years. "More than in the sciences . . . , the paradigm shift in procedure was affected in large part by the sociology and politics of the American judicial system. Despite its origin in elite efforts to pacify the masses, the open procedural paradigm became hugely unpopular with the business community, which saw itself victimized by bogus or marginal claims that consumed legal resources and actually could succeed at the hands of lay jurors, who elites thought inflated the value of legitimate claims." Stempel, *supra* note 24, at 718.

[145] *Id.* at 666 ("Rules Advisory Committee hearings are open to the public unless the Committee specifically enters an executive session. Upon request, the Judicial Conference routinely provides the names, addresses and phone numbers of Committee members, who can be contacted directly by persons wishing to make a case for or against change.") *But see* Stephen B. Burbank, *Ignorance And Procedural Law Reform: A Call For A Moratorium*, 59 BROOK. L. REV. 841, 853 (1993)(disagreeing with Professor Stempel's depiction of the legal community's participation in decision making about the Federal Rules).

[146] *Id.* at 667.

[147] "In recent years the political pendulum has swung in the other direction, towards the 'haves' and away from the 'have-nots.' We have witnessed a backlash against many equalizing developments in the substantive law. The public may discover too late that many of its cherished legal rights have become devalued for lack of any means to redeem them." Senior Judge Jack B. Weinstein, *Procedural Reform as a Surrogate for Substantive Law Revision*, 59 BROOK. L. REV. 827, 828 (1993) (discussing an alternative view of litigation reform).

reformers must be "candid in identifying policy choices and clear about the allocation of power to make them."[148]

From another vantage point, the judicial rulemaking process is perceived to have survived interest-group politics. From this vantage point, the adoption of the mandatory disclosure amendments became integrally linked to political worries about *judicial autonomy over procedural rulemaking.*[149] The Federal Rules Advisory Committee and Judicial Conference faced a threat of usurpation of their rulemaking authority by Congress and grass-roots rule makers under the Congressional Justice Reform Act[150] and by other partisan political lobbying groups.[151] Federal District Judge William Bertlesman encapsulated the concern, stating that "the incentive to get [the mandatory disclosure rule amendment] started. . .[was] the passage of the Biden Bill, when it looked as though the Judiciary was going to lose control of itself."[152] Professor Linda Mullenix perceived recent Congressional action as a debilitating incursion on the judiciary's inherent power to promulgate procedural rules."[153] Members of the Advisory Committee and Federal Judicial

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[148] Burbank, *supra* note 145, at 850 (calling for a cessation of Congressional action in the arena of litigation reform). *But see* Marcus, *supra* note 110, at 820 ("[t]here is a good deal of fear and loathing out there on the reform trail. The political critique contributes to this attitude, of course, by suggesting that there is a malign agenda, hidden or overt, lurking behind the scenes, which taints even the most benevolent-appearing reforms").

[149] Professor Jeffrey Stempel observes that judicial autonomy in rulemaking has withered. "A second, more coherent effort to classify recent events as a reform revolution would argue that Congress has now supplanted the judiciary and that the Rules Enabling Act's model (perhaps the Act itself) faces numbered days. The reaction of Congress to newly promulgated Rules changes concerning the controversial Rule 11, discovery and disclosure amendments indicate that this type of paradigm is possible but not yet able to displace the old model. Congress was heavily involved in almost revising or stopping the proposed amendments, suggesting that the old paradigm is wounded and on the run, and that a possible long-term shift to Congress may be in progress." Stempel, *supra* note 24, at 735. *See also*, Marcus, *supra* note 110.

[150] Joseph R. Biden, Jr., *Equal, Accessible, Affordable Justice Under Law: The Civil Justice Reform Act of 1990*, 1 CORNELL J. PUB. POL. 1 (1992) (describing and justifying CJRA). *See* Linda S. Mullenix, *Unconstitutional Rulemaking, supra* note 21 (CJRA not only drastically and unwisely alters the traditional rulemaking, but violates separation of powers norms as well).

[151] Mullenix, *Unconstitutional Rulemaking, supra* note 21 (describing the pressures faced by the Advisory Committee).

[152] Marcus, *supra* note 110, at 808-9, n. 199.

[153] Linda S. Mullenix, *Should Congress Decide Civil Rules? No: Not a Subject To Wheel'n Deal*, NATIONAL LAW JOURNAL, November 22, 1993, at 15-16. *But see* Alfred W. Cortese

Conference evinced deep concern about the agent of procedural change.[154] Who had the authority, expertise and methodology for responding responsibly to the chaotic demands for change voiced by all three branches of government and the public?[155] If the judiciary backed down on Rule 26—its most significant proposed litigation reform, a reform Congress and the Quayle Commission both recommended—the judiciary might well be viewed as abandoning serious litigation reform while ignoring public outcry. If the judicial branch did not appear to be responsive and in control, others would step in. At stake, from this perspective, were not only discovery reform but also judicial legitimacy in rulemaking.[156]

Mandatory disclosure opponents prevailed in the House with the passage of the "veto bill" House Resolution 2814.[157] Their collective opposition, however, fractured during heavy lobbying in the Senate.[158] Court reporters succeeded in getting one section of Rule 26 changed to omit the cost-cutting video deposition provision.[159] According to one report, this launched a partisan free for all with various interest groups attempting to surgically excise offending portions of any amended rule.[160] With multiple competing mini-veto proposals, the playing field

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Jr. and Kathleen L. Blaner, *Should Congress Decide Civil Rules?*, NATIONAL LAW JOURNAL, Nov. 22, 1993, at 15. Cortese and Blaner argue that the "disclosure experience" demonstrates the benefits of public and Congressional input into the rule-making process.

[154] *See* Mullenix, *Hope over Experience*, *supra* note 7.

[155] The Advisory Committee's procedures also came under fire. Professor Laurens Walker proposed an Executive Order that the Advisory Committee must:

(1) make rules based on adequate information;
(2) refrain from rulemaking unless the "potential benefits to society outweigh the potential costs;"
(3) "pursue objectives chosen to maximize the net benefits to society;"
(4) "choose the alternative involving the least cost to society;" and
(5) attempt to maximize net social benefit in its rules policy.

Laurens Walker, *A Comprehensive Reform for Federal Civil Rulemaking*, 61 GEO. WAS. L. REV. 455, 466-68 (1993).

[156] *See* Mullenix, *Hope over Experience*, *supra* note 7.

[157] *No Mandatory Disclosure*, NATIONAL LAW JOURNAL, Oct. 18, 1993, at 6 (House Judiciary Committee approves bill, H.R. 2814 deleting the controversial mandatory disclosure provision from the pending amendments to the Federal Rules of Civil Procedure). *See Civil Rules Get Nod*, NATIONAL LAW JOURNAL, Nov. 15, 1993, at 6 (reporting the House of Representative's approval of H.R. 2814 deleting proposed Rule 26(a)(1)).

[158] Samborn, *Bill to Stop Change Dies*, *supra* note 14.

[159] *Id.*

[160] *Id.*

muddied. No unified, coherent voice emerged to oppose the Rule 26 changes.[161] The opposition's uncertainty and inconsistency reportedly emboldened steadfast proponents of the amendments, principally the Federal Judicial Conference, and provided space for the Senate's inaction on the veto bill.[162]

In the aftermath of the Congressional non-veto of the Rule 26 amendments, the American Bar Association distributed a now infamous memo.[163] The memo essentially asserted that while a skirmish was lost in Congress the battle itself still raged. The veto war could be won on the federal district court level, the memo said, by lobbying each district court to employ the opt-out provisions of amended Rule 26. As discussed earlier, many district courts responded by opting out of all or some of the Rule 26 mandatory disclosure changes.[164]

District by district opting-out, however, created procedural dis-uniformity nationally.[165] It also apparently created litigation power imbalances in district courts that opted out of some but not all of the discovery changes.[166] In addition, the process of opting-out (or opting-in) by local district court rules, raised new potentially serious political-legal issues. Bill Lann Lee, attorney for the National Association for the Advancement of Colored People Legal Defense Fund, recently observed that the defense bar tends to control local rule changes.[167] In most district courts, he indicated, defense attorneys are the ones with the time to lobby or to sit on local rules committees.[168] Lee's blanket observations are certainly debatable. Implicit in his statement, however, is an important concern about whether current local rulemaking has

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[161] *Id.* Some groups worried that the Senate would not go far enough; i.e., cutting mandatory disclosure but keeping the limits on depositions and interrogatories. Civil Rights groups worried the Senate might perhaps go too far and also veto the amended Rule 11 which they found as a desirable change. *Id.*

[162] *Id.*

[163] Panel Discussion on Amended Rule 26, Annual Meeting of the American Association of Law Schools Civil Procedure and Litigation Sections (January 1994) (discussing ABA memorandum) (tape on file with authors).

[164] Temporary Order, *supra* note 25. The Hawai'i federal district court has chosen this route through a local order filed November 30 1993, opting out of the new rule 26 sections (a), (b), (d), and (f). It should be noted that this "opting out" is only temporary.

[165] *See supra* note 19.

[166] *Id.*

[167] Bill Lann Lee, Panel Discussion on Amended Rule 26, Annual Meeting of American Association of Law Schools Civil Procedure on Sections (January 1994).

[168] *Id.*

provided any particular litigation interest group an opportunity to shift favorably the balance of power in discovery.

Partial opt-out orders, such as the Hawaii's Federal district court's Temporary Order, eliminate mandatory disclosure but leave in place new limits on depositions and interrogatories. The combined effect is presumptively to limit formal discovery (depositions and interrogatories) while not requiring the informal disclosure of core information.[169] This represents an overall narrowing of discovery. Where one party controls most of the relevant information—more often a defendant than a plaintiff—this narrowing of discovery will likely work to that party's benefit and to the other party's detriment. Might such a district court order, or local rule, narrowing discovery, generally be characterized as pro-defendant? On the other hand, blanket mandatory disclosure might drive a wedge between ethical defense counsel and their institutional clients, practically benefitting plaintiffs. Might such an order, or rule, be characterized as pro-plaintiff?

Whatever course district courts pursue via local rules, opportunities for political leveraging are apparent. Balancing concerns about discovery and litigation power among varying kinds of plaintiffs and defendants, individual and institutional litigants, private claimants and government, represented and pro se parties, is essential. It is also a challenging task. Neither the perception of any section of the bar exerting excessive influence over procedural rule formulation nor the perception of judicial efficiency overriding fairness to litigants would bode well for the legitimacy of the civil justice system.

V. Concluding Thoughts: A Glimpse of the Future

Paths to the future emerge from the present. As discussed, confusion and national dis-uniformity mark the present state of Federal Rule 26 and mandatory disclosure.[170] The mandatory disclosure amendments can be fairly viewed as the federal judiciary's primary response to loud calls for systemic litigation change.[171] Those calls have emanated from

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[169] Samborn, *Bill to Stop Change Dies*, *supra* note 14 ("The House took out one part of the balance and left the other part in[.] [This] restricted the traditional means that plaintiffs have of getting discovery and eliminated entirely a new means that was recommended. That made the House bill very unfair to plaintiffs. If we have to have limits, we would rather have limits with mandatory disclosure to offset the effect of the limits").

[170] *See supra* Part II.

[171] *See supra* note 24 and accompanying text.

widely varying sources, sources that can be collectively characterized as multi-faceted, procedural reform movements. Congress is implementing its own litigation reform agenda through the Civil Justice Reform Act.[172] Private businesses, through the Quayle Commission on Competitiveness, have advanced a package of federal litigation reforms to take law "off of the backs" of business.[173] Populists and neighborhood justice centers advocate bypassing court systems altogether and focus on community-centered mediation and arbitration. State courts such as Hawaii's continue to innovate, among other things, establishing far-reaching alternative dispute resolution programs.[174]

The politics of procedural reform thus provides context for viewing the mandatory disclosure amendments. "Who should control procedural reform" became a significant underlying question for many. Despite almost universal opposition by all segments of the national bar,[175] a persistent Advisory Committee and Federal Judicial Conference successfully steered the Rule 26 amendments through the political shoals, including the Supreme Court[176] and Congress. The amendments became effective on December 1, 1993.

Rule 26's opt-out safety valve, however, opened the door for local lobbying[177] and enabled 52 of the 94 federal district courts to exempt themselves, in varying permutations, with varying degrees of permanence, from mandatory disclosure requirements. This present state of

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[172] *See supra* note 21 and accompanying text.

[173] *See supra* note 135 and accompanying text.

[174] HAW. CIR. CT. R. C. A. A. P. (Hawai'i Circuit Court Rules, Mandatory Court Annexed Arbitration Program).

[175] *See supra* Part IIIB and C.

[176] A Supreme Court majority appeared minimally to scrutinize the proffered rule amendments. Even Chief Justice Rehnquist's normally blase transmittal letter is pregnant with material for discussion. In adopting the amendments, he wrote: While the Court is satisfied that the required procedures have been observed, this transmittal does not necessarily indicate that the Court itself would have proposed these amendments in the form submitted.

The transmittal letter suggests a highly deferential standard of review for proposed amendments received from the Judicial Conference.

In light of the language of the Chief Justice's. . . , letter, the most likely conclusion is that the Court majority applied a "quick check for corruption" standard of review that focused only on fairness of process rather than a "rational relationship" standard of review directed toward the actual merits of the proposed rules changes. Stempel, *supra* note 24, at 677-79.

[177] *See supra* note 163 (concerning the American Bar Association memorandum urging collective political lobbying of individual federal district courts).

rule ambiguity and dis-uniformity, and the tumultuous procedural reform process leading to it, are what federal district judge Norma Shapiro recently characterized as the "primordial ooze."[178]

What paths lead from this state of ooze? As mentioned in Part II, for federal district courts such as Hawaii's which have temporarily opted out of some of mandatory disclosure package of amendments, at least four paths emerge: (1) finalize the Temporary Order in its current form, eliminating mandatory disclosure without altering deposition-interrogatory limits and thereby limiting overall discovery; (2) rescind the Temporary Order, thereby "opting-in" to the Rule 26 mandatory disclosure amendments with all their attendant problems (discussed in Section III); (3) issue a new order (or promulgate a local rule) rejecting the blanket applicability of the Rule 26 mandatory disclosure requirements while authorizing judges or magistrate judges to order disclosure without discovery requests on a case specific basis; or (4) alter the Temporary Order to reject the Rules 26, 30, 31 and 33 discovery changes in entirety, thereby reverting to the pre-amendments' discovery scheme which provided for judicial control over discovery through Rules 16, 26(b)(1), 26(c), 26(f) and 26(g).

How should rule reformers assess these alternative paths? Given the absence of encompassing empirical studies, most commentary concerning the likely impact of mandatory disclosure has a best "guesstimate" or reasoned speculation flavor to it. No one can predict the Rule 26 future with reasonable certainty, and speculation about possible impacts varies widely. Much of the evaluative difficulty lies in an unstated assumption embodied in the amended rule itself and much of the diffuse commentary about the rule. That assumption is that mandatory disclosure requirements must be applied in all civil cases. That assumption leads to the evaluative question around which much of the current Rule 26 debate has focused: can the mandatory disclosure amendments be fairly applied to *all cases* to reduce cost and delay? Proponents tend to make broad-based statements about mandatory disclosure's over-all systemic benefits and cite "ordinary" case examples or hypotheticals for support.[179] Opponents tend to highlight specific types of cases in which mandatory disclosure is likely to create an imbalance of litigation power among parties, generate wasteful strategic maneuvering and strain attorney-client relationships.[180]

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[178] *See supra* note 20.
[179] *See supra* Part IIIA.
[180] *See supra* Part IIIB and C.

As one means for breaking the evaluative log-jam, we challenge the assumption of the necessary blanket applicability of mandatory disclosure. We believe that the disclosure amendments can be evaluated by individual federal district courts by asking two questions that assume the potential appropriateness of mandatory disclosure in some types of cases but not others. The first question is, "In what types of cases is mandatory disclosure likely to lead fairly to the reduction of cost and delay?" The corollary question is, "How can rules be fashioned to facilitate mandatory disclosure in those types of cases while allowing for more appropriate methods of discovery in other types of cases?"

Asking those two questions provides a preliminary method for assessing the four paths described above. If the first question is answerable in the negative—there are no categories of cases in which mandatory disclosure is workable—then the only paths warranting further inquiry are path one (finalizing the Temporary "Opt-out" Order) or path 4 (reverting to pre-1993 discovery).

If, however, as we believe, the first question is answerable in the affirmative—mandatory disclosure can work effectively and fairly in some types of cases—then there would be no need to preclude mandatory disclosure for *all cases*. Finalization of the Hawaii district court's Temporary "Opt-out" Order would appear unwise. In addition, finalizing the Temporary order might cement into place a structural imbalance of litigation power in light of its limitation on formal discovery without informal disclosure. Thus path one, described above, appears uninviting.

Path two would be similarly problematic. In light of the voluminous and vociferous criticism, discussed in Part III, opting-in for blanket mandatory disclosure would appear unwise absent unequivocal empirical information about its across-the-board efficacy.

In light of an affirmative response to the first question, path three holds promise. Authorizing magistrate judges selectively to order disclosure on a case specific basis, according to pre-defined criteria, warrants further inquiry. It responds to the second, corollary question—how can rules be fashioned to mandate disclosure in appropriate cases? It embodies an implicit point of convergence among supporters and opponents of blanket mandatory disclosure—that mandatory disclosure may reduce cost and delay in certain kinds of case situations. If this is so, and this proposition still needs further verification, then federal court local rules committees might sensibly do one of two things: (1) identify specific categories of cases for which disclosure is to be mandatory (the magistrate judge's task would be to decide whether the

particular case within a pre-described category); or (2) authorize magistrate judges to exercise discretion ordering disclosure in a particular case following the Rule 26(f) meeting of the parties and a Rule 16 pretrial conference (the magistrate judge's task would be to evaluate case specific circumstances according to accepted criteria and determine whether disclosure is appropriate in that particular case).

We believe that the federal district courts, through their local rules committees, lack the empirical data and clairvoyance needed to identify and define in advance workable mandatory disclosure case categories. This is because key factors for determining workableness, or appropriateness, are interactive. They depend on case specific circumstances. They are not readily susceptible to pre-defined collective categorization. Those factors, identified by mandatory disclosure supporters and critics, include the cooperativeness of both counsel, the locus of needed information, the balance of litigation resources and power among parties and attorneys, the litigation histories of the parties, the complexity of issues and the difficulty of determining "relevancy" in light of the legal theories asserted.

For this reason, and assuming the first question posed above is answerable affirmatively, we believe that a federal district court could sensibly adopt a local rule authorizing magistrate judges to assess in each case the factors described above and order mandatory disclosure where it is appropriate.[181] This is path three. The factors (or criteria) would need careful refinement. Magistrate judges would need to be amenable to greater case management early on. Selective mandatory disclosure in this fashion might provide a way to reduce cost and delay fairly in some cases without generating untoward consequences. Thirteen federal district courts have now taken this approach.[182]

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[181] *See* Federal Judicial Center Report, *supra* note 19 (describing 13 district courts which give judges discretionary power to mandate disclosure). In one case, United States District Judge George M. Marovich authorized the parties in a case removed to his court prior to the adoption of the mandatory disclosure amendments to retroactively adhere to the amendments. Samborn, *Rules For Discovery Uncertain*, *supra* note 14. Judge Marovich noted that "[t]he issues in this lawsuit are few and well-defined. Similarly discovery should be limited and well focused. As a result, this is a case tailor-made for application of the amended federal discovery and scheduling rules." *Id.*

[182] As this article goes to press, the Hawaii Federal district court Local Rules Committee is recommending to the court the adoption of a Local Rule that embraces what we have called "path three"—rejecting blanket mandatory disclosure, as set forth in Federal Rule 26, and authorizing judges, or magistrate judges, to order disclosure on a case specific basis.

What about cases for which mandatory disclosure is deemed inappropriate? Local rules could specify that if a judge declines to order mandatory disclosure the pre-1993 discovery regime applies, as slightly modified by those 1993 amendments not embracing disclosure. But would this not encourage, or at least allow, the very discovery abuses mandatory disclosure attempted to address? This is a distinct possibility. We believe, however, that this need not be so. It appears that pre-1993 discovery management tools were under utilized by most judges. Pre-1993 Rule 26(b)(1)—Rule 26(b)(2) under the 1993 amendments—memorialized the concept of proportionality in discovery and authorized judges to shape and limit discovery at the outset to assure its appropriateness to the needs of the case, the amount in controversy, the resources of the parties and the public's interest. The pre-1993 Rule 26(f) discovery conference—a "meeting of parties" under the 1993 amendments—and Rule 26(g) discovery sanctions provided vehicles and muscle for shaping and limiting discovery to avoid problems. The Rule 16 pretrial conference also conferred upon judges significant discovery management powers. What appeared to have been lacking was a collective commitment among judges and attorneys to employ these rules to facilitate active case management of discovery early on in difficult cases. The combined powers and vehicles established by these rules provide a largely under utilized and potentially viable approach to discovery control in non-mandatory disclosure cases. The key, of course, is commitment by judges, magistrate judges and attorneys to early and active discovery management.

Thus, in our preliminary estimation, path three, as it draws upon part of path four—authorizing judges to order implementation of mandatory disclosure rules in cases where they are appropriate and otherwise relying on pre-1993 discovery management tools—emerges as the appropriate focal point of inquiry. It provides a glimpse of a potentially meaningful discovery, and perhaps even disclosure, future.

Pele Defense Fund v. Paty: Exacerbating the Inherent Conflict Between Hawaiian Native Tenant Access and Gathering Rights and Western Property Rights

I. INTRODUCTION 208
II. FACTS 210
III. HISTORY OF THE LAW 212
  A. *The Origin of Hawaiian Native Tenant Rights* 212
  B. *Access and Gathering Rights for Subsistence, Cultural, and Religious Purposes* 219
  C. *The Constitutional and Statutory Bases of Hawaiian Native Tenant Rights* 221
  D. *Legislative History* 223
  E. *Prior Case Law* 227
    1. *Access case law* 228
    2. *Gathering case law* 230
    3. *Subsistence case law* 232
    4. *Cultural case law* 234
    5. *Religious case law* 236
IV. ANALYSIS 239
  A. *The Hawaii Supreme Court's Analysis in Pele* 239
  B. *Commentary* 243
    1. *The language of the Hawaii Constitution* 244
    2. *The* Kalipi *opinion* 246
    3. *The legislative history of article XII, section 7* 248
    4. *The unusual gathering and access custom in the Puna district* 250
V. IMPACT 252
  A. *Immediate Repercussions* 252
  B. *Future Implications* 256
VI. CONCLUSION 258

I. Introduction

In the 1992 case of *Pele Defense Fund v. Paty*,[1] the Hawaii Supreme Court rendered a landmark decision which broadly held that native Hawaiian rights protected by article XII, section 7 of the Hawaii Constitution "may extend beyond the *ahupua'a*[2] in which a native Hawaiian resides where such rights have been customarily and traditionally exercised in this manner."[3] This controversial decision abolished over 100 years of Hawaii Supreme Court precedent which restricted native tenant gathering rights to the *ahupua'a* of residency. The *ahupua'a* residency requirement had been judicially imposed since at least 1858 in *Oni v. Meek*,[4] and reaffirmed as recently as 1982 in the case of *Kalipi v. Hawaiian Trust Co.*.[5] Further, the *Oni* and *Kalipi* decisions were predicated upon the Kuleana Act of 1850[6] and its modern day successor, Hawaii Revised Statutes section 7-1.[7] Both sources likewise limit the practice of customary and traditional rights to tenants residing within the *ahupua'a* in which they seek to exercise the rights.

Hawaiian history and law manifest an inherent conflict between the customary and traditional rights of native tenants and those of undev-

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[1] 73 Haw. 578, 837 P.2d 1247 (1992), *cert. denied*, ___U.S. ___, 113 S. Ct. 1277 (1993).

[2] An *ahupua'a* is a division of land varying in size from 100 to 100,000 acres which runs from the mountains to the seashore. NATIVE HAWAIIAN RIGHTS HANDBOOK 3 (Melody K. MacKenzie ed., 1991) [hereinafter HANDBOOK].

[3] *Pele*, 73 Haw. at 620, 837 P.2d at 1272.

[4] 2 Haw. 87 (1858). *Oni* addressed the issue of whether native tenant rights included the right to pasture animals within the *ahupua'a* of residency. *Id.* at 88. The Hawaii Supreme Court held that the right of pasturage granted under a predecessor of the Kuleana Act had been abrogated and superseded by the Kuleana Act, which contained all the specific rights of the tenants or caretakers on a *kuleana*. *Id.* at 94-95. A *kuleana* is a tenant's plot of land which included only the land which the tenant actually cultivated plus a house lot not to exceed a quarter acre in size. Act of Aug. 6, 1850, 2 REV. LAWS HAW. 2141, 2142 (1925).

[5] 66 Haw. 1, 656 P.2d 745 (1982). Kalipi filed suit against the *ahupua'a* owners, claiming a right to gather on the *ahupua'a* where he owned lots, despite the fact that he did not reside there. *Id.* at 3-4, 656 P.2d at 747. The Hawaii Supreme Court held "that traditional gathering rights do not accrue to persons, such as Plaintiff, who do not live within the *ahupua'a* in which such rights are sought to be asserted." *Id.* at 13, 656 P.2d at 752.

[6] Act of Aug. 6, 1850, 2 REV. LAWS HAW. 2141 (1925).

[7] HAW. REV. STAT. § 7-1 (1985).

eloped property owners in the State of Hawaii. Unless narrowed to fact-specific exceptions, the *Pele* court's abolition of the *ahupua'a* residency requirement threatens western property concepts because it encourages native Hawaiians to exercise customary and traditional practices on the undeveloped land of others. Such practices sharply conflict with property ownership concepts such as trespass, quiet enjoyment, and investment-backed expectations. By broadly extending access and gathering rights beyond the *ahupua'a* of residency, the *Pele* holding serves to exacerbate, rather than remedy, the inherent conflict between access and gathering rights and western property rights.

Additionally, scrutiny of the four factors upon which the *Pele* court predicated its expansive holding indicates that the abolition of the *ahupua'a* residency requirement is difficult to justify. Neither the plain meaning and legislative history of article XII, section 7 of the Hawaii Constitution, nor the court's reliance upon *Kalipi* and evidence of unusual custom in the area warrant an abrogation of the law as it has existed since 1850. Further, the *Pele* decision produced immediate repercussions, including a recent holding by the Hawaii Intermediate Court of Appeals mandating that government agencies explore possibilities for preserving customarily and traditionally exercised rights on land which is already in the process of being developed.[8] Thus, the controversial *Pele* holding is a likely progenitor of further litigation because more questions seem to have been raised than answered by the Hawaii Supreme Court.

Part II details the pertinent facts and procedural history of *Pele*. The history of customary and traditional rights is reviewed in Part III. This history encompasses the origin of Hawaiian native tenant rights; access and gathering rights for subsistence, cultural, and religious purposes; the constitutional and statutory bases of Hawaiian native tenant rights; the legislative history of such rights; and prior case law. Part IV contains the Hawaii Supreme Court's analysis in *Pele* and commentary examining the language and legislative history of article XII, section 7 of the Hawaii Constitution, the *Kalipi* opinion, and the unusual

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[8] Exactly four months after the Hawaii Supreme Court rendered its opinion in *Pele*, the Intermediate Court of Appeals of Hawaii held that "all government agencies undertaking or approving development of undeveloped land are required to determine if native Hawaiian gathering rights have been customarily and traditionally practiced on the land in question and explore the possibilities for preserving them." Public Access Shoreline Hawaii v. Hawaii County Planning Comm'n, No. 90-293K, slip op. at 13 (Haw. App. Jan. 28, 1993), *cert. granted*, 853 P.2d 542 (1993).

gathering and access custom in the Puna district. Finally, Part V probes the impact of *Pele* through consideration of immediate repercussions and future implications.

The *Pele* decision addressed access and gathering rights of native Hawaiian tenants for subsistence, cultural, and religious purposes. Likewise, this discussion is specifically limited to such rights. Accordingly, shoreline boundary, water, and *konohiki* fishing rights[9] are not discussed.

II. FACTS

In 1985 the State Board of Land and Natural Resources (BLNR) exchanged approximately 27,800 acres of public trust ceded lands[10] for roughly 25,800 acres of private land owned by the Estate of James Campbell, Deceased (Campbell Estate).[11] Pele Defense Fund (PDF) filed suit against the BLNR in federal court in April 1988, and in state court in March 1989.[12] Both complaints alleged, inter alia, that Chairman Paty and the members of the BLNR, acting in their official capacity, had violated article XII, section 7 of the Hawaii Constitution by exchanging the ceded lands.[13] Article XII, section 7 protects "all rights, customarily and traditionally exercised for subsistence, cultural

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[9] *Konohiki* fishing rights are the fishing rights of the owner of the *ahupua'a* and the joint rights of tenants to gather from the *ahupua'a* fishery. HANDBOOK, *supra* note 2, at 306.

[10] Public trust ceded lands are Government and Crown lands transferred in conditional fee title to the United States by the Republic of Hawaii when Hawaii was annexed to the United States in 1898. HANDBOOK, *supra* note 2, at 26. When Hawaii became a state in 1959, Congress transferred some of those lands back to the State of Hawaii. *Id.* at 28. The Admission Act, which Congress passed in 1959 to admit Hawaii into the Union, specified in section 5(f) that the lands:

> shall be held by said State as a public trust for the support of the public schools and other public educational institutions, for the betterment of the conditions of native Hawaiians, as defined in the Hawaiian Homes Commission Act, 1920, as amended, for the development of farm and home ownership on as widespread a basis as possible for the making of public improvements, and for the provision of lands for public use.

Act of March 18, 1959, Pub. L. No. 86-3, § 5(f), 73 Stat. 4, 6 (1959) (popularly known as the Hawaii Statehood Act).

[11] *Pele*, 73 Haw. at 584, 837 P.2d at 1253.

[12] *Id.* at 588, 837 P.2d at 1255.

[13] Plaintiff's Memorandum in Support of Motion for Preliminary Injunction at 6, Pele Defense Fund v. Paty, Civ. No. 89-089 (Haw. 3d Cir. filed Jan. 24, 1991).

and religious purposes and possessed by *ahupua'a* tenants who are descendants of native Hawaiians who inhabited the Hawaiian Islands prior to 1778, subject to the right of the State to regulate such rights."[14]

The United States District Court for the District of Hawaii dismissed PDF's federal and pendent state claims in July 1989.[15] In May 1990, the United States Court of Appeals for the Ninth Circuit affirmed the dismissal of PDF's federal claims and barred the pendent state law claims because the justification for adjudicating them in federal court ceased to exist after the federal claims were dismissed.[16] The Ninth Circuit, however, added that the "plaintiffs' pendent claims based on solely state law and the state constitution . . . could be brought very appropriately in the state court, or, given the nature of the dispute and statutory language, before even the state legislature."[17]

The state Circuit Court of the Third Circuit dismissed the action in its entirety concluding that there were "no material issues of relevant facts between Plaintiff PDF and Defendants."[18] On appeal, the Supreme Court of Hawaii, in a September 1992 landmark decision written by Justice Klein, held that "native Hawaiian rights protected by article XII, section 7 may extend beyond the *ahupua'a* in which a native Hawaiian resides where such rights have been customarily and traditionally exercised in this manner."[19] PDF's federal claims were barred by the statute of limitations and res judicata, and claims alleging illegality of the land exchange were barred by the State's sovereign immunity.[20] The judgment of the lower court was affirmed in all other respects.[21] Thus having affirmed in part and reversed in part, the Hawaii Supreme Court remanded the case to the Third Circuit for a trial on the limited question of whether native Hawaiian PDF members can be denied continued access into undeveloped areas of the exchanged lands to exercise customary and traditional rights for subsistence,

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[14] HAW. CONST. art. XII, § 7.

[15] *Pele*, 73 Haw. at 588, 837 P.2d at 1255.

[16] Ulaleo v. Paty, 902 F.2d 1395, 1398-1400 (9th Cir. 1990). *See generally* Michael M. McPherson & Stephanie M. Parent, Comment, *Native Hawaiians*, 21 ENVTL. L. 1301, 1307-12 (1991) (discussing *Ulaleo* in the context of native Hawaiian rights).

[17] 902 F.2d at 1400.

[18] Findings of Fact, Conclusions of Law, and Decision and Order Granting Defendants' Motions to Dismiss or, Alternatively, for Partial Summary Judgment at 12, Pele Defense Fund v. Paty, No. 89-089 (Haw. 3d Cir. 1991).

[19] *Pele*, 73 Haw. at 620, 837 P.2d at 1272.

[20] *Id.* at 590, 611, 837 P.2d at 1256, 1267.

[21] *Id.* at 622, 837 P.2d at 1273.

cultural, and religious purposes.[22] During the pendency of the remand to the Third Circuit, the Supreme Court of the United States denied certiorari on February 22, 1993.[23]

III. History of the Law

Within the United States, the Hawaiian land tenure system is unique. Property law evolved from the absolute ownership of all land by the Hawaiian monarch.[24] A basic knowledge of the origin of Hawaiian native tenant rights is essential to understanding the state constitutional mandate to protect customary and traditional rights for subsistence, cultural, and religious purposes.

A. *The Origin of Hawaiian Native Tenant Rights*

When the Hawaiian islands were unified under a common leadership in 1810, "Kamehameha I, by right of conquest became lord paramount of these islands. . . . He was the owner of all the land in the kingdom, whether under the sea or above it."[25] Although the land belonged to the king, his subjects "necessarily required the use of land on which to reside, and for agricultural and other purposes."[26] Hawai'i's first king "assigned his newly amassed lands in accordance with ancient and well-tested political principles."[27] Basic land divisions were distributed by the King to favored chiefs, subject to dispossession at the King's pleasure.[28] All who utilized land owed Kamehameha I the following in return for the use of his land: services demanded at will, a land tax, and a portion of the land's products.[29]

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[22] *Id.* at 585, 837 P.2d at 1254.

[23] ___ U.S. ___, 113 S. Ct. 1277 (1993).

[24] Jon J. Chinen, The Great Mahele: Hawaii's Land Division of 1848 (1958). "By right of conquest, each king was lord paramount and owner of all the lands within his jurisdiction. . . . When King Kamehameha I brought all the islands under his control . . . he simply utilized the land system in existence." *Id.* at 5-6. *See generally* Neil M. Levy, *Native Hawaiian Land Rights*, 63 Cal. L. Rev. 848, 848-66 (1975) (discussing the history of native Hawaiian landholdings until 1920).

[25] Territory v. Liliuokalani, 14 Haw. 88, 99 (1902).

[26] Louis Cannelora, The Origin of Hawaii Land Titles and of the Rights of Native Tenants 1 (1974).

[27] Maivân Clech Lâm, *The Kuleana Act Revisited: The Survival of Traditional Hawaiian Commoner Rights in Land*, 64 Wash. L. Rev. 233, 252 (1989).

[28] Kalipi v. Hawaiian Trust Co., 66 Haw. 1, 6, 656 P.2d. 745, 749 (1982).

[29] Chinen, *supra* note 24, at 6.

Each island was divided into basic units known as *ahupua'a*.[30] An *ahupua'a* could vary in size from 100 to 100,000 acres, and "[i]deally, it was an economically self-sufficient, pie-shaped unit which ran from the mountain tops down ridges, spreading out at the base along the shore."[31] The *ahupua'a* chief or land agent, collectively known as *konohiki*,[32] administered the *ahupua'a*, and the *maka'āinana*[33] worked under the supervision of the chiefs and priests in communal endeavors to support the chiefs and priests.[34] However, within the *ahupua'a* boundaries, the commoner tenants had liberal rights to use the resources which included "the right to hunt, gather wild plants and herbs, fish off-shore, and use parcels of land for taro[35] cultivation together with sufficient water for irrigation."[36]

Although the traditional Hawaiian land tenure system appeared similar to Western feudalism, important distinctions existed. First, the commoners did not owe military service to the *konohiki*.[37] Second, the *konohiki* enjoyed no hereditary claim to the land.[38] Third, the commoners were not serfs bound to the land, but could freely move to other *ahupua'a* if treated unfairly.[39] Fourth, abuses by *konohiki* were minimized because if the workforce of an *ahupua'a* became unstable due to mistreatment by the *konohiki*, it was likely that the high chief would replace the *konohiki* for failing to make the land productive.[40] Fifth, the commoners had liberal rights to use the *ahupua'a* resources and to freely move and trade within the boundaries of the *ahupua'a*.[41]

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[30] CANNELORA, *supra* note 26, at 2.

[31] HANDBOOK, *supra* note 2, at 3 (citing In re Boundaries of Pulehunui, 4 Haw. 239, 239-242 (1879)).

[32] *Konohiki* originally referred to a land agent appointed by a superior chief. However, in time, the term was extended to include the chiefs or landlords. Territory v. Bishop Trust Co., 41 Haw. 358, 361-62 (1956).

[33] *Maka'āinana* is defined as commoner, populace, people in general, citizen, subject. MARY K. PUKUI & SAMUEL H. ELBERT, HAWAIIAN DICTIONARY 224 (1986).

[34] HANDBOOK, *supra* note 2, at 3-4.

[35] Taro, also known as kalo, has been a staple in the Hawaiian diet from the earliest times to the present. PUKUI & ELBERT, *supra* note 33, at 542, 123. It is defined as a plant of the arum family which is cultivated in tropical regions and elsewhere for the edible tuber. THE RANDOM HOUSE DICTIONARY 1944 (2d ed. 1987).

[36] HANDBOOK, *supra* note 2, at 4.

[37] Lâm, *supra* note 27, at 240; HANDBOOK, *supra* note 2, at 4.

[38] Lâm, *supra* note 27, at 240.

[39] HANDBOOK, *supra* note 2, at 4.

[40] *Id.*

[41] *Id.*

After Kamehameha I's death, his son Liholiho took the throne as Kamehameha II with the dowager Queen Ka'ahumanu in 1819.[42] Kamehameha II left the majority of the lands in the possession of his father's chiefs with the understanding that the lands would eventually return to the king.[43] In so doing, however, he "further strengthened the stability of *ali'i*[44] tenure and reinforced the expectation that chiefs would hold land hereditarily."[45] Thus, when Kamehameha III took the throne at age 12, the Council of Chiefs was able to convince him to adopt a formal policy, later known as the Law of 1825,[46] which granted the chiefs hereditary succession in the land.[47]

By 1839, overharvesting had caused the collapse of the sandalwood and whaling trades, and large-scale Hawaiian agricultural production for the growing California market became an attractive investment alternative.[48] However, before investors would commit large sums of capital for agricultural production, they required a more secure land tenure system. The desire for an agricultural industry was a major impetus for the government to westernize Hawaiian land tenure.[49] In response, the Hawaiian government enacted a trio of constitutional and statutory measures.

The first measure, the Declaration of Rights, was proclaimed in 1839 by Kamehameha III securing protection to "all the people, together with their lands, their building lots, and all their property . . . and nothing whatever shall be taken from any individual except by express provision of the laws."[50] The second measure, the kingdom's first constitution, was granted by Kamehameha III the following year in 1840 to formally declare that the land belonged to the chiefs and the people, with the king acting as trustee for all:

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[42] *Id.* at 5.

[43] *Id.*

[44] *Ali'i* is defined as chief, chiefess, officer, ruler, monarch. PUKUI & ELBERT, *supra* note 33, at 20.

[45] Lâm, *supra* note 27, at 252.

[46] At the national council held on June 6, 1825, Lord Byron presented a paper to the chiefs containing various policy suggestions for the Hawaiian government, including suggestion number three: "That the lands which are now held by the chiefs shall not be taken from them, but shall descend to their legitimate children, except in cases of rebellion, and then all their property shall be forfeited to the king." 1 RALPH S. KUYKENDALL, THE HAWAIIAN KINGDOM 1778-1854, at 119-20 (1938).

[47] HANDBOOK, *supra* note 2, at 5.

[48] *Id.*

[49] *Id.*

[50] LORRIN A. THURSTON, THE FUNDAMENTAL LAW OF HAWAII 1 (1904).

> Kamehameha I, was the founder of the kingdom, and to him belonged all the land from one end of the Islands to the other, though it was not his own private property. It belonged to the chiefs and people in common, of whom Kamehameha I was the head, and had the management of the landed property.[51]

The third measure was endorsed by the legislature in 1846 and was known as the "Principles Adopted by the Board of Commissioners to Quiet Land Titles in the Adjudication of Claims Presented to Them" (Principles).[52] The Principles consisted of restated provisions of several land tenure statutes enacted between 1840 and 1846, which had been adopted by the Board of Commissioners to Quiet Land Titles (Land Commission).[53] Under the Principles, three classes of persons possessed vested land rights: the government, the landlord, and the tenant.[54] However, under the laws of the Kingdom in 1846, the Land Commission lacked authority to separate the existing undivided interest of the King and the chiefs in the land. Moreover, no alien could acquire fee simple title to land,[55] nor was provision made for the acquisition of title by native tenants, although tenant rights were expressly recognized in the Principles.[56]

To fulfill the Principles and remedy the perceived defects in the law, Chief Justice William Lee[57] formulated a plan to partition the King's and chiefs' interest in the land.[58] The King would retain nearly 2.5

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[51] *Id.* at 3.

[52] Lâm, *supra* note 27, at 253.

[53] The Land Commission was established to:

> investigate and ascertain or reject all claims of private individuals, whether natives or foreigners, to land acquired prior to the creation of the commission [in 1845]. Its decisions were based on the existing land laws of the kingdom, including 'native usages in regard to landed tenures' and could be appealed only to the Hawaii Supreme Court.

HANDBOOK, *supra* note 2, at 6 (citing 2 REV. LAWS HAW. 2123 (1925)).

[54] CANNELORA, *supra* note 26, at 10.

[55] Aliens were ineligible to acquire leasehold estates without first obtaining a certificate of nationality. *Id.*

[56] The seventh Principle expressly recognized tenant rights because it provided that titles to all lands claimed to be held by natives or foreigners would belong to the government if the claims were not presented to the Land Commission on or before February 14, 1848. *Id.*

[57] William Lee was a member of the Land Commission and Chief Justice of the Supreme Court of Law and Equity. LINDA S. PARKER, NATIVE AMERICAN ESTATE: THE STRUGGLE OVER INDIAN AND HAWAIIAN LANDS 114 (1989).

[58] HANDBOOK, *supra* note 2, at 7.

million acres of land as personal property, subject only to the rights of native tenants.[59] The remaining areas of the kingdom would be divided into thirds between the government, the *konohiki*, and the tenants.[60] Lee's plan necessitated the implementation of another trio of measures which would forever change the traditional Hawaiian land tenure system: (1) The Great *Mahele* of 1848,[61] separating Crown from *konohiki* interests; (2) the Act of July 10, 1850,[62] authorizing foreigners to own land in fee simple; and (3) the Kuleana Act of 1850,[63] extending the fee simple regime to commoners.[64]

The first measure, The *Mahele*, consisted of more than 240 mutual quitclaim agreements between the King and the *konohiki* on all the islands to separate the lands in which they held an undivided interest.[65] The process took 39 days, each *mahele* was recorded in The *Mahele* Book, and individual *mahele* were referred to collectively as The *Mahele*.[66] However, The *Mahele* did not convey title to land because the *konohiki* were still required to present their claim before the Land Commission to receive a Land Commission Award.[67] After tendering a commutation tax to the Minister of the Interior, they received allodial title to the land in the form of a royal patent.[68] The lands ultimately owned by the chiefs and *konohiki* became known as *Konohiki* Lands.[69]

The day after the completion of The Great *Mahele*, Kamehameha III gave approximately 1.5 million acres of the nearly 2.5 million acres he had claimed for personal use to the government, which became known as Government Lands.[70] The King registered the remaining one million acres of Crown Lands for himself, his heirs, and his successors.[71] The lands "identified and separated in 1848 as Crown Lands, Government Lands, and *Konohiki* Lands were all subject to the rights of native tenants."[72]

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[59] *Id.*
[60] *Id.*
[61] Act of June 7, 1848, 2 REV. LAWS HAW. 2152-76 (1925).
[62] 2 REV. LAWS HAW. 2233, 2234 (1925).
[63] Act of Aug. 6, 1850, 2 REV. LAWS HAW. 2141-42 (1925).
[64] Lâm, *supra* note 27, at 259.
[65] CHINEN, *supra* note 24, at 16.
[66] CANNELORA, *supra* note 26, at 13.
[67] CHINEN, *supra* note 24, at 20.
[68] *Id.* at 20-21; HANDBOOK, *supra* note 2, at 7.
[69] CHINEN, *supra* note 24, at 20.
[70] Lâm, *supra* note 27, at 260.
[71] *Id.*
[72] CHINEN, *supra* note 24, at 29 (citing 1 LAWS HAW. 22 (1848); 2 REV. LAWS HAW. 2152-76 (1925)).

The second measure, the Act of July 10, 1850, specified that "any alien, resident in the Hawaiian Islands, may acquire and hold to himself, his heirs and assigns, a fee simple estate in any land of this kingdom, and may also convey the same by sale, gift, exchange, will or otherwise, to any Hawaiian subject, or to any alien, resident . . . ."[73] The statute contained the proviso that in the event of a dispute regarding rights, title, or interest, the alien owner shall submit a claim to the judicial tribunals of the kingdom, and abide by the final decision.[74] As a practical matter, the Act allowed alien residents "full rights to acquire, hold and dispose of land . . . and the Land Commission entertained claims of aliens from and after that date."[75]

Because a fee simple estate was awarded by the Land Commission under the terms of the Act of July 10, 1850, arguably the customary and traditional rights of native tenants on land held by resident aliens were extinguished by this Act.[76] Section 3 of the 1854 statute providing for the dissolution of the Land Commission lends credence to this argument:

> Any award of the Land Commission . . . shall be final and binding upon all parties, and shall be a good and sufficient title to the person receiving such award, his heirs or assigns, and shall furnish as good and sufficient a ground upon which to maintain an action for trespass, ejectment or other real action, against any person or persons whatsoever, as if the claimant, his heirs or assigns, had received a Royal Patent for the same; provided that nothing in this section shall be construed as annulling the Government right to commutation in any freehold award as at present established by law.[77]

The third and final measure was the Kuleana Act of 1850,[78] which authorized the Land Commission to award native tenants occupying and improving Government, Crown, and *Konohiki* Lands fee simple title to their own plot, known as a *kuleana*.[79] Native tenants were not required to pay a commutation tax because the owner of the *ahupua'a*

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[73] Act of July 10, 1850, 2 REV. LAWS HAW. 2233, 2234 (1925).

[74] *Id.*

[75] CANNELORA, *supra* note 26, at 17.

[76] After 1850 when aliens gained the right to purchase land, both the chiefs and commoners readily sold their lands to aliens, but the commoners "did not realize that they surrendered all rights to the use of the land when they sold their kuleana." PARKER, *supra* note 57, at 115.

[77] Act approved July 20, 1854, 2 REV. LAWS HAW. 2146, 2146 (1925).

[78] Act of Aug. 6, 1850, 2 REV. LAWS HAW. 2141-42 (1925).

[79] *Id.*

or the *ili kūpono*[80] was wholly responsible for paying the commutation.[81] Because the *ahupua'a* or *ili k;mcupono* owner paid the commutation, he was deemed to have the reversionary interest in all *kuleana* located on his land if the native tenant died without an heir.[82] Other restrictions on *kuleana* land claims included a house lot size not to exceed one quarter of an acre, and a claim to only those agricultural plots which the tenant actually cultivated.[83] *Kuleana* claimants were also required to "pay for a survey of the lands as well as bring two witnesses to testify to the tenant's right to the land."[84]

Every section of the Kuleana Act was repealed over the years with the exception of section 7, which today comprises Hawaii Revised Statutes section 7-1.[85] Section 7-1 detailed the items native tenants could gather and access, and was included at the insistence of King Kamehameha III, as reflected in the Privy Council minutes: "[The] proposition of the King, which he inserted as the seventh clause of the law, as a rule for the claims of common people to go to the mountains, and the seas attached to their own particular lands exclusively, is agreed . . . ."[86] Thus, customary and traditional gathering and access rights of *ahupua'a* tenants were preserved by the Kuleana Act and its successor, Hawaii Revised Statutes section 7-1, on Government, Crown, and *konohiki*-owned portions of *ahupua'a*.[87]

However, developed tenant-owned *kuleana* parcels were arguably not addressed by the Kuleana Act or Hawaii Revised Statutes section 7-1. This is due to the fact that successful *kuleana* claimants were awarded fee simple title to house lots and cultivated plots within the *ahupua'a* which had been developed by the tenant for personal use.[88] The fee simple title conferred upon the *kuleana* claimant the right to press charges of trespass and ejectment.[89] It is implicit then, that *kuleana*

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[80] *Ili kūpono* is defined as nearly independent land divisions within an *ahupua'a* paying tribute to the ruling chief, not to the chief of the *ahupua'a*. PUKUI & ELBERT, *supra* note 33, at 98.

[81] CHINEN, *supra* note 24, at 30.

[82] *Id.*

[83] Act of Aug. 6, 1850, 2 REV. LAWS HAW. 2141, 2142 (1925).

[84] HANDBOOK, *supra* note 2, at 8.

[85] *Id.* at 214.

[86] *Id.*

[87] Act of Aug. 6, 1850, 2 REV. LAWS HAW.. 2141, 2141 (1925).

[88] *Id.* at 2142.

[89] The statute which provided for the dissolution of the Land Commission stated that "[a]ny award of the Land Commission . . . shall be final and binding upon all

tenants could prevent other tenants from entering and gathering upon their developed house lot or agricultural plot. In contrast, the undeveloped areas within the *ahupua'a* were available for access and gathering by all tenants who lived within that particular *ahupua'a*. Thus, it can be argued that customary and traditional rights never permitted indiscriminate access and gathering on the developed *kuleana* parcels of other tenants which were intended for personal use. The implication is that today even the liberal customary and traditional rights doctrine does not afford entry and use of another's land which is intended for personal use, even though the land may not appear developed, such as natural gardens and pastures within property lines.

B. *Access and Gathering Rights for Subsistence, Cultural, and Religious Purposes*

Access rights to the mountains and the sea within the *ahupua'a*, as well as between different *ahupua'a*, were an integral part of the ancient Hawaiian lifestyle.[90] Foot trails traversing *ahupua'a* were the primary means of ground transportation, and the use of trails was open to all classes of people.[91] There are few recorded rules governing trail use, perhaps due to a sixteenth century declaration, later adopted by Kamehameha I as a *kānāwai*,[92] allowing old men, women, and children to sleep safely along the road side.[93]

Vertical trails within *ahupua'a* provided tenants with inland access to tend taro patches or other crops, as well as to gather, hunt, and perform religious activities.[94] Horizontal trails, located primarily along the shoreline, served as thoroughfares for travel between *ahupua'a*.[95] The original network of trails on all the major Hawaiian islands was greatly altered or destroyed by several events: the introduction of horses to the islands in 1803, the passage of laws by the Hawaiian government

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parties, . . . and shall furnish as good and sufficient a ground upon which to maintain *an action for trespass, ejectment or other real action, against any person or persons whatsoever* . . . ." Act approved July 20, 1854, 2 REV. LAWS HAW. 2146, 2146 (1925) (emphasis added).

[90] HANDBOOK, *supra* note 2, at 211.

[91] *Id.* at 211-12.

[92] *Kānāwai* is defined as a law, code, rule, statute, act, regulation, ordinance, decree, edict. PUKUI & ELBERT, *supra* note 33, at 127.

[93] HANDBOOK, *supra* note 2, at 212.

[94] *Id.*

[95] *Id.*

to construct roads, the failure of the Land Commission to record trails, the development of large land tracts for commercial ranching and agricultural operations, and the shifting of native settlements out of the *ahupua'a* into the cities as Hawaii evolved from a subsistence to a mercantile economy.[96]

Ancient Hawaiian gathering rights primarily served to supplement the subsistence lifestyle of native tenants, and were dependent upon access rights.[97] Gathering served three crucial purposes. First, it allowed native tenants to supplement their dietary, medicinal, religious, ornamental, and ceremonial practices with plants, animals, and aquatic life that did not grow on or near their house lot or cultivated plot.[98] Second, it provided for the retrieval of large forest products for communal purposes such as canoe building or crafting house rafters.[99] Third, during times of famine or drought it allowed foraging as a means of survival.[100] Hunting feral pig was considered a form of gathering,[101] as was taking aquatic life in ocean waters and mountain pools.[102] Early Hawaiians cultivated relatively small areas of the total acreage available on each island, but were able to utilize substantial uncultivated areas through gathering.[103]

As with access rights, little has been written regarding the rules of gathering rights. However, it is known that the *kapu* system[104] was imposed by the chiefs on the size, type, number, and manner in which items could be gathered.[105] The Laws of 1839 represent the earliest effort to codify uniform gathering rights on all islands,[106] and imposed several restrictions on native tenant gathering rights. First, the *konohiki*

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[96] *Id.* at 212-13.

[97] *Id.* at 223.

[98] *See* EDWARD S. C. HANDY & ELIZABETH G. HANDY, NATIVE PLANTERS IN OLD HAWAII 234-41 (1972).

[99] *See* EDWARD S. C. HANDY & MARY K. PUKUI, THE POLYNESIAN FAMILY SYSTEM IN KAU'U, HAWAI'I 218-19 (1958).

[100] *See* HANDY & HANDY, *supra* note 98, at 234-36.

[101] HANDBOOK, *supra* note 2, at 223 (citing HANDY & HANDY, *supra* note 98, at 253).

[102] *See* MARGARET TITCOMB, NATIVE USE OF FISH IN HAWAII 4 (1972).

[103] HANDBOOK, *supra* note 2, at 224.

[104] The *kapu* system is a complex structure of rules and laws which Hawaiian society used to protect the *mana*, or supernatural power believed to be present in individuals and places, and to protect others from harm due to such supernatural power. *Id.* at 306-07.

[105] *Id.* at 224.

[106] *Id.*

was allowed to reserve one kind of non-cultivated tree for his exclusive use, and if a tenant took such a tree, it must be split equally with the *konohiki*.[107] Second, Kamehameha III prohibited the taking of sandalwood, except for the King.[108] Third, no tenant or *konohiki* could take any tree which was so large that a man could not place his arms completely around it, unless such a tree was taken for communal purposes such as canoe or paddle building.[109] And fourth, the taking of native *Mʻōʻō*[110] and *mamo* birds[111] was reserved exclusively for the King.[112]

Ultimately, several principal factors contributed to the decline in gathering practices by Hawaiians, including tenant neglect of personal plots when the desire for sandalwood to exchange for western goods became great.[113] Also, the clearing of land for cultivated export crops obliterated gathering areas, and the introduction of cattle and goats likewise destroyed such areas.[114] Finally, many tenants abandoned their subsistence lifestyle to find employment in the cities when Hawaiʻi adopted a mercantile economy.[115]

C. *The Constitutional and Statutory Bases of Hawaiian Native Tenant Rights*

Today, Hawaiian native tenant rights derive from three basic sources: article XII, section 7 of the Hawaii Constitution, Hawaii Revised Statutes section 7-1, and Hawaii Revised Statutes section 1-1. Article XII, section 7 of the state constitution generically discusses customary and traditional rights, and is framed as one long sentence. For purposes of later discussion, it is helpful to separate the sentence into discrete segments:

> [1] The State reaffirms and shall protect all rights,
> [2] customarily and traditionally exercised

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[107] *Id.*

[108] *Id.*

[109] *Id.*

[110] *Mʻōʻō* birds are defined as extinct black honey eaters with yellow feathers used for featherwork. Pukui & Elbert, *supra* note 33, at 290.

[111] *Mamo* birds have not been seen since the late 1800s and are defined as black Hawaiian honey creepers with yellow feathers used in the choicest featherwork. Pukui & Elbert, *supra* note 33, at 235.

[112] Handbook, *supra* note 2, at 224.

[113] Handy & Pukui, *supra* note 99, at 234-35.

[114] Handbook, *supra* note 2, at 225.

[115] *Id.*

[3] for subsistence, cultural and religious purposes
[4] and possessed by ahupua'a tenants
[5] who are descendants of native Hawaiians
[6] who inhabited the Hawaiian Islands prior to 1778,
[7] subject to the right of the State to regulate such rights.[116]

Hawaii Revised Statutes section 7-1 is a recitation of the specific rights of native tenants listed verbatim in section 7 of the Kuleana Act of 1850, as amended in 1851:

> Where the landlords have obtained, or may hereafter obtain, allodial titles to their lands, the people on each of their lands shall not be deprived of the right to take firewood, house-timber, aho cord,[117] thatch, or ki leaf,[118] from the land on which they live, for their own private use, but they shall not have a right to take such articles to sell for profit. The people shall also have a right to drinking water, and running water, and the right of way. The springs of water, running water, and roads shall be free to all, on all lands granted in fee simple; provided that this shall not be applicable to wells and watercourses, which individuals have made for their own use.[119]

Finally, Hawaii Revised Statutes section 1-1 codifies Hawaiian usage as an exception to the English common law of the State of Hawaii:

> The common law of England, as ascertained by English and American decisions, is declared to be the common law of the State of Hawaii in all cases, except as . . . established by Hawaiian usage; provided that no person shall be subject to criminal proceedings except as provided by the written laws of the United States or of the State.[120]

Of the three sources, Hawaii Revised Statutes section 7-1 has been cited most frequently in litigation by native Hawaiians asserting access and gathering rights.[121] Historically, however, section 7-1 has been

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[116] HAW. CONST. art. XII, § 7.

[117] *'Aho* is defined as thatch purlin. PUKUI & ELBERT, *supra* note 33, at 8.

[118] *Kī* leaf is defined as the leaf of the ti plant, a woody plant in the lily family, used to make such items as house thatch, food wrappers, hula skirts, and sandals. *Id.* at 145.

[119] HAW. REV. STAT. § 7-1 (1985) (footnotes added).

[120] HAW. REV. STAT. § 1-1 (1985).

[121] *See* Palama v. Sheehan, 50 Haw. 298, 299, 440 P.2d 95, 97 (1968); Haiku Plantations Ass'n v. Lono, 1 Haw. App. 263, 263, 618 P.2d 312, 313 (1980); Rogers v. Pedro, 3 Haw. App. 136, 138, 642 P.2d 549, 551 (1982); Kalipi v. Hawaiian Trust Co., 66 Haw. 1, 4, 656 P.2d 745, 747 (1982). *See also* Oni v. Meek, 2 Haw. 87, 87-88, 91-92 (1858) (implicitly addressed Hawaii Revised Statutes section 7-1 via the Law of November 7, 1846, a predecessor of the Kuleana Act of 1850).

interpreted by the courts to narrow the scope of the rights granted due to its explicit list of gatherable items which has been construed as an exhaustive inventory of access and gathering rights.[122] Hawaii Revised Statutes section 1-1 has rarely been cited as a source of native tenant rights, although it arguably encompasses a broader scope of rights because the nonspecific term "Hawaiian usage" can be liberally interpreted by the courts. Article XII, section 7 of the Hawaii Constitution had not been asserted as the foundation of an access and gathering rights claim until PDF alleged that the defendants violated the article by the continued denial of access into the exchanged lands for PDF tenants seeking to exercise customary and traditional native tenant rights.[123]

Under principles of statutory construction, the Hawaii Constitution is the organic law of the state and is superior to the two state statutes discussed above.[124] The following section, however, will discuss how article XII, section 7 has stirred great controversy since its inception. A review of the aggregate records comprising the legislative history of article XII, section 7 reveals heated debates among the drafters regarding the wisdom of granting non-specified rights in a constitutional amendment. The records also contain an accurate prediction of the litigious fruit that a non-specific amendment would bear.

D. Legislative History

Article XII, section 7 of the Hawaii Constitution was added during the Constitutional Convention of 1978 and ratified in the November 7, 1978 general election.[125] Standing Committee Report Number 57 indicated that the Committee on Hawaiian Affairs proposed the amendment to reaffirm and protect all rights possessed by ancient Hawaiian native tenants, while providing the State power to regulate these rights.[126] However, the legislative history of article XII, section 7 also

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[122] *Oni*, 2 Haw. at 94-5; *Haiku Plantations*, 1 Haw. App. at 266, 618 P.2d at 314.

[123] Pele Defense Fund v. Paty, 73 Haw. 578, 613, 837 P.2d 1247, 1268 (1992), *cert. denied*, ___U.S. ___, 113 S. Ct. 1277 (1993).

[124] WALTER F. DODD, THE REVISION AND AMENDMENT OF STATE CONSTITUTIONS 237 (1910) (stating that ordinary statutes are subject to state constitutional provisions both as to the method of enactment and as to content).

[125] *See* HAW. CONST. art. XII, § 7.

[126] STAND. COMM. REP. NO. 57, *reprinted in* 1 PROCEEDINGS OF THE CONST. CONVENTION OF HAW. OF 1978, at 639 (1980).

contained evidence of serious conflict among the drafters regarding the broad scope of the rights granted. This conflict was documented in Committee of the Whole Report Number 12,[127] the Debates in Committee of the Whole on Hawaiian Affairs on Committee Proposal 12 (Debates),[128] and Committee of the Whole Report Number 12, Committee Proposal Number 12 (Proposal Number 12).[129]

In addition to protecting native tenant rights, Standing Committee Report Number 57 explicitly indicated that the drafters also desired to protect the rights of private land owners. The report stated: "Your Committee did not intend these [native tenant] rights to be indiscriminate or abusive to others[;] . . . [and] reasonable regulation is necessary to prevent possible abuse as well as interference with these rights."[130]

Another report, Committee of the Whole Report Number 12, reiterated that article XII, section 7 "does not attempt to grant unregulated, abusive and general rights to native Hawaiians. . . ."[131] This report indicated that the drafters anticipated regulation of customary and traditional native tenant rights in order to protect tenant rights and the rights of undeveloped property owners: "[a]lthough the enforcement problems require careful consideration of regulation changes in this area, it is possible, with work, to protect the rights of private land owners and allow for the preservation of an aboriginal people."[132] Thus, in addition to protecting native tenant rights, two reports manifest concern by the drafters for private land owners whose property rights might be abused by the exercise of native tenant practices on their land, and for needed state regulation of such practices where conflicts occur.

The Debates and Proposal Number 12 are particularly illuminating because they further reveal that the committee that drafted article XII,

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[127] COMM. WHOLE REP. NO. 12, *reprinted in* 1 PROCEEDINGS OF THE CONST. CONVENTION OF HAW. OF 1978, at 1016-17 (1980).

[128] DEBATES IN COMM. OF THE WHOLE ON HAWAIIAN AFFAIRS, COMM. P. NO. 12 [hereinafter DEBATES], *reprinted in* 2 PROCEEDINGS OF THE CONST. CONVENTION OF HAW. OF 1978, at 425-27, 432-37 (1980).

[129] COMM. WHOLE REP. NO. 12, COMM. P. NO. 12 [hereinafter COMM. P. NO. 12], *reprinted in* 1 PROCEEDINGS OF THE CONST. CONVENTION OF HAW. OF 1978, at 273-78 (1980).

[130] STAND. COMM. REP. NO. 57, *reprinted in* 1 PROCEEDINGS OF THE CONST. CONVENTION OF HAW. OF 1978, at 639 (1980).

[131] COMM. WHOLE REP. NO. 12, *reprinted in* 1 PROCEEDINGS OF THE CONST. CONVENTION OF HAW. OF 1978, at 1016 (1980).

[132] *Id.*

section 7 did not know exactly what customarily and traditionally exercised native tenant rights were, nor could they agree to whom the rights appertained. Contrary to the *Pele* holding, Delegate Wurdeman stated the amendment did not "seek any new infringement on private property,"[133] and Delegate Hue indicated the rights of non-natives were not precluded: "Just as the right to free speech is not the right to slander, the right to peaceably assemble is not the right to cause riot or mob destruction, these personal rights do not negate other personal rights. All rights must function in relation to all others."[134]

Delegate Kaapu explained that when the land of the Republic of Hawaii was ceded to the United States at the time of annexation, it was given with the understanding that all traditions and rights would continue until Congress could legislate otherwise.[135] Congress never did pass legislation regarding the traditions and rights.[136] Kaapu predicted that:

> What those [native tenant rights] are will be determined, I'm afraid, by lawyers such as yourself and others as they handle trespass charges and other things down the line. . . . That is going to be a problem for historians; historians and lawyers together will finally develop the precise nature of [native tenant rights].[137]

Delegate Burgess was dissatisfied with the ambiguity of the rights granted in the committee report: "I'm very uneasy about granting rights in a constitution unless we know specifically, and with specific understanding, exactly what rights we are dealing with."[138] However Delegate Ontai subsequently assured the drafters that the legislature would change the wording of the amendment so that "it will come out as something everybody can live with. So again I say, have no fear, you have that safety clause. The legislature, as you know, goes through things pretty thoroughly."[139]

The committee discussions continued and are documented in Proposal Number 12. Delegate Burgess moved to delete the entire section on customary and traditional rights because the drafters could not

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[133] DEBATES, *reprinted in* 2 PROCEEDINGS OF THE CONST. CONVENTION OF HAW. OF 1978, at 434 (1980).

[134] *Id.*

[135] *Id.* at 435-36.

[136] *Id.* at 436.

[137] *Id.*

[138] *Id.*

[139] *Id.* at 437.

precisely define the rights.[140] He had done research since the debates, and concluded that native tenant rights under both ancient custom and the laws of 1847 were abrogated and superseded by Hawaii Revised Statutes section 7-1.[141] His research indicated that the native tenant rights in section 7-1 applied exclusively to *kuleana* owners within the *ahupua'a*, rather than to all native Hawaiians.[142] Consequently, Delegate Burgess desired to delete article XII, section 7 because "the proposed amendment to our Constitution . . . goes beyond the law as it presently exists, . . . far beyond what most of us understand it to do."[143] Amending the constitution, he concluded, "should be done carefully and without changing the law as it had come into existence over the last 150 or 200 years."[144]

However, Delegate De Soto disagreed by indicating that section 7-1 of Hawaii Revised Statutes was the successor of the Kuleana Act, which intended that the rights be reserved to the commoners,[145] not merely to *kuleana* owners within an *ahupua'a* as Delegate Burgess asserted. Delegate Kaapu explained that the problem involved the translation of Hawaiian terms into English equivalents which could not precisely convey the meaning of native rights.[146] He concluded:

> For this reason, I think that the proposal . . . would seek to reestablish for those Hawaiians any rights which they once had which were never properly given up, so that in some future court of law or in some action of the legislature these can be better defined and made available today.[147]

Delegate Campbell stated that the language of Hawaii Revised Statutes section 7-1 "revealed attorneys could differ in interpretation . . . [however,] unless the term 'people' meant 'tenant' there seemed no purpose for the section at all."[148] Delegate Hale lamented that "[n]o one has really specified what rights we are talking about, . . ." and questioned the legitimacy of a constitutional amendment purportedly granting "rights that are in [Hawaii Revised Statutes section 7-

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[140] COMM. P. No. 12, *reprinted in* 1 PROCEEDINGS OF THE CONST. CONVENTION OF HAW. OF 1978, at 274 (1980).

[141] *Id.* at 274-75.

[142] *Id.* at 275.

[143] *Id.*

[144] *Id.*

[145] *Id.*

[146] *Id.* at 276.

[147] *Id.*

[148] *Id.* at 277.

1] that cannot be enforced right now, even though the law is on the books.''[149] Finally, Delegate Waihee stated that "the provision provided the vehicle for an individual to prove the existence of traditional rights and that if [the individual] met the burden of proof, the right would then become subject to the regulations of the State.''[150] This comment by the future governor of the State of Hawaii ended the discussions on proposed article XII, section 7. Delegate Burgess's motion to delete the entire section on customary and traditional rights was thereafter defeated.[151]

Thus, the legislative history of article XII, section 7 clearly indicates the existence of an inherent conflict between customary and traditional rights and western property law.[152] Cognizant of this conflict, the drafters failed to include language which would clarify the scope of the native tenant rights granted and to whom they appertained, despite the unresolved controversy which erupted in the committee debates and continued in Proposal Number 12. Nor did the state legislature ever clarify the meaning of the rights, as anticipated by Delegate Ontai. The scenario predicted by Delegate Kaapu, however, that lawyers handling trespass charges in some future court of law would determine the scope of the rights and to whom they appertained, came to pass fourteen years later when the Hawaii Supreme Court reviewed *Pele Defense Fund v. Paty*.[153]

E. Prior Case Law

There are few Hawaiian native tenant cases which precede the *Pele* decision and involve access, gathering, subsistence, cultural, or religious claims. The following case discussions lay the foundation for analysis of the *Pele* court's decision to abolish the longstanding *ahupua'a* residency requirement. They also aptly illustrate the inherent conflict between Hawaiian native tenant rights and western property law, and the Hawaii Supreme Court's history of judicial activism regarding ancient Hawaiian custom under the Richardson Court.[154]

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[149] *Id.*

[150] *Id.* at 278.

[151] *Id.*

[152] STAND. COMM. REP. No. 57, *reprinted in* 1 PROCEEDINGS OF THE CONST. CONVENTION OF HAW. OF 1978, at 639 (1980).

[153] 73 Haw. 578, 837 P.2d 1247 (1992), cert. denied, ___U.S. ___, 113 S. Ct. 1277 (1993).

[154] CAROL S. DODD, THE RICHARDSON YEARS: 1966-1982, at 53 (1985) [hereinafter

1. Access case law

Early Hawaiian access cases often relied upon the common law theory of easement by necessity.[155] However, the first Hawaii Supreme Court case to rely upon the Kuleana Act to interpret access rights, and thus to implicitly address its successor, Hawaii Revised Statutes section 7-1, was *Oni v. Meek*[156] in 1858. *Oni* addressed the issue of whether native tenant rights included the right to pasture animals within the *ahupua'a* of residency recognized under the Law of November 7, 1846, a predecessor of the Kuleana Act.[157] The Hawaii Supreme Court rejected Oni's claim, holding that the right of pasturage under the 1846 law had been abrogated and superseded by the Kuleana Act, which contained "*all* the specific rights of the *hoa'āina*[158] (excepting fishing rights)," because the former right "was inconsistent with the new system" and "would interfere with vested rights" of the *konohiki*.[159] The court also declared the term "people," which is used in the seventh section of the Kuleana Act, to be synonymous with the term "tenants."[160] Thus, the court construed the Kuleana Act to narrow the scope of the native tenant rights granted, due to its explicit list of

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DODD, RICHARDSON YEARS. William S. Richardson was appointed to the Hawaii Supreme Court in 1966. *Id.* at 52. Through a series of controversial decisions spanning Justice Richardson's 16 year tenure on the State's high court, the Hawaii Supreme Court showed "a willingness to defy the existing body of Anglo-American case law" by judicially recognizing the precepts and traditions of ancient Hawaiian culture. *Id.* at 54. Detractors charged the Richardson Court with judicial activism and a racial approach toward legal decision-making. *Id.* at 53. They felt the court assumed lawmaking and public policy functions which were assigned to other government bodies. *Id.* at 55. Some observers felt the court's approach, "if not racial, at least appeared to be biased toward 'local' peoples as opposed to 'outsiders' or newcomers to the islands." *Id.* at 53. However, Justice Richardson, a native Hawaiian, was convinced that native Hawaiians had been deprived of much of their own civilization, and that it was his judicial duty to return some island property to its rightful owners. *Id.* at 74-75. Supporters might assert that through these decisions the Richardson Court "merely attempted to correct imbalances created by island history and by earlier island courts . . . ." *Id.* at 75.

[155] *See, e.g.*, Kalaukoa v. Keawe, 9 Haw. 191 (1893); Henry v. Ahlo, 9 Haw. 490 (1894).

[156] 2 Haw. 87 (1858).

[157] *Id.* at 87-88, 91-92.

[158] *Hoa'āina* is defined as a tenant or caretaker on a *kuleana*. PUKUI & ELBERT, *supra* note 33, at 73.

[159] *Oni*, 2 Haw. at 94-95 (footnote added).

[160] *Id.* at 96.

gatherable items which the court viewed as a complete inventory of tenant access and gathering rights.

Palama v. Sheehan,[161] decided in 1968, was the first Hawaii Supreme Court case to interpret access rights using Hawaii Revised Statutes section 7-1.[162] Chief Justice Richardson wrote the unanimous decision which also "gave the first indication that he considered ancient Hawaiian practices valid precedent for modern legal decisions."[163] *Palama* addressed the issue of whether a right of way existed based upon ancient Hawaiian usage.[164] The Hawaii Supreme Court held that testimony indicating that the Sheehan's predecessors in title had used a trail through the Palama's property to travel from their *kuleana* house lot to their taro patches was sufficient evidence to find that a right of way existed, as well as a right of way by necessity.[165] The court also held that the right of way was wide enough to accommodate vehicular traffic, based upon evidence that in 1910 the Palama's predecessor in title had built a road over the trail.[166]

In 1980, the Intermediate Court of Appeals of Hawaii decided whether the access rights in Hawaii Revised Statutes section 7-1 included the right to park vehicles. In *Haiku Plantations Association v. Lono,*[167] the Court of Appeals affirmed the holding of the First Circuit Court that the access rights mandated in section 7-1 were limited to a right of way for ingress and egress, and did not include the right to park.[168] The court reasoned that *kama'āina*[169] testimony indicated cars were driven across the easement, but there was no evidence that they were actually allowed to park there.[170]

Two years later in *Rogers v. Pedro,*[171] the same court decided whether a landlocked *kuleana* owner could establish an easement by necessity under Hawaii Revised Statutes section 7-1. The Intermediate Court of Appeals affirmed the Second Circuit Court by holding that a *kuleana* owner could establish an easement by necessity under section 7-1 if it

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[161] 50 Haw. 298, 440 P.2d 95 (1968).

[162] HANDBOOK, *supra* note 2, at 215.

[163] DODD, RICHARDSON YEARS, *supra* note 154, at 55.

[164] 50 Haw. at 299, 440 P.2d at 97.

[165] *Id.* at 301, 440 P.2d at 98.

[166] *Id.* at 303, 440 P.2d at 99.

[167] 1 Haw. App. 263, 618 P.2d 312 (1980).

[168] *Id.* at 266, 618 P.2d at 314.

[169] *Kama'āina* is defined as native-born. PUKUI & ELBERT, *supra* note 33, at 124.

[170] 1 Haw. App. at 267, 618 P.2d at 314.

[171] 3 Haw. App. 136, 642 P.2d 549 (1982).

is clearly shown that the landlocked parcel is an ancient tenancy, or a *kuleana* whose origin is traceable to The Great *Mahele*.[172]

Thus, the early cases dealt primarily with access rights and relied upon Hawaii Revised Statutes section 7-1 to interpret those rights. The *Oni* and *Haiku Plantations* decisions restricted the scope of section 7-1 rights because the courts narrowly construed the statute as an exhaustive inventory of access and gathering rights. The *Palama* and *Rogers* opinions expanded the scope of the rights by relying upon ancient Hawaiian usage, *kama'āina* testimony, and origins traceable to The Great *Mahele*.

2. *Gathering case law*

The gathering rights of native tenants were finally addressed by a court more than a century after The Great *Mahele* in the 1982 case of *Kalipi v. Hawaiian Trust Co.*.[173] Chief Justice Richardson wrote the landmark Hawaii Supreme Court opinion. The reasoning was characteristic of the Richardson Court's "delving into island history, apparently disregarding a century of established law in significant instances, attempting to rely upon and apply native concepts, practices and precedents."[174]

Kalipi owned a taro patch in the *ahupua'a* of *Manawai* and a house lot in the *ahupua'a* of *'Ohia* on the island of Molokai; however, he lived in the nearby *ahupua'a* of *Keawenui*.[175] He filed suit against the owners of the *Manawai* and *'Ohia ahupua'a* claiming a right to gather there, despite the fact that he did not reside within those *ahupua'a*.[176] Kalipi based his claim upon three sources: (1) Hawaii Revised Statutes section 7-1, (2) Hawaii Revised Statutes section 1-1, and (3) the explicit reservations found in his original *kuleana* awards.[177] The defendants argued that traditional gathering should not be enforced as a matter of policy because it conflicted with the concept of fee simple land ownership.[178] Although it did not form the basis of the decision, article XII, section 7 of the Hawaii Constitution was acknowledged by the

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[172] *Id.* at 139, 642 P.2d at 551-52.
[173] 66 Haw. 1, 6, 656 P.2d 745, 748 (1982).
[174] DODD, RICHARDSON YEARS, *supra* note 154, at 52.
[175] 66 Haw. at 3, 656 P.2d at 747.
[176] *Id.*
[177] *Id.* at 4, 656 P.2d at 747.
[178] *Id.*

court to impose an obligation on the state to preserve and enforce customary and traditional native tenant rights.[179]

Regarding Kalipi's Hawaii Revised Statutes section 7-1 claim, the court held "that lawful occupants of an *ahupua'a* may, for the purposes of practicing native Hawaiian customs and traditions, enter undeveloped lands within the *ahupua'a* to gather those items enumerated in the statute. . . . subject to further governmental regulation."[180] Lawful occupants were defined by the court as "persons residing within the *ahupua'a* in which they seek to exercise gathering rights."[181] Because Kalipi did not reside within the *ahupua'a* where he sought to gather, the court held that he was not entitled to exercise gathering rights under section 7-1.[182]

The court's rationale for imposing the *ahupua'a* residency requirement, the restriction on gatherable items, and the regulation by the government was based upon the plain meaning of the statutory language.[183] However, the undeveloped land limitation was judicially imposed. The court reasoned that although the undeveloped land restriction was not explicitly stated in section 7-1, it must be a condition precedent since gathering on developed lands would conflict with western property law and with the traditional Hawaiian lifestyle of "cooperation and non-interference with the well-being of other residents."[184]

Regarding Kalipi's Hawaii Revised Statutes section 1-1 claim, the court upheld the Hawaiian usage exception to the state common law by declaring "that the retention of a Hawaiian tradition should in each case be determined by balancing the respective interests and harm once it is established that the application of the custom has continued in a particular area."[185] The court also held that section 1-1 insures the continuance of practices associated with the ancient way of life which are not specifically enumerated in Hawaii Revised Statutes section 7-1, but which have continued in certain *ahupua'a* "for so long as no actual harm is done thereby."[186] However, Kalipi's section 1-1 claim

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[179] *Id.* at 4-5, 656 P.2d at 747-48.
[180] *Id.* at 7-8, 656 P.2d at 749.
[181] *Id.* at 8, 656 P.2d at 749.
[182] *Id.* at 9, 656 P.2d at 750.
[183] *Id.* at 8, 656 P.2d at 749-50.
[184] *Id.* at 8-9, 656 P.2d at 750.
[185] *Id.* at 10, 656 P.2d at 751.
[186] *Id.*

also failed because the court again cited an insufficient basis to find that gathering rights accrued to persons who did not actually reside within the *ahupua'a*.[187] The court did not reach the merits of the third claim of explicit reservations contained in the original *kuleana* awards "[f]or, as with any gathering rights preserved by [section] 7-1 or [section] 1-1, we are convinced that traditional gathering rights do not accrue to persons, such as the Plaintiff, who do not live within the ahupuaa in which such rights are sought to be asserted."[188]

In summary, although Kalipi was not entitled to gather outside the *ahupua'a* of residency, the opinion basically reaffirmed the traditional gathering rights of tenants residing within the *ahupua'a* subject to certain parameters: (1) *ahupua'a* tenants could gather only within the *ahupua'a* in which they reside; (2) only those items enumerated in Hawaii Revised Statutes section 7-1 could be gathered, however section 1-1 also protected the continuance of practices which were not specifically enumerated in section 7-1, as long as no actual harm is done; (3) the plain meaning of the statutory language is used to interpret the scope of the gathering rights; (4) gathering rights could only be exercised on undeveloped land; and (5) each case is evaluated by balancing the respective interests and harm once it has been established that the application of the custom has continued in a particular area.

There are few Hawaiian native tenant cases which pertain to customary and traditional rights for subsistence, cultural, and religious purposes. Further, the cases do not rely upon article XII, section 7 of the Hawaii Constitution as the source of the native tenant rights claimed. However, the following case discussions serve to supplement the reader's understanding of prior judicial interpretation of subsistence, cultural, and religious Hawaiian tenant rights.

3. Subsistence case law

The 1990 federal case and 1991 appeal of *United States v. Nuesca*[189] involved two separate Hawaiian subsistence claims which were consolidated on appeal.[190] The United States Court of Appeals for the Ninth Circuit addressed the issue of whether native Hawaiians possess aboriginal rights to hunt green sea turtle and Hawaiian monk seal in contravention of the Endangered Species Act.[191] The appellants' defense

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[187] *Id.* at 12, 656 P.2d at 752.

[188] *Id.* at 12-13, 656 P.2d at 752.

[189] 773 F. Supp. 1388 (D. Haw. 1990), *aff'd*, 945 F.2d 254 (9th Cir. 1991).

[190] *United States v. Nuesca*, 945 F.2d at 256. Daryl Nuesca appealed his conviction

was not based upon article XII, section 7 of the Hawaii Constitution, but upon federal case law[192] discussed in *United States v. Dion.*[193]

In *Dion*, the United States Supreme Court affirmed the conviction of a member of the Yankton Sioux Tribe for killing bald eagles, despite the tribe's treaty right to hunt on lands reserved to the Yankton Sioux, because it found Congress's intent to abrogate the treaty right was "clear and plain" in the Bald and Golden Eagle Protection Act.[194] The *Nuesca* appellants contended that the Supreme Court did not affirm the *Dion* conviction under the Endangered Species Act because the Act did not possess the requisite "clear and plain" congressional language necessary to abrogate Indian hunting rights, and likewise could not abrogate Hawaiian hunting rights.[195] Nevertheless, the Ninth Circuit distinguished *Dion* and affirmed the *Nuesca* convictions because, unlike the Yankton Sioux, the appellants lacked treaty rights to hunt sea turtle or monk seal, nor did they cite evidence that such hunting was a traditional aspect of native Hawaiian life.[196]

Customary and traditional rights for subsistence purposes under article XII, section 7 of the Hawaii Constitution were not asserted in *Nuesca* as a defense to the violation of the Endangered Species Act. Had the appellants invoked the Hawaii Constitution, it is likely that the Ninth Circuit would have utilized the analysis of the United States

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for taking two green sea turtles off the northern shore of the island of Maui, and Daniel Kaneholani appealed his conviction for killing a Hawaiian monk seal. *Id.*

[191] *Id.* The Endangered Species Act of 1973, Pub. L. No. 93-205, 87 Stat. 884, is codified at 16 U.S.C. §§ 1531-44 (1988 & Supp. 1992). The Secretary of the Interior is required to publish in the Federal Register a list of all species determined to be endangered or threatened. 16 U.S.C. § 1533(c)(1) (1988). The Hawaiian monk seal is an endangered species under the Act. 50 C.F.R. § 222.23(a) (1992). The green sea turtle is a threatened species. 50 C.F.R. § 227.4(a) (1992). If a species is endangered, it is unlawful for persons subject to the jurisdiction of the United States to import, export, take, possess, sell, deliver, carry, transport, ship, or receive such species. 16 U.S.C. § 1538(a)(1)(A)-(F) (1988). If a species is threatened, it is unlawful for persons subject to the jurisdiction of the United States to import, export, take, possess, sell, deliver, carry, transport, ship, or receive such species. 16 U.S.C. § 1538(a)(1)(G) (1988). Section 1540(b) provides criminal penalties for violations of the Endangered Species Act. 16 U.S.C. § 1540(b) (1988).

[192] *Nuesca*, 945 F.2d at 256.

[193] 476 U.S. 734 (1986).

[194] *Id.* at 735, 738, 746. The Bald and Golden Eagle Protection Act, Pub. L. No. 95-616, § 9, 92 Stat. 3144, is codified at 16 U.S.C. § 668 (a)-(c) (1988).

[195] *Nuesca*, 945 F.2d at 256-57.

[196] *Id.* at 257.

Supreme Court when it applies the doctrine of preemption. The Court typically divides preemption analysis into three categories: (1) express preemption, where Congress has expressly declared its intention to preclude state law in a given area; (2) implied preemption, where Congress, through the structure or objective of federal law, has impliedly precluded state law; and (3) conflict preemption, where Congress has not necessarily intended preemption in a given area, but where the particular state law conflicts directly with federal law, or is an impediment to the accomplishment of federal objectives.[197] Given the policy of the Endangered Species Act,[198] and the explicit refusal by the National Marine Fisheries Service to provide a subsistence exception to Hawaiians for green sea turtles[199] comparable to that provided for residents of the Trust Territory of the Pacific Islands,[200] it is likely that the state constitutional provision would have been preempted under one of the three Supreme Court tests.

4. *Cultural case law*

In the 1980 case of *State v. Maxwell*,[201] the Hawaii Supreme Court reviewed a cultural-religious claim by a woman convicted of operating a hula studio in a residential district in violation of both the permitted use ordinance and the special use ordinance.[202] The appellant's defense was not based upon customary and traditional rights for cultural and religious purposes, but upon the federal and state constitutional right

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[197] LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 6-26, at 481 & n.14 (2d ed. 1988).

[198] The Endangered Species Act of 1973, Pub. L. No. 93-205, 87 Stat. 884, is codified at 16 U.S.C. §§ 1531-44 (1988 & Supp. 1992). The policy of the Act is to conserve endangered and threatened species via the use of all methods necessary to bring such species to the point where the measures provided by the Act are no longer necessary. This includes, in extraordinary cases, regulated taking. 87 Stat. 884, 885 (1973).

[199] 50 Fed. Reg. 278 (1985). The National Marine Fisheries Service review of cultural practices outside the Trust Territory of the Pacific Islands revealed that no native cultures were dependent on the taking of sea turtles, thus requests from the State of Hawaii and the Territory of Guam could not be considered under a subsistence exception. *Id.*

[200] 50 C.F.R. § 227.72(f) (1985). The subsistence exception for the Trust Territory of the Pacific Islands applies if the taking is "customary, traditional and necessary for the sustenance of such resident and his immediate family." *Id.*

[201] 62 Haw. 556, 617 P.2d 816 (1980).

[202] *Id.* at 557, 617 P.2d at 817-18.

of religious freedom to conduct a hula *hālau*[203] which she defined as "an inherently cultural, traditional and religious activity of the Native Hawaiian community."[204] The Hawaii Supreme Court upheld the trial court's conviction for violating the permitted use ordinance because there was substantial evidence that the appellant operated a hula studio as a commercial activity rather than as a cultural-religious activity, and the statutory scheme was manifestly clear to prohibit hula studios in residential districts.[205]

The court, however, reversed the conviction regarding the special use ordinance because the State failed to show that the county planning commission had determined that a hula studio constituted a special use, and that the appellant's application would have been granted had she applied for a special use permit.[206] The court also held that the appellant's constitutional claim of violation of religious freedom was not ripe. Although church use constituted a special use in the appellant's residential district, because the appellant failed to apply for a special use permit, the court refused to anticipate how the county planning commission would rule if such an application were made.[207]

A more recent cultural claim was asserted in the 1988 *Maui Land & Pineapple Co. v. Naiapaakai Heirs of Makeelani* case.[208] The Hawaii Supreme Court reviewed the issue of whether children informally adopted by the Hawaiian custom known as *hānai*[209] were legal heirs entitled to inherit property under a deed specifying that the descendants of the testators' children should inherit certain property.[210] The court affirmed the Second Circuit Court's decision that unless state statutory adoption procedures were followed, Hawaiian customary adoption did not produce legal heirs.[211] The lack of a history of uniform *hānai* inheritance custom, and the existence of well settled Hawaii case law supporting this holding was cited as the court's rationale for denying customary

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[203] *Hālau* is defined as a meeting house for hula instruction. PUKUI & ELBERT, *supra* note 33, at 52.

[204] *Maxwell*, 62 Haw. at 559 n.3, 617 P.2d at 818 n.3.

[205] *Id.* at 559-60, 617 P.2d at 819.

[206] *Id.* at 560-61, 617 P.2d at 819-20.

[207] *Id.* at 561-62, 617 P.2d at 820.

[208] 69 Haw. 565, 751 P.2d 1020 (1988).

[209] *Hānai* is defined as to raise, rear, feed, nourish, sustain. PUKUI & ELBERT, *supra* note 33, at 56.

[210] *Maui Land*, 69 Haw. at 566-68, 751 P.2d at 1021.

[211] *Id.* at 568, 751 P.2d at 1021.

adoption inheritance rights.[212] In addition, the court explicitly refused to "engraft a doctrine of equitable adoption on the law of Hawaii,"[213] such as the Supreme Court of Alaska recognized in *Calista Corporation v. Mann*.[214] There, the court upheld the doctrine of equitable adoption to allow two native Alaskans, who had been adopted in the culturally accepted manner of their tribes, to inherit stock in native corporations.[215]

5. *Religious case law*

In the 1987 case of *Dedman v. Board of Land and Natural Resources*,[216] the Hawaii Supreme Court decided the issue of whether the BLNR's approval of geothermal energy development on the Island of Hawai'i impinged upon the Pele practitioners'[217] federal and state constitutional rights to freely exercise their religion.[218] The court applied the four part test enumerated in *State v. Andrews*[219] to determine if an unconsti-

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[212] *Id.*, 751 P.2d at 1022.

[213] *Id.*

[214] 564 P.2d 53 (Alaska 1977).

[215] *Id.* at 54-55, 61.

[216] 69 Haw. 255, 740 P.2d 28 (1987), *cert. denied*, 485 U.S. 1020 (1988). *See generally* David L. Callies et al., *The Lum Court, Land Use, and the Environment: A Survey of Hawai'i Case Law 1983 to 1991*, U. HAW. L. REV. 119, 152-53 (1992) (discussing *Dedman* in the context of land use controls which take precedence over religious practices); Jon M. Van Dyke et al., *The Protection of Individual Rights Under Hawai'i's Constitution*, 14 U. HAW. L. REV. 311, 371 (1992) (discussing *Dedman* in the context of religious freedom); Melody K. MacKenzie, *The Lum Court and Native Hawaiian Rights*, 14 U. HAW. L. REV. 377, 389-90 (1992) (discussing *Dedman* in the context of religious freedom).

[217] Appellant Pele practitioners believe that Pele is either an *akua* (god) or an *aumakua* (family or personal god) who migrated from Tahiti to the Island of Hawai'i where she lives today. *Dedman*, 69 Haw. at 259 & n.2, 740 P.2d at 31 & n.2. Volcanic areas where it is believed that Pele attempted to establish herself are considered sacred, including the area in controversy. *Id.* Phenomena associated with volcanic activity such as heat, steam, and magma, as well as the surrounding landscape, are also considered sacred. *Id.* Appellants assert that construction of geothermal energy plants will desecrate the body of Pele by robbing her of her vital heat. *Id.* at 261, 740 P.2d at 32. It is essential to Pele practitioners that Pele be allowed to exist in her unaltered form and in a pristine natural environment. *Id.* at 265 n.11, 740 P.2d at 35 n.11. The appellants believe that desecration of the body of Pele will destroy their relationship and communication with the goddess. *Id.*

[218] *Id.* at 259-61, 740 P.2d at 32-33.

[219] 65 Haw. 289, 291, 651 P.2d 473, 474 (1982). The State of Hawaii appealed

tutional infringement on religion had occurred: (1) whether the activity interfered with by the state was motivated by and rooted in a legitimate and sincerely held religious belief; (2) whether the parties' free exercise of religion had been burdened by the regulation; (3) the impact of the regulation on the parties' religious practices; and (4) whether the state had a compelling interest in the regulation which justified such a burden.[220]

As to the first prong of the test, the court stated that the legitimacy and the sincerity of the Pele practitioners' religious claims was not questioned.[221] The court held that the appellants failed to show a substantial burden on the free exercise of religion under part two of the test, because "approval of the geothermal plant does not regulate or directly burden Appellants' religious beliefs, nor inhibit religious speech."[222] Under the third prong of the test, the court held that the Pele practitioners failed to show a substantial burden on their religious practices because the BLNR's action "does not compel them, by threat of sanctions, to refrain from religiously motivated conduct or engage in conduct they find objectionable on religious grounds."[223] Also, there was no testimony that the appellants ever participated in religious ceremonies on the property.[224] In regard to the state's compelling interest under part four of the test, the court stated "[t]o invalidate the Board's actions based on the mere assertion of harm to religious practices would contravene the fundamental purpose of preventing the state from fostering support of one religion over another."[225]

The Hawaii Supreme Court's *Dedman* decision is consistent with the United States Supreme Court's decision the following year in *Lyng v. Northwest Indian Cemetery Protective Association*.[226] The Court considered

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from a Third Circuit Court order dismissing its complaint for a permanent injunction against the operation of an unlicensed private school. *Id.* at 290, 651 P.2d at 474. The Hawaii Supreme Court held that the state statute requiring private schools to apply to the Department of Education for a license does not unconstitutionally infringe upon religious freedom. *Id.* at 292, 651 P.2d at 475. *See generally* Jon M. Van Dyke et al., *The Protection of Individual Rights Under Hawai'i's Constitution*, 14 U. HAW. L. REV. 311, 369 (1992) (discussing the *Andrews* test in the context of religious freedoms).

[220] *Dedman*, 69 Haw. at 260, 740 P.2d at 32.

[221] *Id.*

[222] *Id.* at 261, 740 P.2d at 32.

[223] *Id.*, 740 P.2d at 32-33.

[224] *Id.*, 740 P.2d at 33.

[225] *Id.* at 262, 740 P.2d at 33.

[226] 485 U.S. 439 (1988). *See generally* Jon M. Van Dyke et al., *The Protection of*

the issue of whether the First Amendment's Free Exercise Clause prohibited the government from permitting timber harvesting and road construction through a portion of a national forest traditionally used for religious purposes by three native American tribes.[227] The majority utilized the analysis of *Bowen v. Roy*,[228] which is similar to the *Dedman* analysis, to conclude that the First Amendment did not prohibit such activity because the affected individuals were not coerced by the government's action into violating their beliefs, nor did the government's action penalize religious activity by denying any person an equal share of the rights, benefits, and privileges enjoyed by other citizens.[229] The justices stated that "[t]he Free Exercise Clause affords an individual protection from certain forms of governmental compulsion; it does not afford an individual a right to dictate the conduct of the Government's internal procedures."[230]

In sum, relatively few cases involving access and gathering rights have been brought in the state or federal courts. Statutory complaints and defenses were primarily asserted based upon Hawaii Revised Statutes section 7-1.[231] The subsistence, cultural, and religious cases relied upon federal case law or the Free Exercise clause of the federal and state constitutions as the source of the rights claimed.[232] Article XII, section 7 of the Hawaii Constitution was conspicuously absent from the defenses asserted. With the exception of the few Richardson Court cases which relied upon ancient Hawaiian usage, *kama';mcaina* testimony, and origins traceable to The Great *Mahele*,[233] native tenants usually lost their cases on the merits.[234] Then, in the Richardson Court

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Individual Rights Under Hawai'i's Constitution, 14 U. HAW. L. REV. 311, 372 (1992) (discussing *Lyng* in the context of religious freedom); Melody K. MacKenzie, *The Lum Court and Native Hawaiian Rights*, 14 U. HAW. L. REV. 377, 390 (1992) (discussing *Lyng* in the context of religious freedom).

[227] 485 U.S. at 441-42.

[228] 476 U.S. 693 (1986). The parents of a Native American child brought an action challenging the constitutionality of the mandatory use of Social Security numbers to receive benefits under the Aid to Families with Dependent Children program and the Food Stamp program. *Id.* at 695. The United States Supreme Court held that the statutory requirement that a state agency utilize Social Security numbers in administering the programs in question did not violate the Free Exercise clause of the First Amendment. *Id.* at 700-01.

[229] *Lyng*, 485 U.S. at 449.

[230] *Id.* at 448 (quoting Bowen v. Roy, 476 U.S. 693, 699-700 (1986)).

[231] *See* discussion *supra* parts III.E.1-2.

[232] *See* discussion *supra* parts III.E.3-5.

[233] *See supra* text accompanying notes 161-66, 171-73.

[234] *See supra* text accompanying notes 156-61, 167-70.

tradition of showing "a willingness to defy the existing body of Anglo-American case law,"[235] the Hawaii Supreme Court issued the 1992 landmark access and gathering rights decision in *Pele Defense Fund v. Paty*.[236]

IV. Analysis

A. *The Hawaii Supreme Court's Analysis in Pele*

Article XII, section 7 of the Hawaii Constitution protects native tenant rights customarily and traditionally exercised for subsistence, cultural, and religious purposes.[237] PDF argued that the defendants violated article XII, section 7 in two ways: first, by exchanging ceded lands on which native tenants exercise such rights, and second, by the continued denial of access into the exchanged lands for PDF native tenants seeking to exercise such rights.[238] The Hawaii Supreme Court held that the former claim was barred by the State's sovereign immunity, but that the latter claim was independent of the land exchange and thus merited further analysis.[239] Ultimately, the court held that "native Hawaiian rights protected by article XII, section 7 may extend beyond the ahupua'a in which a native Hawaiian resides where such rights have been customarily and traditionally exercised in this manner."[240]

The basis of PDF's continued access claim was that the exchanged lands, known as *Wao Kele 'O Puna* and the Puna Forest Reserve, historically served as a common gathering area for abutting *ahupua'a* tenants, despite the fact that they did not actually reside within the *ahupua'a* containing the exchanged lands.[241] PDF argued that its members need not establish lawful occupancy in the exchanged lands, only that they are tenants of abutting *ahupua'a* who have used the lands to practice customary and traditional rights.[242] Thus under the Hawaii Constitution, PDF alleged that its native tenant members could not be denied continued access into the exchanged lands to practice customary

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[235] Dodd, Richardson Years, *supra* note 154, at 54.

[236] 73 Haw. 578, 837 P.2d 1247 (1992), cert. denied, ___U.S. ___, 113 S. Ct. 1277 (1993).

[237] Haw. Const. art. XII, § 7.

[238] *Pele*, 73 Haw. at 613, 837 P.2d at 1268.

[239] *Id.* at 613-14, 837 P.2d at 1268.

[240] *Id.* at 620, 837 P.2d at 1272.

[241] *Id.* at 616, 837 P.2d at 1269.

[242] *Id.*

and traditional activities for subsistence, cultural, and religious purposes.[243]

To evaluate the efficacy of PDF's claim, and to provide rationale for the extension of customary and traditional rights beyond the residency of an *ahupua'a*, the court considered four factors. First, the language of article XII, section 7 of the Hawaii Constitution was recognized as the foundation of the rights claimed.[244] Second, the *Kalipi* opinion was invoked as precedential authority.[245] Third, the legislative history of article XII, section 7 was relied upon to show the intent of the drafters of the 1978 Constitutional Convention.[246] And fourth, the unusual gathering and access custom in the Puna district was considered to provide broad recognition and preservation of all rights customarily and traditionally exercised.[247]

The court's analysis began with a recitation of the language of article XII, section 7:

> The State reaffirms and shall protect all rights, customarily and traditionally exercised for subsistence, cultural and religious purposes and possessed by ahupua'a tenants who are descendants of native Hawaiians who inhabited the Hawaiian Islands prior to 1778, subject to the right of the State to regulate such rights.[248]

The court then linked the constitutional provision to the landmark *Kalipi* opinion where, in dicta, the Richardson court recognized an article XII, section 7 obligation to preserve and enforce customary and traditional rights.[249] Further analogy was made to *Kalipi* when the *Pele* court coined the phrase "Kalipi rights" to refer to the rudiments of native tenant rights protected by article XII, section 7.[250]

Although Kalipi was not entitled to exercise gathering rights because he did not reside within the *ahupua'a* in which he sought to gather, the *Pele* court emphasized other *Kalipi* holdings which were conciliatory toward native tenants. First, Hawaii Revised Statutes section 7-1 contains two types of tenant rights: specific gathering rights and general

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[243] *Id.* at 613, 837 P.2d at 1268.
[244] *Id.* at 616, 837 P.2d at 1269-70.
[245] *Id.* at 617-19, 837 P.2d at 1270-71.
[246] *Id.* at 619-20, 837 P.2d at 1271.
[247] *Id.* at 620-21, 837 P.2d at 1272.
[248] *Id.* at 616, 837 P.2d at 1270.
[249] *Id.* at 617, 837 P.2d at 1270.
[250] *Id.* at 613, 616, 837 P.2d at 1268, 1270.

access and water rights.[251] Second, Kalipi was not entitled to exercise gathering rights because his claim was based upon land ownership rather than *ahupua'a* residency.[252] Third, the Hawaiian usage clause in Hawaii Revised Statutes section 1-1 may establish certain customary rights beyond those found in Hawaii Revised Statutes section 7-1 by balancing the respective interests and harm once it is established that a custom has continued in a particular area.[253] Finally, Hawaii Revised Statutes section 1-1 insures the continuance of ancient practices as long as no actual harm is done.[254]

The *Pele* court declared that like Kalipi, PDF based its claims upon article XII, section 7 of the Hawaii Constitution and Hawaii Revised Statutes section 1-1 for continued access into an *ahupua'a* where the claimants did not reside.[255] Unlike Kalipi, however, PDF claimed such rights based upon customary and traditional practices in the Puna region rather than upon land ownership.[256] The court's analysis of *Kalipi* ended with the statement that the *Kalipi* opinion foresaw that the precise scope of Hawaiian tenant rights would depend upon the particular circumstances of each case.[257]

The legislative history of article XII, section 7 of the Hawaii Constitution also comprised a large portion of the court's analysis.[258] As the court noted, the Committee on Hawaiian Affairs[259] found that customary and traditional rights were associated with *ahupua'a* residency, and that the State has the power to regulate these rights.[260] However, the *Pele* court emphasized statements in Standing Committee Report Number 57 indicating that article XII, section 7 was intended to reaffirm all rights held by ancient Hawaiians, and that "some traditional rights might extend beyond the *ahupua'a* . . . to protect the broadest possible spectrum of native rights . . . ."[261] The court ex-

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[251] *Id.* at 617, 837 P.2d at 1270.

[252] *Id.* at 618, 837 P.2d at 1270.

[253] *Id.*

[254] *Id.*, 837 P.2d at 1271.

[255] *Id.*

[256] *Id.* at 618-19, 837 P.2d at 1271.

[257] *Id.* at 619, 837 P.2d at 1271.

[258] *Id.* at 619-20, 837 P.2d at 1271-72.

[259] The Committee on Hawaiian Affairs drafted article XII, section 7 as a constitutional amendment during the Constitutional Convention of Hawaii of 1978. *Id.* at 619, 837 P.2d at 1271.

[260] *Id.*

[261] *Id.*

plained that the Committee on Hawaiian Affairs eliminated specific categories of rights from the language because article XII, section 7 was not intended to be narrowly construed or ignored by courts who were unwilling and unable to define native tenant rights.[262] Rather, the amendment was to encompass all rights of native Hawaiians because guidance was badly needed to guarantee judicial enforcement of the rights.[263] The justices reasoned that if customary and traditional rights associated with tenancy in an *ahupua'a* extended beyond the boundaries of the *ahupua'a* where one resides, then article XII, section 7 protected those rights as well.[264]

Finally, the court considered the evidence in PDF affidavits asserting that access and gathering patterns in the Puna region do not conform to the usual custom of exercising such rights strictly within the boundaries of the *ahupua'a* of residency.[265] Specifically, the affidavits suggested that PDF members residing in abutting *ahupua'a* use the Puna Forest Reserve as a common hunting and gathering area, and that this unusual custom may have originated at the time of The Great *Mahele* and the Kuleana Act.[266] Evidence was also introduced in the trial court that early trails and a lava tube[267] provided access from more than one *ahupua'a* into the exchanged lands, and that abutting *ahupua'a* tenants associated this area with the home of Hawaiian deities, rather than with the residence of native tenants.[268] Based upon PDF's affidavits, the court concluded that genuine issues of material fact exist as to whether *Wao Kele 'O Puna* was customarily and traditionally utilized as a common gathering area by native tenants of abutting *ahupua'a*, and whether the other requirements of *Kalipi* were met.[269] Thus, the court

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[262] *Id.* at 619-20, 837 P.2d at 1271.
[263] *Id.* at 620, 837 P.2d at 1271.
[264] *Id.*, 837 P.2d at 1272.
[265] *Id.* at 620-21, 837 P.2d at 1272.
[266] *Id.* at 621, 837 P.2d at 1272.
[267] A lava tube forms when a lava flow cools on the surface, but underground pressure continues to force the hot liquid center out, resulting in hollow tubes of various sizes. SHERWIN CARLQUIST, HAWAII, A NATURAL HISTORY 18 (1980). The Puna Forest Reserve contains a lava tube which stretches continuously for at least 7.5 miles. H. McEldowney & F. D. Stone, Survey of Lava Tubes in the Former Puna Forest Reserve and on Adjacent State of Hawaii Lands 1-2 (Oct. 1991) (on file with University of Hawai'i, Sinclair Library, Hawaiiana Collection). Lava tubes extend onto the Campbell Estate land in controversy, and a high proportion of these tubes contain burial sites. *Id.* at 2.
[268] *Pele*, 73 Haw. at 621, 837 P.2d at 1272.
[269] *Id.*

reversed in part the summary judgment in favor of the defendants and remanded for a full trial on the merits to decide the limited question of whether native Hawaiian tenants who are PDF members can be denied continued access into undeveloped areas of the exchanged lands to exercise customary and traditional rights for subsistence, cultural, and religious purposes.[270] The judgment of the lower court was affirmed in all other respects.[271]

B. *Commentary*

The controversy surrounding the *Pele* holding involves its apparent abolition of the longstanding *ahupua'a* residency requirement. The requirement had its genesis in ancient Hawaiian history,[272] was codified in the seventh section of the Kuleana Act of 1850,[273] and is an explicit requirement in Hawaii Revised Statutes section 7-1.[274] Since at least 1858, the Hawaii Supreme Court has recognized that tenants were restricted to gathering on the *ahupua'a* of residency as evidenced by the discussion in *Oni v. Meek*.[275] The opinion quoted the seventh section of the Kuleana Act which prevented landlords from depriving "the people" from gathering "from the land on which they live," and declared the term "people" is synonymous with the term "tenants."[276] In addition, as recently as 1982, the Hawaii Supreme Court in *Kalipi* explicitly stated, "For, as with any gathering rights preserved by [section] 7-1 or [section] 1-1, we are convinced that traditional gathering rights do not accrue to persons, such as the Plaintiff, who do not live within the ahupuaa in which such rights are sought to be asserted."[277] Thus for well over a century, the Hawaii Supreme Court has consistently recognized that *ahupua'a* tenants are restricted to gathering from the land on which they live.

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[270] *Id.* at 585, 622, 837 P.2d at 1254, 1272-73.

[271] *Id.* at 622, 837 P.2d at 1273.

[272] *See supra* text accompanying notes 31-36.

[273] Act of Aug. 6, 1850, 2 Rev. Laws Haw. 2141 (1925). "When the landlords have taken allodial titles to their lands, the people on each of their lands, shall not be deprived of the right to take . . . *from the land on which they live* . . . ." *Id.* at 2142 (emphasis added).

[274] Haw. Rev. Stat. § 7-1 (1985). "Where the landlords have obtained . . . allodial titles to their lands, the people on each of their lands shall not be deprived of the right to take . . . *from the land on which they live* . . . ." *Id.* (emphasis added).

[275] *See supra* text accompanying notes 156-60.

[276] Oni v. Meek, 2 Haw. 87, 95-96 (1858).

[277] Kalipi v. Hawaiian Trust Co., 66 Haw. 1, 13, 656 P.2d 745, 752 (1982).

The *Pele* holding, however, appears to abolish the court's own longstanding *ahupua'a* residency requirement with the stroke of a pen. Under *Pele*, as long as the activity has been customarily and traditionally exercised for subsistence, cultural, and religious purposes by native Hawaiian *ahupua'a* tenants,[278] the practice may extend beyond the *ahupua'a* in which a native Hawaiian tenant resides.[279] To determine whether the abolition of the *ahupua'a* residency requirement is justified, this commentary will analyze the four factors upon which the Hawaii Supreme Court predicated the *Pele* holding: (1) the language of article XII, section 7 of the Hawaii Constitution; (2) the *Kalipi* opinion; (3) the legislative history of article XII, section 7; and (4) the unusual gathering and access custom in the Puna district.

1. The language of the Hawaii Constitution

When PDF based its claim upon article XII, section 7, it was the first time that a plaintiff utilized the 1978 constitutional amendment as the foundation of a native tenant access and gathering rights claim before the Hawaii Supreme Court. The constitutional claim overcame the limitations of a purely statutory claim based upon Hawaii Revised Statutes section 7-1 because if the right asserted is not specifically enumerated in section 7-1, the activity may still enjoy protection if it is a right customarily and traditionally exercised for subsistence, cultural, and religious purposes.[280] Thus, article XII, section 7 bars the *Oni* and *Haiku Plantations* line of narrow judicial interpretation of section 7-1 as an exhaustive inventory of access and gathering rights.[281]

However, despite its constitutional obligation to protect customarily and traditionally exercised rights, the *Pele* court made no attempt to interpret the language of article XII, section 7. Decisive terms such as "rights customarily and traditionally exercised," "subsistence, cultural, and religious purposes," "*ahupua'a* tenants" and "native Hawaiians" were not defined,[282] nor were the facts of the case applied to the constitutional language. The constitutional amendment was merely

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[278] HAW. CONST. art. XII, § 7.

[279] 73 Haw. 578, 620, 837 P.2d 1247, 1272 (1992), *cert. denied*, ___U.S. ___, 113 S. Ct. 1277 (1993).

[280] *See* discussion *supra* part III.C.

[281] *See supra* text accompanying notes 172-73.

[282] HAW. CONST. art. XII, § 7.

quoted in recognition of its status as the foundation of the rights claimed.[283]

Additionally, the plain meaning of the constitutional language appears to have been lost in the *Pele* decision. The constitutional amendment clearly indicates that customarily and traditionally exercised rights are possessed by *ahupua'a* tenants, who are of Hawaiian ancestry, subject to regulation by the state.[284] However, the *Pele* holding abolished the *ahupua'a* residency requirement, suggesting that nothing in the "possessed by *ahupua'a* tenants" language of article XII, section 7 limits the exercise of customary and traditional rights to residents of the *ahupua'a* in which the rights will be practiced. The language of the constitution, however, is sufficiently clear in its context to be dispositive here. The words make unmistakable the drafters' intent to proscribe article XII, section 7 practices outside the *ahupua'a* where the tenant resides.[285]

There is also ambiguity in the *Pele* holding concerning whether a tenant must be a native Hawaiian by ancestry or residency due to the phrase "rights protected by article XII, section 7 may extend beyond the *ahupua'a* in which a native Hawaiian resides".[286] However the plain meaning of article XII, section 7 limits customary and traditional rights to claimants of Hawaiian ethnicity. This restriction must be construed as racial, due to the explicit proviso that the *ahupua'a* tenants must be descendants of native Hawaiians who inhabited the Hawaiian Islands prior to 1778.[287] Finally, the plain meaning of the constitutional language "subject to the right of the State to regulate such rights"[288] authorizes the State to regulate native tenant rights. However the *Pele* holding invites conflict with the rights of undeveloped property owners, rather than reinforcing the state's right to regulate native tenant rights. When abuses in the exercise of customary and traditional rights occur, the remedy to be applied is state regulation, not judicial fiat.

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[283] *Pele*, 73 Haw. at 616-17, 837 P.2d at 1270.

[284] HAW. CONST. art. XII, § 7. "The State reaffirms and shall protect *all rights, customarily and traditionally exercised* for subsistence, cultural and religious purposes *and possessed by ahupua'a tenants* who are descendants of native Hawaiians who inhabited the Hawaiian Islands prior to 1773, subject to the right of the State to regulate such rights." *Id.* (emphasis added).

[285] *See supra* text accompanying notes 275-77.

[286] 73 Haw. at 620, 837 P.2d at 1272.

[287] HAW. CONST. art. XII, § 7.

[288] *Id.*

Thus, the *Pele* court's abolition of the longstanding *ahupua'a* residency requirement does not comport with the language of article XII, section 7. The plain meaning limits the exercise of customary and traditional rights to residents of the *ahupua'a* in which the rights will be practiced, imposes a racial restriction upon those who possess such rights, and authorizes state regulation of the rights. It is difficult to justify the court's willingness to cut customary and traditional rights loose from the moorings of article XII, section 7 by extending the scope of the rights beyond the *ahupua'a* of residency. Such an expansive judicial reading cannot be harmonized with the plain meaning of the constitutional amendment. But even if it could, the court's reliance upon the *Kalipi* opinion to rationalize the abolition of the longstanding *ahupua'a* residency requirement is also difficult to justify.

2. The Kalipi Opinion

The Hawaii Supreme Court relied upon the *Kalipi* decision as precedent for its landmark holding in *Pele*.[289] In particular, analogy was made to portions of the *Kalipi* opinion which were construed to support the court's extension of native tenant rights beyond the *ahupua'a* of residency.[290] However, the legal foundation of *Kalipi* is distinguishable from that of the *Pele* decision. Although the *Pele* court stated that "[l]ike Kalipi, PDF members assert native Hawaiian rights based on article XII, section 7,"[291] Kalipi did not rely upon the Hawaii Constitution as the basis of his claims. Rather, he asserted three nonconstitutional sources: (1) Hawaii Revised Statutes section 7-1, (2) Hawaii Revised Statutes section 1-1, and (3) the explicit reservations found in his original *kuleana* land titles.[292] In dicta, article XII, section 7 was acknowledged by the *Kalipi* court to impose an obligation on the state to preserve and enforce native tenant rights,[293] but it was not the legal litmus paper by which the court measured Kalipi's claims.

Also, although the *Pele* court's allusion to "Kalipi rights" has a surface attractiveness, the analogy dissipates under analysis. The court characterized the *Pele* holding as an "extension of *Kalipi*,"[294] however,

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[289] *Pele*, 73 Haw. at 617-19, 837 P.2d at 1270-71.
[290] *Id.*
[291] *Id.* at 618, 837 P.2d at 1271.
[292] Kalipi v. Hawaiian Trust Co., 66 Haw. 1, 4, 656 P.2d 745, 747 (1982).
[293] *Id.* at 4-5, 656 P.2d at 747-48.
[294] *Pele*, 73 Haw. at 616, 837 P.2d at 1269.

the removal of the *ahupua'a* residency requirement actually conflicts with the *Kalipi* holding. The Hawaii Supreme Court held that Kalipi was not entitled to exercise gathering rights because he did not reside in the *ahupua'a* in which he sought to gather.[295] A comparison of the facts reveals that Kalipi's claim was far stronger than PDF's, vis-a-vis western property rights, because Kalipi actually owned *kuleana* lots within the *ahupua'a* where he sought to gather,[296] whereas the Campbell Estate owns the land on which PDF members seek continual access.[297] Yet even the sympathetic Richardson Court would not abolish the *ahupua'a* residency requirement for the *kuleana* owner if he did not reside within the *ahupua'a* where the customary and traditional rights are exercised.[298] Thus, if the *Pele* court truly relied upon the rudiments of the native tenant rights expressed in *Kalipi*, it would not abolish the *ahupua'a* residency requirement.

Finally, the *Pele* holding defies the *Kalipi* court rationale not to conflict with western property law and with the traditional Hawaiian concern for other residents. It ignores the *Kalipi* caveat that the continuance of ancient Hawaiian practices will be protected "for so long as no actual harm is done thereby."[299] In *Kalipi*, an undeveloped land restriction on native tenant gathering rights was judicially imposed when the Hawaii Supreme Court considered the ramifications of gathering on the developed land of others:

> In the context of our current culture this result would so conflict with understandings of property, and potentially lead to such disruption, that we could not consider it anything short of absurd and therefore other than that which was intended by the statute's framers. Moreover, it would conflict with our understanding of the traditional Hawaiian way of life in which cooperation and non-interference with the well-being of other residents were integral parts of the culture.[300]

Following the *Kalipi* rationale, in the context of current culture, *Pele*'s removal of the *ahupua'a* residency requirement conflicts with western property concepts, will potentially lead to absurd disruption, and violates the "no actual harm done" caveat through the erosion of the legal rights of undeveloped property owners in the State of Hawaii.

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[295] *Kalipi*, 66 Haw. at 13, 656 P.2d at 752.
[296] *Id.* at 3, 656 P.2d at 747.
[297] *Pele*, 73 Haw. at 587, 837 P.2d at 1255.
[298] *Kalipi*, 66 Haw. at 8, 13, 656 P.2d at 749-50, 752.
[299] *Id.* at 10, 656 P.2d at 751.
[300] *Id.* at 8-9, 656 P.2d at 750 (citations omitted).

Under *Pele*, the right to practice customary and traditional activities such as hunting for feral pig or holding a community *lūau*[301] on the undeveloped land of others could realistically be asserted by native Hawaiians who need not even reside within the area. Thus if the *Pele* court truly relied upon the rudiments of customary and traditional rights expressed in *Kalipi*, its holding would not encourage significant conflict with western property rights and with the well-being of other residents. The emerging legacy of the *Pele* holding, however, is the imposition of substantial harm to the legal rights of undeveloped property owners in the State of Hawaii.[302]

Thus, it is difficult to justify the court's willingness to extend the scope of native tenant rights beyond the *ahupua'a* of residency by utilizing the *Kalipi* decision as precedent. As discussed, the legal foundation of *Kalipi* is distinguishable from that of *Pele*. The holding of *Pele* cannot be characterized as an extension of *Kalipi* because the *Pele* holding conflicts with, rather than extends, the *Kalipi* opinion. And finally, the *Pele* holding clearly defies the conflict rationale expressed by the Hawaii Supreme Court in the *Kalipi* decision.

3. *The legislative history of article XII, section 7*

The Hawaii Supreme Court relied upon the legislative history of article XII, section 7 to show that the intent of the drafters of the 1978 Constitutional Convention supported the *Pele* holding.[303] The *Pele* opinion quoted extensively from Standing Committee Report Number 57 to support the court's abolition of the *ahupua'a* residency requirement.[304] However, only a select portion of the legislative history was utilized in the opinion.[305] Had the court considered the drafters' intent as gathered from the four corners of the aggregate committee reports

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[301] A *lūau* is defined as a Hawaiian feast named for the taro tops served at such a feast. PUKUI & ELBERT, *supra* note 33, at 214.

[302] *See* discussion *infra* parts V.A-B.

[303] Pele Defense Fund v. Paty, 73 Haw. 578, 620, 837 P.2d 1247, 1272 (1992), *cert denied*, ___U.S. ___, 113 S. Ct. 1277 (1993).

[304] *Id.* at 619-20, 837 P.2d at 1271.

[305] The *Pele* court's discussion of the legislative history of article XII, section 7 ignored other portions of Standing Committee Report Number 57, Committee of the Whole Report Number 12, the Debates in Committee of the Whole on Hawaiian Affairs on Committee Proposal 12, and Committee of the Whole Report Number 12, Committee Proposal Number 12. *See supra* text accompanying notes 126-29.

and debates,[306] it would have been difficult to justify the abolition of the longstanding *ahupua'a* residency requirement on the basis of the legislative history of article XII, section 7.

Both Standing Committee Report Number 57 and Committee of the Whole Report Number 12 explicitly indicate that the drafters also desired to protect private land owners from indiscriminate or abusive native tenant rights.[307] Both reports expressed the need for state regulation where conflicts occur with the rights of private land owners.[308] Also, the Debates and Proposal Number 12 reveal that the drafters did not know the scope of the customary and traditional rights which they were granting, nor could they agree to whom the rights appertained.[309] The drafters also engaged in heated debates over the wisdom of granting non-specified rights in a constitutional amendment that would alter the law as it had existed since 1850.[310]

Thus, it is difficult to justify the *Pele* court's holding in light of legislative history which clearly indicates the existence of an inherent conflict between customary and traditional rights and western property law. By extending access and gathering rights beyond the *ahupua'a* of residency, the *Pele* holding exacerbates, rather than remedies, this inherent conflict.[311] Clearly, a talismanic deference should not be imputed to the terms "customary and traditional rights" based upon the legislative history of article XII, section 7. The following section examines whether the unusual gathering and access custom in the Puna District provides justification for the expansive holding in *Pele*.

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[306] *See supra* text accompanying notes 130-51.

[307] STAND. COMM. REP. No. 57, *reprinted in* 1 PROCEEDINGS OF THE CONST. CONVENTION OF HAW. OF 1978, at 639 (1980); COMM. WHOLE REP. No. 12, *reprinted in* 1 PROCEEDINGS OF THE CONST. CONVENTION OF HAW. OF 1978, at 1016 (1980); *see supra* text accompanying notes 129-33.

[308] STAND. COMM. REP. No. 57, *reprinted in* 1 PROCEEDINGS OF THE CONST. CONVENTION OF HAW. OF 1978, at 639 (1980); COMM. WHOLE REP. No. 12, *reprinted in* 1 PROCEEDINGS OF THE CONST. CONVENTION OF HAW. OF 1978, at 1016 (1980); *see supra* text accompanying notes 130, 132.

[309] DEBATES, *reprinted in* 2 PROCEEDINGS OF THE CONST. CONVENTION OF HAW. OF 1978, at 434-37, 432-37 (1980); COMM. P. No. 12, *reprinted in* 1 PROCEEDINGS OF THE CONST. CONVENTION OF HAW. OF 1978, at 274-78 (1980); *see supra* text accompanying note 133.

[310] COMM. P. No. 12, *reprinted in* 1 PROCEEDINGS OF THE CONST. CONVENTION OF HAW. OF 1978, at 274-78 (1980); *see supra* text accompanying notes 143-44.

[311] *See supra* text accompanying notes 152-53.

4. The unusual gathering and access custom in the Puna district

The *Pele* holding is designed to broadly recognize and preserve all rights customarily and traditionally exercised, including unusual practices such as those asserted by PDF Puna district tenants. This design is evident from statements by the court such as: "In *Kalipi*, we foresaw that '[t]he precise nature and scope of rights retained by [section] 1-1 would, of course, depend upon the particular circumstances of each case,'"[312] and "[t]he drafters of the constitutional amendment emphasized that *all* such rights were reaffirmed and that they did not intend for the provision to be narrowly construed."[313] In trial court affidavits, native PDF members who are tenants of *ahupua'a* abutting *Wao Kele 'O Puna* claimed the unusual custom of utilizing the exchanged lands as a common gathering area.[314] If proven on remand, this custom would be an anomaly to the tradition of using resources strictly within the boundaries of the *ahupua'a* where one resides.[315]

The affidavits evoke concepts of ancient Hawaiian usage, *kama'āina* testimony, and origins traceable to The Great *Mahele*, which were the hallmarks of the Richardson Court decisions favoring native tenants in *Palama*[316] and *Rogers*.[317] Although the *Pele* holding was designed to accommodate all rights customarily and traditionally exercised, the court failed to make the language of the holding narrow and fact-specific. In particular, the Hawaii Supreme Court might have explicitly indicated that *Pele* involved a possible fact-specific exception to the *ahupua'a* residency requirement. Thus, an exception to the traditional *ahupua'a* residency requirement may only apply to undeveloped lands where ancient Hawaiian usage, *kama'āina* testimony, and origins traceable to The Great *Mahele* prove the continuous existence of unusual but customary and traditional practices for subsistence, cultural, and religious purposes.

Also, an additional explicit requirement of *continuous* practice of customary and traditional rights on the land in question would help to

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[312] Pele Defense Fund v. Paty, 73 Haw. 578, 619, 837 P.2d 1247, 1271 (1992), *cert denied*, ___U.S. ___, 113 S. Ct. 1277 (1993) (quoting Kalipi v. Hawaiian Trust Co., 66 Haw. 1, 12, 656 P.2d 745, 752 (1982)).

[313] *Pele*, 73 Haw. at 620, 837 P.2d at 1272.

[314] *Id.* at 616, 837 P.2d at 1269.

[315] *Id.* at 620-21, 837 P.2d at 1272.

[316] *See supra* text accompanying notes 161-66.

[317] *See supra* text accompanying notes 171-72.

balance the harm to purchasers of undeveloped land in the State of Hawaii. If such rights have been continuously practiced for a specified time period on a particular parcel, the purchaser can reasonably be deemed to have obtained constructive notice of the continuous use of the land by native tenants, and to factor that information into a purchase decision. Support for an additional explicit requirement of continuous practice of the rights on the land in question is found in *Kalipi*, where the Hawaii Supreme Court articulated the relevant inquiry regarding customary native tenant rights as whether the privilege persisted to the point where it had evolved into an accepted part of the culture, and whether the practice continued without fundamentally violating the new system.[318]

As worded, the *Pele* holding is too broad and imprecise to serve as a meaningful standard for native tenant rights. A prospective owner or developer would be well-advised to shun undeveloped property in Hawaii under *Pele*, for fear of the indiscriminate practice of customary and traditional native tenant rights on the land. Such a result constitutes a substantial restraint on the alienation of land, which is contrary to sound public policy,[319] and renders property unsuitable for the best use dictated by the market.[320] Restraints on the alienation of land also tend to make property unmortgageable, and therefore unimprovable.[321] Thus, it is difficult to justify the *Pele* court's expansive holding under the

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[318] Kalipi v. Hawaiian Trust Co., 66 Haw. 1, 11 n.5, 656 P.2d 745, 751 n.5 (1982).

[319] RESTATEMENT OF PROPERTY § 406 cmt. a (1944) ("The established policy of the law is in favor of freedom of alienation.").

[320] 6 AMERICAN LAW OF PROPERTY § 26.63, at 505, § 26.3, at 413 (A. James Casner ed., 1952). "Any provision the legal effect of which is to restrict the enjoyment of property by depriving the owner of a right, power, privilege, or immunity which he would normally have operates to make that property less marketable, and has the practical effect in some degree of an impediment to alienation." *Id.* at 505. "This effect of the restraint to prevent the utilization of land in the most effective manner is unquestionably one of the most vital objections that can be urged against the validity of the restraint." *Id.* at 413.

[321] *Id.*, § 26.3, at 413. "Another evil growing out of a restraint is its effect to discourage improvements when it is imposed upon an interest in land. A landowner will be reluctant to make improvements upon land that he cannot sell during the period of the restraint, which may be a long term of years, or even his whole life. In many instances, therefore, the restraint deters the owner of land from obtaining the maximum enjoyment of it; it may also retard the development of a particular section of the community and prevent the increase in taxable values which would otherwise naturally occur." *Id.*

guise of preserving unusual custom when the court could have simply found a fact-specific exception to the traditional *ahupua'a* residency requirement.

Clearly, the evidence of unusual gathering customs in *Wao Kele 'O Puna* merits a remand to the Third Circuit to determine if the facts of this particular case warrant an exception to the *ahupua'a* residency requirement. However, in light of the plain meaning of the language of article XII, section 7, the drafters' intent as gathered from the four corners of the aggregate committee reports and debates, and the *Kalipi* court's admonishment not to conflict with western property rights, it is difficult to justify the expansive *Pele* holding as a meaningful standard for access and gathering rights. Further, the following discussion explains how the impact of the *Pele* holding may result in actual harm to the rights of undeveloped property owners in the State of Hawaii.

V. Impact

A. *Immediate Repercussions*

Exactly four months after the Hawaii Supreme Court rendered its opinion in *Pele*, the Intermediate Court of Appeals of Hawaii decided another native Hawaiian access and gathering rights case and applied the *Pele* holding, expanding its application beyond the courts to administrative agencies.[322] In *Public Access Shoreline Hawaii v. Hawaii County Planning Commission*,[323] (*PASH*) the court considered the issue of whether a community organization had standing before the Hawaii County Planning Commission (Commission) to request a contested case hearing[324] on a developer's application for a Special Management Area Use Permit (SMAP).[325] The developer needed the SMAP to build a resort complex near the shoreline in an *ahupua'a* on the Island of Hawai'i.[326] Public Access Shoreline Hawaii wanted to protect customary and traditional rights of native Hawaiian members to access and gather at the anchialine ponds[327] near the shoreline.[328]

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[322] Public Access Shoreline Hawaii v. Hawaii County Planning Comm'n [hereinafter *PASH*], No. 90-293K, slip op. at 13 (Haw. App. Jan. 28, 1993), *cert. granted*, 853 P.2d 542 (1993).

[323] No. 90-293K, slip op. (Haw. App. Jan. 28, 1993), cert. granted, 853 P.2d 542 (1993) (this opinion has not been released for publication in the permanent law reports, but may also be found at 1993 WL 15605 (Haw. App. Jan. 28, 1993)).

[324] "In any contested case, all parties shall be afforded an opportunity for hearing

The Commission concluded that the community organization lacked a sufficient interest to entitle it to a contested case hearing, and thereafter approved the developer's SMAP.[329] The Circuit Court of the Third Circuit disagreed and held that Public Access Shoreline Hawaii had standing under the Commission's Rule 4 as a party with an interest that is clearly distinguishable from the general public.[330] On appeal, the Intermediate Court of Appeals of Hawaii ruled that a native Hawaiian who meets the article XII, section 7 qualifications in the Hawaii Constitution has an interest in a SMAP proceeding which is clearly distinguishable from that of the general public.[331] Therefore, the court held that "[a]rticle XII, section 7 imposes on the Commission the same obligation to preserve and protect native Hawaiian rights as it does on the court."[332] Further, the court held that "all government agencies undertaking or approving development of undeveloped land are required to determine if native Hawaiian gathering rights have

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after reasonable notice." HAW. REV. STAT. § 91-9(a) (1985). The Hawaii County Planning Commission's Rule 4-2 defines contested case as "a proceeding in which the legal rights, duties, or privileges of specific parties are required by law to be determined after an opportunity for agency hearing." *PASH*, No. 90-293K, slip op. at 4 n.6. Rule 4-6(a) provides that "[a] person or agency may request that a contested case hearing procedure be used in a hearing on a particular matter, provided that such request shall be made before or during the Commission's first public meeting on that matter, and not after such meeting." *Id.* at 5 n.6.

[325] *Id.* at 1. "No development shall be allowed in any county within the special management area without obtaining a permit in accordance with this part." HAW. REV. STAT. § 205A-28 (1985).

[326] *PASH*, No. 90-293K, slip op. at 6.

[327] Anchialine ponds are:

> shoreline pools without surface connection to the sea having waters of measurable salinity and showing tidal rhythms. The ponds are commonly located in recent lava flows which had depressions deep enough to reach the water table. The ponds consist of brackish water with a crustacean-mollusk dominated faunal community along with several species of shrimp and a variety of vegetation types. The ponds undergo a natural process of senescence over time, changing from barren lava pools to pools with sediment bottoms and aquatic vegetation, and finally to partially filled marshes or grasslands.

Id. at 3 n.3.

[328] *Id.* at 8.

[329] *Id.* at 2.

[330] *Id.*

[331] *Id.* at 8.

[332] *Id.* at 12.

been customarily and traditionally practiced on the land in question and explore the possibilities for preserving them."[333]

The *PASH* holding clearly contravenes the opinions of the Hawaii Supreme Court in both the *Kalipi* and *Pele* decisions. In *Kalipi*, the court stated that native tenant rights "do not prevent owners from developing lands."[334] The same court in *Pele* reiterated that "Kalipi rights only guarantee access to undeveloped land, under the specified circumstances, but they do not ensure that any particular lands will be held for the exercise of native Hawaiian customs."[335] Review of the controversial *PASH* decision has been granted by the Hawaii Supreme Court.[336] Among the issues that have been raised on appeal is whether the exercise of gathering rights by native Hawaiians on private property rises to the level of an unconstitutional taking of property in violation of the Fifth Amendment as applied to the states by the Fourteenth Amendment.[337]

Another immediate repercussion of the *Pele* holding occurred five months after the Hawaii Supreme Court handed down its landmark decision. In February 1993, notices were circulated on the Island of Hawai'i to urge Hawaiians using *Wao Kele 'O Puna* and the Puna Forest Reserve to contact PDF. The notices declared: "AS A HAWAIIAN: YOU HAVE THE RIGHT OF ACCESS TO UNDEVELOPED FEDERAL, STATE, AND PRIVATE LANDS throughout the State of Hawaii for traditional spiritual, cultural, and subsistence purposes."[338] Reference was made in the notice to the Hawaii Supreme Court's decision in *Pele* as the authority confirming access for "HUNTING AND GATHERING OF FOOD, MEDICINE, AND CEREMONIAL MATERIAL for hula, religious gatherings, family occasions, etc."[339]

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[333] *Id.* at 13.

[334] Kalipi v. Hawaiian Trust Co., 66 Haw. 1, 8 n.2, 656 P.2d 745, 749 n.2 (1982).

[335] Pele Defense Fund v. Paty, 73 Haw. 578, 621 n.36, 837 P.2d 1247, 1272 n.36 (1992), *cert denied*, ___U.S. ___, 113 S. Ct. 1277 (1993).

[336] No. 90-293K, slip op. (Haw. App. Jan. 28, 1993), *cert. granted*, 853 P.2d 542 (1993).

[337] Second Supplemental Brief (Opening Brief) of Petitioner-Appellee-Appellant Nansay Hawaii, Inc. at 26-34, Public Access Shoreline Hawaii v. Hawaii County Planning Comm'n, No. 90-293K (Haw. filed June 7, 1991); Brief Amicus Curiae of Land Use Research Foundation Of Hawaii at 1-10, Public Access Shoreline Hawaii v. Hawaii County Planning Comm'n, No. 90-293K (Haw. filed June 7, 1991).

[338] *See infra* Appendix.

[339] *Id.*

These two repercussions are part of an undercurrent, which began as a ripple in *Palama*, gained momentum in *Kalipi*, and has the potential to become a vortex under the momentum of *Pele* and its progeny. The swift shift from the rationale of the *Kalipi* and *Pele* decisions, which did not require that land be maintained in an undeveloped state to permit the continued exercise of native rights, to the recent *PASH* ruling, which requires government agencies to "explore the possibilities for preserving" such rights on land that is already in the process of being developed, is stark. Almost instantly, *PASH* has raised the specter of development roadblocks by administrative agencies who are required to open "Pandora's box" to determine if native rights have ever been customarily and traditionally practiced on the land. The *PASH* holding effectively arms agencies with the power to unduly hobble the legal rights of owners of undeveloped land in Hawaii. It is a license for mischief, authorizing both the courts and the administrative agencies to delay the owner's rightful use of the property, for the benefit of non-owners who need not even reside within the area.

Also, the February 1993 PDF notice which encouraged native Hawaiians to exercise customary and traditional practices on the undeveloped land of others throughout the State of Hawaii will arguably increase the workload of law enforcement officials, administrative agencies, and the courts. Land owners may press trespass charges and Fifth Amendment constitutional claims of taking of private property without due process of law or just compensation.[340] Particularly disturbing is the encouragement in the PDF notice to exercise hunting as a customary and traditional gathering right on the undeveloped property of others. Such action could readily spawn violations of hunting regulations, claims of reckless endangering, or worse. And because the scope of the rights granted in article XII, section 7 of the Hawaii Constitution is not concrete, the possibility of harm and the attendant legal consequences are myriad. What is certain is that the *Pele* and *PASH* holdings

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[340] In Lucas v. S. Carolina Coastal Council, ___U.S. ___, 112 S. Ct. 2886 (1992), the United States Supreme Court stated that there are at least two discrete categories of regulatory deprivations that are compensable under the Fifth Amendment which do not require case-specific inquiry into the public interest advanced in support of the restraint. *Id.* at 2893. "The first encompasses regulations that compel the property owner to suffer a physical 'invasion' of his property. In general (at least with regard to permanent invasions), no matter how minute the intrusion, and no matter how weighty the public purpose behind it, we have required compensation." *Id.* The second category encompasses regulations which deny all economically beneficial or productive use of land. *Id.*

are likely progenitors of litigation between Hawaiian native tenants, undeveloped land owners, developers, and administrative agencies because under both holdings, the owner suffers a physical invasion of the property, which interferes with quiet enjoyment and "distinct investment-backed expectations."[341]

B. *Future Implications*

When the *Pele* case is remanded to the Third Circuit Court for a full trial on the merits of PDF's claim for continued access into the exchanged lands, the *PASH* holding should not have a direct influence on the remand because neither a SMAP nor an administrative agency decision is at issue. Claims of ancient Hawaiian usage, *kama'āina* testimony, and origins traceable to The Great *Mahele* are likely to dominate the trial. To prevail on the merits, the Campbell Estate could assert that customary and traditional rights of native Hawaiians are no longer applicable under the *Kalipi* and *Pele* rationale because that portion of the land is developed by virtue of the geothermal energy project on the property. The Campbell Estate could also assert that actual harm will be done to the property or to further geothermal projects by PDF's continued access, and that this harm will outweigh PDF member interests. Under *Kalipi* and *Pele*, PDF must prove that the extra-*ahupua'a* customs for subsistence, cultural, and religious purposes have been continuously practiced on this particular parcel for some time, and establish that its members' interest in continuing these practices outweigh the harm to the Campbell Estate.[342]

Conflicts will continue to arise in the wake of the *Pele* and *PASH* decisions because more hard questions seem to have been raised than were answered by the controversial holdings. Many questions are of a fact-specific nature. What is the standard for determining that a practice has risen to the level of a customarily and traditionally exercised right?

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[341] The *Lucas* Court recognized "'the extent to which the regulation has interfered with distinct investment-backed expectations' are keenly relevant to takings analysis generally." *Id.* at 2895 n.8.

[342] The "retention of a Hawaiian tradition should in each case be determined by balancing the respective interests and harm once it is established that the application of the custom has continued in a particular area." Pele Defense Fund v. Paty, 73 Haw. 578, 618, 837 P.2d 1247, 1270 (1992), *cert denied*, ___U.S. ___, 113 S. Ct. 1277 (1993) (quoting Kalipi v. Hawaiian Trust Co., 66 Haw. 1, 10, 656 P.2d 745, 751 (1982)).

How do frequency and consistency of the practice factor into the establishment of custom and tradition? Must native tenants prove the rights have been customarily and traditionally practiced on a particular parcel, or within the *ahupua'a*, or *moku*,[343] or anywhere within the Hawaiian Islands? What qualifies as a subsistence, cultural, or religious purpose? For example, does holding a community *lūau* on the undeveloped property of others merit protection as a cultural purpose? Finally, should the blood quantum of native Hawaiians be at issue when discussing who is entitled to practice customarily and traditionally exercised rights?

Other questions raised are of a theoretical nature. How far can customarily and traditionally exercised rights infringe on the legal rights of others? Should the courts assume the legislative function of law making and policy making? What is the appropriate mean between judicial activism and adherence to the prior body of law? How will the State of Hawaii regulate customarily and traditionally exercised Hawaiian native tenant rights? What role will the courts, administrative agencies, and law enforcement officials play in regulating such rights? Finally, how will the legitimate concerns of undeveloped property owners and developers be addressed?

It is clear that unless narrowed to fact-specific exceptions, the *Pele* and *PASH* decisions will bear litigious fruit. The Hawaii Supreme Court will continue to address Hawaiian native tenant claims because the court has a fundamental policy to provide a forum for issues of broad public interest.[344] The court has already declared "that the rights of native Hawaiians are a matter of great public interest."[345]

The effect of the overbroad *Pele* and *PASH* holdings can be remedied in several ways. The State could pass legislation to regulate Hawaiian native tenant rights. Another constitutional convention could be convened to specify the scope of the customary and traditional rights granted in article XII, section 7. Or the default approach could continue

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[343] *Moku* is defined as a district, island, islet or section. PUKUI & ELBERT, *supra* note 33, at 252.

[344] Judicially imposed standing barriers should be lowered when the "needs of justice" would be best served by allowing a plaintiff to bring claims before the court. *Pele*, 73 Haw. at 614, 837 P.2d at 1268-69. This has consistently been the policy of the court. *See, e.g.*, Life of the Land v. Land Use Comm'n, 63 Haw. 166, 623 P.2d 431 (1981); Akau v. Olohana Corp., 65 Haw. 383, 652 P.2d 1130 (1982); In re Application of Hawaiian Elec. Co., 56 Haw 260, 535 P.2d 1102 (1975).

[345] *Pele*, 73 Haw. at 614, 837 P.2d at 1268.

to be utilized, allowing the judiciary to slowly clarify the rights of Hawaiian native tenants through a case-by-case adjudication process.

VI. Conclusion

A basic knowledge of the origin of Hawaiian native tenant rights is essential to understanding the state constitutional mandate to protect customary and traditional rights for subsistence, cultural, and religious purposes.[346] This comment chronicled the evolution of the Hawaiian land tenure system from the monarch as owner of all lands in the kingdom, to a fee simple regime facilitated by The Great *Mahele*, the 1850 Act authorizing foreigners to own land, and the Kuleana Act.[347] Tenant access and gathering rights for subsistence, cultural, and religious purposes were an integral part of the ancient Hawaiian economy,[348] and the titles to Crown, Government, and *Konohiki* Lands were all subject to the rights of native tenants.[349] Arguably the customary and traditional rights of native tenants, however, were extinguished by the Act of July 10, 1850, on land held by resident aliens,[350] and never permitted indiscriminate entry and use of the developed *kuleana* parcels of other tenants which were intended for personal use.[351]

Today, Hawaiian native tenant rights derive from three sources: (1) article XII, section 7 of the Hawaii Constitution, (2) Hawaii Revised Statutes section 7-1, and (3) Hawaii Revised Statutes section 1-1.[352] Of the three, section 7-1 has most frequently been asserted in access and gathering rights cases brought in state courts.[353] Historically however, the courts have narrowly construed section 7-1 as an exhaustive inventory of access and gathering rights.[354] Thus, with the exception of the few Richardson Court cases which relied upon ancient Hawaiian usage, *kama'āina* testimony, and origins traceable to The Great *Mahele*, native tenants usually lost their case on the merits.[355] Article XII, section 7 of the Hawaii Constitution was conspicuously absent from

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[346] *See supra* text accompanying notes 24-25.
[347] *See supra* text accompanying notes 60-87.
[348] *See supra* part III.B.
[349] *See supra* text accompanying note 72.
[350] *See supra* text accompanying notes 76-77.
[351] *See supra* text accompanying notes 88-89.
[352] *See supra* text accompanying notes 116-20.
[353] *See supra* text accompanying note 121.
[354] *See supra* text accompanying note 122.
[355] *See supra* text accompanying notes 233-34.

the access and gathering claims asserted, until 1992 when the Hawaii Supreme Court reviewed *Pele Defense Fund v. Paty*.[356]

The *Pele* holding appears to abolish the longstanding *ahupua'a* residency requirement because as long as the activity has been customarily and traditionally exercised for subsistence, cultural, and religious purposes by native Hawaiian *ahupua'a* tenants,[357] the practice may extend beyond the *ahupua'a* in which the tenant resides.[358] However careful scrutiny of the four factors upon which the Hawaii Supreme Court predicated the expansive *Pele* holding indicate that an abolition of the *ahupua'a* residency requirement is difficult to justify.

First, the plain meaning of the constitutional language "*ahupua'a* tenants" limits the exercise of customary and traditional rights to the residents of the *ahupua'a* where the rights will be practiced.[359] Second, the court's reliance upon the *Kalipi* decision as precedent is difficult to justify because the legal foundation of *Kalipi* is distinguishable from that of *Pele*, the *Pele* holding conflicts with, rather than extends, the *Kalipi* opinion, and the *Pele* holding defies the *Kalipi* court rationale to avoid conflict with western property law and the well-being of other residents.[360]

Third, had the court considered the drafters' intent as gathered from the four corners of the aggregate committee reports and debates, rather than from a selective reading of Standing Committee Report Number 57, it would be difficult to justify the abolition of the longstanding *ahupua'a* residency requirement based upon the legislative history of article XII, section 7.[361] The aggregate committee reports indicate that the drafters also desired to protect the rights of private land owners from abusive native tenant practices, expressed the need for state regulation of customary and traditional rights where conflicts occur with the rights of private land owners, could not agree upon the scope of the rights granted or to whom they appertained, and engaged in heated debates over the wisdom of granting non-specified rights in a constitutional amendment that would alter the law as it had existed since 1850.[362] Thus, extending access and gathering rights beyond the

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[356] 73 Haw. 578, 837 P.2d 1247 (1992) *cert. denied*, ___U.S. ___, 113 S. Ct. 1277 (1993). *See supra* text accompanying notes 123, 232-33.

[357] *See supra* text accompanying note 278.

[358] *See supra* text accompanying note 279.

[359] *See supra* text accompanying note 285.

[360] *See supra* text accompanying notes 291-302.

[361] *See supra* text accompanying note 306.

[362] *See supra* text accompanying notes 307-10.

ahupua'a of residency exacerbates, rather than remedies, the inherent conflict between access and gathering rights and western property rights.

Fourth, the *Pele* holding is too broad and imprecise to serve as a meaningful standard for native tenant rights. The justices could have addressed the unusual custom in the Puna district by indicating that the *Pele* holding involved a possible a fact-specific exception to the *ahupua'a* residency requirement which may apply only to undeveloped lands where ancient Hawaiian usage, *kama'āina* testimony, and origins traceable to The Great *Mahele* prove the continuous existence of unusual but customary and traditional practices for subsistence, cultural, and religious purposes.[363] An additional explicit requirement of continuous use of the particular parcel would aid purchasers of undeveloped Hawaiian land to obtain constructive notice of the continuous use of the land by native tenants, and to factor that information into a purchase decision.[364]

The Hawaii Supreme Court's holding in *Pele* produced immediate repercussions. In the *PASH* decision, the Intermediate Court of Appeals relied upon the *Pele* holding as precedent to mandate a determination by administrative agencies as to whether native tenant gathering rights have been customarily and traditionally practiced on the land prior to granting development approval, and to explore the possibilities for preserving them.[365] This holding clearly contravenes the opinions of the Hawaii Supreme Court in *Kalipi* and *Pele* because both decisions stated that native tenant rights neither prevent owners from developing their land, nor ensure that lands will be maintained in an undeveloped state for the exercise of such rights.[366] The *PASH* appeal to the Hawaii Supreme Court further raised the issue of whether the exercise of native Hawaiian gathering rights on private property rises to the level of an unconstitutional taking of property in violation of the Fifth Amendment of the United States Constitution.[367]

The PDF notice to Hawaiians on the Island of Hawai'i encouraged them to indiscriminately exercise customary and traditional practices, including hunting rights, on the undeveloped land of others.[368] Possible

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[363] *See supra* part IV.B.4.
[364] *See supra* text accompanying note 318.
[365] *See supra* text accompanying notes 332-33.
[366] *See supra* text accompanying notes 334-35.
[367] *See supra* text accompanying note 337.
[368] *See supra* text accompanying notes 338-39.

consequences of such action include trespass charges, constitutional claims of taking of private property, hunting violations, and claims of reckless endangering, or worse.[369] The *Pele* and *PASH* holdings are likely to breed further litigation because both holdings allow the owners of undeveloped Hawai'i property to suffer a physical invasion of the property, which significantly conflicts with western property rights.[370] Additionally, appellate review is likely to increase because the Hawaii Supreme Court has articulated a fundamental policy to address the rights of native tenants as issues of great public interest.[371] Finally, more questions seem to have been raised than answered by the controversial *Pele* and *PASH* decisions.[372]

In sum, it is clear from Hawaiian history and prior case law that customary and traditional native tenant rights inherently conflict with western property rights, and perhaps under *PASH*, also conflict with rights guaranteed by the United States Constitution.[373] It is equally apparent that Hawaiian native tenant rights are in a state of flux. They arise out of ancient practice, but expand and contract with the creation or amendment of constitutions, the passage of laws, and through judicial interpretation.[374] Although these rights are protected by the Hawaii Constitution, the state has a clear obligation to regulate them to prevent indiscriminate abuse and interference with the rights of undeveloped property owners.[375] Like the drafters of article XII, section 7 of the Hawaii Constitution, it is the hope of this author that "it is possible, with work, to protect the rights of private land owners and allow for the preservation of an aboriginal people."[376]

Gina M. Watumull

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[369] *See supra* text accompanying note 341.
[370] *See supra* text accompanying notes 340-41.
[371] *See supra* text accompanying notes 344-45.
[372] *See supra* text accompanying notes 342-44.
[373] *See supra* text accompanying notes 334-37.
[374] HANDBOOK, *supra* note 2, at ix.
[375] *See supra* text accompanying note 130.
[376] COMM. WHOLE REP. NO. 12, *reprinted in* 1 PROCEEDINGS OF THE CONST. CONVENTION OF HAW. OF 1978, at 1016 (1980); *see supra* text accompanying note 132.

United States v. Burke and Internal Revenue Code Section 104(a)(2): When Will Personal Injury Damages Be Taxed?

I. Introduction

A baby is born at an army medical center.[1] The child suffers severe brain damage. The parents, alleging negligence on the part of the delivery room staff, are awarded twelve million dollars in damages for lost earnings, emotional distress, pain and suffering, and medical expenses.

A female branch manager sues the local bank for sexual discrimination. She receives a settlement payment of two million dollars for lost differential wages and emotional distress.

A 17-year old student athlete is involved in a near-fatal car accident. He is now a quadriplegic and will require attendant care for the rest of his life. He sues the driver of the other car. A jury awards the victim ten million dollars in damages.

Beyond the substantive issues of these negligence and discrimination claims, each scenario raises questions about damage awards and settlement payments.[2] The size of the damage award can be a central concern in any lawsuit. The tax treatment of a damage award can drastically affect the overall amount of funds available to the victim and may affect his or her future financial stability. An attorney, therefore, should have a basic understanding of how taxes affect damage awards.

Taxes are important to damage awards for two reasons. First, depending upon the circumstances, the amount of the damage award

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[1] The examples in this comment are hypothetical and are not based on actual cases.

[2] In this comment, "damage award" refers to both damage awards and settlement payments.

will be included in or excluded from the injured party's income. The ability to exclude the award from income can make the difference between a substantial award and a meager one. Income taxes on the proposed award amounts for the baby, branch manager, and student athlete can be substantial, regardless of the injured party's tax bracket. Second, taxes affect the calculation of the award amount itself. This comment focuses on the tax treatment of damage awards and does not discuss how taxes affect the calculation of damage awards.

Despite the significance of federal income taxes on damage awards, the courts, attorneys, and economic experts struggle to interpret the applicable section of the Internal Revenue Code, 26 U.S.C. § 104(a)(2),[3] and to sort through the plethora of conflicting case law and regulations.[4] This comment examines the following taxation issues:

1. When can a damage award be excluded from a victim's taxable income; and
2. Can an award for punitive damages be excluded from taxable income?

Part II of this comment focuses on the statutory authority and policy considerations governing taxation of damage awards. Part III examines the United States Supreme Court's analysis of when a damage award can be excluded from taxable income under section 104(a)(2), as propounded in *United States v. Burke*.[5] Part IV discusses the taxation issues

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[3] *See infra* text accompanying note 12 (quoting the pertinent language of section 104(a)(2).

[4] For example, in determining the applicability of § 104(a)(2), the Court of Appeals for the Ninth Circuit stated that the proper inquiry is into the nature of the claim and whether the injury was personal or nonpersonal. Roemer v. Comm'r, 716 F.2d 693, 696-97 (9th Cir. 1983). The Internal Revenue Service subsequently issued Revenue Ruling 85-143 which rejected the *Roemer* analysis and stated that the proper inquiry regarded the economic (injury to a business) versus noneconomic (personal injury) consequences of the injury. Rev. Rul. 85-143, 1985-2 C.B. 55-56. In Bent v. Comm'r, the Court of Appeals for the Third Circuit held that a settlement payment based on back pay was excluded from income. 835 F.2d 67, 70 (3d Cir. 1987). The *Bent* decision is in contrast to Revenue Ruling 72-341 which stated that an award based on back pay was received in lieu of income and therefore should be taxed. Rev. Rul. 72-341, 1972-2 C.B. 32. The qualification of punitive damages under § 104(a) is another area in which case law and administrative regulations conflict. Revenue Ruling 84-108 stated that punitive damages from a wrongful death claim should be included in income. Rev. Rul. 84-108, 1984-2 C.B. 32, 34. However, a federal district court held that damages received from a wrongful death claim qualified for the § 104(a)(2) exemption despite Revenue Ruling 84-108. Burford v. United States, 642 F. Supp. 635, 638 (N.D. Ala. 1986).

[5] 504 U.S. ____, 112 S. Ct. 1867 (1992). In *Burke*, damages received from a Title VII action were deemed ineligible for the 26 U.S.C. § 104(a)(2) exemption and were therefore included in taxable income. 112 S. Ct. at 1874. *See* discussion *infra* part III.

concerning punitive damages in light of the United States Tax Court's decision in *Horton v. Commissioner of Internal Revenue.*[6] Finally, Part V analyzes the impact of the *Burke* and *Horton* cases on the taxation of damage awards from a variety of tort claims.

II. History

An analysis of the tax treatment of damage awards begins with the statutory authority for taxation.[7] Gross income is defined in 26 U.S.C. § 61, which states: "[G]ross income means all income from whatever source derived . . . ."[8] The fundamental principle is that income is an "undeniable accession[] to wealth, clearly realized, and over which the taxpayers have complete dominion,"[9] regardless of the source. Due to the expansive definition of income, the Internal Revenue Service (IRS) and the courts give "a liberal construction to this broad phraseology[,] in recognition of the intention of Congress to tax all gains except those specifically exempted."[10] Absent a specific exemption, all damage awards would be included in an injured party's income and, therefore, would be taxed.

Specific exemptions from gross income are found in sections 101 through 136 of the Internal Revenue Code.[11] This comment focuses

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[6] 100 T.C. 93 (1993). *Horton* held that punitive damages awarded in 1985 are excluded from taxable income. *Id.* at 101. *See* discussion *infra* part IV.

[7] The United States Constitution grants Congress the broad powers of taxation. U.S. Const. art. I, § 8, cl. 1. "The Congress shall have the Power to . . . collect Taxes . . . to pay the Debts and provide for the common Defence and general Welfare of the United States. . . ." *Id.* The Internal Revenue Code, 26 U.S.C. §§ 1-9602 (1988 & Supp. 1992) and the regulations promulgated by the IRS, Treas. Reg. §§ 1.0-702.9037-2 (1993) (codified at 26 C.F.R. pts. 1-702), give authority to the method of taxation.

[8] 26 U.S.C. § 61 (1988).

[9] Commissioner v. Glenshaw Glass, Co., 348 U.S. 426, 431 (1955). *Glenshaw Glass* held that money received as exemplary damages for fraud must be reported as gross income. *Id.* at 432-33.

[10] *Id.* at 430.

[11] 26 U.S.C. §§ 101-136 (1988 & Supp. 1992). These provisions include, but are not limited to, exemptions for certain death benefits, 26 U.S.C. § 101 (1988); gifts and inheritances, 26 U.S.C. § 102 (1988); interest on state and local bonds, 26 U.S.C. § 103 (1988); and amounts received under accident and health plans, 26 U.S.C. § 105 (1988 & Supp. 1992).

on the exemption of compensation for personal injuries or sickness in 26 U.S.C. § 104 which states:

> (a) . . . gross income does not include -
>
> . . . .
>
> (2) the amount of any damages received (whether by suit or agreement and whether as lump sums or as periodic payments) on account of personal injuries or sickness;
>
> . . . .
>
> Paragraph (2) shall not apply to any punitive damages in connection with a case not involving physical injury or physical sickness.[12]

While section 104 appears straightforward, it is one of the most litigated sections of the Internal Revenue Code.[13] The deceptively simple language of section 104(a)(2) remains controversial between the courts and the IRS.[14] To gain an understanding of the controversy surrounding the exclusion of damage awards under section 104(a)(2), the purposes and policies behind damages will be discussed. That discussion will be followed by an analysis of the section 104(a)(2) exemption and how the purposes and policies behind damages relate to this exemption.

Damages can be characterized as compensatory or punitive in nature.[15] Compensatory damages are awarded "for the injury sustained . . . [to] make good or replace the loss caused by the wrong or injury."[16] Punitive damages focus on the actions of the wrongdoer and attempt to prevent similar wrongful actions.[17]

In discussing compensatory damages, the Hawaii Supreme Court interpreted a general rule "to give a sum of money to the person wronged which as nearly as possible, will restore him to the position he would be in if the wrong had not been committed."[18] In addition to compensation for losses, other policies for providing damages to an injured party include deterrence to prevent future harm, corrective

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[12] 26 U.S.C. § 104(a) (Supp. 1992). The provision relating explicitly to punitive damages was added in 1989. *See infra* notes 40-48 and accompanying text.

[13] Timothy R. Palmer, *Internal Revenue Code Section 104(a)(2) and the Exclusion of Personal Injury Damages: A Model of Inconsistency*, 15 J. CORP. L. 83, 87 (1989).

[14] *See supra* note 4.

[15] 1 DAN B. DOBBS, LAW OF REMEDIES § 1.1, at 3-4 (2d ed. 1993).

[16] BLACK'S LAW DICTIONARY 390 (6th ed. 1990).

[17] DOBBS, *supra* note 15, § 1.1, at 4.

[18] Rodrigues v. State, 52 Haw. 156, 167, 472 P.2d 509, 517 (1970) (quoting CHARLES T. MCCORMICK, HANDBOOK ON THE LAW OF DAMAGES § 137, at 561 (1935)).

justice to address the moral aspects of a defendant's conduct, and legal precedent.[19] While the purpose of compensatory damages is to make the injured party whole again, punitive damages focus on the wrongdoer.[20]

The concept of punitive damages was addressed by the Hawaii Supreme Court in *Masaki v. General Motors Corp.*.[21] Drawing on treatises,[22] the court stated:

> Punitive or exemplary damages are generally defined as those damages assessed in addition to compensatory damages for the purpose of punishing the defendant for aggravated or outrageous misconduct and to deter the defendant and others from similar conduct in the future. Thus, the practice of awarding punitive damages is an exception to the general rule that damages are aimed at compensating the victim for his injuries.[23]

The purposes of compensatory and punitive damages provide several justifications for the section 104(a)(2) exemption. The first justification, known as the return of capital theory, is that a damage award for personal injuries or sickness restores the victim to his or her position prior to the injury.[24] Being made *whole* again is analogized to a return on investment, or a return of capital.[25] Since there is no tax basis[26] for a damage award that replaces a loss, the award should not be taxed. The second justification is that the damage award is an involuntary transaction.[27] The victim did not choose to be injured. Since the Internal Revenue Code contains provisions granting special status to

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[19] W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 4, at 20-26 (5th ed. 1984).

[20] BLACK'S LAW DICTIONARY 390-92 (6th ed. 1990).

[21] 71 Haw. 1, 780 P.2d 566 (1989). *Masaki* held that punitive damages could be awarded in this product liability case brought by an injured auto mechanic and his parents. *Id.* at 5, 780 P.2d at 569.

[22] The court cited DAN B. DOBBS, HANDBOOK ON THE LAW OF REMEDIES § 3.9, at 204 (1973); RESTATEMENT (SECOND) OF TORTS § 908 (1979); and CHARLES T. MCCORMICK, HANDBOOK ON THE LAW OF DAMAGES § 77, at 275 (1935). 71 Haw. at 6, 780 P.2d at 570.

[23] *Id.* (citations omitted).

[24] Mark W. Cochran, *Should Personal Injury Damage Awards Be Taxed?*, 38 CASE W. RES. L. REV., 43, 45 nn.19-21 (1987-88).

[25] *Id.* at 45 nn.20-21.

[26] The basis of property is defined as the cost of such property. 26 U.S.C. § 1012 (1988).

[27] Cochran, *supra* note 24, at 46 n.29.

certain involuntary transactions,[28] damage awards from involuntary transactions should also receive special exempt status.[29] The third justification is that the exemption is a tax subsidy by the government to benefit the tort victim.[30]

Whether a damage award is compensatory or punitive is only one factor in determining whether an award qualifies for the section 104(a)(2) exemption. While the policies behind damages provide some justification for the section 104(a)(2) exemption, the compensatory-punitive dichotomy described above does not mesh neatly with the statutory text of section 104(a)(2). What is certain from the text of section 104(a)(2) is that (1) damage awards *on account of personal injury and sickness* are excluded from the victim's income,[31] and (2) punitive damages are excluded from the victim's income if the damage awards are for physical injury or sickness.[32] Therefore, the test for whether a damage award will qualify for the section 104(a)(2) exemption depends upon the type of damage award and whether the damages were awarded *on account of personal injuries and sickness*.[33]

The courts' attempts to interpret the phrase *on account of personal injuries and sickness* has a long and complex history.[34] To find a suitable test for the simple yet ambiguous language of section 104(a)(2), courts developed and rejected the "in lieu of what" or nature of the damages test[35] and the "nature of the injury" test.[36] With the IRS, the Tax

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[28] *See, e.g.*, 26 U.S.C. § 1033 (1988 & Supp. 1992) (involuntary conversion of property).

[29] Cochran, *supra* note 24, at 44 n.10.

[30] *Id.* However, these three justifications may be inconsistent with established principles of taxation and may actually clash with fundamental tort policy. Professor Cochran explains that the return of capital theory may be inapplicable because the taxpayer's basis is zero. *Id.* at 46 n.26. The involuntary transaction justification is inconsistent with established principles of taxation because an involuntary transaction is only a deferral of income rather than an absolute exclusion from income. *Id.* at 47. Finally, the tax subsidy justification is inconsistent with fundamental tort policy since the exemption for personal injury is not a wise investment of public resources. The cost allocation between the parties is not equitable. Due to the personal injury tax exemption, the government subsidizes the guilty party. Therefore, the guilty party does not bear his or her appropriate share of the cost. *Id.* at 59-64 nn.140-82.

[31] 26 U.S.C. § 104(a)(2) (1988).

[32] 26 U.S.C. § 104(a) (Supp. 1992).

[33] *Id.*

[34] *See supra* note 4.

[35] The "in lieu of what" test was premised upon the concept that recoveries were generally taxed in the same manner as items for which the recovery was intended to

Court, and the Courts of Appeals disagreeing over the proper test, the United States Supreme Court took up the analysis in *United States v. Burke*.[37]

The *Burke* Court focused on the nature of the claim and articulated the following general test: A damage award will qualify for the section 104(a)(2) exemption if the award redresses a tort-like personal injury.[38] A tort-like personal injury is defined by the availability of a broad range of damages.[39] While *Burke* stated the general test to apply to a section 104(a)(2) exemption, it did not specifically address punitive damages. The issue of whether punitive damages qualify for the section 104(a)(2) exemption was addressed in a separate line of cases[40] and in an amendment to section 104(a).[41]

Historically, punitive damages did not qualify for the section 104(a)(2) exemption. In *Commissioner v. Glenshaw Glass*,[42] the United States Supreme Court held that punitive damages should be included in gross income.[43] Since then, the IRS issued a series of Revenue Rulings generally reaffirming the *Glenshaw Glass* holding.[44] Currently, Revenue

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substitute. Raytheon Production Corp. v. Comm'r, 144 F.2d 110, 113 (1st Cir. 1944), *cert. denied*, 323 U.S. 779 (1944) (stating that recoveries which represent a reimbursement of lost profits are income). The "in lieu of what" test originally dealt with damages awarded to businesses. Palmer, *supra* note 13, at 87. Courts applied the "in lieu of what" test to personal injury awards by analyzing the nature of the damages. If the court viewed the damages as paid in lieu of personal injury, the award was excluded under § 104(a)(2). However, if the damages were awarded in lieu of lost wages or other damages that were economic in character, they were included in income. Palmer, *supra* note 13, at 88.

[36] Under the "nature of the injury" test, the relevant inquiry focused on whether the damages were received on account of personal or non-personal injury. The focus was not whether damages compensated the taxpayer for economic losses, nor was it whether the injury was physical or nonphysical. Byrne v. Comm'r, 883 F.2d 211, 214 (3d Cir. 1989).

[37] 504 U.S. ____, 112 S. Ct. 1867 (1992).

[38] *Id.* at 1872.

[39] *Id.* at 1871.

[40] *See* Burford v. United States, 642 F. Supp. 635 (N.D. Ala. 1986); Miller v. Comm'r, 93 T.C. 330 (1989), *rev'd*, 914 F.2d 586 (4th Cir. 1990); Downey v. Comm'r, 97 T.C. 150 (1991).

[41] Omnibus Budget Reconciliation Act of 1989, Pub. L. No. 101-239, § 7641(a), 103 Stat. 2106, 2379 (1989).

[42] 348 U.S. 426 (1955).

[43] *Id.* at 433.

[44] The series of revenue rulings issued by the IRS is confusing and inconsistent.

Ruling 84-108 asserts a blanket rule that punitive damages should be included in gross income.[45]

Despite *Glenshaw Glass* and the IRS's Revenue Rulings stating that punitive damages should not qualify for the section 104(a)(2) exemption, the United States Tax Court held that punitive damages qualified for the section 104(a)(2) exemption if the award was on account of personal injuries or sickness.[46] In 1989, Congress amended section 104(a) to limit the exclusion of punitive damages to cases involving physical injury or physical sickness.[47] The amendment applies to amounts received after July 10, 1989, but not to amounts received on account of settlement in effect on July 10, 1989, nor to amounts received pursuant to claims filed before July 10, 1989.[48] Thus, analysis of

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In Revenue Ruling 75-45, the IRS provided an exception to the *Glenshaw Glass* case. Rev. Rul. 75-45, 1975-1 C.B. 47. It stated that damages received by the executor of an estate in a wrongful death action were excluded from gross income. *Id.* The IRS explained that § 104(a)(2) excludes any damages received on account of personal injury, even if the damages are punitive in nature. *Id.* Revenue Ruling 75-45 was overruled by Revenue Ruling 84-108, which stated that punitive damages in wrongful death actions are included in gross income. Rev. Rul. 84-108, 1984-2 C.B. 32, 34. The IRS relied on the holding in *Glenshaw Glass* as authority for its ruling. *Id.* at 33-34.

[45] Rev. Rul. 84-108, 1984-2 C.B. 32, 34. In Revenue Ruling 85-98, the IRS further explained that the amount received by an individual in settlement of a libel suit for injury to personal reputation must be included in the individual's gross income to the extent such amount represents the satisfaction of punitive damages. *Id.*

[46] Miller v. Comm'r, 93 T.C. 330 (1989), *rev'd*, 914 F.2d 586 (4th Cir. 1990); Downey v. Comm'r, 97 T.C. 150 (1991). *See infra* notes 135-39 and accompanying text. The Tax Court is bound to decide the issue under the Fourth Circuit's decision in *Miller* for cases to be determined within the Fourth Circuit due to the *Golsen* rule. Golsen v. Comm'r, 54 T.C. 742 (1970), *aff'd on other grounds*, 445 F.2d 985 (10th Cir. 1971), *cert. denied*, 404 U.S. 940 (1971) (finding that judicial administration requires the Tax Court to follow a Court of Appeals decision which is squarely on point, where the appeal from the Tax Court decision will be determined by the same Court of Appeals).

[47] The text of the 1989 amendment reads: "Paragraph (2) shall not apply to any punitive damages in connection with a case not involving physical injury or physical sickness." Omnibus Budget Reconciliation Act of 1989, Pub. L. No. 101-239, § 7641(a), 103 Stat. 2106, 2379 (1989). The legislative history of the 1989 amendment reveals that Congress was rejecting judicial decisions holding § 104(a)(2) to cover damages received from nonphysical injuries.

H.R. Rep. No. 247, 101st Cong., 1st Sess. 1354-55 (1989), *reprinted in* 1989 U.S.C.C.A.N. 2824, 2825 (stating that favorable tax treatment is inappropriate when there is no physical injury involved).

[48] Omnibus Budget Reconciliation Act of 1989, Pub. L. No. 101-239, § 7641(b), 103 Stat. 2106, 2379 (1989).

punitive damages is divided into those cases in which the section 104(a) amendment applies, and those in which it does not apply.

Issues concerning the exclusion of punitive damage awards were addressed by the United States Tax Court in *Horton v. Commissioner of Internal Revenue*.[49] *Horton* involved a claim filed before the section 104(a) amendment took effect. Therefore, the section 104(a) amendment did not apply. *Horton* is important, however, because it provides insight into the issues relevant to any analysis of section 104(a) concerning the taxation of punitive damage awards.

The following part examines the United States Supreme Court's test to determine when a damage award qualifies for the section 104(a)(2) exemption as stated in *United States v. Burke*. The impact of the *Burke* test upon the issue of whether punitive damages qualify for the section 104(a)(2) exemption is then examined in the context of *Horton v. Commissioner*.[50]

III. *United States v. Burke*

A. Analysis

In *Burke*, female employees of the Tennessee Valley Authority (TVA) filed a Title VII[51] action in 1984 for unlawful discrimination in the payment of salaries on the basis of sex.[52] The claimants alleged that the TVA increased the salaries of employees in male-dominated positions but did not increase the salaries of workers in female-dominated positions.[53] The female employees also complained that the TVA lowered the salaries in certain female-dominated positions.[54]

The parties reached a settlement agreement with a payment of five million dollars to the female employees.[55] The TVA withheld federal income taxes on the amounts allocated to the claimants.[56] The female employees filed for refunds of the taxes withheld from their individual

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[49] 100 T.C. 93 (1993).
[50] *See infra* part IV.
[51] 42 U.S.C. §§ 2000e to 2000e17 (1988 & Supp. 1992).
[52] *Burke*, 504 U.S. at ____, 112 S. Ct. at 1869.
[53] *Id.*
[54] *Id.*
[55] *Id.*
[56] *Id.*

settlement allocations with the IRS.[57] The IRS disallowed these refund claims.[58]

The taxpayers brought a refund action in the United States District Court of the Eastern District of Tennessee claiming that the settlement payments should be excluded from their gross income pursuant to section 104(a)(2).[59] The trial court held that the settlement payments were awarded for back pay and not for compensatory damages; therefore, the settlement payments did not qualify for the section 104(a)(2) exemption.[60] The Court of Appeals for the Sixth Circuit reversed, holding that the section 104(a)(2) exemption question turns on whether the injury and claim are tort-like in nature.[61] Since the Title VII claim was deemed tort-like in nature, the Sixth Circuit held that the payments should be excluded from income.[62]

In contrast to the Sixth Circuit's holding in *Burke* that damages from a Title VII action should be excluded from income, the Court of Appeals for the District of Columbia Circuit and the Court of Appeals for the Fourth Circuit held that back pay awarded in a Title VII action must be included in income.[63] The IRS petitioned for review of the Sixth Circuit's *Burke* decision, and the United States Supreme Court granted certiorari to resolve the conflict among the Courts of Appeals.[64]

In *Burke*, the Supreme Court crafted a narrow holding that an award in settlement of a pre-1991 Title VII claim[65] was not excluded from income under section 104(a)(2).[66] The Court initially determined when damages are awarded *on account of personal injuries or sickness* and thereby

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[57] *Id.*

[58] *Id.*

[59] Burke v. United States, No. CIV-1-88-508, 1990 WL 56155, at *1 (E.D. Tenn. March 20, 1990).

[60] *Id.* at *6.

[61] Burke v. United States, 929 F.2d 1119, 1123 (6th Cir. 1991).

[62] *Id.*

[63] Sparrow v. Comm'r, 949 F.2d 434, 438 (D.C. Cir. 1991), *cert. denied*, 504 U.S. ___, 112 S. Ct. 3009 (1992); Thompson v. Comm'r, 866 F.2d 709, 712 (4th Cir. 1989).

[64] *Burke*, 504 U.S. ___, 112 S. Ct. at 1870.

[65] The Civil Rights Act of 1991 amended Title VII and authorized a victim's recovery of compensatory and punitive damages in certain circumstances. Civil Rights Act of 1991, sec. 102, § 1977A, 105 Stat. 1071, 1073, (1991) (codified at 42 U.S.C. § 1981a (Supp. 1992)). The plaintiffs in *Burke* filed an action pursuant to pre-1991 Title VII. 504 U.S. at ___, 112 S. Ct. at 1872 n.8.

[66] *Burke*, 504 U.S. at ___, 112 S. Ct. at 1874.

qualify for the section 104(a)(2) exemption.[67] The Court began its analysis with the definition of income and noted that the concept of income "sweeps broadly."[68] Damage awards are meant to be included as income under 26 U.S.C. § 61 unless these awards qualify for the section 104(a)(2) exemption.[69] The text of section 104(a)(2) and its legislative history do not define *personal injury*.[70] However, the Court noted that a United States Treasury regulation[71] linked *personal injury* under section 104(a)(2) to traditional tort-like rights.[72]

The *Burke* test is based on the premise that the IRS regulations formally link personal injury under section 104(a)(2) to traditional tort principles.[73] The Court defined the hallmark of tort liability as the availability of a broad range of damages to compensate the plaintiff.[74] Therefore, the Court determined that the availability of a wide range of damages or remedies was dispositive of whether a claim redresses a tort-like injury.[75]

The Court then determined whether a Title VII claim redresses a tort-like personal injury.[76] It stressed that harm to individuals did not necessarily mean that there was a tort-like personal injury.[77] In order to qualify under the section 104(a)(2) exemption, the taxpayer has the burden of showing that Title VII redresses a tort-like personal injury.[78]

Title VII actions are based on economic injury and are limited to equitable remedies.[79] The Court noted that Title VII actions were different from other federal anti-discrimination statutes because Title VII actions denied the victim the right to a jury trial and provided

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[67] *Id.* at 1870.

[68] *Id.*

[69] *Id.*

[70] *Id.* at 1870 n.5.

[71] Treas. Reg. § 1.104-1(c) (1993). The regulation states in relevant part: "Section 104(a)(2) excludes from gross income the amount of any damages received (whether by suit or agreement) on account of personal injuries or sickness. The term 'damages received (whether by suit or agreement)' means an amount received . . . through prosecution of a legal suit or action based upon tort or tort type rights, or through a settlement agreement entered into in lieu of such prosecution." *Id.*

[72] *Burke*, 504 U.S. at ____, 112 S. Ct. at 1870.

[73] *Id.*

[74] *Id.* at 1871.

[75] *Id.*

[76] *Id.* at 1872.

[77] *Id.* at 1873.

[78] *Id.* at 1872.

[79] *Id.* at 1873.

limited types of relief.[80] Although the Civil Rights Act of 1991[81] now provides the right to a jury trial and the availability of compensatory and punitive damages, these changes could not be imported back into an analysis of the statute as it existed at the time of the lawsuit.[82] Since pre-1991 Title VII actions provided only for back pay and other injunctive relief, the Court concluded that pre-1991 Title VII actions did not redress a tort-like injury.[83]

The Court further found that the purpose of Title VII was only to restore victims to the wage and employment positions that they would have occupied absent discrimination.[84] The statute was not meant to recompense victims for other harms traditionally associated with personal injury such as pain and suffering, emotional distress, or harm to reputation.[85] Therefore, an award for a pre-1991 Title VII claim was not meant to redress a tort-like personal injury within the meaning of section 104(a)(2).[86] The monies received under settlement were, therefore, taxable as income.

In his concurrence, Justice Scalia stated that the Court should not accept the IRS's tort rights formulation without qualification.[87] Justice Scalia cited common connotation, common sense interpretation, and the existence of analogous text in other sections of the Internal Revenue Code to argue that the IRS's tort rights formulation is not "within the range of reasonable statutory interpretation."[88] He also noted that standard statutory interpretation requires the narrow construction of an exemption provision such as section 104(a)(2) of the Internal Revenue Code.[89] However, Justice Scalia agreed with the majority's de-

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[80] *Id.* at 1872.

[81] Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (1991) (codified at 42 U.S.C. § 1981a (Supp. 1992)).

[82] 504 U.S. at ___, 112 S. Ct. at 1874 n.12. In Landgraf v. USI Film Products, the Supreme Court held that the right to recover compensatory and punitive damages provided by the Civil Rights Act of 1991 does not apply to a case that was pending on appeal when the statute was enacted. ___U.S. ___, 114 S. Ct. 1483, 1488 (1994).

[83] 504 U.S. at ___, 112 S. Ct. at 1874.

[84] *Id.* at 1873.

[85] *Id.*

[86] *But see* Civil Rights Act of 1991, Pub. L. No. 102-166, sec. 102, § 1977A, 105 Stat. 1071, 1072-73 (1991) (codified at 42 U.S.C. § 1981a(b) (Supp. 1992)) (amending Title VII to allow the recovery of compensatory and punitive damages in certain circumstances).

[87] *Burke*, 504 U.S. at ___, 112 S. Ct. at 1875 (Scalia, J., concurring).

[88] *Id.* at 1875-76.

[89] *Id.* at 1876.

termination that the pre-1991 Title VII action did not redress tort or tort-type rights.[90] Justice Scalia argued that the legal injury in a Title VII action is economic deprivation rather than personal injury.[91]

Justice Souter, in his concurrence, noted that the competing arguments addressing whether a Title VII claim is tort-like or contract-like were persuasive.[92] However, he agreed with Justice Scalia that principles of statutory interpretation require that an exemption from gross income be narrowly construed and that the exclusion must be clearly stated.[93] He noted that the exclusion was not clearly stated in section 104(a)(2).[94]

In her dissent, Justice O'Connor stated that the available remedies do not fix the character of the right that the taxpayers seek to enforce.[95] While she agreed with the majority's holding that discrimination causes personal injury, she disagreed with the majority's ruling that a Title VII action does not assert tort-like rights due to the limited remedies that Congress made available.[96] Justice O'Connor believed that the focus on remedies was wrong and that the Title VII action required the Court to look at the nature of the statute and type of claim.[97] She stated that federal civil rights suits were analogous to personal injury tort suits not because of the damages available, but because federal law protects individuals against tort-like personal injuries.[98]

The dissent attacked the majority's holding for three additional reasons.[99] First, the majority's contention that the exclusion of settlement payments from federal income tax gives the victims a windfall was incorrect.[100] Justice O'Connor argued that excluding the settlement payments from income taxation puts the victims on equal footing with others who also suffer personal injury.[101] Second, the unavailability of a jury trial was not dispositive.[102] The dissent stated that the Court

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[90] *Id.*

[91] *Id.*

[92] *Id.* at 1877 (Souter, J., concurring).

[93] *Id.* at 1878. "[A]n accession to wealth is not to be held excluded from income unless some provision of the Internal Revenue Code clearly so entails." *Id.*

[94] *Id.*

[95] *Id.* (O'Connor, J., dissenting).

[96] *Id.* at 1879.

[97] *Id.*

[98] *Id.*

[99] *Id.* at 1880.

[100] *Id.*

[101] *Id.*

[102] *Id.*

had repeatedly declined to address this issue in previous cases.[103] Finally, the majority's contention that the Civil Rights Act of 1991 fundamentally changed the nature of a Title VII suit was erroneous.[104] Justice O'Connor argued that Congress added the new penalties to effectuate an established goal of Title VII and not to substantially change prior goals.[105]

B. Commentary

A tort or tort-like claim was defined in *Burke* as one that has "a broad range of damages to compensate the plaintiff 'fairly for injuries caused by the violation of his legal rights.'"[106] The *Burke* test focuses on the nature of the claim and the types of remedies available under the claim. However, Professors Prosser and Keeton, renowned scholars on the topic of torts, state that there is no satisfactory definition of a tort.[107] Attempts at a definition result in language so broad that it includes matters outside of torts, or language so narrow that some torts are left out.[108] Describing the characteristics common to all torts, "a wrong is called a tort only if the harm which has resulted, or is about to result from it, *is capable of being compensated in an action at law for damages*, although other remedies may also be available."[109]

A point of weakness in the majority opinion is the blanket acceptance of the IRS's formulation concerning tort rights.[110] The dissent raised the more fundamental question of whether the remedy should fix the character of the right which the taxpayers seek to enforce.[111] However, there is learned support for the majority's method of looking to remedies to determine the existence of a tort or tort-like right.[112]

The *Burke* Court stated that discrimination could be deemed a personal injury if it exhibited a tort-like concept of injury and remedy.[113]

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[103] *Id.*

[104] *Id.* at 1881.

[105] *Id.*

[106] *Id.* at 1871 (quoting Carey v. Piphus, 435 U.S. 247, 257 (1978)).

[107] KEETON, et al., *supra* note 19, § 1, at 1.

[108] *Id.* § 1, at 2.

[109] *Id.* § 1, at 4 (emphasis added).

[110] *Burke*, 504 U.S. at ___, 112 S. Ct. at 1875 (Scalia, J. concurring).

[111] *Id.* at 1879 (O'Connor, J. dissenting).

[112] *Id.* at 1871 (citing R. HEUSTON, SALMOND ON THE LAW OF TORTS 9 (12th ed. 1957) and DAN B. DOBBS, HANDBOOK ON THE LAW OF REMEDIES § 3.1, at 136 (1973)).

[113] *Id.* at 1873.

The 1991 amendment to Title VII provides a marked change from the statute's remedial focus of injury and remedy.[114] The Civil Rights Act of 1991 provides victims of discrimination with the right to recover compensatory damages in certain circumstances as well as punitive damages and the right to a jury trial.[115] Victims of intentional discrimination can receive compensatory damages for future pecuniary losses, emotional pain, suffering, inconvenience, mental anguish and loss of enjoyment of life, and other pecuniary losses.[116]

The purpose of the 1991 amendment to Title VII was to strengthen existing protections and remedies and to provide more effective deterrence and adequate compensation for victims of discrimination.[117] In *Burke,* the Court contrasted the pre-1991 Title VII with Title VIII of the Civil Rights Act of 1968,[118] "whose fair housing provisions allow for jury trials and awards of compensatory and punitive damages, [that] 'sound[] basically in tort' and 'contrast[] sharply' with the relief available under [pre-1991] Title VII."[119] Thus, with the inclusion of jury trials and awards of compensatory and punitive damages by the Civil Rights Act of 1991, it appears that the *Burke* Court would find a claim under post-1991 Title VII to be based on a *tort-type* injury.[120] Therefore, awards from a post-1991 Title VII claim would probably be excluded from income under section 104(a)(2).

In conclusion, under *Burke,* a damage award will be excluded under section 104(a)(2) if the award redresses a tort or tort-like personal

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[114] *Id.* at 1874 n.12.

[115] *Id.*

[116] *Id.* (quoting Civil Rights Act of 1991, Pub. L. No. 102-166, sec. 102, § 1977A(b), 105 Stat. 1071, 1073 (1991) (codified at 42 U.S.C. § 1981a(b) (Supp. 1992)).

[117] *See* Civil Rights Act of 1991, Pub. L. No. 102-166, §§ 2-3, 105 Stat. 1071, 1071 (1991).

[118] Civil Rights Act of 1968, 42 U.S.C. §§ 3604-3606, 3631 (1988).

[119] 504 U.S. at ___, 112 S. Ct. at 1874 (quoting Curtis v. Loether, 415 U.S. 189, 195, 197 (1974)).

[120] The claimants in *Burke* cited the Civil Rights Act of 1991 in an attempt to convince the Court that their Title VII claims were for tort-type injuries. 504 U.S. at ___, 112 S. Ct. at 1874 n.12. However, the Court said that the right to compensatory and punitive damages as well as the right to a jury trial were not inherent and therefore, the amendment could not be imported back to the time of female employees' claims. *Id.* The Supreme Court recently ruled that the amendment's provisions for compensatory and punitive damages cannot be applied retroactively to lawsuits filed before the new law took effect. Landgraf v. USI Film Products, ___ U.S. ___, 114 S. Ct. 1483, 1488 (1994). *See supra* note 82.

injury.[121] Whether the claim is for a tort or tort-like injury will be determined by the relevant cause of action, evidenced by a tort-like conception of injury and the available remedies.[122] Application of the *Burke* test and issues concerning the taxation of punitive damages were addressed by the United States Tax Court in *Horton v. Commissioner.*

IV. *HORTON V. COMMISSIONER OF INTERNAL REVENUE*

A. *Analysis*

Ernest and Mary Horton sued Union Light, Heat, and Power Co. (Union) for personal injuries from an explosion and fire due to a gas leak in their home.[123] Union was found liable for the Hortons' personal injuries.[124] Ernest Horton received $62,265 in compensatory damages and $100,000 in punitive damages.[125] Mary Horton received $41,287 in compensatory damages and $400,000 in punitive damages.[126] The punitive damages were awarded based upon a finding of gross negligence by Union.[127]

The Kentucky Court of Appeals reversed the trial court's award of punitive damages.[128] The Kentucky Supreme Court reinstated the punitive damages.[129] The Hortons did not include the punitive damage amounts in their gross income and the IRS determined a deficiency.[130] The Hortons filed a petition with the United States Tax Court to redetermine the deficiency.[131]

The issue before the Tax Court was whether the punitive damage awards should be excluded from income pursuant to pre-amendment section 104(a).[132] The language limiting qualification to physical injury

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[121] *Burke*, 504 U.S. at ___, 112 S. Ct. at 1872.
[122] *Id.* at 1873.
[123] Horton v. Union Light, Heat & Power Co., 690 S.W.2d 382, 384 (Ky. 1985).
[124] *Id.*
[125] Horton v. Comm'r, 100 T.C. 93 (1993).
[126] *Id.* at 94.
[127] 690 S.W.2d at 383.
[128] *Id.* at 384.
[129] *Id.* at 385.
[130] Horton v. Comm'r, 100 T.C. 93, 94 (1993).
[131] *Id.*
[132] *Id.* at 94-95. *See supra* text accompanying notes 47-48.

and sickness was added in the 1989 amendment to the statute.[133] The court ruled that the Hortons' punitive damages qualified as a section 104(a)(2) exemption pursuant to the pre-amendment section.[134]

In allowing the exemption, the Tax Court reaffirmed its holding in *Miller v. Commissioner*.[135] In *Miller*, the Tax Court held that punitive damages received in a personal injury suit were excluded pursuant to pre-amendment section 104(a).[136] Because punitive and exemplary damages were available when section 104(a)(2) was enacted, the Tax Court determined that Congress meant to include *all* damages related to personal injury.[137] The Fourth Circuit reversed, interpreting the language of section 104(a)(2) narrowly and concluding that Congress intended to exclude only those damages that were meant to make the taxpayer whole and not awards resulting in a gain or profit.[138] The Fourth Circuit concluded that, under Maryland law, punitive damages were not awarded to compensate losses caused by personal injury.[139]

In *Horton*, the Tax Court rejected the Fourth Circuit's holding in *Miller* that the section 104(a)(2) exemption applied only to amounts to restore lost capital.[140] The Tax Court stated that the beginning and end of the inquiry was whether the damages were paid on account of personal injury.[141] If the underlying claim was for personal injury, any damages, whether compensatory or punitive, received on account of the claim qualified for the exemption.[142] As support for its emphasis on the nature of the underlying claim, the Tax Court cited the United States Supreme Court's opinion in *Burke*.[143]

According to the Tax Court, *Burke* implied that Congress assumed that *all* damages, including punitive damages, for tort or tort-like claims

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[133] Omnibus Budget Reconciliation Act of 1989, Pub. L. No. 101-239, § 7641(a), 103 Stat. 2106, 2379 (1989) (codified as amended at 26 U.S.C. § 104(a) (Supp. 1992)).

[134] *Horton*, 100 T.C. at 101.

[135] 93 T.C. 330 (1989), *rev'd*, 914 F.2d 586 (4th Cir. 1990).

[136] *Id.* at 341.

[137] *Id.* at 338 (emphasis added).

[138] Miller v. Comm'r, 914 F.2d 586, 590 (4th Cir. 1990).

[139] *Id.* at 589.

[140] Horton v. Comm'r, 100 T.C. 93, 96 (1993). Although the Fourth Circuit reversed the Tax Court's holding in *Miller*, the *Horton* case as law stands on its own and provides insight into the Tax Court's application of *Burke* to punitive damage awards. Until a higher court rules on the question, the issue remains unsettled.

[141] *Id.*

[142] *Id.* at 95.

[143] *Id.* at 96.

involving both physical and nonphysical injuries would be excluded from income.[144] Justice O'Connor's dissent in *Burke* stated that a taxpayer can "exclude from gross income *any* amount[] received as a result of asserting a 'tort-type' right to recover for personal injury."[145] In Kentucky, punitive damages serve to compensate the injured party *and* to punish the wrongdoer.[146] Therefore, the Fourth Circuit's method of distinguishing between damages that serve a compensatory purpose and those that serve a retributive function could not be applied easily.[147]

The Tax Court's interpretation of the impact of the *Burke* test is supported by *O'Gilvie v. United States*.[148] The district court in *O'Gilvie* held that the proper inquiry dealt with the nature of the claim.[149] Since the wrongful death claim was deemed tort-like in nature, punitive damages were excluded from gross income.[150] *O'Gilvie* concluded that *Burke* established that punitive damages were not just incidental results of a personal injury claim, but were inextricably bound up with tort-type rights.[151] Since the prime determinant of the claim was whether it was for personal injury, it was logical to conclude that punitive damages were received *on account of* such claims.[152]

Judge Beghe, in his concurrence, argued that a distinction should be made between *personal injury* and *tortious injury*.[153] He described personal injury as a subset of tortious injury;[154] therefore, not all tortious injury is personal injury.[155] *Damages received* is defined by

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[144] *Id.* at 99.

[145] *Burke*, 504 U.S. at ___, 112 S. Ct. at 1878 (O'Connor, J., dissenting) (emphasis added). "While Justice O'Connor, joined by Justice Thomas, dissented from the majority's holding that the Title VII claim was not a tort type action, the dissenting opinion was in full agreement with the majority that the essential determination for excludability under section 104(a)(2) was the nature of the underlying claim." *Horton*, 100 T.C. at 98.

[146] *Horton*, 100 T.C. at 100.

[147] *Id.*

[148] O'Gilvie v. United States, No. 90-1075B, 1992 WL 123806 (D. Kan. May 26, 1992), *reconsideration granted*, O'Gilvie v. United States, No. 90-1075B, 1992 WL 223847 (D. Kan. Aug. 26, 1992). Kelly O'Gilvie's wife died from toxic shock syndrome. 1992 WL 123806 at *1. *O'Gilvie* held that a settlement payment for punitive damages under a wrongful death claim qualified under the *Burke* analysis as damages paid on account of personal injury. 1992 WL 223847 at *1.

[149] 1992 WL 223847 at *1.

[150] *Id.*

[151] *Id.*

[152] *Id.*

[153] *Horton*, 100 T.C. at 103 (Beghe, J., concurring).

[154] *Id.*

[155] *Id.* at 104.

reference to tort law and the remedies available.[156] However, personal injury is not properly defined as any injury that is tortious, but as tortious injury to the person with bodily harm being the clearest example.[157] Although all of the Hortons' injuries were tortious, they may not have all been personal.[158] Judge Beghe noted that the proper result in *Horton* might have been different if the damages had been stipulated differently.[159] Therefore, Judge Beghe suggested that the inquiry should determine whether Kentucky law permitted punitive damages for non-personal injuries.[160]

In the dissent, Judge Whalen argued that in order to qualify for the section 104(a)(2) exemption, the award must meet two requirements.[161] First, the nature of the underlying claim must be a tort-type personal injury.[162] Second, the damage award must be received *on account of* personal injuries or sickness.[163] Judge Whalen argued that punitive damages in this case were not awarded *on account of* personal injuries or sickness.[164] Under general tort principles and Kentucky law, the punitive damages were awarded on account of the gross negligence of the defendant gas company, rather than on account of the Hortons' personal injuries.[165] The dissent stated that *Burke* only dealt with the first requirement and never got to the second requirement—that the amount at issue must be paid *on account of* personal injury.[166]

B. Commentary

The Fourth Circuit, the United States district courts, and the Tax Court disagree over whether pre-amendment punitive damage awards

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[156] *Id.* at 103.
[157] *Id.* at 103-04.
[158] *Id.* at 104.
[159] *Id.* at 101.
[160] *Id.* at 102.
[161] *Id.* at 108 (Whalen, J., dissenting).
[162] *Id.*
[163] *Id.*
[164] *Id.* at 112. Judge Whalen explained that many torts do not involve personal injury and sickness. *Id.* Damages received on account of torts that do not involve personal injury and sickness should not qualify for the § 104(a)(2) exemption. *Id.* For example, in *Horton*, a portion of the compensatory damages were received on account of property damage to the Horton's house and its contents. *Id.* Judge Whalen believed that an award for property damage should not qualify for the § 104(a)(2) exemption. *Id.*
[165] *Id.* at 105.
[166] *Id.* at 110-11.

qualify for the section 104(a)(2) exemption.[167] The IRS continues to assert that these punitive damages should be included in gross income.[168] Injured parties receiving punitive damage awards under the pre-amendment section 104(a)(2) exemption provision will continue to face uncertainty concerning the tax consequences of these awards.

Under current Hawai'i law in *Masaki v. General Motors, Corp.*,[169] the purpose of punitive damages is to punish the defendant and not to compensate the plaintiff.[170] Therefore, in cases involving claims under the pre-amendment section 104(a)(2) exemption, punitive damages would be included in gross income.[171] The Fourth Circuit's holding in *Miller* concluded that under Maryland law, punitive damages were not awarded to compensate personal injury and therefore punitive damages should be included in gross income.[172] Likewise, a court, applying *Masaki*, would come to the same conclusion as the Fourth Circuit in *Miller*.

While cases involving post-amendment section 104(a)(2) can be analyzed with greater certainty, disputes concerning the allocation of damage awards between compensatory damages and punitive damages will arise.[173] In the future, there may be fewer punitive damage awards since plaintiffs will not want to be taxed nor defendants saddled with the taint of paying punitive damages.[174] Another issue likely to arise under the post-amendment cases is the distinction between punitive damages received for physical and nonphysical injuries. Since the legislative history of the amendment reveals that actions for injury to reputation and employment discrimination are deemed suits for nonphysical injuries,[175] the most contested issue may be whether physical

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[167] *See e.g.*, Miller v. Comm'r, 914 F.2d 586 (4th Cir. 1990); Kemp v. Comm'r, 771 F. Supp. 357 (N.D. Ga. 1991) (holding that pre-amendment punitive damages should be included in income). *But see*, Miller v. Comm'r, 93 T.C. 330 (1989); Horton v. Comm'r, 100 T.C. 93 (1993); Burford v. United States, 642 F. Supp. 635 (N.D. Ala. 1986) (holding that pre-amendment punitive damages should be excluded from income).

[168] *See* Miller v. Comm'r, 914 F.2d 586, 588 (4th Cir. 1990). *See also*, Priv. Ltr. Rul. 91-06-013 (Nov. 7, 1990).

[169] 71 Haw. 1, 780 P.2d 566 (1989).

[170] *Id.* at 6, 780 P.2d at 570.

[171] *See supra* text accompanying notes 135-39; *infra* text accompanying note 173.

[172] 914 F.2d 586, 590-91 (4th Cir. 1990).

[173] David Jaeger, *Taxation of Punitive Damage Awards: The Continuing Controversy*, TAX NOTES 109, 114 (October 5, 1992).

[174] *Id.* at 114.

[175] *Id.* at 115.

manifestations of emotional distress will be deemed physical or non-physical.

In summary, whether pre-amendment punitive damages can be excluded from income remains controversial. Applying the *Burke* test, *Horton* determined that pre-amendment damages were awarded on account of personal injuries and sickness under Kentucky law.[176] Under *Horton*, punitive damages will be excluded if awarded to compensate the victim as well as punish the wrongdoer. Post-amendment punitive damages will only be excluded if they are awarded on account of physical injuries or sickness.[177] Despite the clarity of the post-amendment statute, issues concerning the allocation of compensatory and punitive damages and the distinction between physical and nonphysical injuries are likely to arise.

V. IMPACT OF *BURKE* AND *HORTON* CASES ON OTHER TORT CLAIM

This part will address the applicability of *Burke* and *Horton* to various categories of tort claims. The discussion includes a description of the case law and statutory or administrative authority governing each type of claim. Where applicable, relevant Hawai'i case law and statutes are cited. The taxation of punitive damage awards from these claims is discussed in light of the *Horton* case and the 1989 amendment to section 104(a).

Applying *Burke* and *Horton*, the inquiry begins with a determination of whether the nature of the claim deals with tort or tort-like rights. If the award includes punitive damages, a distinction must be drawn between pre-amendment and post-amendment awards.[178] Pre-amendment awards on account of personal injury or sickness will be excluded from gross income under section 104(a)(2).[179] Post-amendment awards will qualify for the section 104(a)(2) exemption only if the award is on account of *physical* injury or sickness.[180]

A. *Tort Claims Involving Physical Injury*

Physical injury is "almost by definition . . . personal [injury]."[181] If a claim is for physical injury, case law and administrative regulations

[176] *Horton*, 93 T.C. at 100-01.

[177] 26 U.S.C. § 104(a) (Supp. 1992).

[178] *See supra* text accompanying notes 47-48.

[179] *See supra* text accompanying notes 167-71.

[180] *See supra* note 47 and accompanying text.

[181] Threlkeld v. Comm'r, 87 T.C. 1294, 1300 (1986), *aff'd*, 848 F.2d 81 (6th Cir.

state that the entire amount of an award is excluded under section 104(a)(2). The Tax Court in *Threlkeld v. Commissioner*,[182] stated that "[i]f a taxpayer receives a damage award for a physical injury, . . . the entire award is excluded from income even if all or a part of the recovery is determined with reference to the income lost because of the injury."[183] In Revenue Ruling 85-97,[184] the IRS concurred with the Tax Court's position, ruling that the section 104(a)(2) exemption extends to the entire settlement amount, even if all or part of the recovery is for lost income or lost earning capacity.[185]

In *Burke*, physical injury was treated as per se personal injury.[186] The Court focused instead on whether nonphysical injuries could be deemed personal injuries, thereby implying that physical injuries were personal injuries for the purpose of federal income taxes.[187] In accordance with *Burke*, compensatory damages relating to claims for physical injuries will be excluded under section 104(a)(2). Punitive damages based on claims for physical injury will be also excluded due to the presence of bodily injury or physical sickness.

B. *Tort Claims Involving Nonphysical Injury*

In *Burke*, the Court recognized that section 104(a)(2) "encompasses a broad range of physical and nonphysical injuries to personal interests."[188] To support this conclusion, the Court cited legislative history,

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1988). The Court of Appeals for the Sixth Circuit held that the portion of an award from a malicious prosecution action received for injury to professional reputation was on account of personal injury and therefore excluded from gross income. 848 F.2d at 84.

[182] 87 T.C. 1294 (1986), *aff'd*, 848 F.2d 81 (6th Cir. 1988).

[183] *Id.* at 1300.

[184] Rev. Rul. 85-97, 1985-2 C.B. 50.

[185] *Id.* at C.B. 51. The Internal Revenue Service's stance on this issue is a marked change from its earlier rulings. Prior to Revenue Ruling 85-97, the Service stated that compensation for lost wages, lost pension benefits, and other non-personal injury damages were not excluded under § 104(a)(2). *See*, Wolfson v. Comm'r, 651 F.2d 1228 (6th Cir. 1981); Stanford v. Comm'r, 297 F.2d 298 (9th Cir. 1961) (holding that payments for lost earnings should be included in gross income). *But see*, Harris v. Tenneco Oil Co., 563 So.2d 317 (La. App. 1990), *writ denied*, 568 So.2d 1062 (La. 1990); In re Cleavenger, 579 N.E.2d 298 (Ohio 1989) (finding that damage awards representing lost wages should be excluded from income).

[186] 504 U.S. ____, 112 S. Ct. at 1871 n.6.

[187] *Id.*

[188] *Id.* at 1872 n.6.

law reviews, dictionaries, treatises, and case law.[189] The *Burke* Court noted that "the courts and the IRS . . . recognized that section 104(a)(2)'s reference to 'personal injuries' encompasses, in accord with common judicial parlance and conceptions, nonphysical injuries to the individual, such as those affecting emotions, reputation, or character, as well."[190] Compensatory damages can redress intangible elements of an injury.[191] While tort damages are often described as compensatory, they could be larger than the amount necessary to reimburse actual monetary loss sustained or anticipated by the plaintiff.[192]

The Court further noted:

> [T]he victim of a physical injury may be permitted . . . to recover damages not only for lost wages, medical expenses, and diminished future earning capacity on account of the [physical] injury, but also for emotional distress and pain and suffering. Similarly, the victim of a 'dignitary' or nonphysical tort . . . may recover not only for any actual pecuniary loss . . . but for 'impairment of reputation and standing in the community, personal humiliation, and mental anguish and suffering.'[193]

A broad range of damages are available to redress the invaded individual rights. General, nominal, and punitive damages for the "fairly large number of torts, [under both] statutory and common law, . . . [are] concerned principally with invasions of intangible interests

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[189] *Id.* at 1871 n.6. It is important to note that Congress rejected a bill limiting § 104(a)(2) to injuries involving physical injury or sickness. *See* H.R. REP. No. 247, 101st Cong., 1st Sess. 1354-55 (1989), *reprinted in* 1989 U.S.C.C.A.N. 2824, 2825. Congress enacted limitations on the exclusion of punitive damage awards under § 104(a)(2) to only include those punitive damages involving physical injury or physical sickness. Omnibus Budget Reconciliation Act of 1989, Pub. L. No. 101-239, § 7641(a), 103 Stat. 2106, 2379 (1989). This action provides additional support to the view that personal injury includes both physical and nonphysical injuries. *See infra* text accompanying notes 190-96.

[190] 504 U.S. at ___n.6, 112 S. Ct. at 1871 n.6 (citations omitted).

[191] *Id.* at 1871.

[192] *Id.*

[193] *Id.* at 1871-72 (citing DAN D. DOBBS, HANDBOOK ON THE LAW OF REMEDIES § 7.2, at 510-20, 540-51 (1973); Threlkeld v. Comm'r, 87 T.C. 1294, 1300 (1988); Gertz v. Robert Welch, Inc., 418 U.S. 323, 350 (1974)). Earlier opinions support this conclusion. The courts in Roemer v. Comm'r, 716 F.2d 693 (9th Cir. 1983), and Bent v. Comm'r, 835 F.2d 67 (3d Cir. 1987) stated that personal injury was not just physical injury. 716 F.2d at 697; 835 F.2d at 70. Since certain nonphysical injuries could be deemed personal injury, the personal nature of an injury was not defined by its effect. 716 F.2d at 699; 835 F.2d at 70.

rather than with invasions of physical or economic interests."[194] These claims can include those for false imprisonment, malicious prosecution, intentional infliction of emotional distress, invasion of privacy, alienation of affections, intentional interference with voting and other electoral rights, and for invasion of analogous civil rights provided by statutes.[195] General and nominal damages recovered from a judgment where the cause of action is solely for a *dignitary* or nonphysical tort would be excluded from income under the *Burke* test.[196]

Punitive damage awards for nonphysical injuries may qualify for the section 104(a)(2) exemption if the pre-amendment section applies. *Horton* could be cited in order to exclude punitive damages for nonphysical injuries from gross income if damages for a dignitary tort are awarded on account of personal injury.[197] However, if post-amendment section 104(a)(2) is applicable, punitive damages for a dignitary tort must be included in gross income because they would not be awarded on account of physical injury or sickness.[198]

1. *Injury to reputation*

Historically, the Tax Court drew a distinction between injuries to personal reputation and those to professional reputation.[199] Current case law does not draw such a distinction.[200] In *Roemer v. Commissioner*, the Court of Appeals for the Ninth Circuit decided that the relevant distinction in a libel suit was between personal and non-personal injuries.[201] To distinguish personal injuries from non-personal injuries, the court looked to the nature of the claim.[202] The Ninth Circuit

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[194] DAN D. DOBBS, HANDBOOK ON THE LAW OF REMEDIES § 7.3, at 528 (1973).

[195] *Id.* at 528-29.

[196] *See supra* part III.

[197] *See supra* part IV.

[198] 26 U.S.C. § 104(a) (Supp. 1992). Unless there is physical injury resulting from a dignitary tort, the punitive damages will be included in gross income. *See supra* note 47.

[199] Palmer, *supra* note 13, at 90. *See* Rev. Rul. 58-418, 1958-2 C.B. 19.

[200] Roemer v. Comm'r, 716 F.2d 693, 696-97 (9th Cir. 1983); Threlkeld v. Comm'r, 848 F.2d 81, 84 (6th Cir. 1988).

[201] *Roemer*, 716 F.2d at 697. In *Roemer*, compensatory and punitive damages received in a defamation suit were excluded from gross income. *Id.* at 700. The taxpayer claimed injury to his reputation, business profession, and occupation. *Id.* at 695.

[202] *Id.* at 697.

analyzed the nature of the tort of defamation under California law.[203] *Roemer* concluded that defamation of an individual was a personal injury under California law. Therefore, compensatory damages received by the taxpayer in a defamation suit were excluded from gross income.[204]

Applying *Burke* to the facts in *Roemer*, the damage award for injury to reputation claims, that is, defamation and libel, would be excluded from income.[205] However, the reason for allowing the exclusion differs. In *Roemer*, the court ruled that the tort of defamation violated a personal right under California state law.[206] Under *Burke*, a court would determine whether the defamation claim provides for a broad range of damages to decide if defamation redresses tort or tort-like rights.[207] Damages which may be recovered in an action for defamation include compensatory, punitive, and nominal damages. Therefore, any award for damages other than punitive damages from a defamation claim would be excluded under section 104(a)(2).

In applying the *Burke* test to the *Roemer* facts, Roemer's damage award would still be excluded from income. However, *Roemer* provides an example of a potential problem in the wholesale application of the *Burke* test to a broad array of tort claims.[208] In response to *Roemer*, the IRS issued Revenue Ruling 85-143,[209] stating that it would not follow the *Roemer* decision.[210] The Service contended that "[w]hether a libel in a particular situation is a personal injury should depend on the nature of the libel."[211] Since the libelous statements in *Roemer* were directed to an individual in a business capacity, the primary harm was loss of business income which was not a personal injury. The Service's argument is similar to the dissenting opinion in *Horton*.[212] The *Horton* dissent stated that the focus on remedies was only the first step.[213] This

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[203] *Id.* at 697-700. State law creates a legal interest while federal law determines taxation issues. *Id.* at 697.

[204] *Id.* at 700.

[205] *Id.*

[206] *Id.*

[207] *See supra* text accompanying notes 73-75.

[208] The broad application of *Burke* to a wide range of tort claims may result in the exclusion of certain types of damage awards which Congress meant to include in income. *See infra* notes 217-20 and accompanying text.

[209] Rev. Rul. 85-143, 1985-2 C.B. 55.

[210] *Id.*

[211] *Id.* at C.B. 56.

[212] *Horton v. Comm'r.*, 100 T.C. 93, 104-14 (1993) (Whalen, J. dissenting).

[213] *Id.* at 108.

initial inquiry must be followed by an inquiry into whether the damages were awarded *on account of* personal injury.[214]

The legislative history of the Omnibus Budget Reconciliation Act of 1989 provides some insight into Congress' reaction to providing tax advantages for nonphysical injuries.[215] Congress criticized applying the section 104(a)(2) exemption to damages in cases involving employment discrimination and injury to reputation where there was no physical injury.[216] Congress amended the statute because it believed that providing tax relief in these types of injuries was inappropriate where no physical injury was involved.[217]

However, the Ninth Circuit stated that the distinction between injury to personal reputation and professional reputation should not be confused with a personal injury and its derivative consequences.[218] These derivative consequences could include loss of professional reputation and any resulting loss of income.[219] The wholesale application of the *Burke* test to claims involving nonphysical injuries may result in the exclusion of certain types of damage awards that Congress could deem inappropriate for the section 104(a)(2) exemption.[220] Whether the courts will apply the *Burke* test to injuries of this nature remains an issue.

2. Constitutional claims

Generally, damages received for deprivation of freedom of speech[221] are received on account of personal injury and qualify for the section 104(a)(2) exemption.[222] In *Bent v. Commissioner*,[223] the Court of Appeals

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[214] *Id.* This author suggests that the *Horton* dissent's reasoning is circular because its second inquiry still requires a definition of personal injury. However, from a policy standpoint, there are strong arguments to limit exclusions for certain nonphysical injuries. *See infra* text accompanying notes 215-16; *supra* note 47.

[215] H.R. REP. No. 247, 101st Cong., 1st Sess. 1354-55 (1989), *reprinted in* 1989 U.S.C.C.A.N. 2824, 2825.

[216] *Id.*

[217] *See supra* note 47.

[218] *Roemer*, 716 F.2d at 699.

[219] *Id.*

[220] *See supra* text accompanying notes 215-17.

[221] *See* 42 U.S.C. § 1983 (1988) (providing a cause of action for the deprivation of any rights, privileges or immunities guaranteed by the Constitution).

[222] *E.g.*, Bent v. Commissioner, 835 F.2d 67, 70 (3d Cir. 1987).

[223] 835 F.2d 67 (3d Cir. 1987). *Bent* held that a payment in settlement of a First Amendment right to free speech claim was excluded from gross income under § 104(a)(2). *Id.* at 70.

for the Third Circuit ruled that since the right to free speech was violated and damages were paid for personal injury, the settlement payment was excluded from gross income.[224] The court further stated that 42 U.S.C. § 1983 created a variety of tort and tort-type rights:

> The denial of a civil right, such as the right of free speech, involves a personal injury just as much as a physical assault. While the injury is not physical, it may well involve mental or psychic pain and suffering. Just as in the case of the pain and suffering resulting from a physical injury, the injury to the individual from mental pain and suffering can only be estimated in money.[225]

The court stated that the award was not compensation for lost wages even though the amount of lost wages was used in computing the damages.[226]

In *Carey v. Piphus*,[227] the United States Supreme Court stated that actions under 42 U.S.C. § 1983 could be governed by the principle of compensation.[228] However, the Court awarded the plaintiffs nominal damages of one dollar.[229] The Court further stated that the plaintiffs would not be entitled to substantial non-punitive damages absent proof of any other actual injury.[230] The Court reasoned that:

> [c]ommon-law courts traditionally have vindicated deprivations of certain 'absolute' rights that are not shown to have caused actual injury through the award of a nominal sum of money. . . . [I]t remains true to the principle that substantial damages should be awarded only to compensate actual injury or, in the case of exemplary or punitive damages, to deter or punish malicious deprivations of rights.[231]

Burke never discussed the magnitude of damages. A substantial portion of a damage award for a constitutional claim is likely to be allocated to punitive damages since only nominal damages are otherwise available. If case law supports an award of punitive damages for the

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[224] *Id.*

[225] *Id.* at 70-71.

[226] *Id.* at 70.

[227] 435 U.S. 247 (1978). *Carey*, in construing 42 U.S.C. § 1983, held that elementary and secondary students who were suspended from school without procedural due process were entitled to recover only nominal damages in the absence of proof of actual injury. *Id.* at 266.

[228] *Id.* at 254.

[229] *Id.* at 267.

[230] *Id.* at 266.

[231] *Id.*

type of constitutional claim brought by a plaintiff, the amount will be included in taxable income in the absence of physical injury or physical sickness.[232]

3. *Wrongful death*

The Tax Court, applying *Burke*, recently ruled that wrongful death actions constitute claims for personal injury.[233] In *Kovacs v. Commissioner*,[234] the Tax Court stated that "wrongful death . . . clearly lies in tort . . . and it is undisputed that the amount designated as 'damages' was awarded on account of personal injury."[235] Whether damages for a wrongful death claim were taxable was not an issue in *Kovacs*. The IRS relied on Revenue Ruling 84-108 which stated that damages from wrongful death claims, where damages were limited to losses sustained by reason of the wrongful death, would be excluded under section 104(a)(2).[236] The claim in *Kovacs* was brought under the Michigan wrongful death statute which did not allow punitive damages.[237]

The Hawaii Supreme Court in *Greene v. Texeira*[238] analyzed Hawai'i's wrongful death statute.[239] The court recognized that the aim of the statute was compensation for loss rather than punishment, and determined that the statute allowed compensatory, but not punitive damages.[240] The survival statute[241] similarly compensates a decedent's survivors for economic loss and deprivation of love, affection, and

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[232] *See* 26 U.S.C. § 104(a) (Supp. 1992). *See supra* notes 197-98 and accompanying text.

[233] Kovacs v. Comm'r, 100 T.C. 124 (1993).

[234] 100 T.C. 124 (1993). *Kovacs* held that statutorily imposed interest on damages from a wrongful death claim does not qualify as damages for personal injury under § 104(a)(2). *Id.* at 130.

[235] *Id.* at 127.

[236] Rev. Rul. 84-108, 1984-2 C.B. 32.

[237] *Kovacs*, 100 T.C. at 130-31.

[238] 54 Haw. 231, 505 P.2d 1169 (1973). The plaintiff in *Greene* brought actions under Hawai'i's wrongful death and survival statutes upon the death of her son. *Id.* at 232, 505 P.2d at 1171. The court held that the plaintiff was not entitled to recover damages for probable future excess earnings of the decedent under the survival statute. *Id.* at 234, 505 P.2d at 1172.

[239] *Id.* at 234, 505 P.2d at 1172. Hawai'i's wrongful death statute is codified at HAW. REV. STAT. § 663-3 (1985).

[240] 54 Haw. at 236, 505 P.2d at 1173.

[241] HAW. REV. STAT. § 663-7 (1985).

companionship.[242] Therefore, in accordance with *Kovacs* and Revenue Ruling 84-108, damages from claims brought under the Hawai'i wrongful death or survival statutes would be excluded from taxable income under section 104(a)(2).

a. Wrongful death punitive damage awards

When pre-amendment section 104(a)(2) applies, case law and administrative regulations conflict over whether punitive damages under wrongful death claims should be excluded from income.[243] In *Burford v. United States*,[244] an Alabama federal district court held that settlement proceeds from a wrongful death claim brought under an Alabama statute should be excluded from income despite Revenue Ruling 84-108.[245] Revenue Ruling 84-108 states that amounts received by a surviving spouse and child in consideration of the release from liability under a wrongful death act that provides exclusively for payment of punitive damages, are included in gross income.[246] *Burford* described Revenue Ruling 84-108 as an unwarranted administrative amendment to the clear language of section 104(a)(2).[247] The court further stated that Congress intended for wrongful death proceeds to fall within the personal injuries exception regardless of whether these proceeds were classified as compensatory or punitive.[248] Although damages obtained under Alabama's wrongful death law had consistently been labeled as punitive, the court opined that it is neither logical nor realistic to say that such proceeds are not received on account of personal injuries.[249] The court found the Internal Revenue Service's reliance on the holding in *Glenshaw Glass*[250] to be misplaced.[251] The court concluded that dam-

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[242] *Greene*, 54 Haw. at 232 n.2, 505 P.2d at 1171 n.2.

[243] *See supra* note 4.

[244] 642 F. Supp. 635 (N.D. Ala. 1986). *Burford* held that damages received from an action brought under the Alabama wrongful death statute were on account of personal injuries and were excluded under § 104(a)(2). *Id.* at 638. The district court found that Alabama wrongful death damages were instituted for punishment and deterrence purposes. *Id.* at 637.

[245] *Id.* at 637-38.

[246] Rev. Rul. 84-108, 1984-2 C.B. 34.

[247] 642 F. Supp. at 637.

[248] *Id.*

[249] *Id.*

[250] Commissioner v. Glenshaw Glass, Co., 348 U.S. 426 (1955). *See also supra* text accompanying notes 44-45.

[251] 642 F. Supp. at 637.

ages received under any wrongful death act are personal injury proceeds and therefore are excluded from gross income.[252]

In *O'Gilvie v. United States*,[253] a federal district court in Kansas applied the *Burke* test to a wrongful death claim.[254] The court concluded that the pre-amendment section 104(a)(2) claim was tort-like in nature and allowed exclusion of the punitive damages from taxable income.[255] In contrast to the preceding cases which dealt with pre-amendment section 104(a)(2) claims, punitive damage awards for post-amendment section 104(a)(2) claims will be included in gross income. Under survival and wrongful death statutes, the plaintiff is the executor or administrator of the plaintiff's estate or an administrator appointed by the court.[256] The beneficiaries are generally designated in the statutes.[257] These beneficiaries receive their allocated share of the damage award.[258] Since the beneficiaries do not generally suffer physical injuries, the allocated damage award for a post-amendment claim cannot be awarded on account of physical injury or physical sickness and, therefore, must be included in income.

C. *Claims Involving Tort and Contract Rights*

1. *Wrongful discharge*

Claims for wrongful discharge from employment can be based on both tort and contract rights. In a pre-*Burke* decision, *Byrne v. Commissioner*,[259] the Court of Appeals for the Third Circuit ruled that proceeds from a wrongful discharge claim were excluded from gross income.[260] The settlement payment for a wrongful discharge suit was deemed excluded from gross income as a personal injury award.[261] The court

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[252] *Id.* at 638.

[253] No. 90-1075B, 1992 WL 223847 (D. Kan. Aug. 26, 1992).

[254] *Id.* at *1.

[255] *Id.*

[256] W. PAGE KEETON et al., *supra* note 19, § 127, at 947.

[257] *Id.*

[258] *Kovacs*, 100 T.C. at 126.

[259] 883 F.2d 211 (3d Cir. 1989).

[260] *Id.* Byrne agreed not to pursue Fair Labor Standards Act and state wrongful discharge claims against her former employer. *Id.* at 213. The entire settlement payment she received on account of this agreement was deemed to be on account of personal injury and qualified for exclusion under § 104(a)(2). *Id.* at 215-16.

[261] *Id.*

held that wrongful discharge claims under both the Fair Labor Standards Act[262] and New Jersey law asserted violations of tort or tort-like rights.[263] The Fair Labor Standards Act claim alleged "the violation of a duty owed the plaintiff by the defendant employer which arises by operation of the Act. This duty is independent of any duty an employer might owe his employee pursuant to an express or implied employment contract; it arises by operation of law."[264] *Byrne* noted that the state wrongful discharge claim was similar to the Fair Labor Standards Act charge mentioned above.[265]

Applying *Burke* to the *Byrne* facts, damage awards based on wrongful discharge claims under the Fair Labor Standards Act should be excluded from income. Since a wrongful discharge claim provides relief through compensatory and punitive damages, it redresses a tort or tort-like right.[266] An allocation of damages issue surfaces in wrongful discharge cases. It may be necessary to segregate damages between those based on contract rights from those based on tort rights.[267]

In *Parnar v. Americana Hotels, Inc.*,[268] the Hawaii Supreme Court held that an employer will be held liable in tort if his discharge of an at-will employee violates a clear mandate of public policy.[269] *Norris v. Hawaiian Airlines, Inc.*[270] addressed the Hawaii Whistleblower's Protec-

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[262] 29 U.S.C. §§ 201-219 (1988 & Supp. 1992).

[263] *Byrne*, 883 F.2d at 216.

[264] *Id.* at 215.

[265] *Id.* at 216.

[266] *Id.*

[267] *See* Byrne v. Comm'r, 90 T.C. 1000, 1011 (1988) (stating that damages arising from claims encompassing tort and contract rights should be apportioned), *rev'd*, 883 F.2d 211 (3d Cir. 1989). In *Byrne*, the Third Circuit stated: "The Tax Court found that the 'existence of claims falling into both [the tort and contract] categories' required it to allocate the settlement between those two types of claims. While we agree with this general principle, we disagree with the Tax Court's application of the principle in this case." 883 F.2d at 216 (citations omitted). *See also* Eisler v. Comm'r, 59 T.C. 634, 640-41 (1973); Metzger v. Comm'r, 88 T.C. 834, 845-46 (1987).

[268] 65 Haw. 370, 652 P.2d 625 (1982). Parnar sought damages from her former employer for retaliatory discharge, alleging that her discharge was made in an attempt to prevent her from testifying in an antitrust investigation. *Id.* at 373, 652 P.2d at 627. The court held that the discharge of an at-will employee was a violation of a clear mandate of public policy. *Id.* at 380, 652 P.2d at 631.

[269] *Id.*

[270] 74 Haw. 235, 842 P.2d 634 (1992), *cert. granted on other grounds*, ___U.S. ___, 114 S. Ct. 908 (1994). Norris was an airline mechanic who claimed he was discharged for reporting his employer's violation of safety regulations. *Id.* at 245, 842 P.2d at

tion Act[271] (HWPA) and held that the state tort action described in *Parnar* extended beyond at-will employees to include those under a collective bargaining agreement.[272] The court stated that its extension of the *Parnar* reasoning promoted the same public policy as the HWPA.[273]

Wrongful discharge actions brought under the Hawai'i common law claim, as in *Parnar*, or the HWPA, as in *Norris*, will also be deemed tort or tort-like under the *Burke* test due to the broad range of available remedies. Eugenie Parnar was awarded damages for lost wages and emotional distress as well as punitive damages.[274] The HWPA provides for injunctive relief, back pay and actual damages as well as all common law remedies.[275]

2. *Employment discrimination*

Damages from some but not all employment discrimination claims are received on account of personal injury or sickness and thus qualify for the section 104(a)(2) exemption. The majority in *Burke* stated:

> It is beyond question that discrimination in employment on the basis of sex, race, or any of the other classifications protected by Title VII is . . . an invidious practice that causes grave harm to its victims. The fact that employment discrimination causes harm to individuals does not automatically imply, however, that there exists a tort-like 'personal injury' for purposes of federal income tax law.[276]

The following subparts examine a variety of employment discrimination claims in more detail.

a. *Title VII claims*

In *Burke*, the United States Supreme Court ruled that sexual discrimination claims brought under pre-1991 Title VII[277] were not tort

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639. The Court held that the Railway Labor Act, 45 U.S.C. §§ 151-163, 181-185, 186-188 (1988), did not preempt Norris' state tort claims. *Id.* at 258, 842 P.2d at 645.

[271] HAW. REV. STAT. § 378-61 to 378-69 (Supp. 1992).

[272] *Norris*, 74 Haw. at 264-65, 842 P.2d at 647.

[273] *Id.* at 260, 842 P.2d at 646.

[274] Parnar v. Americana Hotels, Inc., No. 12387, 1987 WL 200935, at *1 (Haw. Aug. 13, 1987).

[275] HAW. REV. STAT. §§ 378-63, 378-64, 378-69 (Supp. 1992).

[276] 504 U.S. at ____, 112 S. Ct. at 1872-73 (citations omitted).

[277] 42 U.S.C. §§ 2000e to 2000e17 (1988 & Supp. 1992).

or tort-like claims.[278] Since the remedies for pre-1991 Title VII claims were limited to back pay awards and injunctive relief, the claims were deemed not to redress tort or tort-type rights.[279] Therefore, the settlement payments awarded to the claimants were included in gross income.[280] Decisions following the *Burke* opinion also ruled that pre-amendment Title VII claims are not qualified tort or tort-like claims for the section 104(a)(2) exclusion.[281]

Burke can be viewed as a limitation on the favorable tax treatment of Title VII actions. However, certain post-amendment Title VII claims will most likely qualify as tort or tort-like claims.[282] In light of *Burke*, the IRS issued Revenue Ruling 93-88, stating that damages received for claims of disparate treatment discrimination under post-amendment Title VII qualify for the section 104(a)(2) exclusion.[283]

b. Age Discrimination in Employment Act claims

The Age Discrimination in Employment Act[284] (ADEA) prohibits age-based discriminatory practices involving hiring, firing, and compensation.[285] An individual's rights are enforced in accordance with the powers, remedies, and procedures of the Fair Labor Standards Act.[286] Under the Fair Labor Standards Act, a claimant is entitled to back pay awards and liquidated damages.[287]

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[278] 504 U.S. at ___, 112 S. Ct. at 1874.

[279] *See supra* notes 79-86 and accompanying text.

[280] *See supra* notes 69-72 and accompanying text.

[281] *E.g.*, Robinson v. Southeastern Pa. Transp. Auth., 982 F.2d 892 (3d Cir. 1993); Hubbard v. Administrator, Envtl. Protection Agency, 982 F.2d 531 (D.C. Cir. 1992). In Revenue Ruling 72-341, the Internal Revenue Service stated that payments made by a corporation to an employee for the settlement of a Title VII suit must be included in the employee's gross income. Rev. Rul. 72-341, 1972-2 C.B. 32.

[282] *See supra* text accompanying notes 116-22.

[283] Rev. Rul. 93-88, 1993-2 C.B. 61, 62-63. The IRS distinguished disparate treatment discrimination from disparate impact discrimination by examining the availability of damages under the different claims. "Title VII limits the sum of compensatory and punitive damages that may be awarded under section 1981a against an employer who engaged in disparate treatment discrimination. . . . No compensatory or punitive damages may be awarded against an employer who engaged only in disparate impact discrimination." *Id.* at 62.

[284] 29 U.S.C. §§ 621-634 (1988 & Supp. 1992).

[285] 29 U.S.C. § 623 (1988 & Supp. 1992).

[286] 29 U.S.C. § 626(b) (1988).

[287] 29 U.S.C. § 216(b) (1988).

In *Downey v. Commissioner*,[288] the United States Tax Court ruled that back pay and liquidated damages were paid on account of personal injury and therefore were excluded from gross income under section 104(a)(2).[289] In so ruling, the Tax Court retracted its earlier contention that a back pay award was made to redress a contract claim.[290] Instead, the Tax Court held that a back pay award redressed a tort or tort-like claim, stating:

> [The] [p]etitioner's claim . . . arose *not* because [the employer] allegedly breached some contractual obligation to petitioner *but* because [the employer] allegedly breached its duty under the ADEA not to discriminate on the basis of age. [The employer's] duty under the ADEA not to discriminate does not depend on a contractual relationship with petitioner. . . .[291]

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[288] 97 T.C. 150 (1991). In *Downey*, an airline pilot sued his employer for wrongful discharge and violations of the ADEA. The Tax Court held that the entire settlement payment was excluded under § 104(a)(2). *Id.* at 173.

[289] *Id.*

[290] *Id.* at 168-69. The Tax Court overruled its decisions in Rickel v. Comm'r, 92 T.C. 510 (1989), *rev'd*, 900 F.2d 655 (3d Cir. 1990) and Pistillo v. Comm'r, T.C. Memo. 1989-329, 1989 WL 74738 (T.C. Jul. 11, 1989), *rev'd*, 912 F.2d 145 (6th Cir. 1990). Rickel brought an ADEA claim against his former employer and entered into a settlement agreement. *Rickel*, 900 F.2d 655, 656-57. The Third Circuit reversed the Tax Court, ruling that once it found that age discrimination was analogous to a personal injury and that the taxpayer's ADEA action amounted to the assertion of a tort-type right, the analysis ended and all damages flowing therefrom were excluded under § 104(a)(2). *Id.* at 666-67.

Pistillo filed an ADEA claim and won a judgment against his former employer. Pistillo v. Comm'r, 912 F.2d 145, 146 (6th Cir. 1990). The Tax Court determined that the award was taxable income. *Id.* at 147. The Sixth Circuit reversed the Tax Court, ruling that the settlement of an age discrimination suit was excluded from income because the claim was for personal injury. *Id.* at 149. The court further stated that wage loss did not make the claim a non-personal injury even though lost wages were a substantial consequence of discrimination. *Id.* at 150. While Pistillo's loss of wages were substantial non-personal consequences of his employer's age discrimination, the court held that this did not transform the age discrimination into a non-personal injury. *Id.* The court noted the tax benefits its ruling would give to Pistillo, stating, "[g]iven the result we reach today, Pistillo will have less federal tax liability than if he had not suffered age discrimination. . . . Pistillo endured his employer's indignities, insults and age discrimination; suffered a dignitary tort; and was personally injured." *Id.* The court further noted that Pistillo was "entitled to receive federal tax treatment *equal* to that received by the typical tort victim who suffers a physical injury and, as a result receives a settlement award." *Id.*

[291] *Downey*, 97 T.C. at 169.

Remedies available under the ADEA include back pay awards and in cases of willful violations, liquidated damages.[292] The Tax Court determined that these liquidated damages served compensatory and punitive functions.[293] The court was asked to reconsider its opinion in *Downey* in light of *Burke*.[294] In its supplemental opinion, the court held that the "ADEA compensation scheme evidences a tortlike conception of injury and remedy."[295] Therefore, the court reaffirmed its original holding that damages from an ADEA action qualify for the section 104(a)(2) exclusion.[296]

c. Equal Pay Act claims

The Equal Pay Act[297] (EPA) amended the Fair Labor Standards Act and outlaws discrimination in pay on the basis of sex.[298] Damages available under the EPA include back wages and liquidated damages.[299] The Court of Appeals for the District of Columbia Circuit determined that these liquidated damages were intended to compensate for non-pecuniary harms such as pain and suffering and for pecuniary losses that are too difficult to measure.[300]

In *Thompson v. Commissioner*,[301] the Court of Appeals for the Fourth Circuit affirmed the judgment of the Tax Court, ruling that while liquidated damages were excluded from gross income, an award of back pay under the EPA would not qualify for the section 104(a)(2) exclusion.[302] The court distinguished an award received as compensation for services rendered[303] from compensation for the inability to earn an

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[292] 29 U.S.C. § 626(b) (1988).

[293] *Downey*, 97 T.C. at 172.

[294] Downey v. Comm'r, 100 T.C. 634, 635 (1993).

[295] *Id.* at 637.

[296] *Id.*

[297] Equal Pay Act of 1963, Pub. L. No. 88-38, § 3, 77 Stat. 56, 56-57 (1963) (codified as amended at 29 U.S.C. § 206(d)(3) (1988)).

[298] § 3, 77 Stat. at 56-57.

[299] 29 U.S.C. § 216(b) (1988).

[300] Thompson v. Sawyer, 678 F.2d 257, 281 (D.C. Cir. 1982).

[301] 866 F.2d 709 (4th Cir. 1989). Thompson was an employee in the government printing office. *Id.* at 710. She brought a claim of sexual discrimination under Title VII and the EPA. *Id.*

[302] *Id.* at 712.

[303] The Fourth Circuit stated that "the Tax Court correctly recognized that 'an amount paid as back pay under [the Equal Pay Act] is more in the nature of a payment for a contract violation than for a tort-type right.'" *Id.* (citing Thompson v. Comm'r, 89 T.C. 632, 646 (1987)).

income due to the tortious action of a defendant.[304] "Back pay under the Equal Pay Act is 'deemed to be unpaid minimum wages or unpaid overtime compensation.'"[305] Therefore,

> The back pay award was simply recovery for earned, but unpaid, wages which distinguishes her award of back pay from awards for lost wages or lost income in traditional personal injury/tort actions. [Thompson] received compensation for services rendered whereas a tort plaintiff receives compensation for the inability to earn an income due to the tortious action of a defendant.[306]

However, the Tax Court later rejected similar reasoning when it analyzed the ADEA claim in *Downey*.[307] *Downey* concluded that the ADEA created a statutory duty on the employer to not discriminate based upon age.[308] The court recognized that the EPA creates a similar statutory duty involving sex discrimination.[309] Therefore, the Tax Court is likely to rule that back pay awards under the EPA are excluded from taxable income.

If the EPA claims for back pay are deemed similar to the ADEA claims and conclusions of the Tax Court and the Fourth Circuit in *Thompson* are rejected, the entire award from an EPA claim will be excluded from gross income. The Fourth Circuit concluded in *Thompson* that liquidated damages serve as a deterrent to ensure compliance with the Act and as compensation for injuries too obscure or difficult to prove.[310] Applying the *Burke* test, damage awards under EPA claims will be excluded from taxable income due to their punitive and compensatory functions.[311]

3. *Professional malpractice*

Malpractice actions can arise through breach of contract claims or negligence in tort claims.[312] Applying the *Burke* test in cases where

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[304] 866 F.2d at 712.

[305] *Id.*

[306] *Id.*

[307] Downey v. Commissioner, 97 T.C. 150 (1991).

[308] *Id.* at 169.

[309] Thompson v. Commissioner, 89 T.C. 632, 646 (1987). The Tax Court stated:

> [The] Equal Pay Act places an obligation on the employer to pay an equal amount for equal work regardless of sex. If an employer violates this obligation placed on it, it is required under the enforcement provisions to pay the back pay 'owning' to the employee doing the equal work in the amount 'withheld.'

Id. See supra text accompanying note 290.

[310] *Thompson*, 866 F.2d at 712.

[311] *See supra* text accompanying notes 73-75.

[312] Richard A. Epstein, *Medical Malpractice: The Case for Contract*, 1976 Am. B. Found. Res. J. 87, 93 (1976).

there is no physical injury and the underlying claim is for a contract right, the award should not qualify for a section 104(a)(2) exemption. The nature of the claim in these cases is not a tort or tort-type right.

In legal malpractice cases, a "claim of injury resulting from the professional incompetence of an attorney is actionable under theories which are an amalgam of both tort and contract."[313] In *Higa v. Mirikitani*,[314] the Hawaii Supreme Court stated:

> In view of the fundamentally consensual quality of the attorney-client relationship, and also the usually intangible nature of any injury resulting therefrom, the application of a contractual statute of limitations for legal malpractice is logically appealing.[315]

The court provided some guidelines in order to determine whether an action for malpractice other than medical malpractice would be construed mainly as one in tort or in contract.[316] Legal malpractice cases would be considered under contract theory due to the consensual quality of the relationship and the intangible nature of the injuries.[317] However, an injured party would most likely plead violations of both tort and contract rights.

Applying the *Burke* test to professional malpractice cases, it will be necessary to determine the type of remedies available under such claims.[318] A court will need to allocate between contract and tort damages.[319] One can argue that professional malpractice cases are based on interference with economic relations[320] rather than injury to the person and should not qualify for a section 104(a)(2) exemption. The concurring opinion in *Horton* recognized this distinction when it con-

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[313] Higa v. Mirikitani, 55 Haw. 167, 172, 517 P.2d 1, 5 (1973). *Higa* held that in a legal malpractice action against an attorney, the claim was governed by the six-year statute of limitation for damages based on contractual rights. *Id.* at 173, 517 P.2d at 6.

[314] 55 Haw. 167, 517 P.2d 1 (1973).

[315] *Id.* at 172, 517 P.2d at 5.

[316] "While the relationship between a doctor and patient is also 'consensual,' claims for medical malpractice nearly always involve bodily injury resulting from negligent treatment. As such, they are akin to the cases . . . concerning physical injury to tangible interests in person or property . . . ." *Id.* at 172 n.9, 517 P.2d at 5 n.9.

[317] *Id.* at 172, 517 P.2d at 5.

[318] *See supra* text accompanying notes 73-75.

[319] *See supra* note 267.

[320] Interference with economic relations deals with existing contracts, agreements, and understandings that are contractual in nature. KEETON, et al., *supra* note 19, § 128, at 962.

cluded that not all tortious injury is personal injury.[321] The *Burke* Court, however, rejected differentiating economic damages awarded in tort actions.[322]

4. *Commercial torts*

While misrepresentation or intentional interference with contract are tortious actions, one can argue that damages from such claims should not be excluded under section 104(a)(2). Interference with economic relations, even if pleaded as a tort-type right, is not necessarily *personal injury* for federal income tax purposes.[323] Applying *Burke* to commercial torts may not provide the result Congress intended when it allowed an exclusion for damage awards on account of personal injuries.[324] It is unlikely that the *Burke* test will apply to professional malpractice and commercial tort claims.

VI. CONCULSION

Whether the proceeds from a damage award or settlement payment will be subject to federal income taxation can make the difference between a substantial sum and a meager one. Despite the significant impact of taxes on these amounts, the courts, attorneys, and economic experts have difficulty sorting through the conflicting case law and regulations as well as interpreting ambiguous sections of the Internal Revenue Code.[325] This article examined the taxation issues of damage awards that are confusing to practitioners.

The definition of gross income for federal tax purposes sweeps broadly and includes all accessions to wealth.[326] Only special exemptions within the Internal Revenue Code provide for exclusion from gross income.[327] Unless damages are awarded for personal injury under

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[321] Horton v. Commissioner, 100 T.C. 93, 103 (1993) (Beghe, J., concurring).

[322] United States v. Burke, 504 U.S. at ___, 112 S. Ct. 1867, 1870 (1992).

[323] *Id.* at 1873.

[324] Palmer, *supra* note 13, at 85-86 (explaining that Congress enacted § 213(b)(6), the predecessor of § 104(a)(2), in 1919 to exclude tort damages from income). Beyond Congressional intent, other justifications for the § 104(a)(2) exemption have been advanced. *See supra* notes 24-30 and accompanying text.

[325] *See supra* note 4.

[326] 26 U.S.C. § 61(a) (1988).

[327] *See supra* note 11 and accompanying text.

section 104(a)(2) of the Internal Revenue Code, the award or settlement will be subject to income taxes.[328]

The *Burke* test articulated by the United States Supreme Court requires analysis of the nature of the underlying claim to determine whether an award is on account of personal injury.[329] The Court reasoned that the underlying claim is one for personal injury if it redresses a tort or tort-like right.[330] The determination of whether the claim is for a tort or tort-like right depends on the range of damages available.[331]

The exclusion of punitive damages pursuant to section 104(a)(2) continues to generate much controversy.[332] The 1989 amendment to section 104(a) allows an exclusion of punitive damages only when related to physical injuries or physical sickness.[333] The courts and the IRS remain split over the applicability of the section 104(a)(2) exclusion to pre-amendment suits.[334] In addition, post-amendment suits will provide their own set of controversies concerning the allocation of damage awards between compensatory and punitive damages.[335]

To test the Supreme Court's methodology in *Burke* and the Tax Court's reasoning in *Horton*, the *Burke* test was applied hypothetically to other tort claims.[336] For claims concerning physical injuries, the results are clear. Under *Burke* and *Horton*, damage awards for these claims will be excluded from gross income.[337] Claims involving nonphysical injuries, such as injury to reputation, constitutional claims, and wrongful death should also be excluded from gross income under *Burke*.[338] However, punitive damages for nonphysical injuries will be included in taxable income for claims subject to the 1989 amendment.[339]

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[328] *See supra* notes 10-12 and accompanying text.

[329] United States v. Burke, 504 U.S. at ____, 112 S. Ct. 1867, 1872 (1992). *See supra* text accompanying notes 73-75.

[330] *Id.* at 1870. *See supra* note 73 and accompanying text.

[331] 504 U.S. at ____, 112 S. Ct. at 1871. *See supra* text accompanying notes 73-75.

[332] *See supra* notes 167-68 and accompanying text.

[333] Omnibus Budget Reconciliation Act of 1989, Pub. L. No. 101-239, § 7641(a), 103 Stat. 2106, 2379 (1989).

[334] *See supra* note 167.

[335] *See supra* notes 173-74 and accompanying text.

[336] *See supra* part V.

[337] *See supra* notes 181-87 and accompanying text.

[338] *See supra* notes 188-96 and accompanying text.

[339] *See supra* note 198 and accompanying text.

Damages for tortious claims relating to employment will most likely be excluded from gross income under *Burke*.[340] However, the *Burke* test does not readily apply to other tortious claims involving both tort and contract rights.[341] Applying the *Burke* test to professional malpractice may result in exclusion of some damages.[342] However, it does not appear that the wholesale application of the *Burke* analysis to professional malpractice and commercial tort claims would provide results Congress would sanction.[343]

While the *Burke* and *Horton* opinions provide some needed guidelines into the taxation of damage awards, controversy remains over exactly what *damages on account of personal injury* really means.

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[340] *See supra* text accompanying notes 260-311.
[341] *See supra* notes 312-24 and accompanying text.
[342] *See supra* note 318 and accompanying text.
[343] *See supra* note 324 and accompanying text.

Public Access Shoreline Hawaii v. Hawaii County Planning Commission: The Affirmative Duty to Consider the Effect of Development on Native Hawaiian Gathering Rights

Finally, there remains a percentage, not large indeed, and yet not so small as to be negligible, where a decision one way or the other, will count for the future, will advance or retard, sometimes much, sometimes little, the development of the law.[1]

I. Introduction

In *Public Access Shoreline Hawaii v. Hawaii County Planning Commission*[2] (*PASH*), the Intermediate Court of Appeals (ICA) of Hawaii ruled that a native Hawaiian[3] who has exercised gathering rights on undeveloped land has an interest which is clearly distinguishable from that of the general public, and therefore is entitled to be a party to a contested case proceeding for the approval of a Special Management Area Permit (SMAP) for the development of that land.[4] The court went on to express its view that article XII, section 7 of the Hawaii Constitution requires, at the least, that all governmental agencies undertaking or approving the development of undeveloped lands must determine whether the development would have any effect on native Hawaiian gathering rights and to explore the possibility of preserving those rights.[5]

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[1] Benjamin Cardozo, The Nature of the Judicial Process, at 165-166 (1921).

[2] No. 15460, slip op. at 13 (Haw.Ct.App. January 28, 1993), 1993 Haw. App. LEXIS 2 (Haw. App. Jan. 28, 1993).

[3] As used in this casenote, the term "native Hawaiian" refers to any person of Hawaiian ancestry, regardless of blood quantum.

[4] *PASH*, slip op. at 2.

[5] *Id.* at 6.

The facts of *PASH* are presented in Part II of this note. Part III provides an overview of Hawai'i law concerning the right to contested case hearings, the Coastal Zone Management Act, and native Hawaiian gathering rights. The Intermediate Court of Appeals decision is analyzed in Part IV. Part V considers the potential impact of the decision on native Hawaiian gathering rights and Hawai'i property law in light of the pending consideration of the case by the Hawaii Supreme Court.

II. Facts

Nansay Hawaii, Inc. (Nansay) seeks to develop a resort complex consisting of two hotels, a golf course and clubhouse, 330 multi-family residential units, and other related improvements.[6] The project is located within the *ahupua'a*[7] of Kohanaiki in North Kona and covers 450 acres along 7,200 feet of coastline. The development impinges directly on the general public's access to and use of the beach and anchialine ponds[8] in the proposed development area.[9]

On March 7, 1990, Nansay applied to the Hawaii County Planning Commission for a Special Management Area Permit (SMAP), pursuant to the Coastal Zone Management Act (CZMA).[10] On September 28 and November 8, 1990, the Commission convened public hearings in North Kona to consider Nansay's SMAP application. Public Access Shoreline Hawaii (PASH), an unincorporated community organization whose purpose is to protect public access to beaches and shorelines, presented testimony concerning the environmental impact of the proposed Kohonaiki Resort.[11] PASH also requested a contested case hearing. The Commission concluded that PASH did not demonstrate

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[6] *Id.* at 3.

[7] Land divisions usually extending from the mountains to the sea. *In Re Boundaries of Palehunui*, 4 Haw. 239 (1879).

[8] Anchialine ponds are shoreline pools without a surface connection to the sea having waters of measurable salinity and showing tidal rhythms. The ponds are commonly located in recent lava flows which had depressions deep enough to reach the water table. They consist of brackish water with a crustacean-mollusk dominated faunal community along with several species of shrimp and a variety of vegetation types. The ponds undergo a natural process of senescence over time, changing from barren lava pools to pools with sediment bottoms and aquatic vegetation, and finally partially filled marshes or grasslands. *PASH*, slip op. at fn. 3.

[9] *Id.* at 3.

[10] *Id.* at 2. The CZMA is discussed in section III, *infra*.

[11] *Id.* at 2.

that it would be "so directly and immediately affected" that its interest in the proceeding was "clearly distinguishable from that of the general public," and so it was not entitled to be a party in a contested case procedure.[12] Thereafter, the Commission approved the SMAP, and PASH appealed to the Circuit Court.[13]

The Circuit Court issued an Order concluding that the Commission's decision denying PASH standing for a contested case hearing was clearly erroneous in light of the "reliable, probative, and substantial evidence on record."[14] Nansay and the Hawaii County Planning Commission appealed the Order.

In the public hearings, and in affidavits submitted to the Circuit Court, native Hawaiian members of PASH submitted evidence of continuing native Hawaiian practices on the Kohonaiki property.[15] Malani Pai, a native Hawaiian member of PASH, testified that he, members of his family, and others had been gathering *opae*[16] from the anchialine ponds at Kohanaiki, and that generations of his family had

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[12] *Id.* Rule 4-2 of the Hawaii County Planning Commission's Rules of Practice and Procedure defines the terms relevant to contested cases as follows:

> (5) "Contested Case" means a proceeding in which the legal rights, duties, or privileges of specific parties are required by law to be determined after an opportunity for an agency hearing.
>
> (6) "Party" means any person or agency named or admitted as a party or properly seeking and entitled to as of right to be admitted as a party in a [contested case] proceeding. More specifically, it includes the following, upon the timely filing of requests:
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> (A) Any state or county agency, and
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> (B) Any person who has some property interest in the land, who lawfully resides on the land, or who can demonstrate that the person will be so directly and immediately affected by the Commission's decision that the person's interest in the proceeding is clearly distinguishable from that of the general public; provided that such agency or person must be specifically named or admitted as a party before being allowed to participate in a contested case hearing. *Id.* at fn. 6.

[13] *Id.* slip op. at 2.

[14] *Id.*

[15] Many others presented testimony at the hearing on the SMAP. The persons testifying in opposition to the SMAP were generally concerned with the effect that Nansay's development would have on historic and cultural sites, and access to and use of the beach area for surfing, fishing, swimming, picnicking, camping, and a number of other outdoor activities. The opponents of the SMAP either opposed the permit outright or demanded assurance of continued access and use. *Id.* at 3.

[16] The general name for shrimp. M. PUKUI AND S. ELBERT, HAWAIIAN DICTIONARY 291 (1986). *Id.* at 2 fn. 2.

done so.[17] Pai expressed concern that Nansay's proposed pond management plan did not acknowledge native Hawaiian access to the anchialine ponds.[18] Neither Pai nor PASH offered testimony that Pai was a member of PASH.[19]

III. History

A. Contested Case Hearings

1. Statutory Requirements

When a designated authority under the CZMA considers a SMAP application, it is acting quasi-judicially, because the process "is adjudicative of legal rights or property interests in that it calls for the interpretation of facts applied to rules that have already been promulgated by the legislature."[20] Government entities acting in a quasi-judicial manner are generally required to provide the interested parties with contested case proceedings, that is, trial-type evidentiary hearings.[21] The Hawaii Coastal Zone Management Act does not directly require that county authorities provide for contested case proceedings. It directs that:

> The authority in each county, upon consultation with the central coordinating agency, shall establish and may amend, pursuant to chapter 91, by rule or regulation the special management area permit application procedures, conditions under which hearings must be held, and the time periods within which the hearing and action for special management area use permits shall occur. . . .[22]

Chapter 91 refers to Hawaii Revised Statutes Chapter 91, the Hawaii Administrative Procedures Act (HAPA). Hoping to "resolve doubts concerning the preservation and protection of constitutional rights and due process [to] which a person is entitled,"[23] the state legislature

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[17] *Id.* slip op. at 3.
[18] *Id.* at 7.
[19] *Id.*
[20] *Town v. Land Use Commission*, 55 Haw. 538, 548, 524 P.2d 84, 91 (1974).
[21] Benjamin Schwartz, Administrative Law § 5.6 at 210-211 (1984).
[22] Haw. Rev. Stat. § 205A-29(a) (1979).
[23] H.R. Stand. Comm. Rep. No. 8, 1961 Haw. Leg. Serv. House Journal. 654.

enacted HAPA in 1961 "to provide uniform administrative procedures for all state and county boards, commissions, departments or offices which would encompass the procedure of rule making and the adjudication of contested cases."[24] A contested case is defined as "a proceeding in which the legal rights, duties, or privileges of specific parties are required by law to be determined after an opportunity for agency hearing."[25] Among the procedural protections afforded by a contested case are reasonable notice, the opportunity to present evidence and argument, an agency decision on the record, rules of evidence, the right of cross examination, a written decision accompanied by findings of fact and conclusions of law, and prohibition against ex parte communication.[26]

The County of Hawaii Planning Commission Rules of Practice and Procedure provide for contested case hearings with procedures paralleling the requirements of HAPA. Only a "party" to a contested case can invoke these procedures. "Party" is defined by rule 4-2(b) as including:

> [a]ny person who has some property interest in the land, who lawfully resides on the land, or who can demonstrate that person will be so directly and immediately affected by the Commission's decision that person's interest in the proceeding is clearly distinguishable from that of the general public.[27]

The grant or denial of party status for a contested case hearing has import beyond the immediate procedural protections offered. Standing for judicial review of an agency decision in the circuit courts requires that a person be aggrieved by a final decision in a contested case.[28]

2. *Case Law*

The Hawaii Supreme Court has recently held that contested case procedures are not mandated by the language or legislative history of the CZMA, or by the constitutional requirements of procedural due process. In *Sandy Beach Defense Fund v. City Council*[29] the petitioner

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[24] *Id.* at 653.

[25] HAW. REV. STAT. § 91-1(5) (1985).

[26] HAW. REV. STAT. §§ 91-9 to 91-13 (1985).

[27] Rule 4-6 further provides that a request for a contested case hearing procedure must be made before the close of the first public hearing on the matter. Rule 4-6.

[28] HAW. REV. STAT. § 91-14 (1983).

[29] 70 Haw. 361, 773 P.2d 250 (1989).

challenged the City Council's grant of an Special Management Area (SMA) permit without first holding a contested case hearing.[30] They argued that the language of Hawaii Revised Statutes section 205A-29(a) required the Honolulu City Council, as the CZMA "authority" for Honolulu, to follow the contested case procedures of HAPA.[31] The Court, while conceding that the plain language of the CZMA can be construed to require the "authority" to comply with HAPA, concluded that "HRS § 205A-29(a) refers the county authority to Chapter 91 in its *promulgation of rules* governing SMA use permit hearings, but is otherwise silent on the manner in which the hearings must be conducted."[32]

The court distinguished *Chang v. Planning Commission of the County of Maui*[33] and *Makuiki v. Planning Commission.*[34] In *Chang*, the court had concluded that "[t]he state Coastal Zone Management Act and corresponding planning commission rules specifically make Hawaii Revised Statutes section 91-9 and planning commission contested case procedures applicable to proceedings on SMA use permit applications in Maui County.[35] In *Makuiki*, the decision appealed from was the approval of an SMA permit application, after a public hearing. The Appellees, the permit applicant and the Kauai Planning Commission, asserted that the neighboring landowners had no standing to appeal the decision because they had not participated in a contested case hearing as required by HAPA. The court responded that the public hearing was "obviously" a contested case hearing; "[m]oreover, we recently confirmed that an SMA (special management area) use permit application was a contested case within the meaning of HRS chapter 91."[36]

The *Sandy Beach* court explained that those cases were not dispositive, because the counties of Maui, Kauai, and Hawaii have delegated the function of CZMA "authority" to their respective planning commis-

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[30] *Id.* at 364, 773 P.2d at 253.

[31] *Id.* at 371, 773 P.2d at 257.

[32] *Sandy Beach*, 70 Haw. at 372, 773 P.2d at 258 (citing Chang v. Planning Commission of County of Maui, 64 Haw. 431, 441 n.11, 643 P.2d 55, 63 n.11 (1982) (emphasis added) (Hawaii's Sunshine Law does not require open deliberations in SMA contested case deliberations).

[33] 64 Haw. 431, 643 P.2d 55 (1982).

[34] 65 Haw. 506, 654 P.2d 874 (1982).

[35] 64 Haw. at 450, 643 P.2d at 60.

[36] 65 Haw. at 513, 654 P.2d at 879 (quoting *Chang*, 64 Haw. at 436, 643 P.2d at 60).

sions, who are clearly "agencies" as defined by HAPA.[37] *Chang* and *Makuiki* did not apply to *Sandy Beach*, because the "authority" was the City Council, a legislative body specifically exempted from HAPA's definition of agency.[38]

The court, however, did not base its ruling solely on the exemption of the City Council from the requirements of HAPA. It also concluded that the legislature did not intend to require contested case hearings on SMA permit applications, even when the "authority" was an "agency" within the definition of HAPA. Based on its interpretation of the legislative history, the Court determined that the legislature allowed each authority to decide for itself the nature of the hearings it would conduct in reviewing SMAP applications.[39]

The *Sandy Beach* court also concluded that contested case proceedings were not necessary to meet the constitutional requirements of procedural due process. The court found that the environmental and aesthetic interests asserted by the Sandy Beach Defense Fund, while sufficient to confer standing, did not rise to the level of constitutionally protected property interests.[40] Not content to rest there, the court went on to state that even assuming that the Appellants had demonstrated protectible property interests, their due process rights were satisfied by notice and an opportunity to be heard.[41]

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[37] *Sandy Beach*, 70 Haw. 361, 373-374, 773 P.2d 250, 258-259 (1989).

[38] *Id.*

[39] *Id.* at 373, 773 P.2d at 258. The Court found that the "pattern and "purpose" of the CZMA indicate that the hearings held in conjunction with an SMA application could be "informational" in nature as an aid to the administrative decision. *Id.*

[40] *Id.* at 377, 773 P.2d at 261.

[41] *Id.* at 378, 773 P.2d at 261. It is not entirely clear whether a property interest accorded more weight by the Court would receive more procedural protection. In a prior case, the Court held that in a proceeding to amend state land use district boundaries, an adjoining landowner had a protectible property interest, so the hearings on the matter had to meet HAPA requirements for a contested case. Town v. Land Use Commission, 55 Haw. 538, 548, 524 P.2d 84, 91 (1974). Following *Sandy Beach*, however, the Hawaii Intermediate Court of Appeals (ICA) ruled that adjacent landowners, whose use of their property "might be so severely curtailed by Applicants' geothermal activities as to constitute a deprivation of property" were not denied due process when the hearings on the geothermal permit application were exempted by statute from contested case hearing requirements. Medeiros v. Hawaii County Planning Commission, 8 Haw. App. 183, 194-195, 797 P.2d 59, 65 (1990).

PASH did not assert that gathering rights exercised on Nansay's property gave its members an interest in the property that required the due process protection of a contested case hearing. Arguably, however, the right to enter a property and gather items for subsistence confers an interest in that property that is weightier than the interests of an adjacent landowner.

After *Sandy Beach*, it is clear that the use of contested case hearings for the consideration of SMA permit applications is a matter left to the discretion of each county "authority". While contested case hearings are not statutorily or constitutionally required, the Hawaii County Planning Commission has chosen to make contested case procedures available to those who can demonstrate that they will be so "directly and immediately affected" that their interests are "clearly distinguishable from those of the general public."[42] The Intermediate Court of Appeals has indicated that deference to agency rules on contested case hearings is necessary. *Simpson v. Department of Land and Natural Resources*[43] involved an appeal of a Department of Land and Natural Resources (DLNR) decision denying an application for a commercial mooring. The ICA determined that the administrative proceedings conducted by the DLNR would normally constitute a contested case, giving Simpson standing to appeal the decision. However, because the DLNR had rules, properly promulgated under HAPA, which specified particular procedures for requesting a contested case hearing, the plaintiff was required to follow those rules to receive a hearing.[44]

PASH is the first Hawaii appellate case to directly address standing to participate in a contested case, or to interpret a planning commission's standing requirements.[45] Substantively identical standards appear in other statutes. Chapter 205 of the Hawaii Revised Statutes, the enabling legislation for the Land Use Commission, allows standing in a contested case to:

> all persons who have some property interest in the land, who lawfully reside on the land, or who otherwise can demonstrate that they will be

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[42] Hawaii County Planning Comm. R. Prac. & Proc. 4-6.

[43] 8 Haw. App. 16, 791 P.2d 1267 (1990).

[44] *Id.* at 24, 791 P.2d at 1273. The court held that even though Simpson had not made a timely request for a contested case hearing (because he did not know that it was necessary), "[t]he minimum requirements of fairness mandate that Simpson be accorded a 'contested case hearing' in this case," because otherwise judicial review would be unavailable. *Id.* at 16, 791 P.2d at 1270.

[45] This may be due in part to the fact that there is some confusion about whether the circuit courts have jurisdiction to hear appeals from an agency's denial of a contested case hearing. The question arose in *PASH* shortly before the oral arguments were originally scheduled. The Hawaii Supreme Court ordered further briefing on the question of whether the circuit court had jurisdiction to entertain the appeal. At least two other cases pending before the Court that will require resolution of this issue. Greenwell v. Board of Education, No. 16008 (Haw. argued July 31, 1993); Bush v. Hawaiian Homes Commission, No. 16840 (Haw. argued October 15, 1993).

> so directly and immediately affected by the proposed change that their interest in the proceeding is clearly distinguishable from that of the general public.[46]

In *Life of the Land v. West Beach Development Corp.*[47] the court addressed the application of this standard, albeit tangentially. The issue was whether Life of the Land, an environmental group, had applied for leave to intervene in a contested case in a timely fashion. The court found that chapter 205 and HAPA demonstrated a legislative policy to "encourage[] broad public participation, with intervention to be freely granted."[48]

This interpretation comports with the court's liberal approach to standing for judicial review of agency decisions, as examined and explained in *Mahuiki.*[49] Kauai landowners and residents challenged the Kauai Planning Commission's approval of an SMA use permit for development of a condominium apartment and single family residence project. Their objections, voiced at a public hearing, were largely related to adverse environmental consequences.[50] Their appeal of the Planning Commission's decision was dismissed on standing grounds.[51] On appeal the court first set forth its guiding tenet:

> [W]e initially note that where the interests at stake are in the realm of environmental concerns "we have not been inclined to foreclose challenges to administrative determinations through restrictive applications of standing requirements. . . .[O]ur basic position has been that standing requirements should not be barriers to justice."[52]

Applying this principle to the circumstances, the court determined that the Appellants met HAPA's initial requirement for standing because they were "persons aggrieved." The court explained:

> The interests appellants sought to protect are essentially aesthetic and environmental in character. We have "recognized the importance of . . . [these] interests and . . . allowed those who show aesthetic and environmental injury standing to sue where their . . . interests are 'personal' and 'special', or where a property interest is also affected."[53]

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[46] HAW. REV. STAT. § 205-4(e)(3) (1983).
[47] 63 Haw. 529, 631 P.2d 588 (1981).
[48] *Id.* at 532, 631 P.2d at 591.
[49] 65 Haw. 506, 654 P.2d 874.
[50] *Id.* at 509, 654 P.2d at 876.
[51] *Id.* at 512, 654 P.2d at 878.
[52] *Id.*
[53] *Id.* at 515, 654 P.2d at 880 (quoting Life of the Land v. Land Use Commission, 61 Haw. at 8, 594 P.2d at 1079).

In *Life of the Land v. Land Use Commission*,[54] the State Land Use Commission asserted that an environmental organization had not demonstrated standing because they did not claim that the Commission's action had injured any legally cognizable rights which are "personally and peculiarly theirs."[55] The Hawaii Supreme Court rejected the Commission's arguments that the rights asserted by Life of the Land were generalized interests. Rights to a clean and healthful environment were recognized as "personal or special interests or rights."[56]

B. *Hawaii Coastal Zone Management Act*

1. *CZMA: The Act*

The Coastal Zone Management Act of 1972[57] is a federal grant-in-aid statute providing funding and a statutory framework for the development of state coastal zone management plans. The Congressional declaration of policy states:

> [I]t is national policy. . .(2) to encourage and assist the states to exercise effectively their responsibilities in the coastal zone through the development and implementation of management programs to achieve wise use of the land and water resources of the coastal zone, giving full consideration to ecological, cultural, historic, and esthetics values as well as the needs for compatible economic development. . . .[58]

The Hawaii CZMA,[59] a comprehensive regulatory scheme to protect the environment and resources of our shoreline areas, was adopted pursuant to the federal CZMA.[60] Although state compliance with the federal CZMA is voluntary, program development grants and administrative grants are used to encourage states to implement coastal zone management programs.[61] To qualify for the development grants, a

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[54] 63 Haw. 166, 623 P.2d 431 (1981).

[55] *Id.* at 171, 623 P.2d at 438.

[56] *Id.* at 177, 623 P.2d at 441. The Court made specific reference to the Hawaii Constitution, Article XI, section 9, Environmental Rights: Each person has the right to a clean and healthful environment. . . . Any person may enforce this right against any party . . . through appropriate legal proceedings. Article XI, section 9.

[57] 16 U.S.C. §§ 1451-1464 (1990).

[58] 16 U.S.C. § 1452 [CZMA § 303]

[59] HAW. REV. STAT., Ch. 205A (1979).

[60] *Mahuiki*, 65 Haw. 506, 517,654 P.2d 874, 881 (1982).

[61] 16 U.S.C. §§ 1454, 1455 (1988).

state must develop a comprehensive coastal zone management program that meets the numerous criteria set forth in the federal CZMA. Among other things, the federal CZMA requires that all state shoreline management programs must include "a planning process for the protection of, and access to, . . . public coastal areas of environmental, recreational, historical, ecological, or cultural value."[62]

The Hawaii CZMA has two parts. Part I deals with the coastal zone program objectives[63] and policies,[64] and their implementation.[65] A stated objective of the CZMA is to "[p]rotect, preserve, and, where desirable, restore those natural and manmade historic and prehistoric resources in the coastal zone management area that are significant in Hawaiian and American history and culture."[66] The policy on managing development is to "[e]ffectively utilize and implement existing law to the maximum extent possible in managing present and future coastal zone development."[67] Implementation of the Hawaii CZMA is delegated to the counties, with the state retaining primacy.[68] The Hawaii CZMA imposes the following duties on the implementing agencies:

> (a) In implementing the objectives of the coastal zone management program full consideration shall be given to ecological, cultural, historic, and esthetics values as well as to the needs for economic development.
>
> (b) The objectives and policies of this chapter and any guidelines enacted by the legislature shall be binding upon actions within the coastal zone management area by all agencies.[69]

Unlike the federal CZMA, the Hawaii CZMA provides a direct cause of action for agency non-compliance with the objectives, policies, and guidelines.[70]

Part II of the Hawaii CZMA, which defines the Special Management Areas, is the heart of the coastal management program. Pursuant to the Special Management Area Guidelines,[71] each county authority[72]

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[62] 16 U.S.C. § 1454(b)(7) (1988).

[63] HAW. REV. STAT. § 205A-2(b) (1979).

[64] HAW. REV. STAT. § 205A-2(c) (1979).

[65] HAW. REV. STAT. § 205A-4 (1979).

[66] HAW. REV. STAT. § 205A-2(b)(2)(A) (1979).

[67] HAW. REV. STAT. § 205A-2(c)(7) (1979).

[68] *Mahuiki*, 65 Haw. 506, 517, 654 P.2d 874, 881 (1982).

[69] HAW. REV. STAT. § 205A-4 (1979).

[70] HAW. REV. STAT. § 205A-6 (1979).

[71] 15 C.F.R. § 923.21(b)(l)(i) (1988).

[72] HAW. REV. STAT. § 205A-22(2) defines "authority" as :

identifies and maps those areas near the shoreline that require special protections.[73] Within an SMA, any development[74] requires an SMA use permit issued by the designated authority.[75] The authority may not approve a proposed development without finding:

> (A) That the development will not have any substantial adverse environmental or ecological effect, except as such adverse effect is minimized to the extent practicable and clearly outweighed by public health, safety, or compelling public interests. Such adverse effects shall include, but not be limited to, the potential cumulative impact of individual developments, each one of which, taken in itself might not have a substantial effect, and the elimination of planning options;
>
> (B) That the development is consistent with the objectives, policies, and special management area guidelines of this chapter and any guidelines enacted by the legislature; and
>
> (C) That the development is consistent with the county general plan and zoning. Such a finding of consistency does not preclude concurrent processing where a general plan or zoning amendment may also be required.[76]

> "the county planning commission, except in counties where the county planning commission is advisory only, in which case "authority" means the county council or such body as the council may by ordinance designate." *Id.* § 205A-22(2).

The designated "authority" for the City and County of Honolulu is the City Council. The counties of Hawaii, Kauai, and Maui designate their respective County Planning Commissions as the "authorities".

[73] "Special management area" means the land extending inward from the shoreline as delineated on the maps filed with the authority as of June 8, 1977, or as amended pursuant to section 205A-23. HAW. REV. STAT. § 205A-22(4) (1979).

[74] Development is defined as any use, activity, or operations within the SMA that include:

> (i)The placement or erection of any solid material or any gaseous, liquid, solid, or thermal waste;
>
> (ii)Grading, removing, dredging, mining, or extraction of any materials;
>
> (iii)Change in the density or intensity of use of land, including but not limited to the division or subdivision of land;
>
> (iv)Change in the intensity of use of water, ecology related thereto, or of access thereto; and
>
> (v)Construction, reconstruction, demolition, or alteration of the size of any structure.

HAW. REV. STAT. 205A-22(3)(A)

[75] HAW. REV. STAT. § 205A-28 (1979).

[76] HAW. REV. STAT. § 205A-26(2) (1979). "Substantial adverse environmental or ecological effect" is not defined in the statute. The Hawaii County Planning Com-

While the Hawaii CZMA does not expressly require protection of native Hawaiian gathering and access rights, the mandate to give full consideration to cultural values, stated separately from ecological, historic, aesthetic, recreational, scenic, and open space values, may impose an obligation to separately balance native Hawaiian rights.

2. *HCZMA: The Case Law*

Before *PASH*, the Hawaii courts had never directly addressed the issue of whether there is an obligation to consider native Hawaiian rights when reviewing an application for a SMA permit, either by granting a contested case hearing when those rights are asserted, or by imposing permit conditions to protect native Hawaiian rights. Several cases, however, may have some bearing on the latter issue.

In *Mahuiki*,[77] the Court held that because the Commission had not followed the guidelines and objectives of the CZMA, "the grant of the permit cannot stand."[78] Specifically, the court held that the Commission "breached the command" of Hawaii Revised Statutes sections 205A-4 and 205A-28, by failing to find that the proposed development

> would have no "substantial adverse environmental or ecological effect" or the adverse effect would be "clearly outweighed by public health and safety" and the development was "consistent with the findings and policies set forth" in HRS Chapter 205A.[79]

As *Mahuiki* makes clear, the designated permitting authority is bound by the objectives, guidelines, and policies of the CZMA.

The same result was reached in *Hui Alaloa v. Planning Commission of the County of Maui*.[80] The plaintiffs had challenged a conditional SMA permit granted by the Maui Planning Commission after public hearings and contested case hearings. A permit condition required the applicant to retain a qualified archeologist to conduct a further survey of the area, and to formulate plans to satisfy the historical objectives of the

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mission Rules of Practice and Procedure, Rule 9-10(H), sets forth criteria for determining a "significant adverse effect," instructing the Director to "bear in mind" that "in most instances an irrevocable commitment to loss or destruction of any natural or cultural resource may constitute a significant adverse effect on the environment." Hawaii County Planning Comm. R. Prac. & Proc. 9-10(H).

[77] 65 Haw. 506, 654 P.2d 874 (1982).

[78] *Id.* at 520, 654 P.2d at 883.

[79] *Id.* at 519, 654 P.2d at 882.

[80] 68 Haw. 135, 705 P.2d 1042 (1985).

Hawaii CZMA, but did not require review of the plan by the Commission. The court vacated the granting of the permits, because:

> In view of the conditioned permits granted by the planning commission relative to the historical and archaeological resources of the areas, we fail to see how the planning commission concluded that the developments are consistent with the objectives of protecting and preserving historic and prehistoric resources. We emphasize that this finding must be made before a SMA permit can be issued.[81]

The Hawaii Supreme Court has thus emphatically and consistently required that a SMA permitting authority make the findings required by Hawaii Revised Statutes section 205A-26(2), particularly "[t]hat the development is consistent with the objectives, policies, and special management area guidelines of this chapter and any guidelines enacted by the legislature."[82] The case law is silent on whether the objectives and policies of the CZMA are sufficiently broad to include native Hawaiian access and gathering rights.

C. *Native Hawaiian Gathering Rights*

1. *Statutory and constitutional rights*

Many of the statutory and constitutional bases for native Hawaiian gathering rights were a result of the same pressures which gave rise to the Great Mahele, when the ancient Hawaiian land tenure system gave way to fee simple ownership.[83] The 1839 Declaration of Rights by

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[81] *Id.* at 137, 705 P.2d at 1044.

[82] HAW. REV. STAT. § 205A-26(2)(B) (1979).

[83] Prior to Western contact, patterns of land division paralleled a hierarchical social order. The principal land unit was the ahupua'a, which could range in size from 100 to 100,000 acres.

> A principle very largely obtaining in these divisions of territory was that a land should run from the sea to the mountains, thus affording to the chief and his people a fishery residence at the warm seaside, together with the products of the high lands, such as fuel, canoe timber, mountain birds, and the right of way to the same, and all the varied products of the intermediate land as might be suitable to the soil and climate of the different altitudes from sea soil to mountainside or top.

In Re Boundaries of Pulehunui, 4 Haw. 239, 241 (1879).

Ahupua'a were controlled by chiefs. *Konohiki*, or land agents, subordinate to the chief often administered the *ahupua'a*. Although the *maka'ainana*, or commoners, owed

Kamehameha III marked the beginning of a "peaceful but complete revolution in the entire polity of the kingdom"[84] by limiting the powers of the King. The Declaration was the first of a series of laws westernizing the nature of land tenure,[85] while committing the government to protecting the rights of the tenants:

> God has also established government, and rule for the purpose of peace; but in making laws for the nation it is by no means proper to enact laws for the protection of the rulers only, without also providing protection for their subjects; neither is it proper to enact laws to enrich the chiefs only, without regard to enriching their subjects also, and hereafter there shall by no means be any laws enacted which are at variance with what is expressed. . . .Protection is hereby secured to the persons of all the people, together with their lands, their building lots, and all their property, while they conform to the laws of the kingdom, and nothing whatever shall be taken from any individual except by express provision of the laws.[86]

Virtually the same language became the preamble to the Constitution of 1840.[87] Entitled an "Exposition of the Principles on Which the Present Dynasty is Founded"[88], the first Constitution clarified the land interests of the people, the chiefs, and the monarch.[89] The Constitution stated:

> Kamehameha I was the founder of the kingdom, and to him belonged all the land from one end of the Islands to the other, although it was not his own private property. It belonged to the chiefs and people in

a work obligation to those above them, they had liberal rights to use the resources of the *ahupua'a.* They had plots of land for their own use, and could hunt, gather and fish within the *ahupua'a.* There was no private ownership, but a trust concept reinforced by reciprocal rights and obligations of each section of society. For a thorough discussion of ancient Hawaiian land tenure, *see* J.J. CHINEN, THE GREAT MAHELE (1958); GAVIN DAWS, SHOAL OF TIME (1968); R. KUYKENDALL, THE HAWAIIAN KINGDOM 1778-1854 (1938); M. MACKENZIE, NATIVE HAWAIIAN RIGHTS HANDBOOK (1991); *see also* N. Levy, Native Hawaiian Land RIGHTS, 63 Cal. L. Rev. 848.

[84] In re Estate of His Majesty Kamehameha IV, 2 Haw. 715, 720 (1864).

[85] Maivan Lâm, *The Kuleana Act Revisited: The Survival of Traditional Hawaiian Commoner Rights in Land,* 64 WASH. L. REV. 233, 253 (1989).

[86] Bill of Rights (1839), 2 REV. LAWS HAW. 212 (1925); LAWRENCE THURSTON, THE FUNDAMENTAL LAW OF HAWAII 1 (1904).

[87] Haw. Const. (1840); TRANSLATION OF THE CONSTITUTION AND LAWS OF THE HAWAIIAN ISLANDS 11-12 (1842).

[88] Lâm, *supra* note 85, at 254.

[89] MacKenzie, *supra* note 83, at 5.

> common, of whom Kamehameha I was the head, and had the management of landed property. Wherefore, there was not formerly, and is not now any person who could or can convey away the smallest portion of land without the consent of the one who had, or has the direction of the kingdom.[90]

The Constitution thus attempted to prevent alienation of land to foreigners, yet appease foreign interests by the preamble assuring that land acquired by foreigners would not be taken away from them.[91]

In the face of increasing conflict over land, the government appointed the Board of Land Commissioners in 1845 to undertake "the investigation and final ascertainment or rejection of all claims of private individuals, whether natives or foreigners, to any landed property. . . ."[92]

> Neither the laws of 1839 or 1840 were found adequate to protect the inferior lords and tenants . . . the latter often suffered, and it was found necessary to adopt a new system for protecting those rights when ascertained, and to accomplish this object the Land Commission was formed.[93]

The decisions of the Land Commission were to observe "principles established by the civil code of the kingdom" in regard to "prescription occupancy, fixtures, native usages in regard to landed tenures, water privileges and rights of piscary, the rights of women, the rights of absentees, tenancy and subtenancy, primogeniture, and rights of adoption."[94]

The Land Commission Principles first enunciated the historical and legal elements of the existing system of land tenure.[95] In the Preface to its Principles, the Commission explained that:

> But even when such lord shall have received an allodial title from the King by purchase or otherwise, the rights of the tenants and subtenants must still remain unaffected, for no purchase, even from the sovereign himself can vitiate the rights of third parties. The lord therefore, who

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[90] Thurston, *supra* note 86, at 3.

[91] MacKenzie, *supra* note 84, at 6.

[92] Thurston, *supra* note 86, at 137.

[93] The Principles Adopted by the Board of Commissioners to Quiet Land Titles in Their Adjudication of Claims Presented to them, Stat. L. Kamehameha III 81, *reprinted in* II REV. LAWS HAW. App. 2124 (1925).

[94] *Id.* at 2133.

[95] *Id.* at 2124-30.

> purchases the allodium, can no more seize upon the rights of the tenants and dispossess them, than the King can now seize upon the rights of the lords and dispossess them. This appears clear, not only from the first principles of justice, but also from the act of 1839, declaring protection for tenants as well as for landlords.[96]

The Commission went on to explain that Hawaii's rulers now wished to "conform themselves *in the main*" to a more "civilized state" of "the immutable law of property."[97] Besides restating the existing principles of land tenure, the Commission proposed modifications, or prospective principles, to facilitate the transition.[98] Among these were that there were three parties with vested rights in the land, and that they could be divided out in the proportions of one third to each the King: the landlord, and the tenant.[99] The Commissioners specifically recognized however, that where the King had bestowed rights in land to individuals, the Commission was authorized to convey only "[h]is private or feudatory right as an individual participant in the ownership, not his sovereign prerogatives as head of the nation," among which was the power "[t]o encourage and even to enforce the usufruct of lands for the common good."[100] Because the sovereign prerogatives of the King could not be surrendered, "the following confirmations of the board and titles consequent upon them must be understood subject to these conditions."[101]

The Nobles and the Representatives in the Legislative Council approved the Principles by resolution on October 26, 1846.[102] The Land Commission, however, was able to issue very few awards, because the interests of the King, the chiefs and the tenants remained undivided and inextricably intertwined.[103] The provisions protecting the interests of the tenants were too numerous to permit division of those interests, so the Land Commission could only separate out the King's portion where a party claimed directly from the King.[104]

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[96] *Id.* at 2125.

[97] *Id.* at 2130 (emphasis added).

[98] For a concise but thorough summary of the Land Commission Principles, *see* Lâm, *supra* note 83.

[99] Land Comm. Principles at 2126.

[100] *Id.* at 2128. Black's Law Dictionary defines usufruct as "the right of using and enjoying and receiving the profits of property that belongs to another." Sixth Edition, at 1544.

[101] Land Comm. Principles at 2128.

[102] *Id.* at 2124.

[103] Chinen, *supra* note 83 at 12.

[104] Lâm, *supra* note 83.

The Great Mahele of 1848 came after two years of debate over how to partition the undivided interests in the land and fulfill the Land Commission Principles.[105] The plan finally adopted separated the King's private lands, which he would retain subject to the rights of the tenants "to a fee-simple title to one-third of the lands possessed and cultivated by them."[106] The rest of the land in the Kingdom would be divided into thirds: one-third to the Hawaiian Government, one-third to the chiefs and *konohiki*, and one-third to the tenant farmers.[107] The Mahele was the first step in the partition: between January 27 and March 7, 1848, the interests of the King and 245 chiefs and konohiki were divided by mutual quit-claim.[108] The chiefs and konohiki did not receive title to their lands by virtue of the Mahele, but had to confirm their claims with the Land Commission and tender commutation before Royal Patents were issued on the awards.[109] The Royal Patents did not create unencumbered fee simple title; they specifically stated that the landlords held "subject to the rights of native tenants."[110]

At the end of the Mahele, the King held 2.5 million acres of land, the chiefs 1.5 million acres.[111] The day after the last mahele, the King further divided the lands that were surrendered to him by the chiefs, and "set apart forever to the chiefs and people of my kingdom" approximately 1.5 million acres, retaining 1 million acres for himself.[112] These lands became known as the Government lands and the Crown lands, respectively, and both were made "subject always to the rights of the tenants."[113] Thus, by the end of the mahele each category of landlord—the King, the government, and the konohiki, held subject to the rights of the tenants.

The Kuleana Act of 1850[114] attempted to define and protect "the rights of the tenants."[115] The Act authorized the Land Commission to

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[105] MacKenzie, *supra* note 83, at 7.

[106] Rules adopted by the Privy Council, December 18, 1847, § 4, 4 Privy Council Record (1847).

[107] *Id.* § 2.

[108] Chinen, *supra* note 83, at 12.

[109] *Id.* at 20-21.

[110] *Id.* at 29.

[111] Chinen, *supra* note 83, at 25.

[112] 2 REV. LAWS HAW. 2152-2176 (1985).

[113] *Id.*

[114] The Act Confirming Certain Resolutions of the King and Privy Council, Granting to the Common People Allodial Titles for Their Own Lands and House Lots, and

award fee simple title to the tenants, without commutation, for the lands they occupied, whether Konohiki, Crown, or Government lands.[116] Section 7 of the Act provided that:

> When the landlords have taken allodial title to their lands, the people on each of their lands, may not be deprived of the right to take firewood, house timber, aho cord, thatch, or ti leaf, from the land on which they live, for their own private use, should they need them, but they shall not have a right to take such articles to sell for profit. They shall also inform the landlord or his agent, and proceed with his consent. The people also shall have a right to drinking water, and running water, and the right of way. The springs of water, and running water, and roads shall be free to all, should they need them, on all lands granted in fee simple: Provided, that this shall not be applicable to wells and water courses which individuals have made for their own use.[117]

This section was included at the behest of the King, who was concerned that "a little bit of land, even with an allodial title, if they [the people] be cut off from all other privileges, would be of very little value."[118] The requirement that the *hoa'aina* obtain the consent of the landlord was deleted the following year, in response to the legislature's concern that "many difficulties and complaints have arisen, from the bad feeling existing on account of the konohiki's forbidding the tenants on the lands enjoying the benefits that have been by law given them."[119] Clearly, then, this section gave the hoa'aina rights that were considered to be superior to the rights of the title holder to refuse permission. The provision remains, largely unchanged, and now appears as Hawaii Revised Statutes section 7-1.

The other statutory basis for the protection of native Hawaiian traditional and customary practices is Hawaii Revised Statutes section 1.1, which states:

> The common law of England, as ascertained by English and American decisions, is declared to be the common law of the State of Hawaii in

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Certain Other Privileges, 1850 Hawaii Sess. Laws 202 (Aug. 6, 1850), *reprinted in* 2 REV. LAWS HAW. 2141-42 (1925).

[115] Chinen, *supra* note 83, at 29.

[116] 2 REV. LAWS HAW. 2141.

[117] *Id.* at 2142.

[118] Kalipi v. Hawaiian Trust Co., 66 Haw. 1, 7, 656 P.2d 745, 749 (quoting Privy Council Minutes of July 13, 1850).

[119] Act of July 11th, 1851, Sess. Laws of 1851 at 98-99. The Act also struck the phrase "should they need them." *Id.* at 98-99.

> all cases, except as otherwise expressly provided by the Constitution or laws of the United States, or by the laws of the State, or fixed by Hawaiian judicial precedent, or established by Hawaiian usage.

One explanation for the enactment of the Hawaiian usage exception has been given as follows:

> It is apparent that when the legislature adopted Act 57 in 1892 (now § 1-1, R.L.H.1955), it was cognizant of the fact that before such enactment, the courts of Hawaii had not adopted the common law of England in toto and consequently made certain qualifications. Accordingly, it was deemed necessary to provide for exceptions.[120]

Article XII, section 7 of the Hawaii Constitution was adopted by the 1978 Constitutional Convention and ratified by a majority of the popular vote. It mandates that:

> The State of Hawaii reaffirms and shall protect all rights, customarily and traditionally exercised for subsistence, cultural and religious purposes and possessed by ahupua'a tenants who are descendants of native Hawaiians who inhabited the Hawaiian Islands prior to 1778, subject to the right of the State to regulate such rights.

The Standing Committee Report explains the delegate's purpose:

> Aware and concerned about past and present actions by private landowners, large corporations, ranches, large estates, hotels and government entities which preclude native Hawaiians from following subsistence practices traditionally used by their ancestors, your Committee proposed this new section to provide the State with the power to protect these rights and to prevent any interference with the exercise of these rights.[121]

The legislative history of the amendment also indicates some of the frustration that convinced the delegates that constitutional protection for traditional gathering rights was necessary:

> Your Committee did not intend to have this section narrowly construed or ignored by the courts. Your Committee is aware of the courts' unwillingness and inability to define native rights, but in reaffirming these rights in the Constitution, your Committee feels that badly needed judicial guidance is provided and enforcement is guaranteed.[122]

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[120] De Freitas v. Coke, 46 Haw. 425, 430, 380 P.2d 762, 766 (1963).

[121] STAND. COMM. REP. No. 57, *reprinted in* 1 PROCEEDINGS OF THE CON. CONVENTION OF HAW. OF 1978, at 639 (1980).

[122] *Id.*, *reprinted in* PROCEEDINGS OF THE CON. CONVENTION, at 640.

Subjecting these Constitutional rights to "the right of the State to regulate same" seems incongruous with the strong language of the amendment and the Committee Report. The Committee explains that "reasonable regulation is necessary to prevent possible abuse as well as interference with these rights."[123]

2. *Native Hawaiian Rights: the cases*

Oni v. Meek[124] stands as the leading early case interpreting the Kuleana Act. Oni, a *maka'ainana*[125] of Honouliuli, brought suit to recover the value of two horses taken by Meek and sold as strays because they were grazing on land Meek leased from the *konohiki* of the *ahupua'a*. Meek held the land under three leases, the latest of which contained a clause to the effect that "[t]his lease shall not be construed as conflicting (or interfering) with the rights of the people living under the shade of the party of the first part (the *konohiki*)."[126] Oni claimed the right to graze his horses on three grounds: the reservation in the lease, custom, and statute.[127]

The court held against Oni on each ground. The court found that, because only one of the leases contained the reservation, Oni had not made the proper showing that the land where his horses were seized was land covered by that lease.[128] Further, the court thought the lease reservation superfluous, "inasmuch as those rights would, it seems to us, have been equally well preserved without such a clause; and it was not in the power of the *konohiki*, had he been so disposed, to alienate a single right secured by law to the plaintiff."[129] In other words, these rights were secured by statutory law, not by contract.

The court then considered Oni's claim under custom, and found the custom "so unreasonable, so uncertain, and so repugnant to the spirit of the present laws, that it ought not be sustained by judicial authority."[130] The court also pointed to testimony offered by the plaintiff's witnesses that in 1851 he and other *hoa'aina* of the *ahupua'a* had met

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[123] *Id.*, *reprinted in* PROCEEDINGS OF THE CON. CONVENTION, at 639.
[124] 2 Haw. 87 (1858)
[125] It was unclear whether Oni was a *kuleana* awardee. *Id.* at 88.
[126] *Id.*
[127] *Id.* at 88-89.
[128] *Id.*
[129] *Id.* at 89.
[130] *Id.* at 90.

with the *konohiki* and discussed their understanding that the Kuleana Act had terminated their former privileges.[131] The court noted that by requesting the *konohiki* to continue to grant their grazing privileges in exchange for their continued labor, the right of grazing had become not customary, but contractual.[132] Finally, the court addressed Oni's claim that an 1846 statute, never expressly repealed, specifically protected the rights of *hoa'aina* to graze horses in the *ahupua'a*. The court found that, "the provisions of 1846 must be held, by necessary implication, to be repealed by those of 1850 [the Kuleana Act,]"[133] which enumerate all of the specifically protected rights (excepting fishing rights) of the tenant.[134]

Rights of access, under Hawaii Revised Statutes section 7-1 and the common law doctrine of necessity were addressed by the court in *Palama v. Sheehan*.[135] Palama filed a quiet title action to land, including a fishpond, in Kalaheo, Kaua'i. The defendants held several *kuleana* parcels makai of Plaintiff's property, as well as one *kuleana* parcel within the property, and claimed that they were entitled to access to their parcels under section 7-1.[136] The court held that because their predecessors-in-interest had used the trail since historic times, defendants had established access rights under H.R.S. § 7-1.[137] The holding was also based on the right of way by reason of necessity.[138] Plaintiffs asserted that, because the 1850 grant was limited to pedestrian use, any right of way should not include vehicular traffic.[139] The court found that the burden on the servient estate was not unreasonable, because plaintiff's predecessor-in-interest had enlarged the path for vehicular access in 1910.[140]

Gathering rights under Hawaii Revised Statutes section 7-1 were not addressed by the Hawaii Supreme Court until 1982, in *Kalipi v. Hawaiian Trust Company*.[141] Kalipi asserted a right, established by long-standing family tradition, to enter defendants' undeveloped land to

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[131] *Id.* at 91.
[132] *Id.*
[133] *Id.* at 94.
[134] *Id.* at 95.
[135] 50 Haw. 298, 440 P.2d 95 (1968).
[136] *Id.* at 298, 440 P.2d at 96.
[137] *Id.* at 301, 440 P.2d at 97-98.
[138] *Id.* at 301, 440 P.2d at 98.
[139] *Id.* at 303, 440 P.2d at 99.
[140] *Id.*
[141] 66 Haw. 1, 618 P.2d 312 (1982).

gather natural products used in traditional Hawaiian cultural practices.[142] Kalipi owned a taro patch in the *ahupua'a* of Manawai, on Moloka'i, and an adjoining houselot in the *ahupua'a* of 'Ohi'a. Although he had been raised on the property, he did not live there at the time of the trial.[143]

Kalipi asserted gathering rights based on: Hawaii Revised Statutes section 7-1, section 1-1, and the language of the original awards to the defendants that reserved the rights of the tenants.[144] The court first emphatically rejected defendants' argument that traditional rights were inconsistent with the modern system, and should be abandoned.

> We recognize that permitting access to private property for the purpose of gathering natural products may indeed conflict with the exclusivity traditionally associated with fee simple ownership of land. But any argument for the extinguishing of traditional rights based simply upon the possible inconsistency of purported native rights with our modern system of land tenure must fail.[145]

The court found an obligation to preserve and protect traditional rights in the Hawaii Constitution, Article XII, section 7.[146]

The court recounted the history of Hawaiian land tenure, and then attempted to "conform these traditional rights . . . with a modern system of land tenure."[147] The court struck the balance by spelling out five limitations in its interpretation of section 7-1 rights. First, "[b]y 'lawful occupants' we mean persons residing within the *ahupua'a* in which they seek to exercise gathering rights."[148] Second, the gathering

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[142] These included ti leaf, bamboo, kukui nut, kiawe, medicinal herbs and ferns. *Id.* at 4, 656 P.2d at 747.

[143] *Id.* at 3, 656 P.2d at 747.

[144] *Id.* at 4, 656 P.2d at 747.

[145] *Id.* at 4, 656 P.2d at 748.

[146] *Id.* The court quoted from Standing Committee Report No. 57, the expression of policy: "in reaffirming these rights in the Constitution, Your Committee feels that badly needed judicial guidance is provided and enforcement by the courts of these rights is guaranteed." *Id.* at 5, 656 P.2d at 748. The court did not however, include the initial part of the quote, expressing the delegates' frustration with the treatment of native Hawaiian rights by the courts: "Your Committee did not intend to have the section narrowly construed or ignored by the courts. Your Committee is aware of the courts' unwillingness and inability to define native rights, but in reaffirming these rights . . . ." *Id.* at 7, 656 P.2d at 749.

[147] *Id.*

[148] *Id.* at 8,656 P.2d at 749.

right is limited to the items enumerated in the statute,[149] and must be utilized to practice native customs: "[t]he gathering rights of § 7-1 were necessary to insure the survival of those who, in 1851, sought to live in accordance with the ancient ways. They thus remain, to the extent provided in the statute, available to those who wish to continue those ways."[150] The third limitation imposed by the court is that these rights must be practiced on undeveloped land.[151] Although not found within the statute, the court found the limitation necessary to avoid a result that "would so conflict with understandings of property and potentially lead to such disruption, that we could not consider it anything short of absurd."[152] Fourth, the court determined, without explaining, that section 7-1 rights "would, of course, be subject to further government regulation.[153] Finally, in dicta that has become the central issue in *PASH*, the court proposed that:

> These rights are rights of access and collection. They do not include any inherent interest in the natural objects themselves until they are reduced to the gatherer's possession. As such, those asserting the rights cannot prevent the diminution or destruction of those things they seek. The rights therefore do not prevent owners from developing lands.[154]

The court then went on to discuss the second basis for Kalipi's claim, Hawaiian usage as provided for in Hawaii Revised Statutes section 1-1. In response to the Defendants' contention that *Oni v. Meek* had abrogated any customary rights that might have been retained by section 1-1, the court carefully reviewed that decision, and concluded that:

> [I]nasmuch as the court did not expressly preclude the possibility that the doctrine of custom might be utilized as a vehicle for the retention of some such rights, we find no inconsistency in finding that the Hawaiian usage exception in § 1-1 may be used as a vehicle for the continued existence of those customary rights which continued to be practiced and which worked no actual harm upon the recognized interests of others.[155]

The court perceived the Hawaiian usage exception as "an attempt on the part of the framers of the statute to avoid results inappropriate

[149] *Id.* at 8, 656 P.2d at 749-50.
[150] *Id.* at 9, 656 P.2d at 750.
[151] *Id.* at 8-9, 656 P.2d at 749.
[152] *Id.* at 8, 656 P.2d at 750.
[153] *Id.* at 8-9, 656 P.2d at 749.
[154] *Id.* n.2, 656 P.2d at 749 n.2.
[155] *Id.* at 11-12, 656 P.2d at 751-752.

to the isles' inhabitants by permitting the continuance of native understandings and practices which did not unreasonably interfere with the spirit of the common law''[156] and compared the statutory exception to the common law to the English doctrine of custom.[157] Significantly, the Court did not find that all the elements of the English doctrine were necessarily incorporated into section 1-1.[158] Rather, the nature of the rights retained under section 1-1 would be determined using a case by case balancing approach of the respective interests and harm, once it was determined that a particular custom had continued in a particular area.[159]

Kalipi also claimed that his gathering rights were inherent in the deed reservations in the original awards of defendant's land: ''subject always to the rights of tenants.'' The court, indicating that this claim, like the statutory claims, was foreclosed by the fact the Kalipi was not a tenant of the *ahupua'a*, gave only brief consideration to the kuleana reservations.[160] The court distinguished *Territory v. Liliuokalani*,[161] in which a similar reservation was held not to confer a public right to use shoreline areas within the grant, on the basis that unlike *Kalipi*, that case dealt with asserted public rights, not the reserved rights of *ahupua'a* tenants.[162] While *Kalipi* did not delineate the scope of the reserved rights, the court did suggest that the reservation is more than a vestigial artifact of an ancient understanding, it is a current restriction that inheres in every title in Hawaii.

In *Pele Defense Fund v. Paty* (*Pele*)[163], the court again considered native Hawaiian gathering rights, this time under a slightly different analytical framework. While the *Kalipi* court found an obligation to consider Kalipi's statutory claims under article XII, section 7 of the Hawaii constitution, the Pele Defense Fund's (PDF) claims were brought

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[156] *Id.* at 10, 656 P.2d at 750-51. One commentator questions the support for the Court's assumption that the ''spirit'' of the common law prevails over Hawaiian usage, given the statute's specific wording subordinating Anglo-American common law to Hawaiian usage. *See* M. Lâm, *supra* note 85, at n.309.

[157] *Id.* at 10, 656 P.2d at 751.

[158] *Id.* In Oni v. Meek, the elements of the English doctrine of custom were listed as: existence from time immemorial, reasonableness, certainty, and consistency with the laws of the land. Oni v. Meek, 2 Haw. 87, 90 (1858).

[159] *Kalipi*, 66 Haw. at 10, 656 P.2d at 751.

[160] *Id.* at 12-13, 656 P.2d at 752.

[161] 14 Haw. 88 (1902).

[162] *Kalipi* at 12, 656 P.2d at 752.

[163] 73 Haw. 578, 837 P.2d 1247 (1992).

directly under that provision. PDF challenged the State's decision to exchange ceded lands, including the Wao Kele 'O Puna Natural Area Reserve, for land owned by the Campbell estate.[164] Among the grounds for PDF's challenge was that the exchange violated article XII, section 7 in two ways: "(1) by the relinquishment of state lands on which native Hawaiians customarily and traditionally exercised subsistence, cultural and religious practices; and (2) by the continued denial of access into Wao Kele 'O Puna to native Hawaiian PDF members who seek access for customarily and traditionally exercised subsistence, cultural and religious practices."[165]

The court held that PDF's claim based on the relinquishment of state lands was barred by sovereign immunity, and proceeded to consider the gathering rights claim.[166] PDF claimed that Wao Kele 'O Puna historically served as a common gathering area which could be utilized by tenants who resided in neighboring *ahupua'a*.[167] The court began its analysis by extensively reviewing the *Kalipi* decision.[168] It distinguished PDF's claims from Kalipi's, explaining that while Kalipi's claim had been based on land ownership within the *ahupua'a*, PDF based its claim on the traditional access and gathering patterns of native Hawaiians in the Puna region.[169]

The court then examined the Committee Report for article XII, section 7, and determined that if the customary and traditional rights associated with tenancy in an *ahupua'a* extended beyond the boundaries of the *ahupua'a*, then article XII, section 7 would protect those rights as well.[170] The court relied on language from the report which indicated that the Committee contemplated that some traditional rights may extend beyond the *ahupua'a*: "[f]or instance, it was customary for a Hawaiian to use trails outside the ahupua'a in which he lived to get to another part of the Island," and that the new section "reaffirms *all* rights customarily and traditionally held by ancient Hawaiians."[171]

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[164] *Id.* at 587, 837 P.2d at 1255.
[165] *Id.* at 613, 837 P.2d at 1268.
[166] *Id.* at 613-614, 837 P.2d at 1268.
[167] *Id.* at 616, 837 P.2d at 1269.
[168] *Id.* at 616-618, 837 P.2d at 1270-1271.
[169] *Id.* at 618, 837 P.2d at 1271.
[170] *Id.* at 620, 837 P.2d at 1272.
[171] *Id.* at 619, 837 P.2d at 1271 (quoting STAND. COMM. REP. NO. 57, *reprinted in* 1 PROCEEDINGS OF THE CONST. CONVENTION OF HAW. OF 1978, at 640)(court's emphasis).

Noting affidavits submitted by PDF to support the contention "that access and gathering patterns of tenants in Puna do not appear to have conformed to the usual notion that tenants exercised such rights only within the boundaries of a given *ahupua'a*," the court reversed summary judgment and remanded for trial on the gathering rights claim.[172]

V. Analysis

A. *The Opinion*

The ICA began its opinion with a brief synopsis of the procedural history of the case and then considered Nansay's contention that the circuit court had erred in considering an affidavit filed by PASH in which Malani Pai averred that he was a member of PASH. The court agreed that the circuit court erred in considering the affidavit, because although Pai had testified before the Planning Commission that he and his family had customarily harvested and maintained the anchialine ponds, the Commission's record contained no evidence of Pai's membership in PASH.[173] Although the ICA agreed that the circuit court's Order was "based in large measure" on the Pai affidavit, the court rejected Nansay's contention that the Order was invalid because the circuit court failed to confine its review to the facts in the record. The court explained that the error would not frustrate judicial review because the ICA's standard of review was the same as the circuit court's, so the ICA could avoid the error by limiting its review to the facts in the Planning Commission's record.[174]

In section three of its opinion, the court discussed the standard of review applied to agency decisions. After restating the Hawaii County Planning Commission rules, the court states that the determination of the interests of the general public and of the contested case applicant is a factual determination that will be reviewed for clear error.[175] Whether the interest of the applicant is clearly distinguishable from

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[172] *Id.* at 620-621, 837 P.2d at 1272.

[173] *PASH*, slip op. at 2.

[174] *Id.* at 3.

[175] *Id.* at 5 (citing Protect Ala Wai Skyline v. City Council, 6 Haw.App. 540, 544, 735 P.2d 950, 953 (1987)).

that of the general public is "a legal conclusion reviewable on the basis of whether the Commission's conclusion is right or wrong."[176]

In section four the ICA described the impact of the proposed development and the testimony by the public and members of PASH concerning the impact of the development. The court concluded that Nansay's development "impinges on the public's access to and use of the beach area and the anchialine ponds, lateral movement along the beach, and existing ocean view planes".[177]

In section five of the opinion the court considered native Hawaiian rights law and PASH's standing as an interested party. The court began with its conclusion that:

> [A] native Hawaiian who has exercised such rights as were customarily and traditionally exercised for subsistence, cultural and religious purposes on undeveloped lands of an ahupua'a has an interest in a proceeding for the approval of a SMAP for the development of lands within the ahupua'a which are clearly distinguishable from that of the general public.[178]

The court then described the development of native Hawaiian gathering rights law beginning with *Kalipi*.[179] The court recognized that the gathering activity described by the plaintiffs in *PASH* is not specifically enumerated in HRS § 7-1. The court determined, therefore, that the plaintiff's gathering activity is not protected by article XII, section 7, "unless it has been shown that it is a right 'customarily and traditionally exercised [on the ahupua'a of Kohanaiki] for subsistence . . . purposes and possessed by . . . descendants of native Hawaiians who inhabited the Hawaiian Islands prior to 1778[.]'"[180] The court concluded that the record contained sufficient evidence to satisfy these constitutional

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[176] *Id.* The "right/wrong" standard of review applied to an agency's legal conclusions corresponds to *de novo* review. Camera v. Agsalud, 67 Haw. 212, 215-16, 685 P.2d 794, 796-97 (1984).

[177] *Id.* at 6. The court described the relevant testimony at the hearings and expressed the opinion that the approved SMAP contains numerous conditions designed to address the concerns of the various speakers at the hearings, including establishment of a program for preserving and maintaining archaeological sites and the anchialine ponds. *Id.* at 6-8.

[178] *Id.* at 8.

[179] The court stated that in Kalipi v. Hawaiian Trust Co., 66 Haw. 1, 656 P.2d 745 (1982), the supreme court held that such gathering rights are derived from three sources: article XII, § 7, and HAW. REV. STAT. §§ 7-1 & 1-1. *PASH*, slip op. at 9.

[180] *Id.* at 11 (quoting HAW. CONST. art. XII, § 7).

requirements, based on the sworn, unrefuted testimony of Pai, Marcel Keanaina and PASH representative Jerry Rothstein.[181]

The court then held that the Commission's conclusion that PASH had not demonstrated an interest clearly distinguishable from that of the general public was erroneous. "[T]he Commission disregarded the rules regarding the gathering rights of native Hawaiians and its obligation to protect those rights. Thus, PASH was entitled to contested case hearing procedures, and the Commission erred as a matter of law when it denied PASH's request."[182]

After reversing the circuit court, the ICA made the most sweeping pronouncement of the opinion:

> [I]t is our view, in light of article XII, § 7, that all government agencies undertaking or approving development of undeveloped land are required to determine if native Hawaiian gathering rights have been customarily and traditionally practiced on the land in question and explore the possibilities for preserving them. At least that much is required by article XII, § 7.[183]

Possibly as an example of how its new standard should apply, the court suggested that on remand the Commission could impose some reasonable conditions on the SMAP to protect native Hawaiian rights where the conditions would not cause actual harm.[184]

B. Commentary

The ICA's primary holding in *PASH* is surprising in that none of

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[181] *Id.* The sufficiency of the evidence establishing that *opae* gathering in Kohanaike was customarily and traditionally exercised is at least questionable, in light of *Pele*. In *Pele*, the Hawaii Supreme Court held that evidence of historical gathering patterns presented a material issue of fact sufficient to defeat a motion for summary judgment, and that PDF would have the opportunity to prove at trial that residents of the Puna *ahupua'a* customarily and traditionally accessed Wao Kele 'O Puna for the purpose of gathering. Pele Defense Fund v. Paty, 73 Haw. 578, 620-21, 837 P.2d 1247, 1272 (1992). If the ICA, in *PASH*, was applying a lower threshold to the showing required for standing, it did not specifically discuss the distinction.

[182] *Id.* at 12.

[183] *Id.* at 13. Article XII, section 7 states: "The State reaffirms and shall protect all rights, customarily and traditionally exercised for subsistence, cultural and religious purposes and possessed by ahupua'a tenants who are descendants of native Hawaiians who inhabited the Hawaiian Islands prior to 1778, subject to the right of the State to regulate such lands." HAW. CONST. art. XII, § 7.

[184] *Id.* at 13 (citing *Kalipi*).

the parties in the circuit court case made any specific gathering rights claims under *Kalipi* or *Pele*.[185] At the circuit court level the case essentially concerned PASH's standing for a contested case hearing, particularly whether PASH had interests clearly distinguishable from the general public.

While it is true that PASH as part of its arguments did present evidence of "special" interests centering on the traditional and customary practices of some of its Hawaiian members,[186] it made these arguments to simply get over the hurdle imposed by the Planning Commission. The "clearly distinguishable interest" requirement was the focal point of the case. PASH was not, at least at the Commission's hearings, attempting to assert any specific native Hawaiian property or gathering rights claims.

Hawaii case law on the subject indicates that the ICA had enough to conclude that PASH had standing for a contested case hearing. The ICA could have made this decision without having to decide that PASH has standing because its members "customarily and traditionally exercised" rights on the *ahupua'a* of Kohanaiki.

In *Mahuiki v. Planning Commission*,[187] the Hawaii Supreme Court concluded that those who seek to preserve essential environmental and aesthetic interests have "special" and "personal" interests entitling them to a contested case if they express those interests in the context of a public hearing. Similarly, in *Life of the Land v. Land Use Commission*,[188] the Court found that rights to a clean and healthful environment have been previously recognized as "personal and special interests or rights."[189]

PASH made environmental and aesthetic claims in the context of the Planning Commission's hearings. On that basis alone the ICA could have decided that PASH had contested case hearing standing. The event that apparently shifted the ICA's focus onto Native Hawaiian

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[185] *See* Opening Brief of Hawaii County Planning Commission, Public Access Shoreline Hawaii v. Hawaii County Planning Commission (No. 15460); Appellee-Appellant Nansay Hawaii, Inc.'s Opening Brief, *PASH* (No. 15460); Appellants-Appellees Public Access Shoreline Hawaii's and Angel Pilago's Answering Brief, *PASH* (No. 15460) (hereinafter PASH's Answering Brief in ICA).

[186] *See* PASH's Answering Brief in ICA at 19-21.

[187] 65 Haw. 506, 654 P.2d 874 (1982).

[188] 63 Haw. 166, 623 P.2d 431 (1981).

[189] *Id.* at 177, 623 P.2d at 441. The Court made specific reference to the Hawaii State Constitution, Article XI, Section 9, Environmental Rights: "Each person has the right to a clean and healthful environment. . . . Any person may enforce this right against any party . . . through appropriate legal proceedings." *Id.* n.10.

rights "traditionally and customarily exercised" was the intervening decision of the Hawaii Supreme Court in *Pele*.

The *Pele* Court's expansion of "Kalipi Rights" to native Hawaiians who live outside of the *ahupua'a* in which the right is exercised[190] was the basis for the ICA's conclusion that members of PASH had standing in a contested case. PASH's assertion of gathering activities as a clearly distinguishable interest became an assertion of a constitutionally protected right by virtue of the *Pele* decision. The ICA's requirement that State agencies determine if these rights have been exercised is a legitimate exercise of the *protective* function mandated by article XII, section 7.

IV. Impact

The broad impact of the *PASH* decision will depend, of course, on the Hawaii Supreme Court's eventual ruling. There are indications that the court may go beyond the issue of whether PASH has standing in a contested case, and consider issues of conflicting property rights. By an Order dated June 18, 1993, the Hawaii Supreme Court ordered additional briefing on three issues, discussed *infra*, and further ordered that arguments, including oral argument, be limited to those issues. The three issues requiring additional briefing were the Commission's legal authority to condition a SMAP on protection of native Hawaiian rights, criteria the Planning Commission should consider, and the point at which protection of native Hawaiian rights would become an unconstitutional "taking."[191]

Although the petitioners have claimed that *PASH* is a "judicial taking" because it represents a radical change in the law[192], their assertions are in fact levelled at the *Pele* decision. Nansay claims, for example, that "[t]he most radical departure from existing law was the ICA's abrogation of any requirement that the holder of claimed gathering rights be a tenant or occupant of the ahupua'a"[193] and that "[t]he central issue here is whether native Hawaiian gathering rights have been based upon tenancy or residency within the ahupua'a[;]. . .

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[190] Pele Defense Fund v. Paty, 73 Haw. 578, 620, 837 P.2d 1247, 1272 (1992).

[191] *See* Order, Public Access Shoreline Hawaii v. Hawaii County Planning Commission (No. 15460) (herinafter Order for Additional Briefing).

[192] Second Supplemental Brief (Opening Brief) of Petitioner-Appellee-Appellant Nansay Hawaii Inc. at 26-27, *PASH* (No. 15460) (hereinafter Nansay's Opening Brief).

[193] *Id.* at 32.

[if so], then the ICA opinion is a revolutionary change in the law and if enforced would constitute an unconstitutional taking of Nansay's property."[194] It was, of course, the *Pele* court, not the ICA, that determined that rights customarily and traditionally exercised in another *ahupua'a* were constitutionally protected.

Pele was a unanimous decision, and its reasoning should withstand scrutiny. Allowing PDF to defeat a motion for summary judgment and prove at trial that its members customarily and traditionally exercised native Hawaiian rights in an adjoining *ahupua'a* works no change in the law. Before the right would be enforced, PDF would be required to demonstrate that the right already existed by virtue of custom or tradition, and thus was within existing law and the protection of Article XII, section 7.

If the Hawaii Supreme Court is inclined to treat *PASH* as a property rights case rather than a standing case, it will have to articulate more clearly the extent of protection for native Hawaiian gathering rights. *Kalipi* and *Pele* leave significant unanswered questions surrounding who can assert the rights, and what evidence is required to establish their existence. More importantly, while the court has held that gathering rights exist only on undeveloped land, and can not guarantee that land will be held in its natural state, it may now have to address the fate of these rights as land undergoes the process of development.

The Hawaii Supreme Court could, of course, avoid these issues by affirming the ICA on other grounds. PASH clearly established an alternative basis on which the court could find that it has standing for a contested case hearing. The "takings" issues raised by Nansay are, at this point, hypothetical. It is indeed difficult to credit the argument that by finding that PASH has satisfied the Planning Commission's rules for contested case party status, the ICA has somehow taken Nansay's property. The court could find that because this argument is premature, it is unripe for judicial review.

Although the Hawaii courts are not limited by the "cases or controversies" requirement of the United States Constitution, they are under an obligation to ensure that they have jurisdiction to hear and determine each case.[195] The Hawaii Supreme Court has stated that a Hawaii court will only have the power to adjudicate a dispute if there is a

[194] Third Supplemental Brief (Reply Brief) of Petitioner-Appellee-Appellant Nansay Hawaii, Inc. at 2, *PASH* (No. 15460).

[195] State v. Moniz, 69 Haw. 370, 372, 742 P. 2d 373, 375 (1987).

"justiciable" controversy, a question "capable of judicial resolution and presented in an adversary context."[196] In the absence of ripeness, the court is without jurisdiction.[197] In *State v. Fields*[198], the court expounded on the rules of ripeness and justiciability:

> "[R]ipeness is peculiarly a question of timing," and the relevant prudential rule deals with "'[p]roblems of prematurity and abstractness' that may prevent adjudication in all but the exceptional case. A ruling that an issue is not ripe ordinarily indicates the court has concluded "a later decision [may be] more apt or. . . that the matter is not yet appropriate for adjudication."[199]

Although the hypothetical nature of the "takings" issue arguably deprives the court of jurisdiction to decide it, Hawaii Revised Statutes section 602-4 gives the court supervisory powers over the State courts, allowing it "to prevent and correct errors and abuses therein where no other remedy is expressly provided by law."[200] The court has stated that it "will employ its supervisory power only on the showing of compelling circumstances."[201] It may be that the court is resorting to its supervisory power in this case to consider the "takings" issue, but there is no indication whether the court is trying to prevent an error or to correct one.

In its Order of June 18, the court requested additional briefing on several issues. The questions posed by the court provide little insight into how the court is likely to decide *PASH*, yet offer fuel for speculation. The remainder of this section will discuss the issues raised by the court's order.

A. *The extent of protection for native Hawaiian gathering rights*

The court's first question reads:

> 1. Pursuant to article XII, § 7 of the Constitution of the State of Hawaii, Hawaii Revised Statutes § 7-1, and other relevant law, what is the extent to which native Hawaiian gathering rights on undeveloped

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[196] Life of the Land v. Land Use Commission, 63 Haw. 166, 171-172, 623 P.2d 431, 438 (1981).

[197] *Moniz*, 69 Haw. at 373, 742 P.2d at 376.

[198] 67 Haw. 268, 686 P.2d 1378 (1984).

[199] *Id.* at 274-275, 686 P.2d at 1385 (citations omitted).

[200] HAW. REV. STAT. § 602-4.

[201] *Moniz*, 69 Haw. at 373, 742 P.2d at 376.

land should be protected when that same land is under consideration for development permits, i.e what is the extent of the Hawaii County Planning Commission's obligation to consider native Hawaiian rights, and does the Commission have the legal authority to condition a Shoreline Area Management Permit on the protection of those rights?[202]

The wording of the question suggests, at least, that the court may have already reached some preliminary conclusions. As a threshold matter, the court does not question the ICA's opinion that "[a]rticle XII, § 7, imposes on the Commission the same obligation to preserve and protect native Hawaiian rights as it does on the court."[203] While this may be evident from the language of article XII, section 7, the Hawaii County Planning Commission, in its Application for Writ of Certiorari and both of its briefs, has asked the court to "vacate those portions of the opinion by the ICA . . . asserting its obligation to preserve and protect those rights."[204]

More significantly, by questioning the "extent" to which native Hawaiian gathering rights on undeveloped land should be protected in the development process, instead of *whether* there is an obligation to protect the rights under those circumstances, the court has recognized that it is considering an issue of first impression. While *Kalipi* and *Pele* decisions hold that "Kalipi rights" only guarantee access to undeveloped land, neither goes so far as to guarantee a landowner the unilateral right to develop his land and extinguish the customary rights of native Hawaiians. Protecting gathering rights as land undergoes development is not foreclosed by *Kalipi* or *PDF*. Assuming that the court reaches that conclusion, it could provide more support for it by re-examining the reasoning in *Kalipi* and *PDF*.

The most expansive approach would overturn *Kalipi* with respect to the restrictions placed on gathering rights. Considering an issue of first impression, the *Kalipi* court attempted to accommodate gathering rights within "the exclusivity traditionally associated with fee simple ownership of land."[205] Although the court began with the premise that "any argument for the extinguishing of traditional rights based simply upon

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[202] Order for Supplemental Briefing at 1-2.

[203] Public Access Shoreline Hawaii v. Hawaii County Planning Commission, No. 15460, slip op. at 12 (Haw.Ct.App. January 28, 1993), 1993 Haw. App. LEXIS 2 (Haw. App. Jan. 28, 1993).

[204] Petitioner-Appellee-Appellant Hawaii County Planning Commission's Supplemental Brief at 7, *PASH* (No. 15460).

[205] Kalipi v. Hawaiian Trust Co., 66 Haw. 1, 4, 656 P.2d 745, 748 (1982).

the possible inconsistency of purported native rights with our modern system of land tenure must fail,"[206] it went on to limit section 7-1 rights to undeveloped land, based precisely on that inconsistency:

> The requirement that these rights be exercised on undeveloped land is not, of course, found within the statute. However, if this limitation were not imposed, there would be nothing to prevent residents from going anywhere within the ahupua'a, including fully developed property, to gather the enumerated items. In the context of our current culture this result would so conflict with understandings of property, and potentially lead to such disruption, that we could not consider it anything short of absurd . . . .[207]

This restriction, coupled with the observation in a footnote that "[t]he rights therefore do not prevent owners from developing lands,"[208] allows native Hawaiian gathering rights to be *de facto* extinguished with the development of land. This result is based solely on the argument that the court was unwilling to credit, that traditional rights should be extinguished because of a possible conflict with our modern system of land tenure. Permitting traditional rights to summarily evaporate upon the development of land is also inconsistent with the language of article XII, section 7 requiring the State to reaffirm and *protect* native Hawaiian gathering rights.[209] In this case, however, it is not necessary for the Court to overturn *Kalipi* to protect the rights asserted by PASH.

Although most of the *Kalipi* opinion was devoted to the gathering rights claimed under section 7-1, the most significant aspect of the decision was the reinterpretation of *Oni v. Meek*. The *Kalipi* defendants had asserted, as does petitioner Nansay,[210] that *Oni* abrogated any customary rights retained by HRS section 1-1. By reading *Oni* to state that section 7 of the Kuleana act (the predecessor to HRS section 7-1) enumerated all *statutorily* protected custom at the time of the Mahele, the court found that *Oni* "did not expressly preclude the possibility that the doctrine of custom might be utilized as a vehicle for the retention of some such rights."[211]

The court indicated that the section 1-1 statutory exception to the common law protected a broader range of practices than those enu-

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[206] *Id.*
[207] *Id.* at 9, 656 P.2d at 750.
[208] *Id.* at 8, n. 2, 656 P.2d at 749, n. 2.
[209] HAW. CONST. art. XII, § 7.
[210] Nansay's Opening Brief at 13-14.
[211] *Kalipi*, 66 Haw. at 11-12, 656 P2d at 751.

merated in section 7-1, and more importantly, the court did not restrict the exercise of section 1-1 customary rights with the limitations it imposed on section 7-1 gathering rights.[212] Instead, the court expressed the belief that "the retention of a Hawaiian tradition should in each case be determined by balancing the respective interests and harm once it is established that the application of a custom has continued in a particular area."[213] The court emphasized that "[t]he precise nature and scope of the rights retained by § 1-1 would, of course, depend on the particular circumstances of each case."[214]

The gathering rights asserted by PASH are not claimed under section 7-1, but under section 1-1, as the ICA observed.[215] As such, the "undeveloped land" requirement may not apply, except as it enters the balancing test propounded by *Kalipi*. This interpretation of *Kalipi*, that section 7-1 rights are limited by the enunciated restrictions while section 1-1 rights are subject to a balancing test, would reconcile *Kalipi* with protection of gathering rights as land is developed.

The only obstacle to this construction of *Kalipi* is not found within the opinion itself, but in the court's recounting of *Kalipi* in *Pele*. In a footnote, the *Pele* opinion states:

> We reiterate our early holding that article XII, § 7 does not require the preservation of Wao Kele 'O Puna and the (former) Puna Forest Reserve lands in their natural state. Kalipi rights only guarantee access to undeveloped land, under the specified circumstances, but they do not ensure that any particular lands will be held for the exercise of native Hawaiian customs.[216]

Insofar as the court may have been referring to the dicta in the *Kalipi* footnote, this is a misleading characterization of both the holding of *Kalipi* and the mandate of article XII, section 7. *Kalipi* considered three distinct sources of the asserted gathering rights: section 7-1 gathering rights; section 1-1 Hawaiian usage, or customary rights; and

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[212] Indeed, the court specifically found that not even "all the requisite elements of the doctrine of custom were necessarily incorporated in § 1-1." *Id.* at 10, 656 P.2d at 751. *See, supra*, note 158.

[213] *Kalipi*, 66 Haw. at 10, 656 P.2d at 751.

[214] *Id.* at 12, 656 P.2d at 752.

[215] Public Access Shoreline Hawaii v. Hawaii County Planning Commission, No. 15460, slip op. at 11 (Haw.Ct.App. January 28, 1993), 1993 Haw. App. LEXIS 2 (Haw. App. Jan. 28, 1993).

[216] Pele Defense Fund V. Paty, 73 Haw. 578, 621 n. 36, 837 P.2d 1247, 1272 n. 36 (1992).

the kuleana reservation in the deed. Only the section 7-1 gathering rights were expressly restricted to undeveloped land.

There is no indication that constitutional protection for native Hawaiian rights extends only to undeveloped land. The Committee Report, in reciting the purposes of the amendment, explained:

> Aware and concerned about past and present actions by private landowners, large corporations, ranches, large estates, hotels and government entities which preclude native Hawaiians from following subsistence practices traditionally used by their ancestors, your Committee proposed this new section to provide the State with the power to protect these rights and to prevent any interference with the exercise of these rights.[217]

Comments made in the debates confirm that development was very much on the delegates' minds:

> But yet the continuing pressures of urbanization have caused the fences to go up across similar rights of access all over the State.[218]

The alternative for us is a joyless life in concrete enclaves from which we cannot escape. The options are the recognition of these cultural rights or the condemnation of the Hawaiian people to life in a tropical Chicago, unrecognizable as their native land.[219]

The rights discussed by the *Kalipi* Court are not exhaustive of the rights protected by article XII, section 7, which expressly reaffirms *all* rights that were customarily and traditionally exercised for the stated purposes. While the *Pele* footnote implies, and the *PASH* court assumed, that all native Hawaiian rights are collapsed under the heading of "Kalipi rights" and restricted to undeveloped land, this cannot be what was intended. Clearly, there are rights protected by article XII, section 7 that are not, and never have been, so restricted. Rights of access under section 7-1 are an example.[220] The court now has an opportunity to clarify that by "Kalipi rights," it was referring only to

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[217] STAND. COMM. REP. NO. 57, *reprinted in* 1 PROCEEDINGS OF THE CONST. CONVENTION OF HAW. OF 1978, at 639 (1980).

[218] Comment of Delegate Wurdeman, DEBATES IN COMMITTEE OF THE WHOLE ON HAWAIIAN AFFAIRS, COMM. P. NO. 12, *reprinted in* 2 PROCEEDINGS OF THE CONST. CONVENTION OF HAW. OF 1978, at 434 (1980).

[219] *Id.*

[220] *See* Palama v. Sheehan, 50 Haw. 298, 440 P.2d 95 (1968); Haiku Plantations Association v. Lono, 1 Haw. App. 263, 618 P.2d 312 (1980) (allowing access through developed property based on § 7-1 access rights.)

gathering rights asserted under section 7-1. Read that way, the footnote is more faithful to the purpose of article XII, section 7.

Concluding that the court is willing to consider protecting native Hawaiian rights as land is developed may be reading too much into the wording of the first question, yet the inquiry into the Commission's authority to impose appropriate conditions on a SMA permit supports such a reading. There would be no need to explore this question if the court were unable to get past the threshold issue of whether gathering rights are protectible at all under these circumstances.

B. *Criteria for consideration*

The court's second inquiry was:

> What Criteria Should Be Considered by the Hawaii County Planning Commission to Determine Whether the Proposed Development Would Infringe on Native Hawaiian Rights?[221]

Like its initial query, this question may imply the court's acceptance of the premise that gathering rights are protectible as undeveloped land undergoes development. If development automatically extinguished native Hawaiian rights, it would be unnecessary to consider whether any rights were "infringed" on, the rights would simply cease to exist. What the court may be seeking in this question is some guidance on what must be shown to establish the existence of gathering rights.

Ultimately, the court will need to address the prevailing uncertainty concerning who is entitled to exercise native Hawaiian rights; how ancient must the origins of a custom be before it will be protected; and whether a custom must be shown to have been continuously exercised. If the court intends to maintain a distinction based on development, it should also define "development".

Article XII section 7 makes clear that customarily and traditionally exercised rights inhere to "descendants of native Hawaiians who inhabited the Hawaiian Islands prior to 1778,"[222] with no express requirement for any defined quantum of Hawaiian blood.[223] Although

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[221] Order for Supplemental Briefing at 2.

[222] HAW. CONST. art. XII, § 7.

[223] *See* Kahalekai v. Doi, 60 Haw. 324, 590 P.2d 543 (1979).

> The results of the 1978 general election, with respect to the constitutional amendments presented to the electorate, were challenged, partly on the grounds that the substantive nature and effect of certain amendments were not revealed

this does not appear to be ambiguous, Nansay has argued that gathering rights, pursuant to HRS sections 7-1, 1-1, and *Kalipi*, are not restricted to Hawaiians, so they are indistinguishable from the interests of the general public.[224] *Kalipi* did not expressly impose a restriction on gathering rights based on Hawaiian ancestry, perhaps because it was tacitly understood. The opinion refers to the rights asserted by Mr. Kalipi as "traditional Hawaiian gathering rights,"[225] and finds the court's obligation to protect traditional rights in Article XII, section 7, which explicitly protects only rights possessed by descendants of native Hawaiians.

Ironically, Nansay also argued that because PASH offered no evidence that any of its members are of fifty percent or more Hawaiian blood, it had failed to establish that any members were native Hawaiian.[226] Nansay's argument apparently relies on an ambiguous footnote in *Pele*, which could be interpreted as suggesting that the court will use the Hawaiian Homes Commission Act definition of "Native Hawaiian."[227] While any confusion may be largely artificial, the court should reiterate that Article XII, section 7 protects the traditional rights of native Hawaiians, regardless of blood quantum.

> to the voters. The court held that the definition section in Article XII, § 7 was not properly presented to the public, and thus was not validly ratified.

Id. at 342, 590 P.2d at 543. The proposed definition of terms provided:

> The term 'Hawaiian' means any descendant of the races inhabiting the Hawaiian Islands, previous to 1778.
>
> The term 'native Hawaiian' means any descendent of not less than one-half part of the blood of the races inhabiting the Hawaiian Islands previous to 1778 as defined by the Hawaiian Homes Commission Act, 1920, as amended or may be amended.

It never became part of Article XII, § 7. Even if "native Hawaiian" were defined by a blood quantum, Article XII, § 7 explicitly protects rights possessed by "descendants" of native Hawaiians, so the distinction would not change the effect.

[224] Nansay's Application for Writ of Certiorari at 8, Public Access Shoreline Hawaii v. Hawaii County Planning Commission (No. 15460).

[225] Kalipi v. Hawaiian Trust Co., 66 Haw. 1, 3, 656 P.2d 745, 747 (1982).

[226] Supplemental Brief of Petitioner-Appellee-Appellant Nansay Hawaii, Inc. at 5, *PASH* (No. 15460) (hereinafter Nansay's Supplemental Brief).

[227] Pele Defense Fund v. Paty, 73 Haw. 578, 615 n. 28, 837 P.2d 1247, 1269 n. 28 (1992). The Hawaiian Homes Commission Act of 1920, 42 Stat. 108, *reprinted in* 1 HAW. REV. STAT. 167-205 (1985, 1989 Supp.) (HHCA) defines "Native Hawaiian" as "descendants of not less than one-half part of the blood of the races inhabiting Hawaiian Islands previous to 1778." HHCA § 201(7).

A more difficult issue facing the Court is the determination of how ancient a practice must be to be considered "customarily and traditionally practiced." This was not addressed directly by *Kalipi*, *Pele*, or *PASH*, and the legislative history to Article XII, section 7 provides little guidance. The court has addressed this question before, however, in *State v. Zimring*.[228] The Zimrings claimed title to land deposited by volcanic eruption. They based their claim on ancient custom, which they asserted gave the owner of abutting land a perpetual grant along the shore when volcanic eruptions created a new shoreline."[229] The court ruled that because HRS section 1-1 is derived from a law enacted in 1892, Hawaiian usage must predate 1892.[230]

The definition of "development" also warrants the court's consideration. If development is to be determinative of whether or not native Hawaiian rights remain viable, the CZMA definition[231] may not be appropriate. Rights would terminate when materials are extracted from land, or the intensity of water use changed, but would continue if a single family residence, not part of a larger development, is built.[232]

The anchialine pond area in which PASH asserts gathering rights was to be held in its natural state pursuant to the conditions of the voided SMAP.[233] Even if the court were to decide that native Hawaiian gathering rights under section 1-1, as well as section 7-1, are restricted to undeveloped land, the restriction may not apply when land is required to be preserved in a natural state. In *Pele*, for instance, the court stated that "PDF members . . . may have a right to enter the *undeveloped areas* of the exchanged lands to exercise their traditional practices."[234] The same reasoning would allow native Hawaiians access to the anchialine ponds.

C. *The Takings Issue*

The third issue on which the court requested further briefing was:

> At what point, if any, would the protection of native Hawaiian rights in the land being developed implicate the Takings Clause of the Hawaii and United States Constitutions.[235]

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[228] 52 Haw. 472, 479 P.2d 202 (1970).

[229] *Id.* at 473, 479 P.2d at 202.

[230] *Id.* at 474-475, 497 P.2d at 204.

[231] *See supra*, note 74.

[232] HAW. REV. STAT. §§ 205A-22(A) & (B).

[233] Public Access Shoreline Hawaii v. Hawaii County Planning Commission, No. 15460, slip op. at 14 (Haw.Ct.App. January 28, 1993), 1993 Haw. App. LEXIS 2 (Haw. App. Jan. 28, 1993).

[234] Pele Defense Fund v. Paty, 73 Haw. 578, 621, 837 P.2d 1247, 1272 (1993).

[235] Order for Supplemental Briefing at 2.

This question indicates that *PASH* could have a significant impact on property rights in Hawaii. The Hawaii Supreme Court is indicating that it might attempt to reconcile native Hawaiian property rights and the Fifth Amendment of the United States Constitution. The consideration of "takings" jurisprudence is especially significant in light of recent United States Supreme Court decisions in the area, particularly *Lucas v. South Carolina Coastal Council*. A preliminary overview of "takings" law is helpful.

The "takings issue" essentially involves the contention that a burdensome land use regulation constitutes a taking of private property without compensation contrary to the Fifth and Fourteenth Amendments.[236] There are two primary areas within takings doctrine: regulatory takings and physical invasions.

Physical invasions law is well established. Where a governmental action results in "a permanent physical occupation" of the property, by the government itself or by others, there is a *per se* taking to the extent of the occupation, without regard to whether the action achieves an important public benefit or has only minimal economic impact.[237] Recently the Supreme Court found a "permanent physical occupation" where "individuals. . .are given a permanent and continuous right to pass to and fro, so that real property may continuously be traversed, even though no particular individual is permitted to station himself permanently on the premises."[238]

The law of regulatory takings, in contrast to that of physical invasions, has seen some changes recently. The foundation of regulatory takings analysis was stated in *Pennsylvania Coal Co. v. Mahon*, which states: "The general rule at least is, that while property may be regulated to a certain extent, if regulation goes too far it will be regarded as a taking."[239]

Since *Pennsylvania Coal*, the Court has engaged in *ad hoc* balancing of the public and private interests to determine when a regulation has gone "too far." In 1992, the Court announced an exception to the balancing test for regulatory takings. In *Lucas v. South Carolina Coastal*

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[236] Bosselman, Callies, & Banta, *The Takings Issue: An Analysis of the Constitutional Limits of Land Use Control*, 1973.

The Fifth Amendment states: "private property shall not be taken for public use, without just compensation." U.S. CONST. amend. V.

[237] Loretto v. Telemprompter Manhattan CATV Corp., 458 U.S. 419 (1982).

[238] Nollan v. California Coastal Commission, 483 U.S. 825, 832 (1987).

[239] Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 415 (1922).

Council,[240] the Court determined that any regulation that removes "all productive or economically beneficial use" from a definable interest in real property is a *per se* taking requiring compensation, with two exceptions.[241] The first exception involves regulations which prohibit activity which would constitute a public or private nuisance.[242] The second exception occurs when the regulation is in accordance with the state's "background principles of property law."[243]

Nollan v. California Coastal Commission[244] also is particularly relevant to *PASH*. There the Supreme Court held that for any *condition* to a land use regulatory permit an "essential nexus" must exist between the requirement of the condition and the governmental purpose that the condition seeks to further.[245] Any condition for a land use permit must effectively further a specific, stated, governmental purpose.

On appeal Nansay has argued that *PASH* effectively takes certain "sticks" in their bundle of property rights, in particular the right to exclude others from the property.[246] Nansay contends that the ICA has conveyed to PASH an interest in Nansay's property similar to a profit a prendre, the right to enter the property of another and remove products of the soil, resulting in an extensive "permanent physical occupation" and thus a per se taking of property.[247] Therefore, they argue, the ICA has created new rights, in contravention of Nansay's existing right to exclude.[248] Nansay argues that the ICA's decision redefines native Hawaiian property rights and correspondingly redefined the bundle of rights held by Nansay and other property owners.[249] The extent of native Hawaiian property rights is the most important issue raised by *PASH*. At what point does the exercise of native Hawaiian rights effectuate a taking of the property owners fee simple property rights?

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[240] ___ U.S. ___, 112 S.Ct. 2886 (1992).

[241] 112 S.Ct. at 2895.

[242] *Id.* at 2898-2900.

[243] *Id.*

[244] 483 U.S. 825 (1987).

[245] *Id.* at 837.

[246] *See* Nansay's Supplemental Brief at 12-13.

[247] *Id.*

[248] *Id.* at 13-15. Nansay argues that the gathering rights extended to PASH by the ICA (a profit a prendre) are not limited by tenancy in a particular *ahupua'a*, to native Hawaiians, to rights existing before 1846 and 1892, or to rights that have been continuously exercised. *Id.*

[249] *Id.* at 15.

Affirming *PASH* would solidify the requirement that all governmental agencies considering development of undeveloped land must determine if native Hawaiian gathering rights have been customarily and traditionally practiced and to explore the possibilities for preserving those rights.[250] This requirement can be looked at in two ways. It could simply be akin to an environmental impact statement, which in itself has no enforcement implications. Alternatively, it could provide the basis for the denial or limitation on a property owner's right to develop undeveloped lands.[251] If the requirement works to limit or impede development of the property for the purpose of allowing gathering rights access, the court will have to consider whether such access is a background principle of Hawaii's property law,[252] and whether protecting access rights by limiting development works a "permanent physical invasion."[253]

A condition allowing access to the anchialine ponds would not, of course, fall within the *Lucas* "total takings" rule, because it does not remove all economically beneficial use from the property. *Lucas* is nonetheless instructive. The Court pointed out that notwithstanding a permanent physical occupation or deprivation of all economically beneficial use, restrictions that are inherent in the landowner's title cannot constitute "takings":

> Where permanent physical occupation of the land is concerned, we have refused to allow the government to decree it anew (without compensation), no matter how weighty the assorted public interests involved, though *we assuredly would permit the government to assert a permanent easement that was a preexisting limitation upon the landowner's title.* . . . We believe similar treatment must be accorded confiscatory regulations, i.e., regulations that prohibit all economically beneficial use of land: Any limitation so severe cannot be newly legislated or decreed (without compensation), *but must inhere in the land title itself, in the restrictions that the background*

[250] Public Access Shoreline Hawaii v. Hawaii County Planning Commission, No. 15460, slip op. at 6 (Haw.Ct.App. January 28, 1993), 1993 Haw. App. LEXIS 2 (Haw. App. Jan. 28, 1993).

[251] It is only in the context of future applications of the ICA's ruling that the court will have to consider development restrictions that protect rights of access. In the present case, development of the anchialine pond area is already prohibited by a condition of the SMAP, not to protect access rights, but to protect the resource itself. *Id.* at 13-14.

[252] *See supra*, note 239 and accompanying text.

[253] *See supra*, note 234 and accompanying text.

> *principles of the State's law of property and nuisance already place upon land ownership.*[254]

The "background principles" exception has special significance in the area of native Hawaiian property rights. As discussed *supra*,[255] since the time of the mahele all land in Hawai'i is held "subject always to the rights of the tenants." If the Hawaii Supreme Court determines that this limitation, which inheres in every landowner's title, includes the rights asserted by PASH, then Nansay's "bundle of sticks" never included the right to exclude. After the *Pele* decision, it seems clear that "the rights of the tenants" includes the right to enter another *ahupua'a* for gathering purposes if a historical exercise of the right can be shown. Under *Lucas*, then, a limitation on development to protect these rights, even if such limitation prohibits all economically beneficial use of the land, would not be a compensable taking, because access rights are part of the background principles of Hawai'i property law.

If the court were to decide that gathering rights outside the *ahupua'a* were not included in the reserved "rights of the native tenants," (which would be hard to reconcile with *Pele*), then a development condition that prohibited any economically beneficial use of the land would be a taking, requiring compensation, *Lucas*. Any limitation short of that would not fall within the *per se* rule of *Lucas*, and would need to be analyzed in light of *Nollan v. California Coastal Commission*.[256]

Nollan involved a dispute over a California permit condition requiring a landowner to provide a lateral access easement along the beach. The Court reasoned that if the access requirement were imposed outright, rather than as a condition on development, it would constitute a *per se* physical taking because it would allow a permanent physical occupation.[257] Where a regulation imposing a permanant physical occupation is conditional, however, it will not be a taking if it substantially serves a legitimate state interest, and there is an "essential nexus" between the condition and the purpose advanced as the justification for the condition.[258] In *Nollan* the original purpose for the restriction was protecting the public's ability to see the beach from the road and

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[254] Lucas v. South Carolina Coastal Commission, ___U.S. ___, 112 S.Ct. 1886, 2900 (1992) (citations omitted) (emphasis added).

[255] *See supra*, section III.C.

[256] 483 U.S. 825 (1987).

[257] *Id.* at 831-832.

[258] *Id.* at 836-837.

assisting the public in overcoming the "psychological barrier" to using the beach created by development of shoreline homes.[259] The Court ruled that the California Coastal Commission could not constitutionally use its police power to condition the Nollans' permit on lateral beach access because there was a lack of nexus between the condition and the original purpose of the building restriction.[260] As an example of a permanent physical occupation which would pass muster under *Nollan*, the Court explained that it would be constitutional for the Commission to require the Nollans to build a viewing spot on their property for passerby whose view of the beach was impaired by the Nollan's home.[261] Where a development satisfies the *Nollan* nexus requirement, it does not unconstitutionally take property unless it deprives the landowner of all economically beneficial use.[262]

PASH essentially creates another hurdle to the development approval process. Governmental agencies only must determine if native Hawaiian gathering rights exist and explore ways to protect them as property is developed. If such protection were achieved through a condition on the development, then the *Nollan* "essential nexus" rule would apply to whatever condition was imposed. The question then becomes whether there is a sufficient nexus between the condition and condition's legitimate purpose.

This question must be answered in the abstract in the *PASH* case, because as of yet there are have been no conditions imposed to protect native Hawaiian gathering rights, nor does the ICA's decision require any. In essence *PASH* concerns CZMA procedures for the granting of a Special Management Area Permit. The CZMA, therefore, provides a logical statutory source for the policy underlying the PASH condition. The CZMA's objectives state in part that the CZMA is intended to "[p]rotect, preserve, and where desirable restore those natural and manmade historic and prehistoric resources in the coastal zone management area that are significant in Hawaiian and American history and culture."[263] The CZMA also imposes the following duty: "[i]n implementing the coastal zone management program, *the agencies shall give full consideration to* ecological, *cultural*, historic, aesthetic, recreational,

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[259] *Id.* at 835.
[260] *Id.* at 837.
[261] *Id.* at 836.
[262] *Id.* at 834.
[263] HAW. REV. STAT. § 205A-2(b)(2).

scenic, and open space values, and coastal hazards, as well as to needs for economic development."[264] A permit condition to protect native Hawaiian gathering rights, which are certainly "cultural values," would further these objectives of the CZMA.

Certainly the preservation of native Hawaiian gathering and access rights is a legitimate state interest. As the *Pele* court stated, "[i]t is undisputed that the rights of native Hawaiians are a matter of great public concern in Hawaii."[265] State agencies already have an obligation under the Hawaii Constitution to protect native Hawaiian rights. The ICA's *PASH* opinion requires less than protection, it simply requires state agencies to determine if rights have been "customarily and traditionally" practiced and explore the possibilities of preservation of those rights.[266] This seems to meet the requirements of a nexus between the condition and the obligation placed on the State by Article XII, section 7.

VI. Conclusion

In *Public Access Shoreline v. Hawaii County Planning Commission* the Intermediate Court of Appeals of Hawaii held that PASH, which asserted native Hawaiian gathering rights customarily and traditionally exercised, had an interest that was clearly distinguishable from that of the general public. It thus had standing to be a party in a contested case over a Special Management Area Permit for the development of a resort complex at the site where those rights were exercised. The ICA further opined that light of article XII, section 7 of the Hawaii Constitution, all government agencies undertaking or approving development of undeveloped land are required to determine if native Hawaiian gathering rights have been customarily and traditionally practiced on the land and explore the possibilities for preserving those rights, and suggested that a condition allowing access for gathering might be appropriate.

The Hawaii Supreme Court has granted certiorari, and could decide *PASH* in several ways. The court could, for example, affirm the ICA while declining to adopt its reasoning. PASH articulated environmental interests that have been recognized by the court in the past as "special

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[264] Haw. Rev. Stat. § 205A-4 (emphasis added).

[265] Pele Defense Fund v. Paty, 73 Haw. 578, 614, 837 P.2d 1247, 1268 (1992).

[266] Public Access Shoreline Hawaii v. Hawaii County Planning Commission, No. 15460, slip op. at 13 (Haw.Ct.App. January 28, 1993), 1993 Haw. App. LEXIS 2 (Haw. App. Jan. 28, 1993).

and personal" interests, distinct from the general public. Those interests alone confer contested case standing on PASH.

The court has indicated that that it may treat *PASH* as more than a standing case. Although the issues are largely hypothetical until a SMAP is finally granted and the permit conditions are known, the court requested further briefing on whether the planning commission has authority to impose conditions to protect native Hawaiian rights, the criteria the commission should use, and at what point such conditions would implicate the Fifth and Fourteenth amendments of the United States Constitution. It appears as though the court's decision will attempt to reconcile American notions of property with the traditional rights of native Hawaiians now embodied in the Hawaii Constitution.

Although the posture of *PASH* may not be ideal for a major native Hawaiian rights opinion, further clarification from the court would be welcome. Two prior decisions, *Kalipi* and *Pele*, leave several unanswered questions, such as who can assert the rights, when must rights have originated to be "customarily and traditionally" exercised, what happens to native Hawaiian rights as land is developed, and what, specifically, is development. The court could impart clarity to these issues, as well as reiterate its *Pele* holding, by addressing the native Hawaiian rights issues.

The main contention on appeal is more directed at the *Pele* decision than at *PASH*. Nansay has claimed that by recognizing gathering rights of non-tenants, the ICA has radically expanded the law and taken its property. It was *Pele*, however, that recognized such rights. *Pele* was a unanimous decision, fully supported by article XII, section 7 of the Hawaii Constitution, and binding on the ICA.

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Garcia v. Spun Steak Company: Has the Judicial Door Been Shut on English-Only Plaintiffs?

I. Introduction

In *Garcia v. Spun Steak Company*,[1] the issue before the United States Court of Appeals for the Ninth Circuit was whether the employer, Spun Steak Company, violated Title VII of the Civil Rights Act of 1964 by requiring its workers to speak only English while working on the job.[2] The Ninth Circuit rejected the employees' argument that an English-only policy created an abusive or a hostile work environment and discriminated against their national origin.[3] The court did not address the employer's business necessity defense, since it held that the employees failed to establish a prima facie case of discrimination.[4]

The facts of *Garcia* are discussed in Part II of this casenote. Part III describes the legal background of both the disparate treatment and disparate impact theories, and also the significant English-only cases leading to the *Garcia* decision. Part IV analyzes the Ninth Circuit Court of Appeal's decision. Part V critically examines the decision and asserts that the Ninth Circuit should have deferred to the EEOC Guidelines that address English-only rules in the workplace. Finally, Part VI comments on the impact of the decision, which renders a disparate impact analysis unavailable to English-only case plaintiffs,

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[1] 998 F.2d 1480 (9th Cir. 1993).

[2] *Id.* at 1483. In a short opinion and without an explanation, the United States District Court for the Northern District of California granted the plaintiffs' motion for summary judgment on the first claim for relief of their complaint, and denied Spun Steaks motion for summary judgment. No. C-91-1949RHS, 1991 WL 268021 (N.D. Cal. Oct. 23, 1991).

[3] 998 F.2d at 1488-1489.

[4] *Id.* at 1490.

and discusses the possibility of English-only plaintiffs pursuing claims through a disparate treatment analysis.

II. Facts

Spun Steak Company, a California corporation in South San Francisco that produces poultry and meat products for wholesale distribution, employed thirty-three employees.[5] Out of these employees, twenty-four were bilingual, speaking both English and Spanish, while two spoke only Spanish.[6] Spun Steak did not require its employees to speak or understand English.[7] After September 1990, however, Spun Steak's president, Kenneth Bertelson, instituted an English-only policy in response to complaints that two of the appellees, Priscilla M. Garcia and Maricela Buitrago, made derogatory, racist remarks in Spanish about an African-American and Chinese-American co-worker.[8]

The English-only rule required that only English would be spoken in connection with work.[9] The rule, however, did not extend to the employees' lunch-hour, breaks, and free time.[10] Bertelson reasoned that the policy would promote racial harmony in the workplace.[11] Also, worker safety would be enhanced, since employees who did not understand Spanish would no longer be distracted while operating machinery by employees who spoke Spanish.[12] Finally, the English-only policy would increase product quality because the U.S.D.A inspector

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[5] *Id.* at 1483.

[6] *Id.* The bilingual employees have varying degrees of proficiency in English. *Id.*

[7] *Id.*

[8] *Id.*

[9] *Id.*

[10] *Id.* The rule was adopted as follows:

> It is hereafter the policy of this Company that only English will be spoken in connection with work. During lunch, breaks, and employees' own time, they are obviously free to speak Spanish if they wish. However, we urge all of you not to use your fluency in Spanish in a fashion which may lead other employees to suffer humiliation.

Id.

In addition to the English-only policy, Spun Steak adopted a policy "forbidding offensive racial, sexual, or personal remarks of any kind." *Id.*

[10] *Id.*

[12] *Id.*

could better communicate with employees who wished to raise product-related concerns.[13]

In November 1990, Garcia and Buitrago received warning letters for speaking Spanish during working hours.[14] Consequently, the two were forbidden to work next to each other for the next two months.[15] On May 6, 1991, Garcia and Buitrago through their collective bargaining agent, Local 115, filed charges of discrimination against Spun Steak with the United States Equal Employment Opportunity Commission (EEOC).[16] After an investigation, the EEOC found a reasonable cause to believe that Spun Steak violated Title VII of the Civil Rights Act of 1964, with respect to both its English-only policy and retaliation against Garcia, Buitrago, and Local 115.[17]

Garcia, Buitrago, and Local 115 on behalf of Spun Steak's Spanish speaking employees, filed suit on September 6, 1991.[18] The district court granted the Spanish-speaking employees' motion for summary judgment, after finding that Spun Steak's English-only policy violated Title VII by disparately impacting Hispanic workers without sufficient business justification.[19] Spun Steak filed a timely appeal to the Ninth Circuit Court.[20]

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[13] *Id.*

[14] *Id.*

[15] *Id.* Garcia and Buitrago are production line workers, as are two-thirds of Spun Steak's employees. Production line workers stand individually beside a conveyor belt, remove poultry or other meat products from the belt, and place the product into cases or trays. *Id.* Garcia and Buitrago are fully bilingual. *Id.*

[16] *Id.* The collective bargaining agent representing the employees at Spun Steak is Local 115 of the United Food and Commercial Workers International Union, AFL-CIO. *Id.*

[17] *Id.* at 1483-1484. 42 U.S.C. § 2000e-3(a) (1982) provides:

> It shall be an unlawful employment practice for an employer to discriminate against any of his employees . . . because [the employee] has opposed any practice made an unlawful practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investication, proceeding, or hearing under this subchapter.

Under a retaliation claim, a prima facie case is established by showing: (1) the employee engaged in an activity protected under Title VII: (2) the employer subjected the employee to an adverse employment action; and (3) that there is a causal link between the employer's action and the protected activity. Dimaranan v. Pomona Valley Community Hospital, 775 F. Supp. 338, 345 (C.D. Cal. 1991) (citations omitted).

[18] 998 F.2d at 1484.

[19] *Id.*

[20] *Id.* The EEOC filed a brief amicus curiae and participated in oral arguments. *Id.*

III. History

Title VII of the 1964 Civil Rights Act proscribes employment discrimination based on race, color, religion, sex, or national origin.[21] Congress intended Title VII to assure equal access to employment opportunities, which in the past favored white employees,[22] to eliminate employment discrimination, and to compensate discriminated workers.[23]

A plaintiff may bring a Title VII employment discrimination claim under two distinct theories—disparate treatment and disparate impact.[24] The employer's intent distinguishes the two doctrines.[25] In a disparate treatment case, an employer's liability under Title VII is established where the employer intentionally discriminates against the employee because of the employee's race.[26] The burden of proof rests at all times with the employee.[27] Absent direct evidence of intent, an employee may still establish intent by inference.[28] The burden of persuasion, however, still remains with the employee.[29] The United States Supreme Court has interpreted disparate treatment cases brought under Section

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[21] Sections 703(a)(1) & (2) of Title VII provide:

> (a) It shall be an unlawful employment practice for an employer -
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> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individuals race, color, religion, sex, or national origin; or
>
> (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

42 U.S.C. § 2000e-2(a) (1988).

[22] Griggs v. Duke Power Co., 401 U.S. 424, 429-30 (1971). "What is required by Congress is the removal of artificial, arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classification. *Id.* at 431.

[23] *See, e.g.*, Gutierrez v. Municipal Court, 838 F.2d 1031, 1038 (9th Cir. 1988). Title VII, however, "does not ultimately focus on ideal social distributions of persons of various races and both sexes." Spaulding v. University of Washington, 740 F.2d 686, 708 (citation omitted).

[24] *See, e.g.*, Lynch v. Freeman, 817 F.2d 380, 382 (6th Cir. 1987).

[25] *See, e.g.*, Dimaranan v. PVHC, 775 F. Supp. 338, 343-345 (C.D. Cal. 1991).

[26] *Id.* at 343.

[27] *Id.*

[28] *Id.*

[29] *Id.* at 343.

703(a)(1) of Title VII broadly.[30] For instance, in *Meritor Savings Bank v. Vinson*,[31] the Court found that the language of Title VII is not limited to "economic" or "tangible" discrimination.[32] In holding that an abusive work environment can amount to a condition of employment that could violate Title VII, the Court concluded that Section 703(a)(1) and its phrase "terms, conditions, or privileges" reflects an intent "to strike at the entire spectrum of disparate treatment" in employment.[33] The Court, however, acknowledged that the abusive environment must be "sufficiently severe or pervasive" in order for there to be a Title VII violation.[34]

In a disparate impact case, intent is not the only issue.[35] Rather, the threshold issue is whether a facially neutral practice or policy adversely affects an identifiable group of workers.[36] If an employee establishes a prima facie case of discrimination, burden of persuasion shifts to the employer, who must demonstrate that the practice serves a business necessity.[37]

A. *Disparate Treatment Analysis*

Under the disparate-treatment analysis, an English-only plaintiff must first carry the burden of establishing a prima facie case by: (1) offering

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[30] *See, e.g.*, Meritor Savings Bank v. Vinson, 477 U.S. 57 (1986).

[31] 447 U.S. 57 (1986).

[32] *Id.* at 64.

[33] *Id. Meritor Savings* involved a female bank employee who filed a Title VII claim against her employer for sexual harassment. The Court, in holding that Title VII extended beyond economic discrimination cited Rogers v. EEOC, 454 F.2d 234 (5th Cir. 1971) as the first case to recognize a cause of action based upon an abusive work environment affecting a condition of employment, which gave rise to a Title VII violation. In that case, the court explained that:

> [T]he phrase 'terms, conditions or privileges of employment' in [Title VII] is an expansive concept which sweeps within its protective ambit the practice of creating a working environment heavily charged with ethnic or racial discrimination . . . One can readily envision working environments so heavily polluted with discrimination as to destroy completely the emotional and psychological stability of minority group workers.

Meritor Savings, 477 U.S. at 66 (quoting Rogers v. EEOC 454 F.2d at 238).

[34] *Id.* at 67.

[35] *See, e.g.*, Griggs v. Duke Power Co., 401 U.S. 424, 432 (1971).

[36] *Id.*

[37] 42 U.S.C. § 2000e-(2) (1988).

direct evidence of discriminatory intent; or (2) showing proof of discriminatory animus based on circumstantial evidence.[38] If the plaintiff successfully demonstrates a prima facie case, an inference or presumption of unlawful discrimination is established.[39]

If the employee satisfies the initial burden, the resulting presumption may be rebutted if the employer produces evidence of a legitimate, nondiscriminatory reason for its decision.[40] The burden is one of production and may be satisfied by showing a non-discriminatory reason for the action.[41] The evidence, however, must be "clearly" articulated."[42]

Finally, if the employer carries its burden of production, the employee may still prevail if it is shown by a preponderance of all the evidence that the reasons proffered by the employer were merely pretexts for discrimination.[43] The burden of proof at this stage of the inquiry must be satisfied directly, and cannot be demonstrated indirectly with evidence showing that the employer's reason for the action is unworthy of credence.[44]

If the employee satisfies the initial burden through direct evidence, the employer is in violation of Title VII unless it meets the strict "bona fide occupational qualification" (BFOQ) test.[45] In most cases, however, the plaintiff is able to establish a prima facie case through circumstantial evidence only.[46] Indeed, the BFOQ defense normally arises in disparate treatment cases because it is based on the employer's

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[38] *See, e.g.*, Dimaranan v. PVHMC, 775 F. Supp., 338, 343 (C.D. Cal. 1991). The United States Supreme Court established the three-part allocation of the burden of production and an order for the presentation of proof in Title VII discriminatory-cases in McDonnell Douglas Corp. v. Green. 411 U.S. 792 (1973).

[39] Furnco Constr. Corp. v. Waters, 438 U.S. 567, 577-578 (1978).

[40] Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 254 (1981).

[41] *Id.* at 254.

[42] *Id.* at 255.

[43] *Id.* at 255-256.

[44] Saint Mary's Honor Ctr. v. Hicks, ___U.S.___, 113 S.Ct. 2742 (1993).

[45] Dimaranan v. PVHMC, 775 F. Supp., 338, 343 (C.D. Cal. 1991). 42 U.S.C § 2000e-2(e)(1) (1982) provides in relevant part that:

> [I]t shall not be an unlawful employment practice for an employer to hire and employ employees . . . on the basis of . . . religion, sex, or national origin in those certain instances where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise.

[46] *Id.*

admitted use of sex, religion, national origin, or age as an employment factor.[47]

The disparate treatment analysis has been applied to national origin discrimination claims.[48] For example, proof of discrimination based on an individual's foreign accent has been held sufficient to support a finding of national origin discrimination.[49]

In *Odima v. Westin Tucson Hotel Co.*,[50] the Ninth Circuit Court of Appeals held that the plaintiff established by the preponderance of the evidence a prima facie case of discrimination.[51] Specifically, Odima claimed that the employer had rejected his application for a number of positions because of his accent.[52] The Ninth Circuit concluded that the employer's business reasons were pretextual and not justified.[53] The court emphasized that one's accent and national origin are "intertwined."[54] Hence, discrimination based on accent is unlawful unless the accent affects the employee's ability to effectively complete assigned duties.[55]

B. *The Disparate Impact Analysis*

Unlike the disparate treatment claim, which requires discriminatory intent, disparate impact claims involve facially neutral standards or practices that disproportionately burden a distinct group of workers protected under Title VII.[56] The disparate impact theory developed out of the language in section 703(a)(2),[57] which prohibits discrimination that deprives an individual of an employment opportunity, such as the

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[47] *See, e.g.*, Dothard v. Rawlinson, 433 U.S. 321 (1977).

[48] *See, e.g.*, Xieng v. Peoples Nat. Bank, 844 P.2d. 389 (Wash. 1993); Odima v. Westin v. Westin Tucson Hotel Co., 991 F.2d. 595 (9th Cir. 1993).

[49] *See, e.g.*, Xieng v. Peoples Nat. Bank, 844 P.2d 389 (Wash. 1993); Odima v. Westin Tucson Hotel Co., 991 F. 2d 595 (9th Cir. 1993).

[50] 991 F.2d 595 (9th Cir. 1993).

[51] *Id.* at 600.

[52] *Id.* at 598.

[53] *Id.* at 600.

[54] *Id.* at 601.

[55] *Id.* at 601. An employer, however, does not violate Title VII where employees whose foreign accents make them difficult to understand and impair their ability to perform their job responsibilities are denied jobs. *See, e.g.*, Fragante v. Honolulu, 888 F. 2d 591 (9th Cir. 1988).

[56] Lynch v. Freeman, 817 F.2d 380, 383 (6th Cir. 1987).

[57] *See supra* Note 21.

opportunity to be hired and promoted.[58] The doctrine focuses on policies or practices that are part of an employer's "standard operating procedure," as opposed to isolated acts.[59]

The United States Supreme Court first recognized the disparate impact doctrine in *Griggs v. Duke Power Co.*[60] In *Griggs*, a class of utility company employees claimed that the employer's requirement of a high school education or satisfactory scores on two written tests violated Title VII.[61] The Supreme Court ruled that under Title VII, practices that are fair in form but discriminatory in operation cannot be maintained if they operate to 'freeze' the status quo of prior discriminatory employment practices.[62] The Court also stated that good intent, or lack of discriminatory intent, does not make employment practices lawful when they "operate as 'built-in headwinds' for minority groups and are unrelated to measuring job capability."[63]

Under the current disparate impact analysis, the plaintiff has the initial responsibility of demonstrating the discriminatory impact of a challenged practice.[64] The plaintiff "must demonstrate it is the application of a specific or particular employment practice that has created the disparate impact under attack."[65] A prima facie case is not established until: (1) a specific employment practice or rule that results in a class to be discriminated against is identified, and (2) the cause is shown.[66] In cases where an employer's selection and promotion devices

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[58] Garcia v. Spun Steak Co., 998 F.2d at 1480.

[59] International Brotherhood of Teamsters v. United States, 431 U.S. 324 (1977).

[60] 401 U.S. 424 (1971).

[61] 401 U.S. at 427-428.

[62] *Id.* at 429-430.

[63] *Id.* at 432.

[64] 42 U.S.C. § 2000e-2 (Unlawful employment practices) provides in part:
(k) Disparate impact as basis of practice

(1)(A) An unlawful employment practice based on disparate impact is established under this subchapter only if -

(i) a complaining party demonstrates that a respondent uses a particular employment practice that causes a disparate impact on the basis of race, color, religion, sex, or national origin and the respondent fails to demonstrate that the challenged practice is job related for the position in question and consistent with business necessity; or

(ii) the complaining party makes the demonstration described in subparagraph (C) with respect to an alternative employment practice and the respondent refuses to adopt such alternative employment practice.

42 U.S.C. § 2000e-2(k)(1)(A) (Supp. 1992).

[65] Wards Cove Packing Co. v. Atonio, 490 U.S. 642, 657 (1989).

[66] *Id.* at 657-658.

are questioned the plaintiff cannot satisfy the initial burden on the causation issue by simply pointing to a racial imbalance in the workforce.[67] On the contrary, the proper basis for a disparate impact claim is a comparison between the population in the "relevant labor market" and the racial make-up of the jobs at issue.[68]

If the plaintiff establishes a prima facie case of disparate impact of a specific employment practice, the burden then shifts to the employer, who must show that there is a business justification for the employment practice in question.[69] If the employer demonstrates that the practice does not cause the disparate impact as claimed, the employer need not prove that the practice is required by business necessity.[70] The burden at this stage of the analysis is one of persuasion, rather than production,[71] and the employer must demonstrate that the practice is related to job performance; however, "[t]he touchstone is business necessity."[72] The employer must show the questioned employment practice has "a manifest relationship to the employment in question."[73]

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[67] *Id.* at 650-651.

[68] *Id.* at 656-657. The Court reasoned that if a plaintiff could establish a prima facie case of discrimination by simply proffering statistics indicating a racial imbalance in the workplace, the employer could be "haled" into court, resulting in expensive and time-consuming defenses of its job selection and promotion devices. A lower standard of proof would, therefore, result in employers adopting racial quotas in order to protect the company from suits, which was clearly not the intent of Title VII. *Id.* at 652.

[69] 42 U.S.C. § 2000e-2(k)(1)(A)(i) (Supp. 1992).

[70] 42 USCS § 2000e-2(k)(1)(B)(ii) (Supp. 1992).

[71] The Civil Rights Act of 1991, P.L. 102-166, 11/21/91, supercedes the Supreme Court's analysis articulated in *Wards Cove* with respect to the employer's burden, P.L. 102-166, S. 1745, 11/21/91, and reestablishes the shifting burdens of proof originally set forth in *Griggs*. S. REP. No. 101-315, 6/8/90, p. 6. In *Wards Cove*, the Court held that the employer's burden of proof is not a "persuasion burden" but, rather, a burden of production. 490 U.S. at 658-659. Hence, the ultimate burden of persuasion remained at all times with the plaintiff, who then must ultimately disprove the employer's evidence of business justification. *Id.* at 658-660.

[72] Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971). The Court in *Griggs* found that the employer did not demonstrate that its education and test requirements bore a demonstrable relationship to job-performance ability. Additionally, evidence showed that those who had not fulfilled the requirements performed and progressed satisfactorily. *Id.*

[73] *Id.* at 432. The Court later expanded the scope of disparate impact claims by holding that the analysis may be applied to subjective criteria or discretionary employment practices. Watson v. Fort Worth Bank & Trust, 487 U.S. 977, 991 (1988). 42 U.S.C. § 2000e-2(k)(1)(A)(i) states that an unlawful employment practice based

Under the Civil Rights Act of 1991, a business necessity defense should focus on whether the use of the practice in dispute is significantly more likely to produce an effective work force than other, less discriminatory alternatives.[74] Also, business necessity is not synonymous with management convenience[75] or even with business purpose alone.[76] Although the employment practice does not have to be indispensably related to job performance, it must substantially promote the proficient operation of the business.[77]

Finally, the employee may rebut a showing of business necessity by demonstrating that a less discriminatory alternative to the practice is available to the employer.[78] The court, however, will consider the cost to the employer of effecting the alternative practice.[79]

C. EEOC Guidelines on English-only Rules

Congress created the Equal Employment Opportunity Commission as the administrative agency for Title VII.[80] Originally, the Commission's scope of authority was limited to receiving, investigating, and resolving discrimination charges through conciliation.[81] The Commission is now authorized to bring a civil action with an aggrieved party against a respondent.[82] In addition, as part of its responsibility under Title VII, the EEOC has issued procedural guidelines[83] on national origin discrimination as it relates to English-only rules.[84]

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on disparate impact is established if: "a complaining party demonstrates that a respondent uses a particular employment practice that causes a disparate impact on the basis of race, color, religion, sex, or national origin and the respondent fails to demonstrate that the challenged practice is *job related* for the position in question and consistent with *business necessity.*" [emphasis added]. The terms "job related" and "business necessity" are consistent with those articulated by the Supreme Court in prior decisions. Pub. L. No. 102-166 § 105 (b); 137 Cong. Rec. S15276 (Oct. 25, 1991).

[74] S. Rept. No. 101-315, 6/8/90, p.44.

[75] U.S. v. Jacksonville Terminal Co., 451 F.2d 418 (5th Cir. 1971).

[76] *See, e.g.*, Robinson v. Lorillard Corp., 444 F.2d. 791 (4th Cir. 1971).

[77] Chrisner v. Complete Auto Transit, Inc. 645 F.2d 1251 (6th Cir. 1981).

[78] 42 USCS § 2000e-2(k)(1)(A)(i)

[79] Wards Cove v. Atonio, 490 U.S. 642, 661 (1989).

[80] 42 U.S.C. § 2000e-4 (1982).

[81] 42 U.S.C. § 2000-e-4(g) (1982).

[82] 42 U.S.C. § 2000e-4(g)(6) (1982).

[83] 42 U.S.C. 2000e-12(a) (1982).

[84] *See* 29 C.F.R. § 1606.7. The EEOC first issued National Origin Discrimination

The EEOC's Title VII national origin discrimination guidelines presume that a complete prohibition against speaking a language other than English at work violates Title VII, since such a policy is likely to create an atmosphere of inferiority, isolation, and intimidation for an individual whose other primary language is often an essential national origin characteristic.[85]

Also, employees can be required to speak only in English at work and at certain times if the employer: (1) shows that the requirement is justified by business necessity,[86] (2) clearly informs employees of the circumstances when the English-only rule is applied,[87] and (3) makes clear to the employees the consequences of a rule violation.[88] An ineffective notice to employees of the rule is considered evidence of national origin discrimination, where the employer has made an adverse employment decision based on the employee's violation of the English-only rule.[89]

The United States Supreme Court, when confronted with a statutory construction problem, shows great deference to the interpretation given the statute by the agency charged with the statute's administration.[90] Although the agency's interpretations of the statute is not controlling,[91]

Guidelines in 1980. 45 Fed. Reg. 85,632, 85,634-35 (1980). The Guidelines on Discrimination Because of National Origin, 29 C.F.R § 1606.7 (1980) codified the EEOC's interpretation of English-only rules as they apply to an individual's national origin.

[85] 29 C.F.R § 1606.7(a). 29 C.F.R § 1606.1 provides in part that "[t]he Commission defines national origin discrimination broadly as including, but not limited to, the denial of equal employment opportunity because of an individual's, or his or her ancestor's, place of origin; or because an individual has the physical, cultural, or linguistic characteristics of a national origin group." 29 C.F.R § 1606.1. In EEOC Dec. No. 81-25, 27, the EEOC viewed a rule requiring employees of a tailor shop to speak only English during work hours as an absolute prohibition against the use of any language but English on the job, thus presumptively violative of Title VII. The Commission found that the employer did not offer any evidence as to business necessity, and concluded that the claimed work problems that resulted in the rule could have been addressed by other means other than an absolute prohibition against speaking a language other than English. EEOC Dec. No. 81-25, 27.

[86] 29 C.F.R § 1607(b).

[87] 29 C.F.R. 1606.7 (c).

[88] *Id.*

[89] 29 CFR § 1606.7(c).

[90] *See, e.g.*, United States v. Moore, 95 U.S. 760 (1877) (stating most respectful consideration given to administrative construction of statute).

[91] *See, e.g.*, Espinoza v. Farah Mfg. Co., 414 U.S. 86 (1973) (invalidating EEOC

they constitute a body of experienced and informed judgement to which litigants may properly refer for guidance.[92] The Court will defer to the administrative construction of the statute, unless there are compelling indications that it is wrong.[93]

D. *The English-Only Cases*

The English-only cases prior to *Spun Steak* firmly established the courts' reluctance to accept the assertion that English-only rules constitute a prima facie case of national origin discrimination.[94] In addition, one court has held that an employer's rule restricting its employees from speaking a specific foreign language did not constitute an English-only rule, avoiding the issue of the EEOC's English-only Guidelines altogether.[95] Although the Ninth Circuit Court has held that an employer's English-rule violated Title VII,[96] the United States Supreme Court subsequently vacated the decision as moot.[97]

Courts ruling on English-only policies have focused on whether the plainitff possessed the ability to speak English and conform to the

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Guidelines providing that a lawfully immigrated resident alien may not be discriminated against on the basis of citizenship, where the guidelines were inconsistent with Congress' longstanding policy of requiring federal employees to be citizens); General Electric Co. v. Gilbert, 429 U.S. 125 (1976) (rejecting claim for deference EEOC Guidelines which provided that an employer's disability and sick leave plan should cover pregnancy-related disabilities, where the Commission issued the construction eight years after the enactment of Title VII, it contradicted earlier positions taken by the Commission, new legislative history did not warrant a change in position, and the guideline conflicted with a section of the Equal Pay Act).

[92] *See, e.g.*, United States v. Pennsylvania Industrial Chemical Corp, 411 U.S. 655 (1973); Albermarle Paper Co. v. Moody, 422 U.S. 405 (stating EEOC guidelines for employers seeking to determine whether their employment tests are job-related are entitled to great deference); McDonald v. Santa Fe Trail Transp. Co., 427 U.S. 273 (noting Title VII interpretations of EEOC entitled to great deference); *accord*, Nashville Gas Co. v. Satty, 434 U.S. 136.

[93] *See, e.g.*, New York State Dept. of Social Services v. Dublino, 413 U.S. 405 (1973); Espinoza v. Farah Mfg. Co., 414 U.S. 86 (1973) (following rule).

[94] *See, e.g.*, Garcia v. Gloor, 618 F.2d. 264 (5th Cir. 1980) (holding Employee failed to establish a prima facie case of discrimination where nonobservance of English-only rule was an individual preference); Jurado v. Eleven-Fifty Corp., 813 F.2d. 1406 (9th Cir. 1987).

[95] Dimaranan v. PVHMC, 775 F.Supp. 338, 342 (C.D. Ca. 1991).

[96] Gutierrez v. Municipal Court, 838 F.2d. 1031, 1039 (9th Cir. 1988), *vacated as moot*, 490 U.S. 1016 (1989).

[97] 490 U.S. 1016 (1989).

English-only rule.[98] For example, in *Garcia v. Gloor*,[99] decided before the EEOC established English-only guidelines,[100] the employer prohibited employees from speaking Spanish during work except when speaking with Spanish-speaking customers.[101] The Fifth Circuit rejected Garcia's claim that Spanish was his primary language and that he had difficulty adhering to the rule, by concluding that his nonobservance of the policy was an individual preference.[102]

The Fifth Circuit distinguished Garcia's bilingualism from a person's place of birth, the place of birth of his forebears, race, or fundamental sexual characteristics.[103] The court held that the latter characteristics are clearly immutable, whereas the plaintiff could alter speaking another language.[104] A work rule, which is nondiscriminatory on its face and not intended to be discriminatory, can be invalidated if it has a disparate impact on a protected group.[105] Disparate impact, however, does not exist if the employee can readily observe the rule, the court reasoned.[106]

The court emphasized that language is not immutable.[107] Thus, one's primary language could not be equated with national origin.[108] The court rejected an expert witness called by Garcia, who equated the Spanish language with a person's skin color—synonymous with a Mexican-American's ethnic identification.[109] The court acknowledged

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[98] Garcia v. Gloor, 618 F.2d. 264, 268 (5th Cir. 1980); Jurado v. Eleven-Fifty Corp., 813 F.2d. 1406, 1412 (9th Cir. 1987).

[99] 618 F.2d 264 (5th Cir. 1980).

[100] *Id.* at 268 n.1.

[101] *Id.* at 266.

[102] *Id.* at 270. The court drew an analogy with a non-smoking rule. "[Title VII] would not condemn that rule merely because it is shown that most of the employees of one race smoke, most of the employees of another do not, and it is more likely that a member of the race more addicted to tobacco would be disciplined." *Id.*

[103] *Id.* at 269.

[104] *Id.* at 269. The court compared the English-only policy to grooming codes or length of hair. Such a policy "is related more closely to the employer's choice of how to run his business than to equality of employment opportunity." *Id.* (citation omitted). The court, however, added that, "[f]or the purposes of this opinion, we accept the thesis there may be a disparate impact based on some mutable conditions, such as where an employee lives. Religion, is of course, a forbidden criterion, even though a matter of individual choice." *Id.* at 269 n.6.

[105] *Id.* at 270.

[106] *Id.*

[107] *Id.*

[108] *Id.* at 269-270.

[109] *Id.* at 267.

that an English-only policy could be discriminatory with respect to an employee's national origin if the employee has difficulty speaking a different language than the one used at home.[110] In that situation, the court indicated language would be an immutable characteristic, like skin color, sex or place of birth.[111]

Similarly, the Ninth Circuit permitted an English-only rule under Title VII when applied to a bilingual disc-jockey, and in relation to the legitimate business interest of targeting a specific audience. In *Jurado v. Eleven-Fifty Corp.*,[112] a radio disc jockey sued his former employer and others for allegedly violating his civil rights based on race and national origin discrimination.[113] The plaintiff claimed that the radio station fired him for failing to comply with a rule forbidding him to speak Spanish on the air.[114] The Ninth Circuit held that Jurado, fluently bilingual, failed to establish a case of disparate impact discrimination, because he could easily comply with the rule.[115]

1. Gutierrez: The proper analysis

In a 1988 case, *Gutierrez v. Municipal Court*,[116] the Ninth Circuit rejected the *Garcia* analysis, adopted in *Jurado*, and held that an individual's primary language is an identifying characteristic of national origin.[117] The court concluded that one's ability to comply with the English-only rule does not mean the plaintiff is not adversely affected by the policy.[118]

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[110] *Id.* at 270. Curiously, Garcia had established that his grandparents immigrated from Mexico, he spoke primarily Spanish at home, and had a limited education (9th grade); all strong indications that he had difficulty complying with the policy and would be susceptible to slipping into speaking Spanish with other Hispanic employees. Hence, it is difficult to imagine what evidence the court required to disprove that Garcia exercised a "preference."

Under the EEOC guidelines, the burden is on the employer to justify the English-only rule. *See supra* notes 80-93 and accompanying text.

[111] *Id.* at 270.

[112] Jurado v. Eleven-Fifty Corp., 813 F.2d 1406 (9th Cir. 1987).

[113] *Id.* at 1409.

[114] *Id.* at 1408.

[115] *Id.* at 1412.

[116] 838 F.2d 1031 (9th Cir. 1988).

[117] Gutierrez v. Municipal Court, 838 F.2d 1031, 1039 (9th Cir. 1988).

[118] *Id.* at 1039.

The Southeast Judicial District of the Los Angeles Municipal Court employed Alva Gutierrez and a number of other bilingual clerks.[119] As one of their duties, the bilingual clerks translated for the non-English speaking public.[120] In March, 1984, the Municipal Court enacted a personnel rule forbidding employees to speak any language other than English, except when the employee acted in the capacity of translator.[121] The Municipal Court later changed the rule to allow employees to speak other languages during breaks and lunchtime.[122] Conversations during work, however, remained subject to the English-only rule.[123]

In analyzing the likelihood that Gutierrez would succeed on the merits of her case, the Ninth Circuit first acknowledged that language is an important aspect of national origin.[124] In addition, since the use of a person's primary language ties them to a certain minority group, an English-only policy may be a pretext for intentional national origin discrimination.[125] The court, therefore, concluded that the plaintiff established a prima facie case of an adverse impact according to the EEOC's guidelines, which equate one's primary language with national origin.[126]

The Ninth Circuit deferred to the guidelines, issued by the EEOC after the Garcia case, which state that a limited English-only policy was lawful only where the employer showed that: (1) the rule is justified by business necessity, (2) the employees are clearly informed of the circumstances under which the rule applies, and (3) the consequences

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[119] *Id.* at 1036.

[120] *Id.*

[121] *Id.* at 1036.

[122] *Id.*

[123] *Id.*

[124] *Id.* at 1038-1041.

[125] *Id.* at 1039. The court noted that commentators generally agree that language is an important aspect of national origin and the use of one's primary language is an affirmation of that person's ethnic identity and culture. *Id.* (citations omitted).

[126] *Id. See supra* notes 80-93 and accompanying text. The court noted that EEOC guidelines provide that "the primary language of an individual is often an essential national origin characteristic" and that an English-only policy in the workplace may "create an atmosphere of inferiority, isolation and intimidation." 29 C.F.R. § 1606.7 (a) (7-1-92 Edition) (footnote omitted). The court also stated that "EEOC guidelines are generally entitled to considerable deference so long as they are not inconsistent with Congressional intent." 813 F.2d at 1039 (citing Espinoza v. Farah Mfg. Co., 414 U.S. 86, 94-95 (1973).

of violations of the rule are made clear.[127] The court also dismissed *Garcia* as not controlling because "the mere fact that an employee is bilingual does not eliminate the relationship between his primary language and the culture that is derived from his national origin."[128] In support of this argument, the court noted that the EEOC guidelines provide that an essential national origin characteristic is often an individual's primary language.[129] The court concluded that because language was equated with one's national origin, the fact that an employee can readily observe an English-only rule did not insulate an employer from Title VII liability.[130]

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[127] 813 F.2d at 1039. (quoting 29 C.F.R. § 1606.7 (b, c) (1987). EEOC guidelines on English-only rules provide:

§ 1606.7 Speak-English rules.

> (a) When applied at all times. A rule requiring employees to speak only English at all times in the workplace is a burdensome term and condition of employment. The primary language of an individual is often an essential national origin characteristic. Prohibiting employees at all times, in the workplace, from speaking their primary language or the language they speak most comfortably, disadvantages an individual's employment opportunities on the basis of national origin. It may also create an atmosphere of inferiority, isolation and intimidation based on national origin which could result in a discriminatory working environment. Therefore, the Commission will presume that such a rule violates title VII and will closely scrutinize it.
>
> (b) When applied only at certain times.An employer may have a rule requiring that employees speak only in English at certain times where the employer cn show that the rule is justified by business necessity.
>
> (c) Notice of the rule. It is common for individuals whose primary language is not English to inadvertently change from speaking English to speaking their primary language. Therefore, if an employer believes it has a business necessity for a speak-English-only rule at certain times, the employer should inform its employees of the general circumstances when speaking only in English is required and of the consequences of violating the rule. If an employer fails to effectively notify its employees of the rule and makes an adverse employment decision against an individual based on a violation of the rule, the Commission will consider the employer's application of the rule as evidence of discrimination on the basis of national origin.

29 C.F.R. § 1606.7 (c) (7-1-92 Edition).

The court noted that the guidelines "properly balance the individual's interest in speaking his primary language and any possible need of the employer to ensure that in particular circumstances only English shall be spoken . . . Accordingly we adopt the EEOC's business necessity test as the proper standard for determining the validity of limited English-only rules." 813 F. 2d at 1040.

[128] 813 F.2d at 1039.

[129] *Id.* at 1039 (citing 29 C.F.R. § 1606.7 (1987)).

[130] *Id.* at 1040-1041.

The *Gutierrez* court distinguished this case from *Jurado* by noting that the plaintiff in that case failed to prove that the policy had a disparate impact on the employees.[131] The policy had a minimal impact on the protected group of employees in that it limited one employee's on the air talk to the English language.[132] Additionally, the scope of the policy did not extend to intra-employee conversations, work-related and non-work-related, as was the case in *Gutierrez*.[133]

Moreover, assuming that Jurado had a established a prima facie case of discrimination, the employer met the business necessity test.[134] Specifically, the employer restricted the English-only rule to on-the-air broadcasting, a reflection of the employer's right to "control the essential nature of its product."[135] The employer had instituted the policy only after determining that the bilingual format damaged the station's ratings, further justifying the policy based on a business necessity test.[136]

In contrast, the Ninth Circuit Court in *Gutierrez* rejected the employer's business reasons for enacting the English-only policy and concluded that the employer had failed to meet the business necessity test.[137] First, the employer attempted to justify the policy by arguing that the United States is an English-speaking country and California an English-speaking state.[138] The court dispensed with that argument by concluding that requiring its employees to speak English does little to reach to goal of fulfilling the state interest in having a single language system.[139]

Second, the employer argued that the rule eliminated the distractions caused by employees speaking different languages.[140] The court rejected the "Tower of Babel"[141] argument in large part because Spanish-speaking employees were already necessary for the efficient operation

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[131] *Id.* at 1041.

[132] *Id.*

[133] *Id.* at 1041 (citing Jurado v. Eleven-Fifty Corp., 813 F.2d at 1410).

[134] *Id.* at 1041.

[135] *Id.*

[136] *Id.*

[137] *Id.* at 1041-44.

[138] *Id.* at 1042.

[139] *Id.*

[140] *Id.*

[141] *Id.* The Los Angeles Municipal Court contended that employees speaking Spanish on the job disrupted the work of others, which resulted in an inefficient workplace. *Id.*

of the courts.[142] Additional Spanish spoken through intra-employee communication would not likely create a greater disruption than already existed.[143]

Third, the court found no evidence that Spanish-speaking employees used their language to "convey discriminatory or insubordinate remarks and otherwise belittle non-Spanish-speaking employees."[144] The court also rejected the argument that the rule eased the non-Spanish-speaking employees' fears and suspicions.[145] The court quickly dispensed with that argument by concluding that fears or prejudices cannot justify a policy that adversely impacts employees based on their national origin.[146]

Fourth, the employer asserted that the supervisors who did not speak Spanish could not discern whether employees gave correct information to the public.[147] The court found the argument flawed for a number of reasons.[148] The court reasoned that the employer hired the plaintiffs specifically for the purpose of disseminating information to the public in Spanish, for the majority of people who used the Southeast Judicial District courts primarily spoke Spanish.[149] Also, the employer could ensure that the employees correctly relayed information to the public by hiring Spanish-speaking supervisors.[150]

Lastly, although the California Constitution adopted English as the official language of the State of California, it did not provide the justification for the English-only rule for three reasons.[151] Section 6 of the constitution, which declares English as the official language of the state, is merely a symbolic statement and does not state or imply that the circumstances under which the municipal court operated required an English-only policy.[152]

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[142] *Id.* at 1042.

[143] *Id.*

[144] *Id.* To support this argument, the employer produced affidavits from supervisors. However, the Ninth Circuit noted that the supervisors did not speak nor understand Spanish. It was likely, the court reasoned, that the supervisors views were a reflection of a "prejudice toward the use of a tongue they do not understand, and also may indicate a bias against Hispanic-Americans." *Id.* at 1042 n.15.

[145] *Id.* at 1042-1043.

[146] *Id.* at 1043.

[147] *Id.*

[148] *Id.*

[149] *Id.*

[150] *Id.*

[151] *Id.* at 1043-1044.

[152] *Id.* at 1043-1044.

The court also rejected the defendant's argument that section 6 requires that English be spoken at governmental places of business.[153] Interpreting the statute and the legislative history in the broadest manner possible, section 6 at most required English to be spoken in official communications. Section 6 drew a distinction between official communications and private affairs and did not intend to regulate those that are private.[154] The court noted the English-only rule, ironically, attempted to bar private speech in Spanish during work but often expressly mandated that it be spoken in official communications.[155]

Lastly, the court of appeals rejected the argument that section 6 created a business necessity.[156] The court reasoned that if state enactments, in themselves, could constitute the business justification for the adoption of a discriminatory rule without meeting the business necessity test, "employers could justify discriminatory regulations by relying on state laws that encourage or require discriminatory conduct."[157]

In rejecting the business necessity arguments proffered by the defendants the court concluded that the justification did not sufficiently override the discriminatory impact created by the challenged rule.[158] In addition, the court added that the employer did not prove that the rule was essential to the business and driven by a compelling purpose.[159]

The Supreme Court subsequently vacated *Gutierrez* as moot without an explanation.[160] Consequently, the Ninth Circuit is not bound by its decision or reasoning, since the case has no precedential authority.

2. *Dimaranan: A sign of things to come*

The *Dimaranan v. Pomona Valley Hospital Medical Center*[161] decision of the United States District Court for the Central District of California departed from the mooted *Gutierrez* decision.[162] In Mid-1988, Pomona

[153] *Id.* at 1044.
[154] *Id.*
[155] *Id.*
[156] *Id.*
[157] *Id.*
[158] *Id.* at 1041.
[159] *Id.* at 1042.
[160] 490 U.S. 1016 (1989).
[161] 775 F.Supp. 338 (C.D. Ca. 1991).
[162] *Id.* at 343 n.2.

Valley Community Hospital announced a rule prohibiting the use of Tagalog[163] after receiving complaints about the Assistant Head Nurse, Adelaida Dimaranan, a fully bilingual Filipino.[164]

Specifically, other nurses in Dimaranan's unit complained about her management performance, including her inability to listen and communicate effectively, failure to properly implement a hospital program, and of favoritism in the treatment of staff nurses.[165] The Hospital considered the most serious complaint to be Dimaranan's use of Tagalog with other Filipino nurses, since it seemed to be the root cause of the divisiveness on the Unit.[166] As a consequence, in April 1988, the Hospital asked that Tagalog not be spoken on the Unit.[167] When it appeared, a month later, that Tagalog was still being spoken, Dimaranan's supervisor, Ms. Holstein, responded by prohibiting the use of Tagalog in the unit.[168]

In January 1989, Dimaranan received a yearly performance evaluation which, unlike past appraisals, portrayed her work in an almost entirely negative light.[169] Subsequently, on March 3, 1989, Dimaranan filed a charge with the California Department of Fair Employment and Housing and the EEOC, claiming discrimination based on national origin.[170] Dimaranan also claimed that the Hospital retaliated against her resistance to its "No Tagalog" rule by giving her a poor work evaluation.[171] After returning from a medical leave of absence on June 17, 1989, the Hospital began to closely scrutinize and document Dimaranan's work.[172] On July 18, 1989 Dimaranan filed a lawsuit

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[163] *Id.* at 340. Tagalog is the native language of the Phillipines. *Id.*

[164] *Id.* at 340-341.

[165] *Id.*

[166] *Id.* at 341.

[167] *Id.*

[168] *Id.*

[169] *Id.* Indeed, Ms. Holstein consistently gave Dimaranan above-standard evaluations. *Id.* at 340. Dimaranan's personnel record and past evaluations demonstrating a long and satisfactory work history, resulted in her receiving an R.N. II status, which is awarded only to those with superior clinical skills. *Id.*

[170] *Id.* at 341.

[171] *Id.* at 341-342. At a special staff meeting held on March 22, 1989, the Hospital denied having an "English-Only language policy." *Id.* at 342. Later, the president of the Hospital issued a memo to all Hospital employees, denying the existence of any language restriction policy. *Id.*

[172] *Id.* at 342.

against the Hospital, and on September 21, 1989, she was removed as Assistant Head Nurse.[173]

The court first ruled that the Hospital did not institute an "English-only" rule.[174] Therefore, the EEOC's Speak-English Guidelines did not apply, since the Hospital did not limit conversations to English, but responded to increasing tension by restricting the use of Tagalog only on the evening shift of Dimaranan's unit.[175] Although the court concluded that an "English-only" rule did not exist, it still had to determine whether the Hospital's "No Tagalog" rule violated Title VII under a disparate treatment or disparate impact theory.[176]

The court concluded that the Hospital did not violate Title VII by intentionally discriminating against Dimaranan on the basis of her national origin.[177] The Hospital restricted the use of Tagalog out of concern over the breakdown of cohesion in Dimaranan's unit and the effect it would have on patients and newborns.[178] The court also concluded that since the restriction did not result from racial animus, the action should never have been a Title VII case.[179]

The court next found a disparate impact analysis inapplicable, since Dimaranan failed to establish that the Hospital's language restriction constituted a facially neutral practice.[180] The court noted that, in fact, the language restriction was clearly subjective, but not discriminatory in light of the context and manner in which the Hospital implemented it.[181] The court pointed out that employees spoke Spanish in the Unit, and if it considered the "No Tagalog" rule facially neutral, obviously discriminatory policies could be deemed facially neutral as well.[182]

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[173] *Id.*

[174] *Id.*

[175] *Id.* Judge Rafeedie remarked that he could not "conclude that the Hosptial has or had a per se language rule which prohibited the use of all languages except English. The "No Tagalog: rule was, at most, a shift-specific directive tailored to respond to certain conflicts among identified staff nurses. Even this prohibition, in its limited form, was repealed . . . during the March 1989 staff meeting and again by . . . letter dated March 24, 1989." *Id.*

[176] *Id.* at 343.

[177] *Id.* at 344.

[178] *Id.* at 343-344.

[179] *Id.* at 344.

[180] *Id.* at 344-345. Dimaranan argued that the rule constituted a facially neutral practice in that it applied to all the employees, but only adversely impacted those who spoke Tagalog. *Id.* at 345.

[181] *Id.* at 345.

[182] *Id.*

Although the court found that the Hospital's language restriction did not violate Title VII, it did find the Hospital liable for retaliating against Dimaranan's right under Title VII to oppose the rule.[183] The court ordered that Dimaranan be reinstated to her old job, that the Hospital expunge unfavorable evaluations and performance assesments that resulted in Dimaranan's demotion, and that Dimaranan receive back-pay.[184]

Dimaranan is a significant English-only case for a number of reasons: First, the court avoided applying EEOC Guidelines by narrowly interpreting them.[185] The court reasoned that the Hospital's language restriction did not constitute an "English-only" rule, since the Hospital limited the restriction to the evening shift of Dimaranan's unit and restricted the use of Tagalog only.[186]

Second, *Dimaranan* is also significant given the manner in which the court addressed the mooted *Gutierrez* decision.[187] Although the court avoided analyzing *Gutierrez* by finding that an English-only rule did not exist, it nonetheless rejected the policy behind *Gutierrez* by refusing to equate lanaguage with one's national origin,[188] thus marking another step towards developing an unsympathetic judicial attitude towards bilingual employees.

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[183] *Id.* at 346.

[184] *Id.* at 348.

[185] *Id.* at 342-343.

[186] *Id.* The language restriction should have been ruled to be an English-only rule. EEOC Guidelines specifically prohibit limited English-only rules unless "the employer can show that the rule is justified by business necessity." 29 C.F.R. § 1606.7 (b) (7-1-92 Edition). Clearly, the imposition of a limited "No Tagalog" rule is no different than informing the employees that they are required to speak only English on the job. In this sense, "No Tagalog" should be equated with "English-only." The fact that the Hospital allowed Spanish-speakers to converse in their native language should not have been a bar to declaring the existence of an "English-only" rule. The EEOC Guidelines do not state that an English-only rule must blanket all employees before the Guidelines are triggered. *See* 29 C.F.R. § 1606.7 (b) (7-1-92 Edition).

[187] *Id.* at 343 n.2.

[188] *Id.* at 344. For example, in holding that the hospital's language restriction did not constitute intentional discrimination, the Dimaranan court rejected the Gutierrez court's conclusion that a bilingual employee's ability to observe an English-only rule does not insulate an employer from Title VII liability, since an essential national origin characteristic is often an individual's primary language. *Id.*

IV. Analysis

A. Disparate Impact Applied

In *Garcia v. Spun Steak*, the Ninth Circuit, as a threshold matter, first determined whether the plaintiff's cause of action fell within the purview of Section 703(a)(1)[189] or 703(a)(2)[190] of Title VII.[191] Section 703(a)(2) prohibits employers from limiting employees "in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin."[192] Section 703(a)(1), on the other hand, prohibits practices that affect conditions of employment.[193] In this case, the plaintiffs claimed that Spun Steak's English-only rule violated Section 703(a)(1) in that the policy affected the conditions of their employment, and resulted in both denial of the right to cultural expression and an abusive work environment.[194]

The court first noted that all its cases concluding that the plaintiff has proved discrimination based on a disparate impact theory involved employees who claimed that an employer violated Section 703(a)(2) by way of a facially neutral policy that resulted in the exclusion of a protected group from being hired or promoted.[195] The court, however,

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[189] § 703(a)(1) of Title VII provides that it is unlawful for an employer "to fail or refuse to hire or to discharge an individual, or otherwise to discrimnate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin. 42 U.S.C. § 2000(e)(2)(a)(1)(1988).

[190] § 703(a)(2) of Title VII provides that it is unlawful for an employer "to limit segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin. 42 U.S.C. § 2000(e)(2)(a)(2) (1982).

[191] 998 F.2d 1480, 1483.

[192] *See supra* note 21.

[193] *Id.*

[194] *Id.* at 1485, 1487, 1488. With regard to the abusive work environment issue, the employees specifically argued that the policy created "an atmosphere of inferiority, isolation, and intimidation." *Id.* at 1488. However, the court did not characterize the English-only rule, in itself, as a condition of employment. Rather, the court inferred that the employee's argument was that the rule infused the workplace with ethnic tensions, which created the condition. *Id.*

[195] *Id.* 1485. *See, e.g.*, Bouman v. Block, 940 F. 2d 1211 (9th Cir. 1991). The plaintiff in *Bouman* challenged a Los Angeles County Sheriff's Department police

reasoned that the case before it did not fall neatly within the language of 703(a)(2) and, therefore, could only be brought under 703(a)(1).[196]

The court justified analysis under 703(a)(1) by stating that the Supreme Court has interpreted 703(a)(1) broadly.[197] The court also made it clear that "[r]egardless whether a company's decisions about whom to hire or to promote are infected with discrimination, policies or practices that impose significantly harsher burdens on a protected group than on the employee population in general may operate as barriers to equality in the workplace and, if unsupported by a business justification, may be considered discriminatory."[198]

B. *Prima Facie Case Rejected*

The Ninth Circuit held that the employees failed to establish a prima facie case of discrimination.[199] The court reasoned that in a disparate treatment case, a plaintiff may meet the prima facie requirement by showing evidence which establishes by inference the employer's intent to discriminate.[200] In a disparate impact case, however, the plaintiff is held to more exacting requirements.[201] The court found that in a typical

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sergeant examination as discriminatory. Specifically, the plaintiff claimed that a statistical disparity in passing rates between men and women applicants established a prima facie case of disparate impact. The court held that the exam had a disparate impact on women in that the women's pass rate was only 66 percent of men's pass rate, while women's promotion rate was less than 53 percent of men's promotion rate. *Id.* at 1225-1227.

[196] 998 F.2d at 1485. The court stated that "[w]e have never expressly considered . . . whether disparate impact theory applies to claims under § 703(a)(1), and the Supreme Court has explicitly reserved the issue." *Id.*

[197] *Id.* (citing Meritor Savings Bank v. Vinson, 477 U.S. 57, 64 (1985). Specifically, in Vinson, one of the issues the Supreme Court confronted was whether sexual harassment is a form of sex discrimination prohibited by Title VII, or is Title VII limited to "economic" or "tangible" discrimination. In holding that Title VII is not limited to "economic or "tangible" discrimination, the Court remarked that "the phrase 'terms, conditions, or privileges of employment' evinces a congressional intent to strike at the entire spectrum of disparate treatment of men and women' in employment." Meritor Savings Bank v. Vinson, 477 U.S. 57 (1985) (citations omitted) (internal quotations omitted).

[198] 998 F.2d at 1485 (citing Lynch v. Freeman 817 F.2d 380, 387 (6th Cir. 1987)).

[199] *Id.* at 1490.

[200] *Id.* at 1486 (citing McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802-806, (1973).

[201] *Id.* (quoting Spaulding v. University of Washington, 740 F.2d 686, 705 (9th Cir.), *cert. denied*, 469 U.S. 1036 (1984). The lower standard of proof required to

disparate impact case, in contrast to a disparate treatment case, the plaintiff must show statistical disparities between the racial make-up in the work place and the racial composition of those qualified in the labor market.[202] The court reasoned that in a disparate impact inquiry, the employer's intent is not an issue.[203] Although an employer may adopt a rule or practice without intending to discriminate, the policy could operate in a way that results in discrimination.[204] Therefore, the plaintiff must do more than raise an inference of discrimination, but must prove a prima facie case of discrimination by showing that a facially neutral practice adversely affects an identifiable group of workers, regardless of the employer's intent.[205]

The court confronted the problem of a group of employees whose discrimination claim could not be supported by statistical disparities required by *Wards Cove*,[206] since the claim involved conditions, terms, or privileges of employment.[207] Although the effects of the English-only rule adversely affected Spun Steak employees depended "on subjective factors not easily quantified,"[208] the court held that the plaintiffs were not relieved of their burden to prove: (1) they were adversely affected by the policy, (2) the policy impacted terms, conditions, or privileges of employment, (3) the impact was significant, and (4) the policy did not affect employees outside the protected class to the same degree.[209]

The court rejected all of the plaintiffs' arguments that the policy adversely affected them.[210] Specifically, the plaintiffs argued that the policy: (1) denied them the right to express their cultural heritage, (2)

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establish a prima facie case of discrimination under a disparate treatment analysis is traceable to the nature of the disparate treatment claim itself. In a disparate treatment case, the plaintiff claims that she has been intentionally discriminated against by the employer. Most likeley proof of intentional discrimination will be inferred from evidence presented by the plaintiff. *See, e.g.*, Mcdonnell Douglas Corp. v. Green 411 U.S. 792, 802-807 (1973).

[202] *Id.* (citing Wards Cove Packing Co. v. Atonio, 490 U.S. 642, 650 (1988).

[203] *Id.* at 1484.

[204] *Id.* at 1484-1485.

[205] *Id.* at 1486 (citation omitted). *See, e.g.*, Griggs v. Duke Power Co. 401 U.S. 424, 432 (1971) ("Congress directed the thrust of the Act to the *consequences* of employment practices, not simply the motivation.") (emphasis in original).

[206] *Id.* (citing *Wards Cove*, 490 U.S. at 650).

[207] *Id.*

[208] *Id.*

[209] *Id.* The Supreme Court's disparate impact analysis in Wards Cove made clear that the plaintiff's burden to initially establish a prima facie case of discriminatin is heavy. Wards Cove v. Atonio, 490 U.S. 642, 650 (1989).

[210] *Id.* 1487-1488.

denied the privilege allowed monolingual speakers of English to speak a language with which they feel most comfortable, (3) created a hostile work environment of inferiority, isolation, and intimidation.[211]

The court rejected the plaintiffs' argument that they had a right to express themselves culturally on the job.[212] Although the court acknowledged that language can be an important aspect of national origin, it concluded that Title VII does not "confer substantive privileges."[213] The plaintiffs made a related argument in that Spun Steak denied their right to speak a language that they felt most comfortable.[214]

The court found that an employer may lawfully define the contours of privileges afforded to its employees; the privilege of speaking another language being one of them.[215] Also, the employer may define the

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[211]; *Id.*

[212] *Id.* at 1487.

[213] *Id. citing* Garcia v. Gloor, 618 F.2d 264, 269 (5th Cir. 1980) ("National origin must not be confused with ethnic or sociocultural traits or an unrelated status, such as citizenship or alienage, or poverty, or with activities not connected with national origin, such as labor agitation.") *But see* Gutierrez v. Municipal Court, 838 F.2d 1031, 1039 (9th Cir. 1988) (concluding that even if an individual learns English, his primary language still is an important aspect of his national origin).

In Garcia v. Gloor, the Fifth Circuit's entire analysis focused narrowly on whether the English-only rule as applied to Garcia constituted discrimination on the basis of national origin. The court concluded that Garcia was fully capable of speaking English and deliberately disregarded the rule. Its opinion did not impress a "judicial imprimature" on all English-only rules. Garcia v. Gloor, 618 F.2d 264, 272 (5th Cir. 1980). Here, Spun Steak never required its employees to speak or0*0*0* ," understand English as a prerequisite for employment. Therefore, although the Fifth Circuit expressed its opinion that Title VII does not confer "substantive privileges" to employees, the court spoke of that in the context of an employee it found to be fully bilingual. The focus then should have turned to Garcia and Buitrago's ability to speak and understand English or whether that is relevant to the issue at all.

[214] *Garcia*, 998 F.2d at 1487.

[215] *Id.* The court said that:

> [t]he employees have attempted to define the privilege as the ability to speak in the language of their choice. A privilege, however, is by definition given at the employer's discretion; an employer has the right to define its contours. Thus, an employer may allow employees to converse on the job, but only during certain times of the day or during the performance of certain tasks. The employer may proscribe certain topics as inappropriate during working hours or may even forbid the use of certain words, such as profanity.

Id. But see 29 CFR § 1606.7 (a) & (b) (1991) (recognizing that an employer may require its employees to speak only in English at certain times but only if justified by business necessity). *See infra note* 127 and accompanying text.

privilege narrowly without violating Title VII.[216] In this case, since the bilingual plaintiffs could readily comply with the policy, they failed to establish proof of an adverse impact.[217] The court cited *Jurado* as consistent with its finding that a prima facie case is not established where the plaintiff can easily comply with the rule.[218] In holding that the plaintiffs could readily observe the policy and failure to do so reflected an individual preference, the court rejected as irrelevant the plaintiff's contention that they often unconsciously spoke Spanish on the job.[219] The court reasoned that absent evidence that the employer imposed harsh penalties for "slips of the tongue," involuntary switching from one language to another did not constitute a significant impact.[220]

The court refused to adopt a per se rule that English-only rules create an abusive work environment and held that the policy did not contribute to an atmosphere of "isolation, inferiority or intimidation."[221] In rejecting the plaintiffs' argument that it should adopt a per se rule, the court looked to the specific factual context of the case and concluded that the plaintiffs presented no evidence as to how the policy infused the workplace with an atmosphere of "isolation, inferiority, or intimidation," other than making conclusory statements.[222]

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[216] *Id.*

[217] *Id.*

[218] *Id.* The facts of Jurado, however, differ with this case in that Spun Steak prohibited intra-employee conversations in Spanish. In Jurado, on the one hand, the Ninth Circuit concerned itself with a single employee whose on-the-air use of Spanish affected legitimate business concerns of the employer radio station. The station did not attempt to proscribe the language used by the plaintiff off the air, only on the air. This situation could be likened to a company whose product is sold to English-only clientele—a legitimate business justification. In other words, the "purpose and effect" of the English-only rule in that case was wholly inapposite to the issue before the Ninth Circuit in this case.

[219] 998 F.2d at 1487-88.

[220] *Id.* at 1488. The court conceded that the policy might significantly impact a person who spoke no or very little English. It found one employee who spoke no English at all; however, that employee stated she was not bothered by the rule, preferring to work in peace. *Id.* Additionally, the court held that the issue of whether any other employees spoke little or no English, so as to be denied the privilege of speaking on the job, was to be decided on remand as a question of fact. *Id.* at 1490.

[221] *Id.* at 1489.

[222] *Id.* Ironically, the court found substantial evidence that the plaintiffs themselves created an abusive environment by using their language to isolate and intimidate the non-Spanish speaking employees. *Id.*

C. *Ninth Circuit Court Retreats from Gutierrez*

The Ninth Circuit retreated from its decision in *Gutierrez*, upon which the plaintiffs relied in making their arguments.[223] The court reasoned that because the Supreme Court vacated *Gutierrez*, it had no precedential authority.[224] The court's retreat without an explanation is curious because in both cases, the employer instituted a far-reaching English-only policy that covered intra-employee conversations.[225] If the court had followed the *Gutierrez* analysis, it would have held that Spun Steak's policy violated Title VII because in that case the court equated language with national origin and rejected the employee's business justifications.[226]

D. *The Ninth Circuit Rejects the EEOC Guidelines*

The Ninth Circuit Court rejected the EEOC Guidelines, which provide that a limited English-only rule is lawful if justified by business necessity.[227] The court acknowledged that English-only rules may "create an atmosphere of inferiority, isolation, and intimidation," which could result in a discriminatory work environment."[228] It, however, also noted that, although the EEOC Guidelines are instructive,[229] the court is not bound by them where "there are compelling indications that [they are] wrong."[230] The court concluded that it would not defer to the EEOC's statutory interpretation of English-only rules because Title VII Congressional testimony indicated that Congress would not have approved of a requirement that an employer must justify an English-only policy.[231]

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[223] *Id.* at 1487 n.1.

[224] *Id.*

[225] Specifically, Spun Steak imposed the English-only rule on all its employees when conversing on the job. *Id.* at 1483. Similarly, the employer in Gutierrez forbade its employees from speaking any language other than English during work. Gutierrez v. Municipal Court, 838 F.2d. 1031, 1036 (9th Cir. 1988).

[226] *See supra* notes 116-160 and accompanying text.

[227] 29 CFR § 1606.7(b) (7-1-92 edition).

[228] 998 F.2d. at 1489, citing 29 CFR § 1606.7(a) (1991). The guidelines provide that an individual's primary language "is often an essential national origin characteristic." *Id.*

[229] 998 F.2d at 1489.

[230] *Id.* (citation and internal quotations omitted).

[231] *Id.* at 1489-90.

Specifically, the court cited testimony by a member of Congress that led it to conclude that Title VII balanced the concerns of employment discrimination and the employer's independence.[232] The court reasoned that Title VII could not have been passed as law without leaving undisturbed "management prerogatives and union freedoms," to the extent that the employer is not involved in discrimination practices.[233] In light of the compromise between the preservation of an employer's independence and the prevention of discrimination, the court cited the Fifth Circuit's pre-Guidelines analysis in *Garcia v. Gloor* as worthy of following.[234] The court rejected the Guidelines while imposing the Supreme Court standard of requiring the plaintiff to prove a discriminatory effect before shifting the burden to the employer.[235] In this regard, the plaintiffs had failed to establish a prima facie case that the policy adversely impacted "terms, conditions, or privileges" of their employment, notwithstanding the EEOC's statutory construction of Title VII.[236] A genuine issue of material fact existed, however, with respect to whether the English-only policy adversely impacted the employees that had a limited proficiency in English.[237]

V. Critique of *Spun Steak's* Sanctioning of Cultural Intolerance

The Ninth Circuit's retreat from *Gutierrez* and resurrection of *Garcia v. Gloor* and *Jurado*'s narrow focus on the issue of whether the employees possessed the ability to conform to the English-only rule was not justified. First, the court dismissed the practical realities of the close link language has to one's cultural identity, previously recognized by the *Gutierrez* court—the ability to conform to a discriminatory policy should be irrelevant to the issue.

[232] *Id.*

[233] *Id.* quoting United Steelworkers of America, AFL-CIO v. Weber, 443 U.S. 193 (1979).

[234] *Id.* at 1489.

[235] *Id.* at 1490.

[236] *Id.*

[237] *Id.* The court reversed the judgment and remanded with instructions to grant summary judgment in favor of Spun Steak. *Id.*

Second, the court manipulated *Garcia v. Gloor* and *Jurado* in support of its decision when those cases could easily be distinguished. *Garcia v. Gloor* was decided before the EEOC enacted English-only guidelines, and the Fifth Circuit hinted that it would have deferred to the guidelines had they existed at the time of its decision.[238] In *Jurado*, the Ninth Circuit recognized the validity of the EEOC guidelines[239] while holding that the employer could require a single disc-jockey to speak english while broadcasting—a legitimate business justification.[240]

In addition, the court should have followed *Gutierrez*'s deference to the EEOC guidelines,[241] since it failed to clearly establish the existence of "compelling indications" that the Guidelines are "wrong."[242] Although the court did not address Spun Steak's business justification defense, clearly the business reasons proferred by the employer did not rise to the "safety"[243] concerns usually upheld as necessary to the operation of a business.[244]

A. *Disparate Impact Claim Is Properly Considered Under Either 703(A)(1) Or 703(A)(2)*

The Ninth Circuit reasonably focused on the issue of whether the particular claim before it should be considered under 703(a)(1) or 703(a)(2), and properly decided that the plaintiffs' could be analyzed under 703(a)(1). In *Lynch v. Freeman*,[245] the Sixth Circuit considered the issue of whether working conditions may be the basis of disparate

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[238] Garcia v. Gloor, 618 F.2d. 264, 268 n.1 (5th Cir. 1980).

[239] Jurado v. Eleven-Fifty Corp., 813 F.2d. 1406, 1411 (9th Cir. 1987).

[240] *Id.* at 1410.

[241] *See, e.g.*, Griggs v. Duke Power Co., 401 U.S. 424, 433-434 (1971) (The administrative interpretation of [Title VII] is entitled to great deference).

[242] *See, e.g.*, Espinoza v. Farah Mfg. Co., 414 U.S. 86 (1973) (holding administrative interpretation of a statute should not be deferred to where there are compelling indications that it is wrong).

[243] *See, e.g.*, Dothard v. Rawlinson, 433 U.S. 321 (1977) (holding in a disparate impact case, employer's safety justification for height and weight requirements designed to measure strength for police officers held lawful).

[244] Under the Civil Rights Act of 1991, when a plaintiff establishes that an employer's practice causes a disparate impact, the employer must "demonstrate that the challenged practice is job related . . . and consistent with business necessity." 42 U.S.C.S § 2000e-2(k)(1)(A)(i) (Supp. 1992).

[245] 817 F.2d 380 (6th Cir. 1987).

impact claims. In that case, a female employee filed a suit based on sex discrimination and 703(a)(2), claiming that the employer's policy of providing unsanitary portable toilets for employees disparately impacted women because of their greater susceptibility to disease and infection.[246] The court rejected the employer's contention that working conditions may never be the basis of disparate impact claims under 703(a)(2), since it found that 703(a)(2) is broad enough to include working conditions that have an adverse impact on a protected group of employees.[247]

In addition, the Ninth Circuit extended 703(a)(1)'s scope to include disparate impact claims in *Wambheim v. J.C. Penny Co.*[248] In that case it held that the plaintiff and her class could challenge the employer's medical and dental insurance coverage "head-of-household" rule under a disparate impact claim and 703(a)(1).[249]

Finally, the United States Supreme Court held that section 703(a)(1)'s language is broad enough to extend beyond the economic aspects of employment, where an abusive working environment is severe enough to affect conditions of employment.[250]

Since courts have shown a willingness to interpret Title VII broadly enough to classify a disparate impact claim under either 703(a)(1) or 703(a)(2),[251] the Ninth Circuit Court correctly allowed the employees' disparate impact claim to be analyzed under 703(a)(1). Congress specifically intended to remove facially neutral policies that operated to discriminate invidiously on the basis of, in this instance, national

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[246] *Id.* at 386-387.

[247] *Id.* at 387. The court went on to add that the language of 703(a)(2) prohibits employers from engaging in practices that "derive any individual of employment opportunities or otherwise adversely affect" the employee's status because of the individual's sex. The plaintiff proved that the condition of the toilets limited female employees' status based on their sex. *Id.*

[248] 705 F.2d 1492 (9th Cir. 1983).

[249] *Id.* at 1494.

[250] Meritor Savings Bank v. Vinson, 477 U.S. 57, 67 (1986). *See supra* notes 31-34 and accompanying text.

[251] *See, e.g.*, Wambheim v. J.C. Penny Co., Inc., 705 F.2d 1492, 1494 (1983) (finding the disparate impact analysis is appropriately considered under § 703(a)(1); Lynch v. Freeman, 817 F.2d 380, 388 ("Title VII is remedial legislation which must be construed liberally to achieve its purpose of eliminating discrimination from the workplace."). Disparate treatment claims have traditionally been filed under 703(a)(1). *See, e.g.*, McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973).

origin.[252] Indeed, if the court failed to classify the employees' claim under either 703(a)(1) or 703(a)(2), it would have allowed Spun Steak and other employers to circumvent Title VII's broad purview by instituting policies that do not fit neatly under either category. In other words, the court could have found that the English-only rule could not adversely impact an "employment opportunity" or "status" of an employee under 703(a)(2).[253] Also, since 703(a)(1) traditionally applies to disparate treatment cases,[254] the court could have held that it was not subject to a disparate impact analysis.[255] The court seemed to recognize, however, that if it made such conclusions, the purpose of disparate impact cases, remedying discriminatory effects from facially neutral policies, would be unduly restricted to employers hiring and promotion practices.[256]

B. The Ninth Circuit Should Have Deferred to EEOC Guidelines

The Ninth Circuit rejected EEOC Guidelines that presumed an English-only rule to be lawful only when justified by business necessity,

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[252] Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971).

[253] 998 F.2d at 1485-86. The court remarked that "[t]he cases in which we have concluded that the plaintiff has proved discrimination based on a disparate impact theory have all involved plaintiffs who claimed that they were denied employment opportunities as the result of artificial, arbitrary, and unnecessary barriers that excluded members of a protected group from being hired or promoted, not plaintiffs contending that they were subjected to harsher working conditions than the general employee population." *Id.*

[254] *Id.* at 1485. "The Supreme Court has instructed that the language of § 703(a)(1) is to be interpreted broadly. The phrase terms, conditions, or privileges of employment evinces a congressional intent to strike at the entire spectrum of disparate treatment." *Id.* (citing Meritor Sav. Bank v. Vinson, 477 U.S. 57, 64, (1985)).

[255] *Id.* at 1485-86. "This case . . . does not fall within the language of § 703(a)(2). While policies that serve as barriers to hiring or promotion clearly deprive applicants of employment opportunities, we cannot conclude that a burdensome term or condition of employment or the denial of a privilege would limit, segregate, or classify employees in a way that would deprive any individual of employment opportunities or otherwise adversely affect his status as an employee in violation of § 703(a)(2)." (citation and internal quotations omitted). *Id.* at 1485.

[256] *Id.* "[W]e see no reason to restrict the application of the disparate impact theory to the denial of employment opportunities . . . . Regardless whether a company's decisions about whom to hire or to promote are infected with discrimination, policies or practices that impose significantly harsher burdens on a protected group than on the employee population in general may operate as barriers to equality in the workplace and, if unsupported by a business justification, may be considered discriminatory. We are satisfied that a disparate impact claim may be based upon a challenge to a practice or policy that has a significant adverse impact on the terms, conditinos, or privileges of the employment of a protected group under § 703(a)(1). *Id.*

on the basis that Congress intended to balance Title VII with the preservation of the employer's independence.[257] The court deemed the Guidelines inconsistent with Congress' intent when passing Title VII.[258] The court, however, failed to explore fully the issue of when an administrative agency's construction of a statute does not deserve deference, which would have indicated that the EEOC's interpretation of the statute was consistent with Congressional intent.

In *Espinoza v. Farah Mfg. Co.*,[259] the United States Supreme Court held that an employer's refusal to hire an alien from Mexico because of lack of American citizenship did not constitute discrimination on the basis of "national origin." The Court concluded that an administrative interpretation of a statute should not be deferred to "where there are compelling indications that it is wrong."[260] The compelling indication in *Spun Steak*, according to the Ninth Circuit, was an EEOC interpretation inconsistent with legislative intent.[261] The Supreme Court

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[257] *Id.* at 1489-90. In his dissent in part, Circuit Judge Boochever, disagreed that the court should reject the EEOC Guidelines:

> "I would defer to the Commission's expertise in construing the Act, by virtue of which it concluded that English-only rules may create an atmosphere of inferiority, isolation and intimidation based on national origin which could result in a discriminatory working environment.
>
> As the majority indicates, proof of such an effect of English-only rules requires analysis of subjective factors. It is hard to envision how the burden of proving such an effect would be met other than by conclusory self-serving statements of the Spanish-speaking employees or possibly by expert testimony by psychologists. The difficulty of meeting such a burden may well have been one of the reasons for the promulgation of the guideline. On the other hand, it should not be difficult for an employer to give specific reasons for the policy, - such as the safety reasons advanced in this case."

Id. at 1490-91 (Boochever, J., dissenting).

[258] *Id.* at 1489-90. The rejection of the guidelines contradicted prior United States Supreme Court disparate impact decisions that deferred to them. For example, in Griggs the Court rejected the employer's general intelligence tests as inconsistent with EEOC Guidelines on Testing and Employee Selection Procedures, and characterized the Commision as an administrative authority, whose responsibility is to interpret Title VII. Griggs v. Duke Power Co., 401 U.S. 424, 433-434 (1971).

Also, in Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975), the Court similarly viewed the Commission guidelines as "[t]he administrative interpretation" of Title VII. Accordingly, the Court adopted the EEOC Guidelines on Employment Selection Procdures and held that employers must determine through validation studies that employment tests are job related. *Id.* at 430-431.

[259] 414 U.S. 86 (1973).

[260] *Id.* at 94.

[261] 998 F.2d at 1489-90.

in Espinoza, however, refused to defer to EEOC Guidelines where the application of the interpretation "would be inconsistent with an *obvious* congressional intent"[262]

In *Espinoza*, the Court found an *obvious* inconsistency in the EEOC's interpretation of national origin with Congressional intent by citing to testimony that spoke directly on the subject.[263] In addition, the Court pointed to Congress' long-standing policy of requiring United States citizenship of federal employees.[264]

An *obvious* inconsistency is lacking in *Garcia*. In fact, in terms of Congressional intent, a recent Supreme Court case sheds more light on the issue of whether the Ninth Circuit correctly found the legislator's testimony as an expression of a contrary intent to the EEOC guidelines in clear and unambiguous terms. In a 1991 decision, *Rust v. Sullivan*,[265] the United States Supreme Court confronted the issue of whether the Health and Human Services regulations which, in part, prohibited Public Health Service Act Title X projects from engaging in abortion counseling, referral, or advocacy, permissibly construed section 1008 of the Public Health Service Act. Specifically, the Public Health Service Act mandated that none of the federal funds appropriated under the Title X could be used for programs where abortion is a method of family planning.[266] The Court upheld the agency's construction of the statute, in part, because of what it found to be ambiguous legislative history on Congress's intent.[267] The Court found the legislative history to be ambiguous because Congress did not directly address the issues of abortion counseling, referral, or advocacy.[268] Therefore, the Court

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[262] 414 U.S at 94.

[263] *Id.* at 88-89. The Court referred to a remark made in the House of Representatives by Congressman Roosevelt, in which he defined "national origin" as meaning the country from which an individual and his forebears came. The record, therefore, indicated to the Court that the term "national origin" did not embrace citizenship. *Id.*

[264] *Id.* at 90. In General Electric Company v. Gilbert, 429 U.S. 125 (1976), the Court rejected a 1972 EEOC guideline regarding pregnancy-related disabilities, because it conflicted with earlier EEOC pronouncements; was inconsistent with the Wage and Hour Administrator's interpretation of § 703(h) of Title VII, and the "plain-meaning" of Congress' language when it enacted the statute; and was not a contemporaneous interpretation of Title VII. *Id.* at 141-146.

[265] 500 U.S. ___, 111 S.Ct. ___, 114 L. Ed. 2d. 233 (1991).

[266] *Id.* at 246-247.

[267] *Id.* at 250.

[268] *Id.*

was unpersuaded by Title X grantees' and doctors' "attempts to characterize highly generalized, conflicting statements in the legislative history into accurate revelations of congressional intent."[269]

Similarly, the Ninth Circuit concluded that a general statement by a single legislator emphasizing that the Commission must respect "management prerogatives, and union freedoms" was inconsistent with the Commission's English-only guidelines.[270] This lone statement certainly qualifies as "highly generalized" and should not be seen as an accurate reflection of Congress' intent—at least for the purposes of overriding EEOC guidelines. In addition, the legislator, William M. McCulloch, acknowledged that "management prerogatives" should not be left undisturbed where an employer is engaged in discriminatory practices.[271]

The guidelines, therefore, are consistent with Congressional intent. Also, as the agency charged with the administration of Title VII, and having been given the authority to issue guidelines, the EEOC may determine where the line is drawn between leaving "management prerogatives" undisturbed, and intervening when an employer enacts a discriminatory policy.[272] Short of a statutory construction clearly in

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[269] *Id.*

[270] 998 F.2d at 1489-90.

[271] H.R. REP. No. 914, 88 Cong., 2d. Sess. (1964), *reprinted* in 1964 U.S.C.C.A.N. 2516. Title VII's legislative history provides in part:

> [Title VII] establishes an Equal Employment Opportunity Commission which shall be charged with the task of investigating complaints concerning the existence of discrimination in business establishments, labor unions, and employment agencies[.]
>
> . . . .
>
> It must . . . be stressed that the Commission must confine its activities to correcting abuse, not promoting equality with mathematical certainty. In this regard, nothing in the title permits a person to demand employment. Of greater importance, the Commission will only jeopardize its continued existence if it seeks to impose forced racial balance upon employers or labor unions. Similarly, management prerogatives, and union freedoms are to be left undisturbed to the greatest extent possible. Internal affairs of employers and labor organizations must not be interfered with except to the limited extent that correction is required in discrimination practices. Its primary task is to make certain that the channels of employment are open to persons regardless of their race and that jobs in companies or membership in unions are strictly filled on the basis of qualification.

Id.

[272] *See, e.g.*, Griggs v. Duke Power Co., 401 U.S. 424, 433-34 (1971) (holding the administrative interpretation of [Title VII] is entitled to great deference).

conflict with an identifiable, expressed Congressional policy, as seen in *Espinoza*, a court should not find the administrative interpretation inconsistent.[273]

The United States Supreme Court held that where the statute in question is silent or ambiguous with respect to the issue to be decided, the agency's interpretation is considered consistent where the construction is rational and consistent with the statute as a whole.[274] Because William M. McCulloch's statement, which expressed his concern that "management prerogatives" be left undisturbed to the greatest extent possible, is not testimony dealing directly with English-only Rules and not an obvious contrary legislative intent, the proper approach is to look to Title VII as a whole.[275] This approach seems even more approprate in this case, since in the first place Title VII is broadly worded to protect against national origin discrimination. Second, it seems that the policy behind the EEOC's English-only guidelines is that one's language and national origin are intertwined, which justifies defining an English-only policy as prima facie evidence of national origin discrimination.

Looking at Title VII as a whole, the legislative history does not adequately define the phrase "national origin."[276] The EEOC, however, has broadly defined it to include "physical, cultural or linguistic characteristics of a national origin group."[277] Courts, as well, have

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[273] *See, e.g.*, Rust v. Sullivan, 500 U.S. ___, 111 S.Ct. ___, 114 L. Ed. 2d. 233 (1991). It seems the Ninth Circuit would have declared the EEOC's interpretation consistent with Title VII only if specifically authorized by Title VII legislators: "We are not aware of, nor has counsel shown us, anything in the legislative history to Title VII that indicates that English-only policies are to be presumed discriminatory. Indeed, nowhere in the legislative history is there a discussion of English-only policies at all." 998 F.2d at 1490.

[274] *See, e.g.* Sullivan v. Everhart, ___U.S. ___, 110 S. Ct. 960.

[275] *Id.*

[276] Congressman Roosevelt explained that the phrase "national origin . . . means the country from which you or your forebears came from. You may come from Poland, Czechoslovakia, England, France, or any other country." 110 CONG. REC. 2549 (1964).

[277] 29 C.F.R. § 1606.1 (1989). The EEOC "defines national origin discrimination broadly as including, but not limited to:

> The denial of equal employment opportunity because of an individual's, or his or her ancestor's, place of origin; or because an individual has the physical, cultural or linguistic characteristics of a national origin group. The Commission will examine with particular concern charges alleging that individuals within the jurisdiction of the Commission have been denied equal employment opportunity

construed the phrase "national origin" broadly.[278] For example, as recently as 1993, the Ninth Circuit held that proof of discrimination based on an individual's foreign accent may sufficiently establish a prima facie case of national origin discrimination.[279] In *Odima v. Westin Tucson Hotel Co.*,[280] the Ninth Circuit held that the employer used language as a pretext for national origin discrimination and found that in many cases "[a]ccent and national origin are obviously inextricably intertwined."[281] With respect to the Ninth Circuit, it seems inconsistent that it would construe Title VII broadly to the extent of, in accordance with EEOC Guidelines, equating an individual's foreign accent with national origin, yet reject the similar notion that an individual's foreign language is an integral part of his or her national origin.[282]

More importantly, a consistent and long-standing interpretation of a statute by the administering agency is entitled to great deference.[283] In the case of EEOC Guidelines pertaining to English-Only rules, the Commission has maintained a consistent policy since 1980.[284]

> for reasons which are grounded in national origin considerations, such as (a) marriage to or association with persons of a national origin group; (b) membership in, or association with an organization identified with or seeking to promote the interests of national origin groups; (c) attendance or participation in schools, churches, temples or mosques, generally used by persons of a national origin group; and (d) because an individual's name or spouse's name is associated with a national origin group. In examining these charges for unlawful national origin discrimination, the Commission will apply general title VII principles, such as disparate treatment and adverse impact.

Id.

[278] *See, e.g.*, Odima v. Westin Tucson Hotel Co., 991 F.2d. 595 (9th Cir. 1993).

[279] Odima v. Westin Tucson Hotel Co., 991 F.2d 595, 601 (9th Cir. 1993).

[280] 991 F.2d 595 (9th Cir. 1993).

[281] *Id.* (quoting Fragrante v. City and County of Honolulu, 888 F. 2d 591, 596 (9th Cir. 1989)).

[282] *Garcia*, 998 F.2d at 1489. "In holding that the enactment of an English-only while working policy does not inexorably lead to an abusive environment for those whose primary language is not English, we reach a conclusion opposite to the EEOC's long standing position. *Id.*

[283] General Electric v. Gilbert, 429 U.S. 125, 142 (1976). In *Gilbert*, the Court remarked that "[t]he EEOC guideline in question does not fare well . . . It is not a contemporaneous interpretation of Title VII, since it was first promulgated eight years after the enactment of that Title. More importantly, the 1972 guideline flatly contradicts the position which the agency had enunciated at an earlier date, closer to the enactment of the governing statute." *Id.*

[284] The 1987 EEOC Guidelines on Discrimination Because of National Origin, 29 C.F.R. § 1606.7 (1987), made no changes to the 1980 Guidelines. *Id.*

Congress's inaction subsequent to an agency's construction of a statute has been held to suggest legislative approval and recognition of the interpretation.[285] Congress has not acted upon the EEOC's English-only Guidelines but, rather, the Civil Rights Act of 1991 recognized the need to afford additional protections to plaintiffs that have been discriminated against by unlawful employment policies.[286]

C. *Spun Steak Provided Inadequate Business Justifications Under The EEOC Guidelines*

The Ninth Circuit Court held that if an employee fails to provide evidence that an English-only rule causes a significant adverse impact on the terms, conditions, or privileges of employment, an employer is not required to provide a business justification for an English-only rule.[287] The court rejected the EEOC Guidelines, which equated na-

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[285] *See, e.g.*, United States v. Jackson, 280 U.S. 294, (1930); Norwegian Nitrogen Products Co. v. United States 288 U.S. 294 (1933).

[286] The Civil Rights Act of 1991, Pub. L. No. 102-166, Nov. 21, 1991. Congress made the following findings:

> (1) additional remedies under Federal law are needed to deter unlawful harassment and intentional discrimination in the workplace;
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> (2) the decision of the Supreme Court in Wards Cove Packing Co. v. Atonio, 490 U.S. 642 (1989) has weakened the scope and effectiveness of Federal civil rights protections; and
>
> (3) legislation is necessary to provide additional protections against unlawful discrimination in employment.

Id. § 1. In addition, Congress passed the Civil Rights Act of 1991 with the following purposes in mind:

> (1) to provide appropriate remedies for intentional discrimination and unlawful harassment in the workplace;
>
> (2) to codify the concepts of "business necessity" and "job related" enunciated by the Supreme Court in Griggs v. Duke Power Co., 401 U.S. 424 (1971), and in the other Supreme Court decisions prior to Wards Cove Packing Co. v. Atonio, 490 U.S. 642 (1989);
>
> (3) to confirm statutory authority and provide statutory guidelines for the adjudication of disparate impact suits under Title VII of the Civil Rights Act of 1964 (42 U.S.C. 2000e et seq.); and expanding the scope of relevant civil rights statutes in order to provide adequate protection to victims of discrimination.

Id. § 3.

[287] 998 F.2d at 1490 n.1.

tional origin with language to create a rebuttable presumption that such a policy discriminates based on national origin.[288]

Under the current disparate impact standard, the employer is required to carry a burden of persuasion once a prima facie case of discrimination is established by the employee.[289] As codified by the Civil Rights Act of 1991, the employer is required to show evidence that the proferred business justification constitutes a "business necessity" and is "job related," concepts first enunciated by the Supreme Court in *Griggs v. Duke Power Co.*[290]

Even assuming that Spun Steak could carry its burden of persuasion by its proffered business justifications, which included promoting racial harmony, enhancing worker safety, and increasing product quality, nevertheless Spun Steak could have availed itself of alternative policies allowing it to meet its business goals without disparately impacting the plaintiffs.

The promotion of racial harmony does not meet an employer's burden of persuasion.[291] In this regard, the *Gutierrez* decision is instructive, although it has no precedential authority.[292] In *Gutierrez*, the Ninth Circuit rejected the employer's argument that the English-only rule was necessary because Spanish may be used to "convey discriminatory remarks or insubordinate remarks and otherwise belittle non-Spanish-speaking employees."[293] The court also found that even if the employer could prove that the rule reduced the subjective fears of non-Spanish-speaking employees, it would not be a sufficient business justification for enacting a rule that adversely impacted persons based on national origin.[294]

It may well be that employers and employees who are suspicious of other employees who speak a non-English language, and who have no way of knowing what is being said, simply are prejudiced towards that racial group.[295]

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[288] *Id.* at 1489.

[289] 42 USCS § 2000e-2. *See supra* notes 56-79 and accompanying text.

[290] Civil Rights Act of 1991, Pub. L. No. 102-166 § 105 (b); *see also* 137 CONG. REC. S15276 (Oct. 25, 1991).

[291] Gutierrez v. Municipal Court, 838 F.2d 1031, 1042 (9th Cir. 1988).

[292] Gutierrez v. Municipal Court, 838 F.2d 1031 (9th Cir. 1988), *vacated as moot*, 490 U.S. 1016 (1989).

[293] *Id.* at 1042.

[294] 838 F.2d at 1043.

[295] *Id.* at 1042, n.1 (citation omitted).

Spun Steak argued that an English-only rule enhanced worker safety because the use of Spanish distracted non-Spanish-speakers while operating machinery.[296] A court, however, can reasonably find this argument unpersuasive as it appears to be borne of the subjective fears of those who do not understand the language being spoken around them.[297] Spun Steak's argument is further weakened by the fact that it never required its employees to speak or understand English,[298] and the employees' work consisted of standing individually before a conveyor belt and removing products from the belt and placing the product into cases for resale.[299]

Traditionally, English-only rules have been held not to be violative of Title VII where there exists an essential need for communication between employees or between an employee and a customer in English.[300] For example, an employer's application of an English-only rule to refinery employees when handling volatile materials and during emergencies did not violate Title VII.[301] In terms of other cases involving policies other than English-only rules, courts have similarly accepted the "safety" justification.[302] For example, the United States Supreme Court upheld an employer's safety justification for height and weight requirements designed to measure strength for police officers as lawful, even though they tended to deprive a disproportionate number of female applicants from being hired.[303]

Spun Steak's rationale for the English-only rule does not rise to the level of safety concerns accepted by courts in other cases, and appears to be based on the subjective fears of the company and non-Spanish-speaking employees.[304] In addition, why is it that a non-Spanish-speaking production line employee is distracted by another employee speaking Spanish around the work area, but not distracted when English is spoken? An employee who is selectively distracted by conversations in Spanish should be reprimanded—a less drastic alternative to insti-

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[296] Garcia v. Spun Steak, 998 F.2d 1480, 1483 (9th Cir 1993).

[297] *See Gutierrez*, 838 F.2d at 1042-143 (holding existing racial fears or prejudices and their effects cannot justify a racial classification).

[298] 998 F.2d at 1483.

[299] *Id.*

[300] EEOC Dec. No. 83-7 (4/20/83).

[301] *Id.*

[302] *See, e.g.*, Dothard v. Rawlinson, 433 U.S. 321, 331-332 (1977).

[303] *Id.*

[304] Gutierrez v. Municipal Court, 838 F.2d 1031, 1043 (9th Cir. 1988) (holding existing racial fears or prejudices and their effects cannot justify a racial classification).

tuting an English-only rule. On the other hand, the employer may reasonably assert a "no conversation in certain work areas" rule if safety were truly a concern, rather than burdening a protected class of employees.

Spun Steak argued that product quality would be enhanced, because the U.S.D.A. inspector in the plant spoke only English and could not understand product concerns raised in Spanish.[305] Spun Steak's argument, however, is unpersuasive in light of the ability of many of the employees to communicate effectively in English, specifically Garcia and Buitrago.[306] A sweeping rule is not necessary to address an employer's product quality concern when the employer may simply, as a less discriminatory employment practice, appoint a fully bilingual supervisor that could act as a liaison between the inspector and the employees. In addition, the majority of Spun Steak's workers are employed on the production line. It is doubtful that these positions mainly emphasize oral communications with the inspector.

Garcia and Buitrago's bilingualism does not weaken their national origin discrimination claim, either.[307] An employee's ability to conform to an English-only rule "does not eliminate the relationship between his primary language and the culture that is derived from his national origin."[308]

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[305] Garcia v. Spun Steak, 998 F.2d 1480, 1483 (9th Cir. 1993).

[306] Garcia and Buitrago are fully bilingual. *Id.* In addition, only two out of the twenty-four who speak Spanish, do not also speak English. *Id.*

[307] *See Gutierrez*, 813 F.2d. at 1040-1041 ("The mere fact that an employee is bilingual does not eliminate the relationship betwen his primary language and the culture that is derived from his national origin.")

[308] *Id.* at 1039. In *Gutierrez*, the Ninth Circuit Court equated primary language with national origin:

> Although an individual may learn English and become assimilated into American society, his primary language remains an important link to his ethnic culture and identity. The primary language not only conveys certain concepts, but is itself an affirmation of that culture. From the standpoint of the Anglo-American, another person's use of a foreign language may serve to identify that individual as being of foreign extraction or as having a specific national origin.

Id. (citations and internal quotations omitted).

For a discussion on the different business justifications given by employers in support of English-only rules, see Juan F. Perea, *English-Only Rules and Right to Speak One's Primary Language in the Workplace*, 23 MICH. J. LAW REFORM. 265 (1990). Author, Juan F. Perea writes that:

> English-only rules increase, rather than reduce, racial tensions and fears. Different-language conversations are no more disruptive than conversations in

VI. Impact

In the wake of the Spun Steak decision, it is clear that the English-only plaintiff will most likely not establish a prima facie case of discrimination under a disparate impact analysis. In the alternative, this section will determine whether English-only plaintiffs have a greater chance of establishing a prima facie case of discrimination under a disparate treatment theory and, therefore, a greater chance of prevailing.

The Ninth Circuit's refusal to follow EEOC Guidelines, which would allow an employee to establish a prima facie case of disparate impact based on national origin by proving the existence of an English-only rule, will result in a high initial burden placed on English-only plaintiffs in future disparate impact claims. Although the uncertain legal status of other English-only rules within the jurisdiction of the Ninth Circuit before the Spun Steak ruling resulted in most companies settling possible suits out-of-court,[309] now companies will be more likely to litigate suits filed against them. Other jurisdictions may not follow the Ninth Circuit's ruling and choose to follow EEOC Guidelines. At the very least, these circuits will look very closely to *Spun Steak* for guidance and the decision's impact may be great, since very little English-only case law exists in those jurisdictions.[310]

> English . . . And English-only rules do little to improve the English of persons whose primary language is not English . . . It is questionable whether supporting the use of English in this country is a business purpose at all. A desire to enhance the effectiveness of supervision cannot constitute a business justification unless a supervisor's access to the content of different-language conversations relates to the job and enhances supervision. Furthermore, a plaintiff often will be able to show a less discriminatory, and more effective, alternative to an English-only rule: an employer needs only to hire a supervisor conversant in the different language to achieve more effective supervision . . . Under appropriate circumstances, an employer may be able to justify an English-only rule on the grounds of safety and efficiency . . . Plaintiffs, however, may be able to prevail by demonstrating less restrictive and more effective alternatives.

Id. at 316-317.

[309] *See* Sklarewitz, *American Firms Lash Out at Foreign Tongues*, BUSINESS AND SOCIETY REVIEW, Fall 1992 at 24-28. For example, Sears, Roebuck & Company settled out of court and retracted an English-only rule issued via memorandum to thirty Spanish-speakers in its payroll-processing office in Los Angeles, after the local EEOC office filed a Title VII suit. *Id.* at 27.

[310] In light of *Dimaranan*, 775 F.Supp. 338 (C.D. Ca. 1991), employers will likely narrow rules to specific groups, shifts, and work-areas in an attempt to circumvent the EEOC guidelines, should the relevant jurisdiction continue to defer to them.

One issue is clear—immigration trends indicate that employers, especially in the unskilled and semi-skilled sectors, are drawing their employees from a work population increasingly filled with recent immigrants from Asia, Eastern Europe, and Latin America. In Hawai'i, to which a large number of Asians and Pacific Islanders immigrate, the Ninth Circuit's decision might also have far-reaching implications.[311]

The Ninth Circuit's ruling will likely affect English-only cases brought under a disparate impact theory in two ways. First, the heavy burden placed on plaintiffs to show that the English-only policy resulted in an abusive work environment discourages employees from filing suits. At the same time, the Ninth Circuit's ruling encourages employers to institute some form of an English-only rule.[312]

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[311] *See* Mari Matsuda, *Voices of America: Accent, Antidiscrimination Law, and a Jurisprudence for the Last Reconstruction*, 100 YALE L.J. 1329, 1333 (1991) (discussing Hawaii's multiculturalism).

As of 1987, Asia provided nearly half of all legal immigrants to the United States. Within the legal Asian immigrant group, most come from the Philippines, Vietnam, China, South Korea and India. After Mexicans, Filipinos are currently the second-largest group among all legal immigrants to the United States. JAMES T. FAWCETT AND BENJAMIN V. CARINO, EDS, PACIFIC BRIDGES: THE NEW IMMIGRATION FROM ASIA AND THE PACIFIC ISLANDS (1987).

[312] Kathryn K. Imahara, director of the Language Rights Project of the Asian Pacific American Legal Center, believes that English-only policies instituted by employers are "very prevalent." Currently more complaints are not filed, however, because many of the workers discriminated against fear losing their jobs. Sklarewitz, *supra* note 309.

The issue of whether an increase in immigrants to the United States will result in more English-only rules depends in part on how the newest immigrants adapt to American society. In this regard, it seems clear that today's immigrants are less likely to subscribe to the melting pot concept and abandon cultural and linguistic traits, as the European immigrants did in the nineteenth century. FAWCETT & CARINO, eds. *supra* note 311.

For example, a study has shown that although over fifty percent of Filipino immigrant children in Hawaii are likely to speak English outside the classroom, only thirty percent speak English at home. In addition, a majority of the children in the study expressed a desire to retain their cultural heritage. This study, however, also concluded that a majority of the immigrants surveyed understood the importance of learning English, thus countering the English-only proponents' argument that immingrants have a low regard for English, with the result being that the nation will become divided along linguistic lines. UNIVERSITY OF HAWAII CENTER FOR GOVERNMENTAL DEVELOPMENT, ANALYSIS MODEL ON ACCULTURATION OF IMMIGRANTS TO HAWAII, (1976).

In contrast to the advocates of cultural pluralism who wish to protect and preserve their ethnic identities, are assimilationists who hope that the newly arrived immigrants will shed their cultural and linguistic traits and conform to Anglo-Saxon norms, i.e.

Second, for English-only plaintiffs who pursue Title VII claims under a disparate impact theory, the Ninth Circuit's ruling provides little guidance as to how a prima facie case of discrimination is to be established under its scheme.[313] Consequently, in attempting to establish that the English-only policy resulted in an abusive work environment plaintiffs will likely expend more time, money and effort gathering evidence, which also will result in delaying litigation. In turn, the Ninth Circuit's ruling will likely lengthen trials and unduly tax the judiciary. Plaintiffs challenging English-only rules will be subjected to these unreasonable burdens, since it is uncertain as to how a court will view their evidence.[314]

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the English language. *See, e.g.*, FAWCETT & CARINO *supra* note 311. The assimilationist view is reflected in in the current movement by states to declare English as the "official" language. Currently, 16 states have declared English as their official language. *See*, *Language Rights and the Legal Status of English-Only Laws in the Public and Private Sector*, 20 NORTH CAROLINA CENTRAL L.J. 65 (1992).

[313] *See* Garcia v. Spun Steak, 998 F.2d 1480, 1490-91 (9th Cir. 1993) (Boochever, J. dissenting). Judge Boochever dissented from the majority's rejection of the EEOC Guidelines and asserted that rejecting the Guidelines would place an unreasonable burden on English-only plaintiffs to prove that the English-only policy resulted in an abusive work environment.

> As the majority indicates, proof of such an effect requires analysis of subjective factors. It is hard to envision how the burden of proving such an effect would be met other than by conclusory self-serving statements of the Spanish-speaking employees or possibly by expert testimony of psychologists. The difficulty of meeting such a burden may well have been one of the reasons for the promulgation of the guideline. On the other hand, it should not be difficult for an employer to give specific reasons for the policy,—such as the safety reasons advanced in this case.

Id.

[314] A recent United States Supreme Court sexual harassment case does little in the way of lending clear standards to courts faced with the task of determining whether a workplace is abusive. Harris v. Forklift Systems, Inc., 1993 U.S. Lexis 7155. In Harris, the Court found that a determination of whether a workplace is abusive can be made only by looking at all the circumstances, which include "the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance" *Id.* at *10-*11. Although psychological harm is an important consideration, no single factor is determinative of the issue of whether an abusive environment existed. *Id.* at *11. The Court's standard reinforces the notion that an English-only plaintiff faces an unreasonable burden in establishing a prima

A. Alternatives Available to Employees

The Ninth Circuit Court failed to acknowledge Title VII's "broad remedial purview"[315] by not recognizing that Spun Steak's English-only rule placed a heavier burden on those employees whose Spanish-speaking ability identified them as members of a protected group. The court's decision basically circumvented Title VII's purpose of eradicating discrimination from the workplace.

From a legal standpoint, a plaintiff adversely affected by an English-only rule may satisfy the initial burden under a disparate treatment analysis by raising an inference of discrimination. Although under a disparate treatment analysis, establishing a prima facie case is not enough to shift the burden of persuasion to the employer, at least one commentator believes that the employer is admitting that national origin is used as an employment factor by instituting an English-only rule.[316] Therefore, because the plaintiff has raised an inference of invidious discriminatory intent based on national origin, the employer must show the policy is permissible as a bona fide occupational qualification (BFOQ),[317] which is considered an affirmative defense[318] and stricter than the business necessity defense.[319]

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facie case of an abusive work environment. For example, one can imagine a plaintiff spending vast amounts of time and resources on showing how each of the factors contributed to an abusive workplace, yet still failing to establish a prima facie case. *See Id.* at *12 (Scalia, J., concurring - "Today's opinion does list a number of actors that contribute to abusiveness, . . . but since it neither says how much of each is necessary . . . nor identifies any single factor as determinative, it thereby adds little certitude.").

[315] Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971).

[316] *See* Juan F. Perea, *English-Only Rules and Right to Speak One's Primary Language in the Workplace*, 23 MICH. J. LAW REFORM. 265 (1990).

[317] 42 U.S.C. § 2000e-2(e) provides in relevant part that:

> [I]t shall not be an unlawful employment practice for an employer to hire and employ employees . . . on the basis of . . . religion, sex, or national origin in those certain instances where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise[.]

42 U.S.C. § 2000e-2(e) (1982).

[318] *See, e.g.*, United States v. Gregory, 818 F.2d 1114 (4th Cir. 1987).

[319] Gutierrez v. Municipal Court, 838 F.2d 1031, 1040 n.9 (9th Cir. 1988).

Theoretically, it appears more logical that an English-only rule should be addressed under a disparate treatment analysis. Traditionally, a disparate impact analysis is applied to an employment practice or test that is fair in form but discriminatory in operation.[320] An English-only rule, however, seems far from facially neutral in that it is aimed at, and discriminates against, a protected group. Under the BFOQ defense, the employer must show that the policy is reasonably necessary to the normal operation of the particular business.[321] The Supreme Court has characterized the BFOQ as "an extremely narrow exception."[322]

Although theoretically it seems an employee's chances to successfully argue a national origin discrimination claim are much greater under the disparate treatment theory, in practice two recent developments will make it increasingly difficult for the plaintiff to prevail. First, an employer is required to defend a rule or practice with a BFOQ when the plaintiff presents direct evidence that the employer adopted the rule or practice for the purpose of unlawful discrimination.[323] In most cases, the direct evidence is presented by way of the employer's admitted use of sex, religion, or national origin in adopting a rule or practice.[324]

In this regard, the plaintiff in *Dimaranan* failed to establish a prima facie case under the disparate treatment analysis showing, either circumstantially or directly, that the employer prohibited on-the-job conversations in Tagalog with the intention of unlawfully discriminating against her.[325] The district court found that the plaintiff failed to establish a prima facie case of disparate treatment because, most significantly, the Hospital allowed Tagalog to be spoken for many years before instituting the "No Tagalog" policy, the policy was shift specific, and the hospital produced evidence that it was primarily concerned with the unit's cohesion, rather than discriminating against the plaintiff.[326] As illogical as it may appear, courts may not necessarily equate an English-only rule with an employer's admission that national

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[320] *Griggs*, 401 U.S. at 429-430.

[321] 42 U.S.C. § 2000e-2(e) (1982).

[322] Dothard v. Rawlinson, 433 U.S. 321 (1977).

[323] *See, e.g.*, Dimaranan v. PVCH, 775 F. Supp. 338, 343 (C.D. Cal. 1991).

[324] *See, e.g.*, Dothard v. Rawlinson, 433 U.S. 321 (1977) (finding that hiring of women in contact positions at male maximum security prison would pose a substantial security problem directly linked to their sex).

[325] *Dimaranan*, 775 F. Supp. at 343.

[326] *Id.* at 343-344.

origin was considered in the decision to institute it.[327] Therefore, the employer is spared the task of defending the policy with a BFOQ, an affirmative defense. In the wake of *Dimaranan*, more employers will tailor language restrictive policies carefully, so that it conforms to the policy approved by the Federal District Court for the Central District of California.

The second recent development in the disparate treatment analysis concerns the last stage of the shifting burdens of proof. If the English-only plaintiff is able to establish a prima facie case through an inference, the employer must carry the burden of producing evidence of a legitimate, nondiscriminatory reason for its decision.[328] If the employer satisfies the burden, the employee may still prevail by showing that the proffered reasons were merely pretexts for discrimination.[329] In *Texas Department of Cummunity Affairs v. Burdine*, the United States Supreme Court held that the employee may ultimately prove discrimination "indirectly by showing that the employer's proffered explanation is unworthy of credence."[330] In a 1993 decision, however, the Court held that the burden of proof at this final stage must be satisfied directly.[331]

In *Saint Mary's Honor Center v. Hicks*,[332] the Court held that if the employer carries its burden of producing evidence of a non-discriminatory reason for a challenged policy, the employee can no longer meet the ultimate burden of proving discrimination "indirectly by showing that the employer's proffered explanation is unworthy of credence."[333] Thus, for the English-only plaintiff, challenging an employer's language restrictive policy under a disparate treatment theory presents the same problem of proving discrimination now encountered under a disparate impact theory.

Under a disparate impact theory, the employee faces an unreasonable burden of initially establishing that the policy resulted in an abusive work environment, since the Ninth Circuit left little guidance as to

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[327] *See, e.g.*, Jurado v. Eleven-Fifty Corp., 813 F.2d. 1406, 1410 (9th Cir. 1987) (English-only order imposed on radio disc jockey during programming was not racially motivated).

[328] Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 254 (1981).

[329] *Id.* at 253, 255.

[330] *Id.* at 256.

[331] Saint Mary's Honor Ctr. v. Hicks, ___U.S. ___, 113 S.Ct. 2742 (1993).

[332] *Id.*

[333] See Burdine, 450 U.S. at 256.

how this could be proved. Similarly, under a disparate treatment theory, if the plaintiff raises an inference of discrimination and the employer rebuts the inference, there is a good chance that the employee will fail to proffer direct evidence disproving the employer's business reasons for the policy. In addition to having to establish that the employer's explanation is unworthy of credence through direct evidence, the employee must "disprove all other reasons suggested, no matter how vaguely, in the record."[334]

Arguably, the English-only plaintiff is similarly affected under the Court's new disparate treatment scheme and the *Spun Steak* ruling. Under the disparate treatment theory, the plaintiff must anticipate any possible business reason for a language restriction policy, related to the employer's articulated reasons or not.[335] Consequently, "to the extent such workers . . . decide to press forward, the result will likely be wasted time, effort, and money."[336]

VII. Conclusion - Towards an Intolerant Society

Spun Steak reflects an increasing trend to discourage diversity in this country. From a legal standpoint, English-only plaintiffs challenging language-restrictive policies will not find a remedy under a disparate impact analyis, unless the court defers to the EEOC's English-only Guidelines. Also, clearly the disparate treatment analysis no longer represents the last resort for legal protection to those in the workplace who are bilingual. In fact, there may no longer exist a judicial remedy for bilingual workers. As more immigrants enter the workforce, more employers will institute English-only rules. More importantly, in light

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[334] *St. Mary's*, ___U.S. ___, 113 S.Ct. 2742 (1993) (Souter, J., joined by White, J., Blackmun, J., and Stevens, J., dissenting). Justice Souter remarked that:

> [t]he possiblity of some practical procedure for addressing what *Burdine* calls indirect proof is crucial to the success of most Title VII claims, for the simple reason that employers who discriminate are not likely to announce their discrimnatory motive. And yet, under the majority's scheme, a victim of discrimination lacking direct evidence will now be saddled with the tremendous disadvantage of having to confront, not the defined task of proving the employer's stated reasons to be false, but the amorphous requirement of disproving all possible nondiscrimnatory reasons that a fact finder might find lurking in the record. In the Court's own words, the plaintff must 'disprove all other reasons suggested, no matter how vaguely, in the record.'

[335] *Id.*

[336] *Id.*

of this disturbing trend the question that must be asked is: "What does the English-only rule say about ourselves and the society in which we live?" The irony is apparent—on the one hand, we take pride in referring to the United States as a country of immigrants and democratic ideals. Yet, at the same time, we are growing more intolerant of diversity and self-expression. The suppression of language rights and cultural diversity, in turn, threatens the very democracy upon which the country was founded, since it discourages the free-flow of ideas and diverse voices from being heard.[337] One commentator has suggested that the increased demand for uniformity in speech in the workplace represents a new way to vent racial anxieties, now that other traditional outlets are deemed unacceptable.[338] Perhaps now, the legal system is accomodating these anxieties.

Roman Amaguin

[337] *See Matsuda supra* note 311 at 1388-1389.
[338] *See Matsuda supra* note 311.

Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah: Reaffirming The Supreme Court's Religious Free Exercise Jurisprudence

I. Introduction

This casenote examines the United States Supreme Court's recent treatment of the First Amendment's Free Exercise Clause[1] in *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*.[2] The Church of Lukumi Babalu Aye brought suit against the City of Hialeah, Florida, after Hialeah's City Council adopted ordinances prohibiting individuals from practicing religious animal sacrifice.[3] The Court held that the ordinances were not neutral and were not generally applicable.[4] Further, the Court found that because the ordinances were blatantly enacted to restrict Santerian worship, the City was preempted from asserting a compelling interest that might have overridden the Santerians' right to free exercise of religion.[5] The Court raised several questions in determining the constitutionality of the ordinances: whether the ordinances were neutral; whether the ordinances were generally applicable; and whether the ordinances were phrased in a manner which was directly aimed at prohibiting the Santerian ritual of animal sacrifice.[6]

Part II of this note provides a synopsis of the relevant factual and procedural background of this decision. Part III reviews the development of law regarding the Free Exercise Clause by both the United

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[1] U.S. Const., amend. 1, which states, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . ."

[2] 113 S.Ct. 2217 (1993).

[3] *Id.* at 2223-24.

[4] *Id.* at 2226.

[5] *Id.* at 2222.

[6] *Id.* at 2217.

States Supreme Court and the Hawaii Supreme Court. Part IV then analyzes the United States Supreme Court's interpretation of the Free Exercise Clause in the context of the Santerian religion. Finally, Part V of this note examines *Lukumi*'s potential impact on the free exercise of religion.

II. FACTS

The dispute in this case arose out of the controversy surrounding the Santerians' practice of animal sacrifice.[7] One of the principal forms of devotion in this religion is animal sacrifice.[8] Animals that are commonly sacrificed include chickens, pigeons, doves, ducks, guinea pigs, goats, sheep, and turtles.[9] The ritual consists of killing the animals by severing the carotid arteries in their necks before cooking and eating them.[10] The practice is usually highly secretive, because in Cuba many members faced persecution for participation in the practice.[11]

The Church of Lukumi Babalu Aye (Church) is a non-profit corporation organized under Florida law in 1973.[12] In April 1987, the Church leased land in the City of Hialeah, Florida (City) and announced its plans to open a house of Santerian worship and to introduce its ritual of animal sacrifice to the public.[13] The Church then began the process of acquiring necessary licensing, inspection, and zoning approvals.[14]

Reacting to the Church's actions, residents of the City urged the City Council (Council) to hold an emergency public session on June 9, 1987.[15] Subsequently, the Council adopted several resolutions and ordinances.[16]

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[7] *Id.* The religion developed in the nineteenth century after the Yoruba people were brought, as slaves, from Africa to Cuba, and their African religion merged with Roman Catholicism. *Id.* at 2222.

[8] *Id.* The members practiced sacrifice for survival, and now perform this ritual at birth, marriage, and death, to cure the sick, during initiation of new members, and during annual celebrations. Church of the Lukumi Babalu Aye v. City of Hialeah, 723 F.Supp. 1467, 1470 (S.D. Fla. 1989).

[9] 723 F. Supp. at 1471.

[10] *Id.* at 1472.

[11] *Id.* at 1470.

[12] 113 S.Ct. at 2223. The District Court's estimated membership in South Florida was 50,000. *Id.*

[13] *Id.*

[14] *Id.*

[15] *Id.*

[16] *Id.*

The Council passed Resolution 87-66, which expressed the "concern" of many residents that "certain religions may . . . engage in practices which are inconsistent with public morals, peace or safety."[17] The Council also passed Ordinance 87-40, which adopted Florida's animal cruelty laws,[18] and subjected those who "unnecessarily or cruelly [kill] any animal" to criminal punishment.[19] Although the Council wanted to take further legislative action, it was deterred by the Florida law which prohibited municipalities from enacting legislation relating to animal cruelty that conflicted with state law.[20] Florida's Attorney General solved this dilemma by stating that "ritual sacrifice of animals for the purposes other than food consumption" was not a "necessary" killing, and was thus prohibited by section 828.12 of the Florida Statutes.[21] The Attorney General concluded that, because religious animal sacrifice was a violation of state law, a city ordinance prohibiting such would not be in conflict.[22]

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[17] *Id.* City of Hialeah, Florida, Res. No.87-66, adopted June 9, 1987, stated:
Whereas, residents and citizens of the City of Hialeah have expressed their concern that certain religions may propose to engage in practices which are inconsistent with public morals, peace or safety, and whereas, the Florida Constitution, Article I, Declaration of Rights, Section 3, Religious Freedom, Specifically states that religious freedom shall not justify practices inconsistent with public morals, peace or safety. Now, therefore, be it resolved by the mayor and city council of the City of Hialeah, Florida, that: 1. The City reiterates its commitment to a prohibition against any and all acts of any and all religious groups which are inconsistent with public morals, peace or safety.

[18] *Id.*

[19] Whereas, the citizens of the City of Hialeah, Florida, have expressed great concern over the potential for animal sacrifices being conducted in the City of Hialeah; and Whereas, §828.27 Florida Statutes, provides that "nothing contained in this section shall prevent any county or municipality from enacting any ordinance relating to animal control or cruelty to animals which is identical to the provisions of this Chapter . . . except as to penalty."
NOW, THEREFORE BE IT ORDAINED BY THE MAYOR AND CITY COUNCIL OF THE CITY OF HIALEAH, FLORIDA, that:
Section 1. The Mayor and City Council of the City of Hialeah, Florida, hereby adopt Florida Statute, Chapter 828- "Cruelty to Animals"

. . .

Section 3. Any person, firm or corporation convicted of violating the provisions of this ordinance shall be punished by a fine, no exceeding $500.00 or by a jail sentence, not exceeding sixty (60) days, or both, in the discretion of the Court.
City of Hialeah, Fla., Ordinance No. 87-40, adopted June 9, 1987.

[20] *Id.*

[21] *Id.*

[22] Church of Lukumi Babalu Aye v. City of Hialeah, 113 S.Ct. at 2223 (citing

The Council then enacted Resolution 87-90, which declared that city policy opposed ritual sacrifice of animals and warned that those practicing the ritual "will be prosecuted."[23]

In September 1987, the Council adopted three additional ordinances regarding animal sacrifice.[24] First, Ordinance 87-52 defined "sacrifice" to mean to "unnecessarily kill, torment, torture or mutilate an animal in a public or private ritual or ceremony not for the primary purpose of food consumption."[25] The ordinance, however, exempted slaughter-

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Fla. Opp. Atty. Gen. 87-56, Annual Report of the Attorney General 146, 147, 149 (1988)).

[23] City of Hialeah, Florida, Resolution No. 87-90, adopted August 11, 1987.

. . .

WHEREAS, the City of Hialeah, Florida, has received an opinion from the Attorney General of the State of Florida, concluding that public ritualistic animal sacrifices is [sic] a violation of the Florida State Statute on Cruelty to Animals; and

Whereas, the Attorney General further held that the sacrificial killing of animals other than for the primary purpose of food consumption is prohibited under state law[.]

[24] 113 S.Ct. at 2224.

[25] City of Hialeah, Fla., Ordinance 87-52, adopted September 8, 1987, provides:

WHEREAS, the City of Hialeah, Florida, has received an opinion from the Attorney General of the State of Florida, concluding that public ritualistic animal sacrifice, other than for the primary purpose of food consumption, is a violation of state law; . . .

WHEREAS, the City of Hialeah, Florida, now wishes to specifically prohibit the possession of animals for slaughter or sacrifice within the City of Hialeah, Florida.

NOW, THEREFORE, BE IT ORDAINED BY THE MAYOR AND CITY COUNCIL OF THE CITY OF HIALEAH, FLORIDA, that:

Section 1. Chapter 6 of the Code of Ordinances of the City of Hialeah, Florida, is hereby amended by adding thereto two (2) new Sections 6-8 'Definitions' and 6-9 'Prohibition Against Possession Of Animals For Slaughter Or Sacrifice', which is to read as follows:

Section 6-8. Definitions

1. Animal—any living dumb creature.

2. Sacrifice—to unnecessarily kill, torment, torture, or mutilate an animal in a public or private ritual or ceremony not for the primary purpose of food consumption.

3. Slaughter—the killing of animals for food.

Section 6-9. Prohibition Against Possession of Animals for Slaughter Or Sacrifice.

1. No person shall own, keep or otherwise possess, sacrifice, or slaughter any sheep, goat, pig, cow or the young of such species, poultry, rabbit, dog, cat,

ing by those licensed to kill animals specifically raised for food purposes.[26] The ordinance expressly applied to any individual or group that "kills, slaughters or sacrifices animals for any type of ritual, regardless of whether or not the flesh or blood of the animal is to be consumed."[27] Second, Ordinance 87-71 declared that ritual sacrificing of animals within city limits was "contrary to the public health, safety, welfare and morals of the community."[28]

Finally, Ordinance 87-72 defined "slaughter" as the "killing of animals for food" and prohibited slaughter outside areas zoned for that specific purpose.[29] The ordinance, however, exempted the slaughter or

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or any other animal, intending to use such animal for food purposes.
2. This section is applicable to any group or individual that kills, slaughters or sacrifices animals for any type of ritual, regardless of whether or not the flesh or blood of the animal is to be consumed.
3. Nothing in this ordinance is to be interpreted as prohibiting any licensed establishment from slaughtering for food purposes any animals which are specifically raised for food purposes where such activity is properly zoned and/or permitted under state and local law and under rules promulgated by the Florida Department of Agriculture[.]

[26] City of Hialeah, Florida, Ordinance 87-52.

[27] *Id.*

[28] City of Hialeah, Fla., Ordinance 87-71, adopted September 22, 1987, provides:
WHEREAS, the City Council of the City of Hialeah, Florida, has determined that the sacrificing of animals within the city limits is contrary to the public health, safety, welfare and morals of the community;
Section 3. It shall be unlawful for any person, persons, corporations or associations to sacrifice any animal within the corporate limits of the City of Hialeah, Florida.
Section 4. All societies or associations for the prevention of cruelty to animals organized under the laws of the State of Florida, seeking to register with the City of Hialeah for purposes of investigating and assisting in the prosecution of violations and provisions [sic] of this Ordinance, shall apply to the City Council for authorization to so register and shall be registered with the Office of the Mayor of the City of Hialeah, Florida, following approval by the City Council at a public hearing in accordance with rules and regulations (i.e., criteria) established by the City Council by resolution, and shall thereafter, be empowered to assist in the prosection of any violation of this Ordinance.
Section 5. Any society or association for the prevention of cruelty to animals registered with the Mayor of the City of Hialeah, Florida, in accordance with the provisions of Section 4 hereinabove, may appoint agents for the purposes of investigating and assisting in the prosection of violations and provisions [sic] of this Ordinance, or any other laws of the City of Hialeah, Florida, for the purpose of protecting animals and preventing any act prohibited hereunder[.]

[29] 113 S.Ct. at 2238 (citing City of Hialeah, Fla. Ordinance No. 87-72).

processing for sale of "small numbers of hogs and/or cattle per week in accordance with an exemption provided by state law."[30]

Following the enactment of these ordinances, the Church filed this action pursuant to 42 United States Code, section 1983 in the United States District Court for the Southern District of Florida.[31] The Church alleged violations of its members' rights under the Free Exercise Clause of the First Amendment and sought a declaratory judgment in addition to injunctive and monetary relief.[32] The district court granted the defendants' motion for summary judgment, finding that: 1) the City had absolute immunity for its legislative acts, and 2) the ordinances and resolutions did not constitute an official policy of harassment.[33]

The district court acknowledged that the ordinances were "not religiously neutral,"[34] and that the City's concerns were prompted by

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[30] City of Hialeah, Florida, Ordinance No. 87-72, adopted September 22, 1987, provides:

> WHEREAS, the City Council of the City of Hialeah, Florida, has determined that the slaughtering of animals on the premises other than those properly zoned as a slaughter house, is contrary to the public health, safety and welfare of the citizens of Hialeah, Florida.
>
> NOW, THEREFORE, BE IT ORDAINED BY THE MAYOR AND CITY COUNCIL OF THE CITY OF HIALEAH, FLORIDA, that:
>
> Section 1. For the purpose of this Ordinance, the word slaughter shall mean: the killing of animals for food.
>
> Section 2. For the purpose of this Ordinance, the word animal shall mean: any living dumb creature.
>
> Section 3. It shall be unlawful for any person, persons, corporations or associations to slaughter any animal on any premises in the City of Hialeah, Florida, except those properly zoned as a slaughter house, and meeting all the health, safety and sanitation codes prescribed by the City for the operation of a slaughter house. . .
>
> Section 6. This Ordinance shall not apply to any person, groups or organization that slaughters, or processes for sale, small numbers of hogs and/ or cattle per week in accordance with an exemption provided by state law. . .

[31] Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 113 S.Ct. at 2227 (1993). 42 U.S.C. § 1983 reads as follows:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any state or territory, subject or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

[32] 113 S.Ct. at 2227.

[33] *Id.* (citing Church of Lukumi, 723 F.Supp. 1522 (S.D. Fla. 1988)).

[34] 723 F.Supp. at 1479 (S.D. Fla. 1989).

the Church's attempts at establishing an institution.[35] The court, however, concluded that the purpose of the ordinances was to end the ritual of animal sacrifice, for whatever reason, and not to exclude the Church from the City.[36] The court also held that the ordinances did not facially target religious conduct, and that regulating religious conduct did not violate the First Amendment "when [the conduct] is deemed inconsistent with public health and welfare."[37]

In balancing the governmental and religious interests at issue, the district court explained that the validity of the ordinances "depends upon the cost to the government of altering its activity to allow the religious practice to continue unimpeded versus the cost to the religious interest imposed by the government activity."[38] The court found four compelling governmental interests: (1) that animal sacrifices presented a substantial health risk, both to participants and the general public; (2) that the ritual caused emotional injury to children who witnessed the ritual; (3) that animals should be protected from cruel and unnecessary killing; and (4) that the slaughter or sacrifice of animals should be restricted to areas zoned for slaughterhouse use.[39]

On appeal, the Eleventh Circuit Court of Appeals affirmed the decision in a one-paragraph per curiam opinion.[40] The court opted not to rely on the district court's findings of compelling interest in promoting the welfare of children.[41] Instead, it simply stated that the ordinances were consistent with the Constitution.[42]

On certiorari, the United States Supreme Court addressed the issue of whether the four ordinances prohibiting the religious sacrifice of animals violated the First Amendment's Free Exercise Clause.[43] The Supreme Court held that the City ordinances were not neutral, that the ordinances were not of general applicability, and that the governmental interest asserted by the City did not justify its restraint on

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[35] *Id.* at 1483.

[36] *Id.* at 1479.

[37] *Id.* at 1484.

[38] 113 S.Ct. at 2225.

[39] 723 F.Supp. at 1486.

[40] 936 F.2d 586 (11th Cir. 1991).

[41] *Id.*

[42] *Id.*

[43] U.S. CONST. amend. I, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof[.]"

religious activity.[44] Accordingly, the Court found the ordinances violated the First Amendment's Free Exercise Clause.[45]

III. History

The Free Exercise Clause of the First Amendment of the United States Constitution bars Congress from enacting any law "prohibiting the free exercise" of religion.[46] Through the Fourteenth Amendment, the Free Exercise Clause applies to state governments as well.[47] The Clause simply forbids any law that prohibits any religious belief.[48] The complications in enforcing the Clause involve the restrictions on religious *conduct*.[49] The United States Supreme Court has focused on the intent of the governmental action that allegedly inhibits free religious exercise.[50] In those instances when the Court found that the government's intent was to inhibit the free exercise of one' religion, it invalidated the governmental action as violative of the Federal Constitution's First Amendment.[51] The Court, however, has been careful to not favor religions by condoning certain conduct, lest such favoritism violate the First Amendment's Establishment Clause.[52]

When a governmental action is not motivated by an intent to inhibit religious conduct, but nonetheless has that effect, the Court has applied a heightened scrutiny test.[53] In those cases, the government must demonstrate an important governmental goal and prove that allowing the religious exercise would substantially hinder its goal.[54] In employing this heightened scrutiny test, the Court considers: 1) the "neutrality" of the governmental action, 2) whether the regulation in question is

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[44] 113 S.Ct. at 2217.

[45] *Id.*

[46] U.S. Con. amend. I.

[47] Cantwell v. Connecticut, 310 U.S. 296, 303 (1940).

[48] Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 113 S.Ct. 2217, 2226 (1993).

[49] Bowen v. Roy, 476 U.S. 693 (1986); Sherbert v. Verner, 374 U.S. 398, (1963); Cantwell v. Connecticut, 310 U.S. 296 (1940)(stating that the Court protects *only* beliefs, and not conduct).

[50] Employment Division v. Smith, 494 U.S. 872, 878-79 (1990).

[51] 113 S.Ct. at 2222.

[52] 113 S.Ct. at 2226.

[53] Laurence H. Tribe, American Constitutional Law, 1187 (1988).

[54] McDaniel v. Paty, 98 S.Ct. 1322, 1329 (1978); *Cantwell*, 310 U.S. at 303-4.

"generally applicable", and (3) whether the regulation represents the "least restrictive means" of attaining the government's goals.[55]

A. Traditional Evaluation of Free Exercise Clause Violations

The Court initially established that it will not uphold governmental action that either severely burdens religious practices or constitutes preferential treatment of one religion over another.[56] In *Reynolds v. United States*, the Supreme Court instituted the "burdensome effect" test to review free exercise claims.[57] The plaintiff in *Reynolds* practiced the Mormon religion, and claimed that federal law prohibited the religious duty of polygamy, thereby violating his right to religious free exercise.[58]

In acknowledging the government's interest in opposing polygamy, the *Reynolds* Court noted that polygamy had always been considered an offense against society.[59] The Court analogized polygamy to human sacrifice, and found that both violated "social duties."[60] The Court also noted the possibility that polygamy would disturb the "social condition" of the people.[61] Furthermore, the Court stated that condoning polygamy would allow a professed doctrine of religious belief to take precedence over the law.[62] Although these reasons were not wholly grounded in case law, the Court based its holding on these social concerns.[63] The Court also concluded that the Free Exercise Clause does not protect religious conduct to the same extent that it protects religious beliefs.[64] Thus, the Court found that the government's interest in prohibiting polygamy outweighed the burden imposed on the plaintiff's free exercise of religion.[65]

Almost one hundred years later, in *Braunfeld v. Brown*,[66] the Court reviewed an individual's violation of a Pennsylvania criminal statute

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[55] 113 S.Ct. at 2231-32.
[56] Reynolds v. United States, 98 U.S. 145 (1878).
[57] *Id.* at 165.
[58] *Id.* at 160.
[59] *Id.* at 164.
[60] *Id.* at 163.
[61] *Id.* at 166.
[62] *Id.* at 167.
[63] *Id.* at 166.
[64] *Id.*
[65] *Id.* at 167.
[66] 366 U.S. 599 (1961).

that prohibited retail sales on Sundays.[67] Plaintiff argued that, because his religion prevented him from working on Saturdays, he should instead be allowed to work on Sundays.[68] The Court considered the issues of whether the statute forced the plaintiff to sacrifice the observance of his religion or, alternatively, to become economically disadvantaged.[69] The Court noted that the statute burdened only Orthodox Jews, who found it necessary to work on Sunday.[70]

Recognizing the "burden" concept in conjunction with the government interest, the Court ruled in favor of the State.[71] The Court raised its level of judicial scrutiny and imposed a higher burden of the "most critical scrutiny."[72] However, the law would be found valid if the State could not achieve its purpose in a way that would not impose such a burden.[73] The purpose sought by the government was to assure a uniform day of rest and did not relate to economic achievement or compensation.[74] The Court found that the burden imposed on Sabbatarians was not sufficient to warrant striking down the law.[75] Not every interest claimed by government is sufficiently compelling to justify a restraint on religious conduct.

In *Niemotko v. Maryland*,[76] the appellants were Jehovah's Witnesses who scheduled bible talks in a public park in the city of Havre de Grace.[77] Although the city had no ordinances regulating the park's use, organizations customarily obtained permits to use the park for meetings.[78] Appellants applied for a permit with the park commissioner for their bible talks and were refused because of a conflict in scheduling.[79] After a second denial, appellants proceeded to hold their meeting and were subsequently arrested for disturbing the peace.[80] The city's mayor testified that he believed the permits were denied because

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[67] *Id.* at 600.
[68] *Id.* at 601.
[69] *Id.* at 602.
[70] *Id.* at 605.
[71] *Id.* at 609.
[72] *Id.* at 606.
[73] *Id.* at 607.
[74] *Id.* at 608.
[75] *Id.* at 605.
[76] 340 U.S. 268 (1951).
[77] 340 U.S. at 274.
[78] *Id.* at 269.
[79] *Id.*
[80] *Id.* at 270.

of the topics discussed at those meetings.[81] The Court examined the prohibition of the appellants' religious practices on equal protection grounds, and also considered the arbitrary licensing procedure.[82] In holding that the city's actions violated the appellants' free exercise rights, the Court stated that this case exemplified the possibility of governmental abuse and unwarranted discrimination.[83]

In a similar case, *Fowler v. State of Rhode Island*,[84] the appellant, a Jehovah's Witness minister, held a religious meeting in a public park.[85] He was found guilty of violating a city ordinance that prohibited citizens from conducting any political or religious meetings in public parks.[86] The lower courts upheld the ordinance while conceding that the defendant's meeting was religious.[87] The state's Assistant Attorney General further conceded that the ordinance did not specifically prohibit holding church services in the park.[88] The Supreme Court found this fact sufficient to show that the Jehovah's Witness meeting was treated differently than services by other religious sects.[89]

The Court stated that, although appellant's sect practiced different rituals than other religions, the courts could not decide that a particular religious practice for a certain group was not protected by the First Amendment.[90] The fiction of calling one minister's speech a sermon and another's an address, thereby subjecting it to regulation, was an indirect way of preferring one religion over the other.[91] The Court held that the ordinance was discrimination barred by the First and Fourteenth Amendments.[92]

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[81] *Id.* at 274.
[82] *Id.* at 271.
[83] *Id.* at 272.
[84] 345 U.S. 67 (1953).
[85] 345 U.S. at 67-68.
[86] *Id.* at 67, citing Section 11 of the City of Pawtucket, RI ordinance:
No person shall address any political or religious meeting in any public park; but this section shall not be construed to prohibit any political or religious club or society from visiting any park in a body, provided that no address shall be made under the auspices of such club or society in such park.
[87] 345 U.S. at 69.
[88] *Id.*
[89] *Id.*
[90] *Id.* at 70.
[91] *Id.*
[92] *Id.* at 69.

B. Modern Examination of Free Exercise Violations

In recent years, the Court has assessed free exercise claims on the basis of the "compelling state interest" and "least restrictive means" tests.[93] Thus, to justify a restraint on religion, the government must both articulate a compelling interest and show that the regulation in question is the least restrictive means available to the government of furthering that interest.[94]

1. Feasible Exemption Doctrine

When state regulations have the unintended effect of burdening religious beliefs, courts have upheld such laws only when they are the least restrictive means of accomplishing a compelling state interest.[95] Where the state's objectives could be adequately served by granting an exemption to the practitioners, however, it must be granted if at all feasible.[96]

An example of the Court's granting of feasible exemptions are the cases which have accommodated for the Sabbath. In *Sherbert v. Verner*,[97] the Court created the feasibility doctrine.[98] In this case, the plaintiff's religious practice prohibited her from working on Saturdays.[99] The plaintiff's employer required her to work on Saturdays; when she refused, he fired her.[100] The government then denied her unemployment compensation because she did not accept other jobs also requiring Saturday work.[101] Plaintiff challenged the denial of her unemployment compensation as an unconstitutional violation of her free exercise rights.[102]

In holding that plaintiff's free exercise rights were violated, the Court established the "compelling state interest" test for review, also referred to as "strict scrutiny."[103] The Court reasoned that the government's

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93 *Id.*

94 *Cantwell*, 310 U.S. at 303-304.

95 *Sherbert*, 374 U.S. at 403.

96 *Id.* at 408-9.

97 374 U.S. 398 (1963).

98 *Id.*

99 *Id.* at 399.

100 *Id.*

101 *Id.* at 400-401.

102 *Id.* at 401.

103 The state must show a compelling governmental interest and use the least drastic alternatives. *Id.* at 403.

action lacked a compelling state interest, and possibly could have been satisfied by a policy that imposed less of a burden on the individual.[104] The Court held that the government had failed to show that an exemption for Sabbatarians would prevent it from disbursing unemployment payments to those who were involuntarily unemployed.[105] The Court also reasoned that in addition to forcing the plaintiff to choose between benefits and religion, the denial of compensation was discriminatory because Sunday worshippers were not burdened equally.[106]

Similarly, in *Hobbie v. Unemployment*,[107] the plaintiff refused to work on her Sabbath and was fired.[108] She then sought unemployment compensation, and the Unemployment Compensation Board denied her claim because of "misconduct connected with [her] work."[109] The Court held that the Board's refusal to award compensation violated the Free Exercise Clause of the First Amendment.[110]

In assessing the *Hobbie* scenario, the Court found no meaningful distinctions among the situations in *Sherbert*, *Thomas*, and *Hobbie*.[111] The Court followed *Sherbert* and *Thomas* in holding that such infringements must be subjected to strict scrutiny and can be justified only by proof of a compelling state interest.[112] The argument by the Appeals Commission that Hobbie was the "agent of change," and was therefore responsible for the consequences, did not impress the Court.[113] The Court noted that the Appeals Commission wanted the Court to single out religious converts and to apply less favorable treatment to them than to those whose adherence to their faith preceded employment.[114] The Court declined to do this and stated that the timing of the plaintiff's

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[104] *Id.* at 407.

[105] *Id.* at 407-409.

[106] *Id.*

[107] 480 U.S. 136 (1987).

[108] *Id.* at 137.

[109] *Id.* at 136.

[110] *Id.* at 146. The Court cited Sherbert v. Verner, 374 U.S. 296 (1940), when it held that the State's disqualification of Hobbie required her to choose between her religion or her work. In *Sherbert*, the Court concluded that the state imposed a burden on plaintiff's free exercise rights that were not justified by a compelling state interest. The Court also cited Thomas v. Review Board of Indiana Employment Security Division, 450 U.S. 707 (1981) in which the Court also held that a state's denial of unemployment benefits unlawfully burdened an employee's right to free exercise of religion.

[111] 480 U.S. at 141.

[112] *Id.*

[113] *Id.* at 143.

[114] *Id.* at 144.

conversion was irrelevant to the fact that her free exercise rights were burdened.[115]

Wisconsin v. Yoder[116] involved the burden placed on an Amish parent who believed, in accord with his religion, that high school would endanger his daughter.[117] He thus refused to send her to the ninth grade despite the state's requirement that all students attend school until the age of sixteen.[118] After balancing the parties' interests, the Court found that the state did not have sufficient interests to require schooling.[119] The Court also stated that "belief and action cannot be neatly confined in logic-tight compartments."[120]

Not every restraint on religious conduct will violate the Constitution, however. In *United States v. Lee*,[121] the Court found that a prohibition on religious conduct could survive strict scrutiny.[122] Lee was an Amish farmer and carpenter who believed in a religiously based obligation to provide for his fellow members similar to the assistance contemplated by the Social Security system.[123] During certain years when Lee employed other Amish to work on his farm, he failed to withhold Social Security taxes because he believed payment would violate his faith.[124] The Court held that the exemption provided by 26 U.S.C. § 402[125] was inapplicable to Lee because it was only available to self-employed individuals and not to employers or employees.[126] The Court first found that payment of Social Security taxes and the receipt of benefits violated the Amish beliefs and that compulsory participation in the system burdened their free exercise rights.[127] But the Court noted that not all burdens on religion are unconstitutional.[128] The Court reasoned that the Social Security system was a nationwide program and that the

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[115] *Id.*
[116] 406 U.S. 205 (1972), discussed *infra* at 15.
[117] *Id.* at 209.
[118] 406 U.S. at 207.
[119] *Id.* at 215.
[120] *Id.* at 220.
[121] 455 U.S. 252 (1982).
[122] 455 U.S. at 258.
[123] *Id.* at 252.
[124] *Id.*
[125] 26 U.S.C. § 402(g), which exempts Social Security taxes under the First Amendment, on religious grounds, to self-employed Amish.
[126] 455 U.S. at 252.
[127] *Id.* at 256-57.
[128] *Id.* at 257.

governmental interest in ensuring the fiscal vitality of the system was high.[129]

The Court then inquired as to whether accommodating the Amish belief would unduly interfere with the fulfillment of the governmental interest.[130] The Court found that it would be difficult to adjust the system by granting exceptions for religious beliefs.[131] Despite the sensitivity of the courts and Congress to the Free Exercise Clause, the Court noted that citizens cannot expect absolute protection from all burdens that interfere with their right to practice their religious beliefs.[132] Articulating a new test, the Court inquired whether accommodating the Amish belief would *unduly interfere* with fulfillment of the government's interest in the "fiscal vitality of the Social Security system."[133] Answering the question in the affirmative, the Court concluded that the governmental interest was strong and that the government was not compelled by the Constitution to grant a religious exemption.[134]

2. *Conditions versus Compulsion*

Some governmental actions "compel" individuals to violate their religious beliefs, while others "condition" benefits upon their willingness to violate their beliefs.[135] This distinction is significant because of the different constitutional standard accorded to the regulation in each instance. Recently, the Court determined that regulations that compel individuals to violate their religious beliefs should remain subject to the "strict scrutiny" test, while those that condition the receipt of benefits on violating religious beliefs should only be held to a rational relation review.[136] *Wisconsin v. Yoder* provided an example of a compulsory action.[137] Respondents Miller and Yoder were members of the Old Amish Order religion.[138] Respondents refused to send their children

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[129] *Id.* at 258.
[130] *Id.* at 259.
[131] *Id.* at 259-60.
[132] *Id.* at 261.
[133] *Id.* at 258.
[134] *Id.* at 258-59.
[135] *See, e.g.*, Wisconsin v. Yoder, 406 U.S. 205 (1972); Bowen v. Roy, 476 U.S. 693 (1986).
[136] *Bowen* at 706.
[137] *Yoder* at 205.
[138] *Id.* at 207.

to school after they completed the eighth grade, though they conceded that they were subject to the Wisconsin statute.[139] After the school administrator complained of respondents' violations, they were charged, tried, and convicted of violating the statute.[140]

The respondents defended their actions on the ground that the mandatory attendance law violated their rights under the First and Fourteenth Amendments.[141] Their children's compulsory attendance of high school was contrary to their Amish religion and way of life.[142] The argued that high school and higher education taught values that differed drastically from Amish values and the way of life of the Amish.[143] The state stipulated that respondents' religious beliefs were sincere.[144]

The respondents sent their children to elementary school, explaining that an elementary education was necessary to teach their children the basic skills they needed to read the Bible, be good farmers and citizens, and be able to associate with non-Amish people.[145] The Court held that the protection of respondents' free exercise rights required the State to show an interest important enough to override the respondents' interests.[146] The State argued that it maintained a high responsibility for educating its citizens and thus had the power to impose reasonable regulations on the control and duration of basic education.[147]

The Court distinguished a religious faith from a way of life.[148] A way of life may not justify exemptions from state regulations if it is based purely on secular considerations.[149] The Court found that the Amish way of life was not merely a matter of personal preference, but was deeply rooted in their historical and Biblical background.[150]

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[139] *Id.* Respondents' children were ages fourteen and fifteen. At issue was Wisconsin's compulsory school attendance law which required parents to send their children to public or private school until the children reach the age of sixteen. *Id.* (citing Wis. Stat. §118.15).

[140] *Yoder* at 208.

[141] *Id.* at 208-9.

[142] *Id.* at 209.

[143] *Id.* at 209-10.

[144] *Id.* at 209.

[145] *Id.* at 212.

[146] *Id.* at 214.

[147] *Id.* at 213.

[148] *Id.* at 214.

[149] *Id.* at 215.

[150] *Id.* at 216.

The Court next examined the impact that the law would have on the respondents. The law's impact on the Amish would not only be severe, but inescapable, because the statute affirmatively compelled Amish children to perform acts in conflict with the fundamental tenets of their religion.[151] The Court held that the First and Fourteenth Amendments barred the state from controlling respondents' conduct by compelling them to send their children to high school until age sixteen.[152]

Conditioning the receipt of government benefits upon the willingness of an individual to violate her religious beliefs was examined in *Bowen v. Roy*.[153] Plaintiff, of Native American ancestry, believed that giving his daughter a Social Security number[154] would rob her spirit.[155] The Court noted the distinction between the freedom of individual belief, which is absolute, and the freedom of individual conduct, which is not.[156] The Court noted that it had never interpreted the First Amendment to require the government to allow the individual to further his or her spiritual development.[157] Furthermore, the Court said that the government cannot be required to conduct its own internal affairs in accordance with the religious beliefs of particular citizens.[158]

The Court added that although the Free Exercise Clause affords an individual protection from certain forms of government compulsion, it does not dictate that an individual's religious beliefs change the government's internal procedures.[159]

The Court upheld the statute at issue, which required recipients of Food Stamps to present a Social Security number, after finding it was wholly neutral in religious terms and uniformly applicable.[160] The Court concluded that a government regulation that indirectly mandates that an individual choose between government benefits and religious beliefs is completely different from government action that criminalizes religiously inspired activity.[161]

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[151] *Id.* at 218.

[152] *Id.* at 234.

[153] 476 U.S. 693 (1986).

[154] *Id.* at 695-96. The appellees were required to provide a Social Security number in order to participate in the Food Stamp Program. *Id.* at 696.

[155] 476 U.S. at 696.

[156] *Id.* at 699.

[157] *Id.*

[158] *Id.*

[159] *Id.* at 700.

[160] *Id.* at 704.

[161] *Id.* at 706.

The Court found that the strict scrutiny test was inappropriate for such indirect governmental interference with religion.[162] The government should not be put to the strict scrutiny test but, absent proof of an intent to discriminate against particular religious beliefs or religion in general, it could meet its burden by showing that the challenged action was a reasonable means of promoting a legitimate public interest.[163] The Court denied the plaintiff's request for an exemption, holding that the governmental interest was sufficient and that the statute served a legitimate public interest.[164] The Court also stated that although the government may grant a religious exemption in such situations, it is not required to do so under the Free Exercise Clause.[165]

More recently, the Court has displayed even greater tolerance for government created burdens on religious conduct. In *Lyng v. Northwest Indian Cemetery Protective Association*,[166] for example, the government interest was relatively weak compared to the individual's interest in religious practice.[167] Certain Native Americans opposed the Forest Service's plan to construct a road through land that they considered sacred.[168] The Court, however, found that the burden on the religious practices was not "heavy enough to violate the Free Exercise Clause."[169]

The Court conceded that damages to the religion would be extreme,[170] but concluded that the "incidental effects of government programs, which may make it more difficult to practice certain religious beliefs, [do not] require . . . a compelling justification for otherwise lawful actions." Any other holding, the Court stated, would unduly burden the government.[171] The Court focused on the form and not the effect of the governmental burden as it thoroughly discussed the various measures that the government undertook to lessen the impact on the religious territory.[172] The Court did not, however, discuss the resulting detrimental effect on the religion itself.[173]

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[162] *Id.* at 707.
[163] *Id.* at 707-8.
[164] *Id.* at 709.
[165] *Id.* at 712.
[166] 485 U.S. 439 (1988).
[167] *Id.*
[168] *Id.* at 442.
[169] *Id.* at 447.
[170] *Id.* at 451.
[171] *Id.* at 452.
[172] *Id.* at 454.
[173] *Id.*

The *Lyng* Court distinguished governmental coercion from governmental burdens.[174] In essence, the Court held that the Free Exercise Clause was not violated unless the individual was "coerced" to violate his religious beliefs, regardless of the burden placed on the individual.[175]

3. Neutrality

Various cases before *Lukumi*, involving the religious free exercise and Establishment Clauses, focused on the question of whether the governmental action was neutral, as opposed to discriminatory.[176] Certain laws which burdened genuinely-held religious beliefs have nevertheless survived the strict scrutiny test based on the neutral and objectively mandatory nature of the regulation.[177] In *Walz v. Tax Commission of the City of New York*,[178] the Court found that the governmental interest asserted did not run afoul of the Establishment Clause.[179] Appellant, who owned real estate in New York, sought an injunction to prevent the Tax Commission from granting tax exemptions to religious organizations.[180] The New York Constitution authorized such an exemption from state taxes.[181] Appellant contended that the tax exemption indirectly required him to make a contribution to religious bodies, and thus violated the provision prohibiting the establishment of religion under the First Amendment of the United States Constitution.[182] Justice Douglas also commented that the Court exhibited a

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[174] *Id.* at 449.

[175] *Id.*

[176] *See, e.g.*, Walz v. Tax Commission, 397 U.S. 664 (1970); Employment Division v. Smith, 494 U.S. 872 (1990), United States v. Lee, 455 U.S. 252 (1982).

[177] *See e.g.*, United States v. Lee, 455 U.S. 252 (1982).

[178] 397 U.S. 664 (1970).

[179] 397 U.S. at 674.

[180] *Id.* at 665.

[181] N.Y. Const. art. XVI, §1 provides:

> Real property owned by incorporation or association organized exclusively for the moral or mental improvement of men and women, or for religious, bible, tract, charitable, benevolent, missionary, hospital, infirmary, educational, public playground, scientific, literary, bar association, medical society, library, patriotic, historical or cemetery purposes . . . and used exclusively for carrying out thereupon one or more such purposes . . . shall be exempt from taxation as provided in this section.

[182] The Court cited Zorach v. Clauson, 343 U.S. at 312 (1952), in which Justice Douglas noted that the First Amendment does not specify that there shall be a separation of church and state in all instances. *Walz*, 397 U.S. at 667.

governmental attitude that did not exhibit partiality to any group but allowed "each [to] flourish accordingly to the zeal of its adherence."[183]

The *Walz* Court extended its analysis when it stated that Constitutional neutrality in this area cannot be absolutely rigid because it would defeat the Establishment Clause's purpose to ensure that no religion be sponsored or favored, commanded nor inhibited.[184] The Court held that it would not tolerate governmentally established religion or governmental interference with religion.[185] The Court, however, granted room for "benevolent neutrality" without sponsorship and interference.[186]

The Court determined that it was not the legislative purpose of the church tax exemption to establish, sponsor, or support religion.[187] It also concluded that the end result was not excessive government entanglement with religion.[188] The Court differentiated between the government granting a money subsidy as compared to a tax exemption.[189] The Court held that the tax exemption was not sponsorship because the government did not transfer its revenue to churches, but simply abstained from demanding that the church support the State.[190] The Court concluded that the government's passive acquiescence toward religion was not unconstitutional.[191] Finally, the Court referred to the decisional history in this area which indicated that federal or state grants of tax exemptions to churches were not violative of the First Amendment's religious clauses.[192]

4. *General Applicability*

Another factor that the Court has considered in religion cases is "general applicability."[193] The rule suggests a reversal in past free exercise theory and automatically validates a law that is found to be generally applicable.[194]

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[183] *Id.* (citing Zorach, 343 U.S. at 313).
[184] *Walz*, 397 U.S. at 669.
[185] *Id.*
[186] *Id.*
[187] *Id.* at 672.
[188] *Id.* at 674.
[189] *Id.* at 675.
[190] *Id.*
[191] *Id.*
[192] *Id.* at 680.
[193] Employment Division v. Smith, 494 U.S. 872 (1990).
[194] *Id.*

In *Hernandez v. Commissioner of Internal Revenue*,[195] the Court addressed the narrow issue of whether taxpayers may deduct, as charitable contributions, payments made to the Church of Scientology for services known as "auditing."[196] This case involved section 170 of the Internal Revenue Code, which allows a tax deduction for charitable contributions.[197] The Court held that the payments at issue were not deductible.[198]

The petitioners claimed that denying their tax deduction placed a heavy burden on their central religious practice.[199] The Court held the burden to be no different from that imposed by any other public tax or fee.[200] The Court noted that even a substantial burden is justified by a "broad public interest in maintaining a sound tax system" free of "myriad exceptions flowing from a wide variety of religious beliefs."[201] In addition, the petitioner's claim for exemption was not stated in its religious doctrine.[202] Thus, the Court held that the petitioner's free exercise rights were not violated because the petitioner was not excepted from charitable tax exemptions.[203]

The most recent case involving the free exercise of religion is *Employment Division v. Smith*,[204] which arose after the respondents challenged the denial of their unemployment compensation after being fired from their jobs.[205] They were terminated for ingesting peyote for sacramental purposes related to the Native American Church.[206] Respondents violated an Oregon law that prohibits the ingestion of a "controlled substance" not prescribed by a physician.[207] The state's Employment Division denied the respondents' claims for unemployment

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[195] 490 U.S. 680 (1989).

[196] *Id.* at 684.

[197] *Id.* at 683 (citing 26 U.S.C. § 170, which defines a "contribution or gift" to include entities which are organized or operated exclusively for religious purposes.

[198] 490 U.S. at 700.

[199] *Id.* at 698.

[200] *Id.* at 699.

[201] *Id.* at 699-700 (citing United States v. Lee, 455 U.S. 260 (1982)).

[202] *Id.* at 700.

[203] *Id.*

[204] 494 U.S. 872 (1990).

[205] 494 U.S. at 874.

[206] *Id.*

[207] OR. REV. STAT. § 475.992(4) (1987). Prohibits the "knowing or intentional possession of a 'controlled substance' unless the substance has been prescribed by a medical practitioner."

compensation, finding that the respondents were discharged for work-related misconduct.[208]

The Court acknowledged that the Free Exercise Clause grants individuals the right to believe and profess whatever religious doctrine they desire.[209] The free exercise of religion often involves belief and profession as well as the performance of or abstention from physical acts.[210] But the Court noted that it had never held that an individual's beliefs would excuse him from compliance with valid law, which the state has been free to regulate.[211]

The respondents urged the Court to hold that when prohibited conduct is accompanied by religious convictions, the conduct should be free from governmental regulations.[212] The Court rejected the respondents' argument and stated that Oregon's drug law was not an attempt to regulate religious beliefs.[213]

The Court then declined to apply the *Sherbert* test[214] to require exemptions from a generally applicable criminal law.[215] The Court held that Oregon's interest need *not* be balanced against the individual's religious beliefs, as long as the ban on the drug was generally applicable and was not motivated by a desire to affect religion.[216] If those two requirements were met, the law was fully enforceable, regardless of the burden placed on plaintiffs.[217] The rule in *Smith* required that a law burdening religious conduct must be (1) neutral, and (2) generally applicable.[218] If the government action fails either criterion, then it must pass strict scrutiny in order to be constitutional.[219]

The opinion, however, may have little impact on future religious cases due to the newly passed Religious Freedom Restoration Act of 1993.[220] The Religious Freedom Restoration Act was enacted specifically

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[208] 494 U.S. at 874.
[209] *Id.* at 877.
[210] *Id.*
[211] *Id.* at 878-79.
[212] *Id.* at 882.
[213] *Id.*
[214] 374 U.S. at 407 (involving a balancing of interests between the government and the individual).
[215] 494 U.S. at 884.
[216] *Id.* at 885.
[217] *Id.* at 888.
[218] *Id.* at 885.
[219] *Id.*
[220] Religious Freedom Restoration Act of 1993, Pub. L. No. 103-141, 107 Stat. 1488 (1993).

to respond to and counter the holding in *Smith*.[221] The Act explains that *Smith* eliminated the requirement that the government justify the burdens placed on religious exercise even where a law is neutral toward religion.[222] The Act also states that "neutral" laws can be as burdensome on religious exercise as laws that are intended to interfere with religious exercise.[223] Finally, the Act recites the compelling interest test as used in prior federal court rulings as a "workable test for striking sensible a balance" between religious and governmental interests.[224]

The Act states that its purpose is to restore the compelling interest test as set forth in *Sherbert v. Verner* and *Wisconsin v. Yoder*, and to guarantee that the test is applied whenever free exercise is substantially burdened.[225] Finally, the Act allows the government to substantially burden a person's exercise of religion only if it demonstrates a compelling governmental interest and that it is the least restrictive means of furthering that interest.[226] The effect of this Act on religious exercise decisions is to restore the stricter standard placed on the government, prior to *Smith*.[227] The Act was proposed and signed into law as a response to numerous decisions, based on the *Smith* ruling, while allowing for government infringement on religious practices.[228] Thus, the test placed on government interference with religious exercise has once again risen to the level of strict scrutiny.[229]

Currently, the Court will find that a law unconstitutionally infringes on one's right to free religious exercise if: (1) it is not neutral and discriminates against a religious practice on its face;[230] (2) it targets religious conduct for distinctive treatment through the guise of facially neutral construction;[231] (3) it is not justified by compelling governmental interests and is not narrowly tailored to it stated purpose;[232] and (4) it

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[221] *Id.* at § 2(a)(4).

[222] *Id.*

[223] *Id.*

[224] *Id.*

[225] §2(b)(1) Religious Freedom Restoration Act.

[226] *Id.*

[227] Peter Steinfels, New Law Protects Religious Practices, N.Y. TIMES, Nov. 17, 1993, at A13.

[228] *Id.*

[229] *Id.*

[230] *Church of Lukumi* at 2227.

[231] *Id.*

[232] *Id.*

is not of general applicability and tends to be underinclusive or overinclusive.[233] If this is the type of regulation at issue, the Court will subject the law to the strictest scrutiny.[234]

C. *Hawai'i's Treatment of the Free Exercise Clause*

The Hawai'i courts have also examined the religion clauses.[235] A brief overview of Hawai'i law indicates that the Hawai'i courts have applied both the Hawai'i Constitution[236] and the United States Constitution as interpreted by the United States Supreme Court, in its free exercise decisions.

Medeiros v. Kiyosaki[237] reviewed the Hawai'i public school system's showing of films involving family life and sex education.[238] Plaintiffs alleged that showing the films to their children violated their right to educate their children in sexual matters according to their particular religious beliefs.[239] The Hawaii Supreme Court heard testimony from clergymen from various faiths and found that there was no direct or substantial burden on plaintiffs' free exercise of religion.[240] The court found it significant that plaintiffs had the option of previewing the films and withholding their children from the film program.[241] The court held that, since it found no compulsion or coercion related to the film program, the school's actions were not a violation of the First Amendment's Free Exercise of Religion Clause.[242]

In *Hawai'i v. Blake*, the Intermediate Court of Appeals upheld the plaintiff's criminal conviction for possessing marijuana despite his religious freedom argument.[243] Plaintiff contended that the Hawai'i

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[233] *Id.* at 2233.

[234] *Id.*

[235] *See* Medeiros v. Kiyosaki, 52 Haw. 436, 478 P.2d 341 (1979); Hawaii v. Blake, 5 Haw. App. 411, 695 P.2d 336 (1985); Koolau Baptist Church v. Department of Labor and Indus. Relations, 68 Haw. 410, 718 P.2d 267 (1986); Dedman v. Board of Land and Natural Resources, 69 Haw. 255, 740 P.2d 28 (1987).

[236] "No law shall be enacted respecting an establishment of religion, or prohibiting the free exercise thereof." HAWAI'I CONST. art. I, § 4.

[237] Medeiros v. Kiyosaki, 52 Haw. 436, 478 P.2d 341 (1970).

[238] *Id.* at 436.

[239] *Id.* at 441.

[240] *Id.* at 442.

[241] *Id.* at 440.

[242] *Id.* at 444.

[243] 5 Haw.App. 411, 695 P.2d 336 (1985).

statute prohibiting the possession of marijuana[244] unconstitutionally deprived him of his right to the free exercise of his religion, Hindu Tantrism.[245] The court assumed that the plaintiff's religious beliefs were sincere and proceeded to review the constitutionality of his conviction.[246] The court reviewed the lower court's finding that the use of marijuana was only an optional practice in Hindu Tantrism,[247] and held that the plaintiff's conviction did not violate his right to free exercise of religion.[248]

In *Koolau Baptist Church v. Department of Labor and Industrial Relations*,[249] the Hawai'i Supreme Court reviewed the state's imposition of the Federal Unemployment Tax on a church-affiliated school.[250] The Hawai'i Employment Security law provides protection against wage loss during temporary unemployment for Hawai'i workers.[251] All employers in the state must contribute money into a trust fund used for this type of compensation, unless expressly exempted under the law.[252] When the Koolau Baptist Church was served with a Notice of Contribution Assessment for delinquent contribution, it argued that it was exempt from coverage.[253] The Church maintained that the contribution requirement impinged upon its free exercise of religion.[254] The court found that the Church did not refer to any particular religious tenet when it claimed the exemption.[255] The court also noted that the burdens imposed on the Church were the same as those imposed on all non-profit organizations that operated schools.[256] Thus, the court found that because there was no conflict that mandated the use of a balancing test, the Church's right to free exercise was not violated.[257]

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[244] Promoting detrimental drug in the third degree. (1) A person commits the offense of promoting a detrimental drug in the third degree if he knowingly possess any marijuana or any Schedule V substance in any amount. (2) Promoting a detrimental drug in the third degree is a petty misdemeanor. HAW. REV. STAT. § 712-1249 (1976).

[245] 5 Haw.App. at 412.

[246] *Id.* at 415.

[247] Record at 309.

[248] 5 Haw.App. at 418.

[249] 68 Haw. 410, 718 P.2d 267 (1986).

[250] 68 Haw. at 412.

[251] HAW. REV. STAT. § 383-2(a).

[252] 68 Haw. at 412.

[253] *Id.* at 413.

[254] *Id.* at 417.

[255] *Id.*

[256] *Id.* at 418.

[257] *Id.* at 419.

In *Dedman v. Board of Land and Natural Resources*,[258] Hawai'i's high court analyzed the more recent religious issues associated with developments on lands considered sacred by Native Hawaiians.[259] The case involved a decision by the Board of Land and Natural Resources to allow the Estate of James Campbell and True/Mid-Pacific Geothermal Venture (Campbell) to explore and develop geothermal energy in the Kilauea Middle East Rift Zone.[260] Appellants argued that the geothermal project would infringe on their religious practices as "Pele practitioners," worshippers of the volcano goddess, Pele.[261] The practitioners considered areas in the island chain where Pele has attempted to establish herself to be sacred.[262] Appellants contended that the geothermal development would infringe on their rights to exercise their religion freely as guaranteed by the First Amendment of the United States Constitution, and by Article I, section 4 of the Hawai'i Constitution.[263]

The Hawai'i Supreme Court considered the following issues: whether the claimants' activity with which the state interfered was motivated by and rooted in a legitimate and sincerely held religious belief; whether appellants' free exercise of religion had been burdened by the regulation; the extent of the impact on the religious practices; and whether the state had a compelling interest in the regulation.[264] Neither party questioned the legitimacy or sincerity of appellants' religious claims.[265]

The court next considered the burdens imposed on appellants' religious practice.[266] Appellants argued that the energy plants would desecrate Pele's body by robbing her of her vital heat.[267] They also argued that geothermal development would impede the training of young Hawaiians.[268] The court found that the plant development did not directly burden the religious beliefs nor did it compel the appellants to refrain from religious conduct.[269]

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[258] 69 Haw. 255, 740 P.2d 28 (1987).

[259] 69 Haw. at 259.

[260] *Id.* at 258-59.

[261] *Id.* at 259.

[262] *Id.* at 259.

[263] *Id.* at 260. HAW. CONST. art. I, § 4 states: "No law shall be enacted respecting an establishment of religion, or prohibiting the free exercise thereof."

[264] 69 Haw. at 260.

[265] *Id.* at 260.

[266] *Id.*

[267] *Id.* at 261.

[268] *Id.*

[269] *Id.*

The court found that because there was no evidence that Kilauea Volcano's eruptive nature has been diminished or negatively affected, the development posed no objective danger to appellants' free exercise of religion.[270] The court explained that the First Amendment gives no one the right to insist that others must conform their conduct to comply with one group's religious needs.[271]

Finally, in *Gaudiya v. Vaishnava Society*,[272] the Ninth Circuit Court of Appeals considered the issue of whether an ordinance that regulated the sale of merchandise on public sidewalks by nonprofit organizations was constitutional.[273] The appellees were five nonprofit organizations that participated in a variety of charitable, religious, and political activities.[274] They raised funds and disseminated their teachings by selling various paraphernalia that bore messages.[275] The organizations challenged a San Francisco ordinance that prohibited nonprofit organizations from selling items that have no intrinsic value other than to communicate a message.[276]

The argument asserted by appellees was that the ordinance vested unbridled discretion in a governmental official over whether to deny or permit expressive activity.[277] The narrow question answered by the court was whether the sale of merchandise that carries a political, religious, philosophical or ideological message is afforded protection by the First Amendment.[278] The court's analysis in the case focused on the issue of censorship and expression, rather than religious free exercise.[279] The court ultimately held that the ordinance was unconstitutional because the government's restrictions were not content-neutral, narrowly tailored to serve a significant government interest, and did

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[270] *Id.* at 262.

[271] *Id.*

[272] 952 F.2d 1059 (9th Cir. 1991). Although this is not specifically a Hawaii case, it was decided by the Federal Court of Appeals for the Ninth Circuit under which Hawai'i is included. The decision is included in this section because of its applicability to similar issues in Hawai'i.

[273] *Id.* at 1060.

[274] *Id.*

[275] *Id.*

[276] *Id.* at 1061. The ordinance provides that permits are to be granted, denied and revoked at the discretion of the police department. SAN FRANCISCO, CA. POLICE CODE §§ 869-869.18.

[277] 952 F. 2d at 1062.

[278] *Id.*

[279] *Id.*

not retain ample alternative channels of communication.[280] This decision discussed the treatment of religious conduct, as opposed to beliefs, but limited itself to the First Amendment's free speech analysis rather than focusing on religious application.[281]

IV. Analysis

The Court in *Lukumi Babalu Aye* based its analysis on *Employment Division v. Smith*[282] when it held that the ordinances violated the Free Exercise Clause.[283] In light of the Court's recent trend of allowing the government to impose religious burdens on individuals to achieve secular goals,[284] it is somewhat surprising that the same Court allowed Santerians to perform ritual animal sacrifices despite the asserted governmental interests. The Court, however, focused on the weak and poorly proposed governmental interests asserted by the City of Hialeah and could not justify an exemption to the Free Exercise clause.[285] This next section examines Justice Kennedy's majority opinion, and the concurrences written by Justice Scalia, Justice Souter, and Justice Blackmun.

A. *Summary of Opinion*

Justice Kennedy delivered the opinion of the Court and concluded that the laws in question violated the Church's constitutional rights under the First Amendment's Free Exercise Clause.[286] The Court stated its rule that "at a minimum, the protection of the Free Exercise Clause pertains if the law at issue discriminates against some or all religious beliefs or regulates or prohibits conduct because it is undertaken for religious reasons."[287] The Court then began its inquiry regarding the constitutionality of the ordinances in question.[288]

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[280] *Id.* at 1065.
[281] *Id.* at 1062-63.
[282] 494 U.S. 872, 885 (1990).
[283] 113 S.Ct. at 2234.
[284] *See, e.g.*, Fowler v. Rhode Island, 345 U.S. 67 (1953); Cantwell v. Connecticut, 310 U.S. 296 (1940); Sherbert v. Verner, 374 U.S. 398 (1963); Wisconsin v. Yoder, 406 U.S. 205 (1972); Thomas v. Review Board, 450 U.S. 707 (1981); United States v. Lee, 455 U.S. 252 (1982); Hobbie v. Unemployment, 480 U.S. 136 (1987).
[285] 113 S.Ct. at 2220.
[286] *Id.* at 2220.
[287] *Id.* at 2226.
[288] *Id.* at 2227.

The two questions that the Court examined first were (1) whether the ordinances were neutral, and (2) whether the ordinances were generally applicable.[289] If the Court found that the ordinances satisfied both of the above requirements, then it would not need to examine whether the asserted governmental interest could withstand the "strict scrutiny" test.[290]

1. Neutrality

a. Facial Neutrality

The Court first addressed the neutrality of the ordinances passed by the City.[291] It looked to the text of the ordinances in order to determine whether the measures were neutral on their face.[292] The Court noted that a law is not neutral if "the object of the law is to infringe upon or restrict practices because of their religious motivation."[293]

The Court also noted that a law is not neutral if "it refers to a religious practice without a secular meaning discernible from the language or context."[294] The Court agreed with the Church's argument that the words "sacrifice" and "ritual" in the ordinances [295] suggest facial discrimination but also found that this argument alone was inconclusive.[296] The Court emphasized that facial neutrality alone is not determinative of law's constitutionality.[297]

The Court observed that the facial neutrality test alone would simply encourage lawmakers to camouflage their damaging intent with neutral words.[298] The Court noted that the Clause protects against "governmental hostility which is masked, as well as overt."[299] The Court concluded that the object of the ordinances at issue was suppression of

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[289] *Id.* at 2230.
[290] *Id.* at 2226.
[291] *Id.* at 2230-31.
[292] *Id.* at 2227.
[293] 113 S.Ct. at 2227 (citing Employment Div. v. Smith).
[294] 113 S.Ct. at 2227.
[295] *See supra* note 23.
[296] 113 S.Ct. at 2227.
[297] *Id.*
[298] *Id.*
[299] *Id.*

the Santerian worship service and the ordinances were thus not neutral.[300]

b. Effect of the Laws

The Court next noted that the record did not support the notion that the city officials had any other religion than Santeria in mind when it passed the ordinances.[301] The Court concluded that in addition to the text of the laws, the "effect of a law in its real operation is strong evidence of its object."[302]

The Court was careful to note that a finding of adverse impact is not *per se* conclusive of a violation, and added that a legitimate governmental concern may justify that impact.[303]

In fact, the Court conceded that the concerns advanced by the City were unrelated to "religious animosity."[304] The Court found that the ordinances, as a group of laws, however, did not support the same concerns.[305] The Court noted the texts of the ordinances appear to have been drafted together with the purpose of targeting the religious exercise of the Santeria church members.[306]

The Court first addressed Ordinance 87-71,[307] which prohibited the sacrifice of animals.[308] It defined sacrifice as an act "to kill . . . an animal in a public or private ritual or ceremony not for the primary purpose of food consumption."[309] The Court found the ordinance to exempt almost all animal killings except those for religious sacrifice.[310] Furthermore, the ordinance specifically exempted Kosher slaughter.[311] Thus, the Court decided that the "net result of the gerrymander is that few if any killings of animals are prohibited other than Santeria sacrifice . . ."[312]

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[300] *Id.*
[301] *Id.* at 2228.
[302] *Id.*
[303] *Id.* at 2227.
[304] *Id.*
[305] *Id.*
[306] *Id.*
[307] City of Hialeah, Fla., Ordinance 87-71 (Sept. 22, 1987).
[308] 113 S.Ct. at 2228.
[309] City of Hialeah, Fla., Ordinance 87-71 (Sept. 22, 1987).
[310] 113 S.Ct. at 2228.
[311] City of Hialeah, Fla., Ordinance 87-71 (Sept. 22, 1987).
[312] 113 S.Ct. at 2228.

The Court then discussed the similar effect that Ordinance 87-52[313] had on the Church.[314] This Ordinance operated to exempt animal killing by licensed food establishments of those animals specifically raised for food.[315] This Ordinance, like 87-71, also exempted Kosher slaughter.[316] The Ordinance required the individual engaging in animal killing to intend to use the animal for food.[317] The Court tracked the internal logic of the ordinance: if the killing is for food, then it is exempted; if the killing is for food but not part of a ritual, it is exempted; if the killing is for food, and is part of a ritual, and takes place in a properly zoned and licensed establishment, and involves animals that were raised for consumption, it is exempted.[318] Thus, the Court demonstrated how the pattern of narrow prohibition served to burden only the Church.[319]

Next, the Court addressed Ordinance 87-40,[320] which incorporated the Florida animal cruelty statute.[321] The operative word in the ordinance is "unnecessarily."[322] The Court found the City and the Attorney General's interpretation of the word problematic.[323] While the City found killing for religious purposes "unnecessary," it also found hunting, slaughter for food, poisoning insects and pests, and euthanasia "necessary."[324] Thus, those who engage in animal killing are subjected to an evaluation of the justification for the action.[325] The Court deemed this as "individualized governmental assessment"[326] and concluded the City could only extend this assessment to religions upon a showing of a compelling reason.[327]

The Court was offended by the City's requirement to show religious necessity as it devalued religious reasons for killing by judging them

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[313] *See supra* note 25.
[314] 113 S.Ct. at 2228.
[315] *Id.*
[316] *See supra* note 19.
[317] 113 S.Ct. at 2228.
[318] *See supra* note 19.
[319] 113 S.Ct. at 2228.
[320] City of Hialeah, Fla. Ordinance No. 87-40 (June 9, 1987).
[321] 113 S.Ct. at 2229.
[322] *Id.*
[323] *Id.*
[324] *Id.*
[3254] *Id.*
[326] *Id.* (citing Smith, 494 U.S. at 884).
[327] 113 S.Ct. at 2229.

as less important than non-religious reasons.[328] The Court then concluded that the religious practice was "singled out for discriminatory treatment."[329]

c. Purported Purpose of the Laws

The Court next discussed the government's purported reasons for enacting the ordinances.[330] The Court found evidence of the improper targeting of the Church because the ordinances "prescribe more religious conduct than is necessary to achieve their stated ends."[331] The Court conceded that protecting public health and preventing animal cruelty were legitimate concerns.[332] However, the Court concluded that these concerns could have been remedied or addressed without prohibiting all Santerian sacrificial acts.[333]

The Court noted that, with respect to health concerns, the City could have mandated a general regulation on carcass disposal.[334] In addition, the religious sacrifice would be illegal under these ordinances even if performed in licensed, inspected, and zoned slaughterhouses.[335] The Court found that the broad ordinances prohibited the Church's sacrifices even when public health was not threatened.[336] Therefore, the City's stated interest in health was seemingly irrelevant upon a careful reading of the ordinances.[337] Finally, the Court reasoned that a law is suspect if First Amendment freedoms are restricted to prevent isolated collateral harms which are not in themselves prohibited by direct regulation.[338]

Following a similar analysis, the Court also found that narrower regulation would achieve the City's stated interest in preventing cruelty to animals.[339] The Court noted that one option that the City could consider was regulating the conditions and treatment of animals re-

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[328] *Id.*
[329] *Id.*
[330] *Id.*
[331] *Id.*
[332] *Id.*
[333] *Id.*
[334] *Id.* at 2229-30.
[335] *Id.* at 2230.
[336] *Id.*
[337] *Id.*
[338]; *Id.*
[339] *Id.*

gardless of the purpose for keeping them.[340] Similarly, the method of killing the animals could be regulated.[341] The Court pointed out that the method used by the Church[342] was the same method employed in Kosher slaughter.[343]

Although the district court found this method of killing to be inhumane, the Supreme Court found that the lower court's reasoning was misdirected.[344] The Court reasoned that if the City's true concerns were cruel methods of killing, the City should have engaged in regulation of the methods of killing rather than regulation of religious conduct.[345]

Finally, the Court discussed Ordinance 87-72,[346] and stated that, although it is by itself broader and substantially nonreligious, it operates as part of a group for neutrality purposes.[347] The Court noted that the ordinance was passed and enacted on the same day as the other ordinances.[348] Moreover, as a group, the ordinances were enacted in direct response to the opening of the Church.[349] The Court concluded, therefore, that the entire group of ordinances worked to suppress the Church and was essentially non-neutral.[350]

d. Evidence of City's Motives

The Court also turned to its prior decisions in equal protection cases for guidance in determining whether a law is neutral.[351] The Court considered both direct and circumstantial evidence.[352] Additionally, the Court considered the following factors: historical background of the decision under challenge; the specific series of events leading to the enactment or official policy in question; and the legislative or admin-

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[340] *Id.*
[341] *Id.* at 2230.
[342] The Church's method of killing is severing the carotid arteries with a sharp instrument. 113 S.Ct. at 2230.
[343] *Id.* at 2230.
[344] 723 F.Supp. at 1472-73.
[345] 113 S.Ct. at 2230.
[346] City of Hialeah, Fla. Ordinance No. 87-72 (Sept. 22, 1987).
[347] 113 S.Ct. at 2230.
[348] Discussed *supra*.
[349] 113 S.Ct. at 2230.
[350] *Id.*
[351] *Id.*
[352] *Id.*

istrative history, including contemporaneous statements made by members of the decision-making body.[353] The Court found blatant hostility against the Santerians, as evidenced by the recorded conduct at the City Council meetings, and confirmed that the ordinances were enacted to target Santerians.[354] The ordinances were enacted "because of" not "in spite of" their suppression of Santerian beliefs.[355] Thus, the City's actions evidenced its invidious, mean-spirited intent to discriminate against the Santerians' method of religious worship.[356]

Regarding the neutrality question, the Court held that the ordinances were enacted to suppress religion; they were not neutral, and the Court of Appeals committed clear error in failing to reach this conclusion.[357]

2. General Applicability

The Court turned next to the second requirement of the Free Exercise Clause that the laws burdening the religious practice must be of general applicability.[358] The requirement is intended to ensure that the governing body, in pursuit of legitimate interest, does not impose burdens selectively.[359] The Court stated, however, that it did not need to "define with precision the standard used to evaluate whether a prohibition is of general application, for these ordinances fall well below the minimum standard necessary to protect First Amendment rights."[360] Although it would be difficult to disagree with this statement, the Court did not articulate the standards for use in deciding subsequent decisions.[361] The Court merely assessed the City's claimed interests in light of the general applicability requirement.

a. Cruelty to Animals

The Court first addressed the City's interests in the prevention of cruelty to animals.[362] The ordinances were deemed underinclusive since

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[353] *Id.* at 2230-31 (citing Village of Arlington Heights v. Metropolitan Housing Dev., 429 U.S. 252, 266 (1977)).
[354] 113 S.Ct. at 2230-31.
[355] *Id.* at 2231 (citing Massachusetts v. Feeney, 442 U.S. 256, 279 (1979)).
[356] *Id.*
[357] *Id.*
[358] *Id.* at 2231-32 (citing Smith v. Employment Division, 494 U.S. 872 (1990)).
[359] *Id.* at 2232.
[360] *Id.*
[361] *Id.*
[362] *Id.* at 2230.

they "fail to prohibit nonreligious conduct that endangers these interests in a similar or greater degree than Santeria sacrifice does."[363] The Court used fishing, placing poison in one's yard, and hunting as examples of equal, if not greater, degrees of animal cruelty.[364] The City's argument that animal sacrifice, as practiced by the Church, is "different" did not impress the Court.[365] The Court responded that the bare assertions "do not explain why religion alone must bear the burden of the ordinances."[366]

b. Public Health

The Court also addressed the City's concern with carcass disposal.[367] The evidence did not support the City's contention that the Church's conduct subjected the public to any more sanitation problems than did a restaurant or slaughterhouse.[368] The Court noted that the City did not impose the same restrictions, nor voice the same concerns, with regard to hunters who bring home their kill.[369] Thus, although the Court agreed that improper disposal is a valid health concern, it disapproved of the City's limited focus on animal killings related to religious exercise.[370]

The Court then considered another valid health concern regarding the consumption of uninspected meat.[371] The concern was subjected to the same examination as the disposal issue, and similarly failed.[372] The court found the ordinances were again underinclusive because they did not apply to hunters and fishers who might eat their kill although it is uninspected.[373] Also, the ordinances exempted those who raise their own animals for consumption.[374] The Court considered this lack of effectiveness regarding the City's averred health interests and stated

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[363] *Id.*
[364] *Id.*
[365] *Id.*
[366] *Id.*
[367] *Id.* at 2333.
[368] *Id.*
[369] *Id.*
[370] *Id.* at 2223.
[371] *Id.*
[372] *Id.*
[373] *Id.*
[374] *Id.*

that "neither interest is pursued by respondent [City] with regard to conduct that is not motivated by religious conviction."[375]

c. *Zoning Concerns*

Finally, in reviewing the general applicability of the ordinances, the Court considered Ordinance 87-72,[376] which prohibited the slaughter of animals outside of areas zoned for slaughterhouses.[377] Again, the Court found that the ordinance was underinclusive on its face.[378] The City did not provide an adequate justification for exempting commercial operations that slaughter "small numbers" of hogs and cattle.[379] The Court found that the City did not regulate other killings for food in the same way it regulated Santeria slaughter.[380]

The Court concluded its examination of the general applicability requirement by stating that each of the ordinances pursued the City's interests "only against conduct motivated by religious belief."[381] The Court then announced that "this precise evil is what the requirement of general applicability is designed to prevent."[382]

3. *Strict Scrutiny Standard*

The Court lastly engaged in the application of "strict scrutiny."[383] The Court held that law that burdens religious practice and that is not neutral or is not generally applicable must "advance 'interests of the highest order' and must be narrowly tailored in pursuit of those interests."[384] This test is one of the most rigorous employed by the Court because a law that targets religious conduct "will survive strict scrutiny only in rare cases."[385] Although the Court concluded that

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[375] *Id.* at 2333.
[376] City of Hialeah, Fla. Ordinance No. 87-72 (Sept. 22, 1987).
[377] 113 S.Ct. at 2333.
[378] *Id.*
[379] *Id.*
[380] *Id.*
[381] *Id.*
[382] *Id.*
[383] *Id.* at 2223.
[384] *Id.* (citing McDaniel v. Paty, 435 U.S. at 628 (quoting Wisconsin v. Yoder, 406 U.S. 205 (1972))).
[385] *Id.*

these ordinances would never survive such scrutiny, it provided a brief discussion.[386]

a. Ordinances Not Narrowly Tailored

The Court first held that even if the City's interests were compelling, the ordinances were not in narrow enough terms to achieve those interests.[387] The ordinances failed for being either underinclusive or overinclusive.[388] The Court found the absence of narrow tailoring sufficient to invalidate the ordinances.[389]

b. No Compelling Interests

The Court also held that in addition to drafting faulty ordinances, the City failed to demonstrate that its interests were compelling.[390] The Court reasoned that when the government restricts only "conduct protected by the First Amendment and fails to enact feasible measures to restrict other conduct" that produces similar harm, the interest is not compelling.[391] The Court noted that the strict scrutiny standard does not tolerate a law that leaves "appreciable damage to that supposedly vital interest unprohibited."[392] The ordinances, if upheld, would still allow for continued harm to animals and sanitation.[393] Thus, the Court found that the City had no compelling interests.[394]

The Court finally held that the ordinances offended the Free Exercise Clause's commitment to government tolerance of religion.[395] The Court admonished that "those in office must be resolute in resisting importunate demands and must ensure that the sole reasons for imposing the burdens of law and regulation are secular."[396]

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[386] *Id.* at 2234.
[387] *Id.*
[388] *Id.* For discussion, *see supra.*
[389] *Id.*
[390] *Id.*
[391] *Id.*
[392] *Id.*
[393] *Id.* at 2233.
[394] *Id.*
[395] *Id.*
[396] *Id.*

B. *Concurring Opinions*

This majority opinion was relatively uncontroversial. However, a few justices took this opportunity to voice their opinions regarding the appropriate analysis for evaluating free exercise cases in relation to the new *Smith* standard. This section reviews the concurring opinions of Justice Scalia, Justice Souter, and Justice Blackmun.

1. *Justice Scalia*

Justice Scalia, joined by the Chief Justice, concurred in part and concurred in the judgment.[397] Justice Scalia discussed what he saw as the majority's error in separating the "neutrality" and "general applicability" analyses.[398] He emphasized that the two standards substantially overlap but that each should be used for different purposes.[399] He explained that the "neutrality" factor applies to laws that impose disabilities on the basis of religion.[400] The "general applicability" standard applies to laws that, although neutral in text, effectively target religious practice.[401]

Justice Scalia disagreed with the majority's focus on the lawmakers' intent.[402] He noted that it is virtually impossible to determine a single motive of a governmental body and the Court should refrain from attempting to do so.[403] Scalia stated that the First Amendment does not refer to discriminatory purpose, but to the burdensome effects placed on religious exercise.[404] He concluded that intent should be wholly irrelevant in determining whether a law burdens a particular religious practice.[405]

2. *Justice Souter*

Justice Souter, who also concurred in part and in the judgment, objected to the applicability of the newly-established *Smith* rule in this

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[397] *Id.* 2239.
[398] *Id.*
[399] *Id.*
[400] *Id.*
[401] *Id.*
[402] *Id.*
[403] *Id.*
[404] *Id.* at 2240.
[405] *Id.*

case.[406] Justice Souter explained that the *Smith* rule involved more than the two-step test of neutrality and general applicability.[407] He noted that the significance of the rule lay in the particular, narrow conception of free exercise neutrality.[408]

Justice Souter focused on the complicated structure of the neutrality standard.[409] He explained that a facially neutral law may in effect not be neutral.[410] He then separated formal neutrality—neutrality that would bar laws that purposefully discriminate against religion—from substantive neutrality, which demands both a secular objective and requires the government to exempt religious practices from formally neutral laws.[411] He explained in a footnote that formal neutrality would allow the Court to delve into the lawmakers' intentions.[412]

Justice Souter then noted that neutrality as defined in *Smith* was formal and only pertained to laws whose "object" and "effect" was to prohibit religious exercise.[413] Under *Smith*'s reasoning, Justice Souter believed those laws that satisfied formal neutrality would not be subjected to any scrutiny at all.[414] Justice Souter concluded that Hialeah's ordinances were not neutral under any definition, however, and thus did not require analysis within the substantive neutrality scheme.[415]

Justice Souter's contention was that the *Smith* standards of formal neutrality and general applicability are not sufficient for cases that are less clearly discriminatory.[416] Justice Souter attributed this to the Court's desire to dilute the compelling interest test in the context of formally neutral laws.[417] He accused the Court of not following its religious exercise precedents faithfully.[418] However, Justice Souter conceded that this was not an appropriate case in which to discuss the tensions which exist between the two forms of neutrality.[419]

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[406] *Id. See supra.*
[407] *Id.*
[408] *Id.*
[409] *Id.* at 2241.
[410] *Id.*
[411] *Id.*
[412] *Id.* at 2242, n.3.
[413] *Id.* at 2242.
[414] *Id.*
[415] *Id.*
[416] *Id.* at 2243.
[417] *Id.* at 2246.
[418] *Id.* at 2245.
[419] *Id.* at 2250.

3. *Justice Blackmun*

Justice Blackmun concurred to emphasize that the Free Exercise Clause protection applies only to governmental actions that directly discriminate against religion and would utilize a more stringent test, subjecting the law to strict scrutiny.[420] He noted that his test would have produced the same result in this case, but via different means.[421] He objected to the application of the *Smith* two part test,[422] arguing it ignored individual liberty of religious freedom and treated it like any anti-discrimination conflict.[423]

V. Impact

The complexity of constitutional religious issues lies in the definition of "religion" and in the commingling of the Establishment Clause and the Free Exercise Clause. The holding in *Smith* stated that laws that burden religious free exercise, but are "generally applicable," will not be subjected to a balancing of interests.[424] The danger lies in lawmakers who may deliberately fashion laws to be generally applicable to avoid judicial scrutiny.

The judicial role in determining which religions are entitled to constitutional protection will become obscured. Professor Laurence Tribe has discussed the increasing complexity of religious issues in his constitutional law treatise.[425] Tribe explains that "religion" must be defined broadly enough to recognize the increasing diversity of faiths and to accord them freedom from governmental interference.[426] He notes that excessive judicial inquiry into religious beliefs may, in itself, constrain religious liberty.[427] In *Thomas v. Review Board*, the Court stated that beliefs can be adequately religious even if they are not "acceptable, logical, consistent, or comprehensible."[428] However, the Court has also distinguished between religious and philosophical be-

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[420] *Id.* at 2250.
[421] *Id.* at 2250.
[422] *See supra.*
[423] 113. S.Ct. at 2250.
[424] 494 U.S. at 885.
[425] Laurence H. Tribe, American Constitutional Law, (1988).
[426] Laurence H. Tribe, American Constitutional Law, 1181, (1988).
[427] *Id.* at 1181.
[428] 450 U.S. at 714.

liefs.[429] The difficulty arises when a new religion declares that it is entitled to special rights or exemptions. The Court cannot venture too far into determining whether the religion is valid, but rather must assess the believer's sincerity.[430] The line distinguishing what a valid religion is continues to be blurred and the Court's decisions will eventually have to provide guidance regarding the government's interaction with "religions."

A. *The Rise of New Religions*

The policy behind the Religious Freedom Clauses is to encourage tolerance towards the practice of a variety of religions. Many of the less "traditional" and more "unorthodox" religions have aroused concern because of the unusual conduct involved. As more religions that cut against the status quo develop, the Court may find it a challenge to remain neutral.

Recent lower court cases illustrate the concerns that may face the Supreme Court in future cases involving religious free exercise. For example, in *Ohio v. Luff*,[431] Luff asserted his right to religious constitutional protection after he was convicted on five counts of aggravated murder and four counts of kidnapping.[432] Luff became an avid follower of Lundgren, a self-proclaimed Reorganized Latter Day Saints prophet.[433] Lundgren discouraged all forms of independent thinking among his followers, criticized them for being "wrong," and threatened death if they did not follow his rules.[434] Lundgren then told his followers that the end of time was nearing and that they would have to sacrifice five followers in order for God to appear.[435] He decided that the five sacrificial followers would be the Avery family.[436] Luff and others then summoned each of the five members of the Avery family, individually, and they were killed.[437]

Although this was a criminal proceeding, expert testimony revealed that certain religions can exercise psychological controls over their

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[429] *See, e.g.*, Wisconsin v. Yoder, 406 U.S. 205, 213 (1972).
[430] Laurence H. Tribe, AMERICAN CONSTITUTIONAL LAW, at 1182 (1988).
[431] Ohio v. Luff, 621 N.E.2d 493 (Ohio Ct. App. 1993).
[432] *Id.* at 495.
[433] *Id.* at 496.
[434] *Id.*
[435] *Id.*
[436] *Id.* at 496-97.
[437] *Id.* at 497.

followers.[438] Dr. Richard J. Ofshe, a University of California at Berkeley professor, stated that a cult is a group of people extremely devoted to one person or an idea.[439] He also explained that the characteristics of cults are mind control and social isolation.[440] Although this example of a "cult" religion is not necessarily illustrative of all recent religious factions, it suggests that religious conduct and belief may become too intertwined to separate. The Court may have to decide how far to intervene in the conduct of these religions without breaching the Free Exercise Clause.

The recent tragedy involving the Waco, Texas compound and religious leader David Koresh has increased society's awareness that cults are becoming more active and visible. Several watchdog groups have risen in response to these psychologically addictive organizations. These groups raise a question as to whether the government should allow itself to get involved in determining the effect that these religions may have on certain classes of society.

The Cult Awareness Network ("CAN") is a non-profit organization that addresses public concern regarding those cult religions that employ influence techniques to control their followers.[441] Cynthia Kisser, the director of CAN, recently discussed the destructive potential that cults can have on broad ranges of society. For example, she explained that cults can undermine the democratic process by voting in solid blocks or by providing free volunteer labor, while wealthier cults can influence and control the media.[442] In addition, she noted that taxpayers end up paying for governmental remedies to catastrophes that cults cause, as in the raid on the Koresh compound.

CAN provides information about suspect cult groups to up to 15,000 callers per year.[443] It advises callers on how to identify destructive cults[444] and how to seek legal and psychological counseling. The public attention CAN receives is mostly due to the fact that more children

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[438] *Id.* at 502.

[439] *Id.*

[440] *Id.*

[441] Cynthia Kisser, *Cults Can Hatch a Nest of Ills*, THE PLAIN DEALER, Mar. 12, 1993.

[442] *Id.*

[443] David C. Rudd, Group Gives Judges, Legislators the Lowdown on Cult Groups, CHI. TRIB., Apr. 22, 1991.

[444] Wes Smith, *Cult Fighters in Center of Raging Storm*, CHI. TRIB., Mar. 20, 1988. Destructive cults are defined as those that allegedly employ mind control techniques, coercion and unethical or illegal practices.

have become victims of ritualized abuse.[445] In 1988, CAN lobbied Congress to support its resolution to declare a National Cult Awareness Week.[446] Legislators, however, hesitate to work with CAN because of the constitution's religious clauses which prohibit governmental involvement in the establishment and exercise of religion. The American Civil Liberties Union expressed its concern that CAN is dangerously close to infringing on the constitutional rights of freedom of religion and speech.[447] CAN responds that it merely refers callers to legal, psychological, or medical counselors.[448]

CAN is one indication that the rise of cult religions may mandate increased involvement by governmental bodies. If the government does become involved in monitoring the activities of cults, the Court may be faced with constitutional dilemmas such as: (1) how to determine whether religious belief and conduct are distinct and separate; (2) how the Court will determine whether governmental involvement is neutral and generally applicable, and if not, does the government have a compelling state interest to support its involvement; and (3) whether the government is condoning the existence of some religions and preventing others.

As shown in *Luff*,[449] certain cult religions utilize psychological tactics on their followers which prompts them to act out their religious beliefs. The Court may have to investigate the beliefs themselves in order to determine to what extent the conduct is related to the beliefs. This would require that the Court question religious beliefs, which it has historically refused to do.

If a governmental body were to align itself with an organization such as CAN, would its conduct be neutral and generally applicable? If not, is the government's interest compelling, and did it take the least drastic alternative? Answering these questions would require the government to make substantial value judgments regarding the role that cult religions play in our society. While CAN and similar groups would argue that the psychological dependence which some cults require of their followers goes against public policy, the government is unable

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[445] David C. Rudd, *Group Gives Judges, Legislators the Lowdown on Cult Groups*, CHI. TRIB., Apr. 22, 1991.

[446] Wes Smith, *Cult Fighters in Center of Raging Storm*, CHI. TRIB., Mar. 20, 1988.

[447] *Id.*

[448] *Id.*

[449] 621 N.E.2d 493 (1993).

to express opinions as easily for fear of treading on constitutionally protected territory.

It would be almost impossible for the government to argue validly that its involvement in a watchdog group was neutral to the cults. Also, the government would find it difficult to argue that its interest in protecting society from cult worship was generally applicable when only the cults are subjected to the monitoring. The government would have to show that it has a compelling interest in protecting citizens from these groups. This test would be nearly impossible to pass since it involves religious beliefs and the government would, in essence, be telling people to refrain from certain religious beliefs.

By scrutinizing only certain religious groups, the government would be violating the Establishment Clause by blatantly favoring one religion over another.[450] In order for the government to justify this entanglement, it would need to reformulate its standards of religious analysis. Due to the increasing publicity of cults, however, the government may have to consider the possibility of increased involvement.

B. *The Impact on Religion After Lukumi*

Lukumi's holding can be viewed from two perspectives: that of the government and that of the religious practitioner. This decision was reasoned to cast no doubts that even the most carefully crafted ordinances which result in discriminatory treatment will not be upheld as constitutional. The Court, however, did not discuss the distinction it may find in protecting religious beliefs as opposed to religious conduct. While this case provided a somewhat shocking example of which kind of religious conduct may be afforded protection, it also left room for speculation on how other forms of religious worship will be addressed.

The other viewpoint from which this decision may be viewed is by the religious practitioner and is similarly unremarkable. This case did not purport to liberate religious worshippers by condoning previously shunned forms of practice. Rather, the Court provided a thorough explanation of the various reasons why the ordinances that inhibited religious conduct were unconstitutional. This was not to say that the conduct was immune to all governmental regulation. While the Court was vehement in honoring the practitioners' free exercise rights, it also indicated its adherence to the established test of neutrality and general

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[450] Laurence H. Tribe, AMERICAN CONSTITUTIONAL LAW, at 1181 (1988).

applicability. The Court, however, did not employ the test espoused in *Smith* because the ordinances at issue here were neither neutral nor generally applicable and therefore did not require further analysis. Thus, this decision did not drastically alter the legal environment surrounding the religious Free Exercise Clause, but merely confirmed and clarified that the Court remains devoted to protecting the right of individuals to freely exercise religion.

VI. Conclusion

Church of Lukumi Babalu Aye stands for the Supreme Court's refusal to allow burdensome governmental actions to restrict religious exercise. Because of the Hialeah City Council's blatant hostility toward the Church and the obvious bias of the ordinances, the Court was able to rule without much difficulty. It found that the ordinances were not neutral, and thus, were unconstitutional. The Court also noted that, although the reasons that the City asserted for enacting the ordinances could conceivably be valid, the ordinances were both underinclusive and overinclusive. This case was another reminder that the Court will not tolerate governmental action for the purpose of impairing individuals' right to freely exercise their religious beliefs.

Emily Kawashima

For Better or for Worse, in Sickness and in Health, Until Death Do Us Part: A Look at Same-Sex Marriage in Hawaii*

I. Introduction

On May 5, 1993, the Hawaii Supreme Court decided *Baehr v. Lewin*,[1] a case which could lead the way to valid same-sex marriages. Although the Hawaii Supreme Court did not pronounce finally on the same-sex marriage issue in *Baehr*, it did allow a same-sex marriage case to proceed further than any other state or federal court.[2] The State of Hawai'i must now put forth a compelling state interest in order to justify its exclusion of marriage licenses for same-sex couples.[3]

In addition, *Baehr* marks the first time the Hawaii Supreme Court has stated that it considers gender to be a suspect category.[4] *Baehr* is not simply an historic same-sex marriage case, it is also a landmark decision subjecting gender-based discrimination by the State of Hawai'i to a strict scrutiny test. Thus, any gender-based discrimination by the state must be necessary and justified by a "compelling state interest."[5]

This casenote begins in Part II with a description of the facts leading to the decision in *Baehr*. Part III examines the history of marriage as a fundamental right, both nationally and in Hawai'i. In part IV, we analyze the decision itself. Finally, the possible impacts of *Baehr* on the State of Hawai'i and the nation as a whole are discussed in Part V.

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* The authors would like to thank Professor Jon Van Dyke, Peg Aurand, and Troy Fukuhara for critically commenting on our many drafts.

[1] 74 Haw. 530, 852 P.2d 44 (1993).

[2] *See infra* text accompanying notes 143-252.

[3] *See infra* text accompanying notes 230-239.

[4] *See infra* part IV(C)(3).

[5] *Id.*

II. Facts

On December 17, 1990, three couples—Ninia Baehr and Genora Dancel, Tammy Rodrigues and Antoinette Pregil, and Pat Lagon and Joseph Melilio (collectively, Plaintiffs)—filed three separate applications with the Hawaii Department of Health (DOH) to obtain marriage licenses.[6] These applications were filed pursuant to Hawaii Revised Statutes (HRS) section 572-6, which requires couples to appear personally and to file a written application for marriage before a license will be granted.[7]

Despite meeting the plain language requirements of Section 572-6, Plaintiffs' applications were denied by John C. Lewin (Lewin), in his official capacity as Director of the DOH, in letters dated April 12, 1991.[8] These letters made it clear that the Plaintiffs' applications for marriage licenses were denied solely because each couple was of the same sex.[9]

In an attempt to force the DOH to grant them marriage licenses, Plaintiffs filed a complaint that averred:

> (1) the DOH's interpretation and application of HRS § 572-1 to deny same-sex couples access to marriage licenses violates the plaintiffs' right to privacy, as guaranteed by article I, section 6 of the Hawaii Constitution as well as to the equal protection of the laws and due process

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[6] Baehr v. Lewin, 74 Haw. 530, 538, 852 P.2d 44, 49 (1993).

[7] *Id.* Hawaii Revised Statutes (HRS) § 572-6 provides in pertinent part: "To secure a license to marry, the persons applying for the license shall appear personally before an agent authorized to grant marriage licenses and shall file with the agent an application in writing." Haw. Rev. Stat. § 572-6 (Supp. 1992).

[8] *Baehr*, 74 Haw. at 539 n.3, 852 P.2d at 50 n.3.

[9] The letters read:

> This will confirm our previous conversation in which we indicated that the law of Hawaii does not treat a union between members of the same sex as a valid marriage. We have been advised by our attorneys that a valid marriage within the meaning of ch. 572, Hawaii Revised Statutes, must be one in which the parties to the marriage contract are of different sexes. In view of the foregoing, we decline to issue a license for your marriage to one another since you are both of the same sex and for this reason are not capable of forming a valid marriage contract within the meaning of ch. 572. Even if we did issue a marriage license to you, it would not be a valid marriage under Hawaii law.

Id. at 539 n.3, 852 P.2d at 50 n.3.

of law, as guaranteed by article I, section 5 of the Hawaii Constitution.[10]

In their June 7, 1991 response to Plaintiffs' complaint, Defendants asserted the defenses of failure to state a claim upon which relief can be granted, sovereign immunity, qualified immunity, and abstention in favor of legislative action.[11] Defendant's next filed a motion for

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[10] *Id.* HRS § 572-1 provides:

REQUISITES OF A VALID MARRIAGE CONTRACT. In order to make valid the marriage contract, it shall be necessary that:

(1) The respective parties do not stand in relation to each other of ancestor and descendant of any degree whatsoever, brother and sister of the half as well as to the whole blood, uncle and niece, aunt and nephew, whether the relationship is legitimate or illegitimate;

(2) Each of the parties at the time of contracting the marriage is at least sixteen years of age; provided that with the written approval of the family court of the circuit within which the minor resides, it shall be lawful for a person under the age of sixteen years, but in no event under the age of fifteen years, to marry, subject to section 572-2;

(3) *The man* does not at the time have any lawful wife living and that *the woman* does not at the time have any lawful husband living;

(4) Consent of neither party to the marriage has been obtained by force, duress, or fraud;

(5) Neither of the parties is a person afflicted with any loathsome disease concealed from, and unknown to, the other party;

(6) It shall in no case be lawful for any person to marry in the State without a license for that purpose duly obtained from the agent appointed from the agent appointed to grant marriage licenses; and

(7) The marriage ceremony be performed in the State by a person or society with a valid license to solemnize marriages and *the man and the woman* to be married and the person performing the marriage ceremony be all physically present at the same place and time for the marriage ceremony.

HAW. REV. STAT. § 572-1 (1985) (emphasis added).

The Hawai'i Constitution, art. I, § 6 provides in pertinent part: "The right of the people to privacy is recognized and shall not be infringed without the showing of a compelling state interest. The legislature shall take affirmative steps to implement this right." HAW. CONST., art. I, § 6 (added by Const. Con. 1978 and election Nov. 7, 1978).

The Hawai'i Constitution, art. I, § 5 provides in pertinent part: "No person shall be deprived of life, liberty or property without due process of law, nor be denied the equal protection of the laws, nor be denied the enjoyment of the person's civil rights or be discriminated against in the exercise thereof because of race, religion, *sex* or ancestry." HAW. CONST., art. I, § 5 (renumbered and amended by Const. Con. 1978 and election Nov. 7, 1978) (emphasis added).

[11] *Baehr*, 74 Haw. at 540, 852 P.2d at 50. Defendants included John C. Lewin, in his capacity as Director of the Department of Health, and the State of Hawai'i.

judgment on the pleadings and to dismiss the complaint.[12] In their memorandum in support of the motion, Defendants stated that Plaintiffs' complaint failed to state a claim upon which relief could be granted for the following reasons:

> (1) the state's marriage laws "contemplate marriage as a union between a man and a woman"; (2) because the only legally recognized right to marry "is the right to enter a heterosexual marriage, [the] plaintiffs do not have a cognizable right, fundamental or otherwise, to enter into state-licensed homosexual marriages"; (3) the state's marriage laws do not "burden, penalize, infringe, or interfere in any way with the [plaintiffs'] private relationships"; (4) the state is under no obligation "to take affirmative steps to provide homosexual unions with its official approval"; (5) the state's marriage laws "protect and foster and may help to perpetuate the basic family unit, regarded as vital to society, that provides status and a nurturing environment to children born to married persons" and, in addition, "constitute a statement of the moral values of the community in a manner that is not burdensome to [the] plaintiffs"; (6) assuming the plaintiffs are homosexuals (a fact not pleaded in plaintiffs' complaint), they are "neither a suspect nor a quasi-suspect class and do not require heightened judicial solicitude"; and (7) even if heightened judicial solicitude is warranted, the state's marriage laws "are so removed from penalizing, burdening, harming, or otherwise interfering with [the] plaintiffs and their relationships and perform such a critical function in society that they must be sustained."[13]

On August 29, 1991, Plaintiffs filed a memorandum in opposition to Defendants' motion for judgment on the pleadings.[14] Defendants' motion was heard in circuit court on September 3, 1991, and the court filed its order in favor of Lewin on October 1, 1991.[15] Plaintiffs appealed.[16]

On appeal, the Hawaii Supreme Court determined that the Plaintiffs had stated facts sufficient to survive a Hawaii Rules of Civil Procedure Rule 12(c) motion on the pleadings and held that the circuit court had erroneously dismissed the complaint.[17] In making

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[12] *Id.* at 541, 852 P.2d at 51.

[13] *Id.* at 543-44, 852 P.2d at 51-52 (footnotes omitted) (quotations in original).

[14] *Id.* at 544, 852 P.2d at 52.

[15] *Id.* at 545, 852 P.2d at 52.

[16] *Id.*

[17] *Id.* at 550, 852 P.2d at 54. Rule 12(c) of the Hawaii Rules of Civil Procedure

this finding, the Hawaii Supreme Court declared that the right to privacy does not include a fundamental right to same-sex marriages.[18] Then, the Hawaii Supreme Court determined that the right to equal protection afforded same-sex couples the same right to marriage licenses as heterosexual couples, based on the anti-gender-discrimination provisions of the Hawaii Constitution.[19] Accordingly, the Hawaii Supreme Court vacated the circuit court's order and judgment, and remanded the case to circuit court.[20]

Defendants then filed a motion for reconsideration, or, in the alternative, for clarification, with a suggestion of rebriefing and reargument.[21] The Supreme Court denied this motion for reconsideration, rebriefing and reargument, and clarified the issue before the circuit court on remand:[22] Whether the state has a compelling interest sufficient to enable it to prevent same-sex couples from obtaining marriage licenses.[23] The court noted that if, on remand, the state can demonstrate a compelling state interest, denial of Plaintiffs' license applications will be upheld.

III. History

Before examining the holding in *Baehr*, it is useful to explore the historical setting in which *Baehr* was decided. The following is a brief synopsis of the history of marriage and the rights of homosexual couples in relation to the institution of marriage.

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states:

> (c) Motion for Judgment on the Pleadings. After the pleadings are closed but within such time as not to delay the trial, any party may move for judgment on the pleadings. If, on a motion for judgment on the pleadings, matters outside the pleadings are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

HAW. R. CIV. P. 12(c).

[18] *Baehr*, 74 Haw. at 550-57, 852 P.2d at 55-57.

[19] *Id.* at 558-80, 852 P.2d at 59-67.

[20] *Id.* at 536, 852 P.2d at 48.

[21] *Id.* at 645, 852 P.2d at 74.

[22] *Id.* at 645-46, 852 P.2d at 74.

[23] *Id.* at 646, 852 P.2d at 74.

A. *Marriage as a Fundamental Right*

The United States Supreme Court recognized that marriage was a specially protected institution as far back as 1888.[24] Since then, the Court has continuously recognized and protected the institution of marriage. For example, in *Meyer v. Nebraska*,[25] the Court called the right "to marry, establish a home and bring up children" a liberty protected by the Due Process Clause.[26] In *Skinner v. Oklahoma*,[27] the United States Supreme Court declared that "[m]arriage and procreation are fundamental to the very existence and survival of the race."[28]

Although not dealing directly with the right to marry, the United States Supreme Court was faced with the issue of privacy within the context of marriage in *Griswold v. Connecticut*.[29] In *Griswold*, the Court overruled a Connecticut statute that had made it illegal to sell contraceptives to married couples.[30] *Griswold* was the first in a line of cases that grounded the institution of marriage in a "right to privacy" which the Court said was implicit in the Fourteenth Amendment's Due Process Clause.[31]

The Supreme Court next encountered the issue of marriage in *Loving v. Virginia*.[32] In *Loving*, a Virginia statute prohibited blacks and

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[24] Maynard v. Hill, 125 U.S. 190 (1888), upheld an Act of the Legislative Assembly of the Territory of Oregon which declared a marriage dissolved. In so doing, the Court characterized marriage "as creating the most important relation in life, as having more to do with the morals and civilization of a people than any other institution." *Id.* at 205.

[25] 262 U.S. 390 (1923).

[26] *Id.* at 399. The Court reversed as violative of the Fourteenth Amendment a Nebraska Supreme Court decision that affirmed the conviction of a teacher who violated a statute forbidding any language other than English in school. *Id.* at 403.

[27] 316 U.S. 535 (1942).

[28] *Id.* at 541. Although *Skinner* dealt primarily with a state's right to sterilize habitual criminals, the Supreme Court discussed procreation as it related to marriage. *Id.*

[29] 381 U.S. 479 (1965).

[30] *Id.* at 485-86.

[31] *Id.* The Court stated: "We deal with a right of privacy 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." *Id.* at 486.

[32] 388 U.S. 1 (1967).

whites from marrying one another.[33] The Lovings, black and white residents of Virginia, married in the District of Columbia where interracial marriages were legal.[34] The Lovings returned to Virginia where they were soon indicted for violating Virginia's interracial marriage prohibition.[35] After pleading guilty, the Lovings were sentenced to one year in jail, but the sentence was suspended by the trial judge on the condition that the Lovings not return to Virginia together for 25 years.[36] In overruling the Virginia supreme court's holding in *Loving*, the Supreme Court stated 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."[37] Thus, the Court held that racial classifications could not be used to infringe upon "this fundamental freedom," and an individual's decision to marry a person of another race "resides with the individual and cannot be infringed by the State."[38]

The Supreme Court next visited the issue of marriage in *Zablocki v. Redhail*.[39] The Court in *Zablocki* held that Wisconsin could not prevent a man from remarrying just because he could not afford to support his child from a previous relationship.[40] The Court further held that because the institution of marriage was a fundamental right, the Wisconsin statute could only be upheld if it were "supported by

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[33] *Id.* at 4. The Virginia statute stated in pertinent part: "If any white person intermarry with a colored person . . . he shall be guilty of a felony and shall be punished for not less than one nor more than five years." VA. CODE ANN. § 20-59 (repealed by Acts 1968, c. 318) (cited in *Loving*, 388 U.S. at 4 n.3).

[34] *Loving*, 388 U.S. at 2.

[35] *Id.* at 3.

[36] *Id.* The Lovings then took up residence in the District of Columbia. After four years, they filed a motion in Virginia state court to vacate the judgment against them. When this motion was denied, the Lovings appealed to the Virginia supreme court of appeals. The convictions were then affirmed and the United States Supreme Court noted probable jurisdiction on December 12, 1966. *Id.* at 3-4.

[37] *Id.* at 12.

[38] *Id.*

[39] 434 U.S. 374 (1978). Redhail was a Wisconsin resident who was unable to remarry because he had a child from another relationship, and he was financially unable to make regular support payments to that child's mother. Under Wisconsin law, a person could not receive permission to marry unless he submitted proof that he had fulfilled his support payment obligation. In addition, the person who desired to marry was required to demonstrate that his or her children "are not then and are not likely thereafter to become public charges." *Id.* at 375.

[40] *Id.* at 389-91.

sufficiently important state interests and [was] closely tailored to effectuate only those interests."[41] The Court concluded that the State's reasons for promulgating the statute, while valid, were not compelling enough to restrict an individual's fundamental right to marriage.[42]

The most recent Supreme Court case discussing the issue of marriage is *Turner v. Safley*.[43] In *Turner*, the Court held that even prisoners had a constitutional right to marriage.[44] The Court reasoned that an "almost complete ban on the decision to marry [was] not reasonably related to legitimate penological objectives."[45]

From the above cases, it is clear that the Supreme Court has not retreated from its view that the institution of marriage is a fundamental right. The Court has, however, indicated that marriage is a right that can and should be regulated by the states.[46] State regulations, however, cannot interfere with the decision to marry to such a degree that people are entirely prevented from entering into a marital relationship.[47]

B. No State Has Legalized Same-Sex Marriage

Marriage is a state-conferred legal status.[48] Until *Baehr*, all of the state courts that have been confronted with the issue of same-sex marriage have declined to recognize these unions as protected by either the United States Constitution or any of the various state

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[41] *Id.* at 388 (citing, *inter alia*, Carey v. Population Serv. Int'l, 431 U.S. 678, 686 (1977); Memorial Hospital v. Maricopa County, 415 U.S. 250, 262-63 (1974)).

[42] *Id.* at 388. The state had argued that (1) the statute gave government officials an additional chance to counsel the applicant on the necessity of meeting his child support payments, and (2) it protected the welfare of "out-of-custody" children. *Id.* at 388.

[43] 482 U.S. 78 (1987). The Court considered whether it was constitutional for Missouri prisons to prevent inmates from marrying other inmates or civilians. The marriage regulation allowed an inmate to marry only if the superintendent gave his or her permission, and a superintendent was only to give permission "when there [were] compelling reasons to do so." *Id.* at 82.

[44] *Id.* at 99.

[45] *Id.*

[46] *Zablocki*, 434 U.S. at 386. The Court stated that "reasonable regulations that do not significantly interfere with decisions to enter into the marriage relationship may legitimately be imposed." *Id.*

[47] *Id.* at 387.

[48] Baehr v. Lewin, 74 Haw. 530, 558, 852 P.2d 44, 58 (1993).

constitutions.[49] The issue of same-sex marriage has arisen on several different fronts: applications for marriage licenses by same-sex couples;[50] a same-sex palimony suit;[51] and a will contest.[52] This section briefly discusses the denial of same-sex marriages in various state courts throughout the country.[53]

In 1971, the Supreme Court of Minnesota addressed the issue of same-sex marriage when two men applied for a marriage license.[54] The men argued that because the marriage licensing statute did not prohibit same-sex marriages, the state could not withhold the license from them.[55] The *Baker* court, however, believed that a "sensible reading of the statute disclose[d] a contrary intent."[56] Reasoning that the term "marriage," as commonly understood, applied only to a "union between persons of the opposite sex," the court quickly dispensed with the petitioner's argument.[57] In addition to the common usage analysis, the *Baker* court found further evidence of the "contrary intent" in dictionary definitions: Webster's Third International Dictionary[58] defined marriage as "the state of being united to a person of the opposite sex as husband or wife;"[59] while Black's Law Dictionary similarly defined marriage as "the civil status, condition, or relation of one man and one woman united in law for life."[60]

In its constitutional analysis, the *Baker* court reviewed the history of marriage as a fundamental right and concluded that a state may

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[49] *See* Baker v. Nelson, 191 N.W.2d 185 (Minn. 1971), *appeal dismissed for want of federal question*, 409 U.S. 810 (1972); Jones v. Hallahan, 501 S.W.2d 588 (Ky. 1973); Singer v. Hara, 522 P.2d 1187 (Wash. Ct. App. 1974); DeSanto v. Barnsley, 476 A.2d 952 (Pa. 1984); In re Cooper, 592 N.Y.S.2d 797 (N.Y. 1993).

[50] *Baker*, 191 N.W.2d 185; *Jones*, 501 S.W.2d 588; *Singer*, 522 P.2d 1187.

[51] *DeSanto*, 476 A.2d 952.

[52] In re Cooper, 592 N.Y.S.2d 797.

[53] For other cases discussing same-sex marriage, *see* Adams v. Howerton, 673 F.2d 1036, 1043 (9th Cir. 1982), *cert. denied*, 458 U.S. 1111 (1982) (holding that Congress did not intend an immigration marriage statute to cover same-sex relationships); Jennings v. Jennings, 315 A.2d 816, 820 n.7 (Md. Ct. Spec. App. 1974) (indicating that Maryland does not recognize a marriage between persons of the same sex); Slayton v. Texas, 633 S.W.2d 934, 937 (Tex. Ct. App. 1982) (stating that same-sex marriage is impossible in Texas).

[54] *Baker*, 191 N.W.2d 185.

[55] *Id.*

[56] *Id.*

[57] *Id.* at 186.

[58] *Id.*, n.1 (citing WEBSTER'S THIRD INTERNATIONAL DICTIONARY 1384 (1966)).

[59] *Id.*

[60] *Id.*, n.1 (citing BLACK'S LAW DICTIONARY 1123 (4th ed.)).

restrict marriages under certain circumstances.[61] In its review of the Supreme Court's fundamental right analysis, the Minnesota supreme court concluded that a crucial purpose for marriage was procreation, and that although the State does not require heterosexual couples to prove they will or can have children, "abstract symmetry is not demanded by the Fourteenth Amendment."[62] Thus, the court held that the Supreme Court's analysis in *Loving* did not prevent a state from restricting marriage based on the fact that the parties in the couple were of the same sex.[63]

Another 1971 case involving same-sex marriage rights was filed in New York.[64] There, a male plaintiff sought to annul his "marriage" to another man whom he thought was a woman at the time of their marriage ceremony.[65] Concluding that a marriage must be a union between a man and a woman, the New York Supreme Court declared that a marriage had never existed under the laws of the state, and indicated that no further action was necessary to dissolve the marriage.[66]

In 1973, the Kentucky Court of Appeals was faced with a similar case when two women who were denied a marriage license brought suit against the state.[67] The Kentucky court approached the issue in much the same way that the Minnesota and New York courts had in *Baker* and *Anonymous*. First, the Kentucky court recited several dictionary definitions to indicate that the word marriage itself applies only to couples of different sexes.[68] Then, the court cited *Baker* and indicated that it saw no need to delve into similar constitutional analysis because the "appellants [were] prevented from marrying . . . by their own incapability of entering into a marriage as that term is defined."[69]

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[61] *Id.* at 187.

[62] *Id.*

[63] *Id.* The *Baker* Court concluded "The equal protection clause of the Fourteenth Amendment, like the due process clause, is not offended by the state's classification of persons authorized to marry. There is no irrational or invidious discrimination." *Id.*

[64] Anonymous v. Anonymous, 325 N.Y.S.2d 499 (1971).

[65] *Id.* at 499.

[66] *Id.* at 500.

[67] Jones v. Hallahan, 501 S.W.2d 588 (1973).

[68] *Id.* at 589.

[69] *Id.*

The issue of same-sex marriage next surfaced in *Singer v. Hara*, where the state denied two men a marriage license.[70] The men first argued that nothing in the state statute prevented them from obtaining a marriage license.[71] The Washington Court of Appeals attacked their reasoning by quoting from another part of the same statute which made reference to "the male" and "the female," which, in the opinion of the court, "dispel[led] any suggestion that the legislature intended to authorize same-sex marriages."[72]

The two Washington men in *Singer* had an additional argument that had not been available to same-sex couples previously seeking marriage licenses. The State of Washington had recently passed an equal rights amendment (Washington's ERA) as part of the state constitution, and the appellants argued that to deny them the opportunity to marry would violate their state constitutional rights under Washington's ERA.[73]

The State argued that while men were denied the right to marry men, and women were denied the right to marry women, this did not violate the parties' equal rights because as men, appellants had "failed to make a showing that they [were] somehow being treated differently by the state than they would [have been] if they were women."[74] The two Washington men contended that, based on the holdings of *Loving* and its progeny, the State was estopped from making this argument.[75] The court, however, found an inherent difference between the relationship of the parties in *Loving* and the two men in this case.[76]

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[70] 522 P.2d 1187 (Wash. Ct. App. 1974).

[71] *Id.* at 1189. The statute read in relevant part: "Marriage is a civil contract which may be entered into by persons of the age of eighteen years, who are otherwise capable." WASH. REV. CODE § 26.04.010 (1970) (quoted in *Singer*, 522 P.2d at 1189).

[72] *Id.* (footnote omitted). The court reasoned that the statute would have referred to "the males" and "the females" if it had been the Washington legislature's intention to sanction same-sex marriages. *Id.*

[73] *Id.* at 1190. Washington's ERA provided in relevant part: "Equality of rights and responsibility under the law shall not be denied or abridged on account of sex." *Id.*

[74] *Id.* at 1191.

[75] *Id.*

[76] *Id.* The court stated:

"There is no analogous sexual classification involved in the instant case because appellants are not being denied entry into the marriage relationship because of their sex; rather, they are being denied entry into the marriage relationship

The court then addressed the state of affairs that led to Washington's ERA. In doing so, the court discussed wage differentials for women and men who work equal jobs, and concluded that the purpose of Washington's ERA was to provide legal protection missing from both the state and the federal Bill of Rights.[77]

While stating that the institution of marriage is one which society views as "the appropriate and desirable forum for procreation and the rearing of children," the *Singer* court acknowledged that heterosexual marriages do not always produce children.[78] However, it characterized such childless marriages as "exceptional situations."[79] Thus, the court concluded that because no same-sex couple can reproduce between its two partners, the "refusal of the state to authorize same-sex marriage results from such impossibility of reproduction rather than from an invidious discrimination 'on account of sex.'"[80] Consequently, the statute prohibiting same-sex marriages was constitutional because it was "founded upon the unique physical characteristics of the sexes."[81]

Lastly, the court addressed the *Singer* plaintiffs' final argument which pertained to the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution.[82] The plaintiffs argued that if they were not being discriminated against as males under Washington's ERA, then they were being discriminated against as homosexuals under the Fourteenth Amendment.[83] The court agreed that the appellants were being discriminated against as homosexuals, but concluded that homosexuals were not members of a suspect class, and that, therefore, the state need satisfy only a rational basis test for discriminating against them.[84] The court then concluded that the state had met its burden.[85]

> because of the recognized definition of that relationship as one which may be entered into only by two persons who are members of the opposite sex."

Id. at 1192.

[77] *Id.* at 1194. The court stated that "a common-sense reading of the language of the ERA indicates that an individual is afforded no protection under the ERA unless he or she first demonstrates that a right or responsibility has been denied solely because of that individual's sex." *Id.*

[78] *Id.* at 1195.

[79] *Id.*

[80] *Id.*

[81] *Id.*

[82] *Id.*

[83] *Id.*

[84] *Id.* at 1196.

[85] *Id.* at 1197.

The next same-sex marriage controversy, *DeSanto v. Barnsley*,[86] was litigated in 1984, in a Pennsylvania superior court, when two males asked for a divorce from their "common law marriage." The court went through several steps in reaching its conclusion. First, it defined marriage as a union between a man and a woman.[87] Next, it addressed the history of common law marriage and concluded that it, too, pertained to the union of a man and a woman.[88] Finally, the court examined the reasons for common law marriage and concluded that "considerations of social policy" did not "support the expansion of common law marriage."[89] In the court's view, this extension would recognize at common law a marriage that was not recognized by statute.[90] Thus, the court concluded that such a move would appropriately be made only by the legislature.[91]

In addition to the above same-sex marriage challenges, the issue of same-sex marriage has also arisen in a will contest.[92] In *In re Cooper*, the New York supreme court, appellate division, refused to redefine the term "spouse" for the purpose of allowing a same-sex surviving spouse to take an elective share of the estate when that spouse is omitted from a will.[93] Because a "spouse" was a component of a union between a man and a woman, a homosexual lover could not take property under a spousal elective share of the estate.[94] Thus, another same-sex marriage challenge failed.

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[85] *Id.* at 1197.

[86] 476 A.2d 952 (Pa. Super. Ct. 1984).

[87] *Id.* at 954.

[88] *Id.* at 955.

[89] *Id.*

[90] *Id.*

[91] *Id.*

[92] In re Cooper, 592 N.Y.S.2d 797 (1993). The court held that the survivor of homosexual relationship, alleged to be a "spousal relationship," was not entitled to the right of election against decedent's will. *Id.* at 798.

[93] *Id.* at 799. The statute in question stated in pertinent part:

> (1) Where . . . a testator executes a will disposing of his entire estate, and is survived by a spouse, a personal right of election is given to the surviving spouse to take a share of the decedent's estate, subject to the following:
>
> ***
>
> (B) The elective share. . .is one-third of the net estate if the decedent is survived by one or more issue and, in all other cases, one-half of such net estate.

Id. at 798 (citing EST. POWERS & TRUSTS § 5-1.1(c)(1)(B)).

[94] *Id.* at 801.

Most recently, a District of Columbia superior court held that two men were not deprived of equal protection through their Fifth Amendment right of due process when they were denied a marriage license.[95] The D.C. court followed the traditional approach stating that "historically, society has viewed marriage as being a union between a man and a woman."[96] The plaintiffs argued that as homosexuals they were being deprived of equal protection and that homosexuals comprised a suspect class.[97] Nevertheless, the Court stated that it was irrelevant whether the plaintiffs were members of a suspect class because denial of their marriage license was not based on their homosexuality, but rather on the definition of marriage.[98] The court added that even if the denial had been based on the plaintiffs' homosexuality, they would not have been accorded a strict scrutiny review because "the District of Columbia has found homosexuals to be entitled to no enhanced constitutional protection."[99] Accordingly, the court concluded that the statute easily survived a rational basis test.[100]

The plaintiffs in *Dean* also argued that the Court's use of biblical references to determine the common usage and understanding of the term "marriage" was a violation of the principle of separation of church and state.[101] They further argued that if biblical references had guided the Council in its drafting of the Marriage Act, then the Marriage Act was a violation of the Establishment Clause of the First Amendment.[102] The court rejected these arguments and indicated that even if the Bible had guided the Council, the Marriage Act would still not violate the Establishment Clause because the legislature could

> rationally, and constitutionally, conclude (a) that marriages between persons of the same sex would be inconsistent with their views of

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[95] Dean v. District of Columbia, D.C. Super. Ct., No. 90-13892, June 2, 1992. Fourteenth Amendment rights such as equal protection were made applicable to federal actions through the Fifth Amendment's Due Process Clause in *Bolling v. Sharpe*, 347 U.S. 497 (1954) (invalidating segregated public education in the District of Columbia). *Id.* at 500.

[96] 18 FLR 1387.

[97] *Id.*

[98] *Id.*

[99] *Id. See* Padula v. Webster, 822 F.2d 97 (D.C. Cir. 1987); Dronenberg v. Zech, 741 F.2d 1388 (D.C. Cir. 1984), *reh'g denied*, 746 F.2d 1579.

[100] 18 FLR at 1388.

[101] *Id.*

[102] *Id.*

> morality and (b) that [a] distinction may be drawn—socially, legislatively and constitutionally—between a societal commitment to eradication of discrimination based on "sexual orientation" (as evidenced by D.C.'s Human Rights Act) and authorization of such a change in the basic concept of marriage.[103]

The court concluded that prohibition of same-sex marriage "advances no religion and has secular purposes."[104]

As demonstrated by the preceding cases, no state, nor the District of Columbia, has allowed a same-sex union to become a valid marriage. The *Baehr* case represents the closest any state has come to allowing same-sex marriages. Before examining the *Baehr* holding in detail, it is important to understand the history of marriage in Hawai'i.

C. *The History of Marriage in Hawai'i*

1. *The requisites of a valid marriage in Hawai'i*

Prior to *Baehr v. Lewin*, the Hawaii Supreme Court, like the United States Supreme Court, had indicated that marriage was not only a fundamental right, but a relationship that should be encouraged.[105] In *Baehr*, the Hawaii Supreme Court did not deviate from this view.[106] It was not willing, however, to extend the fundamental right of marriage to same-sex couples.[107]

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[103] *Id.*

[104] *Id.*

[105] Ross v. Stouffer Hotel Co. (Hawaii) Ltd., Inc., 72 Haw. 350, 816 P.2d 302 (1991), *reconsideration denied*, 72 Haw. 616, 841 P.2d 1074 (1991). The Hawaii Supreme Court held that enforcement of an employer's policy that required employees to transfer or resign after marrying another employee of the same department violated the state's marital status anti-discrimination statute. *Id.* at 355, 816 P.2d at 304.

[106] Baehr v. Lewin, 74 Haw. 530, 553-55, 852 P.2d 44, 56 (1993).

[107] *Id.* at 556-57, 852 P.2d at 57. The Court held that the right to same-sex marriage is not:

> so rooted in the traditions and collective conscience of our people that failure to recognize it would violate the fundamental principles of liberty and justice that lie at the base of all our civil and political institutions. Neither do we believe that a right to same-sex marriage is implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if it were sacrificed.

Id.

As demonstrated in the foregoing discussion, states have traditionally possessed the sovereign power to regulate marriage.[108] Inherent in this power has been the ability to determine the requisites of a valid marriage.[109] Hawai'i codified the requisites of a valid marriage in HRS section 572. Among these requisites are no blood relationship between the potential spouses, a minimum age, no bigamy, valid consent, no concealed diseases, and a license requirement for the performer of the ceremony.[110] HRS sections 572-1(6) and 572-6 also require that a marriage license be obtained from an agent duly authorized to grant licenses to marry before a marriage ceremony can take place.[111] It was this final requirement of a license that was at stake in *Baehr*.

2. The Constitution of the State of Hawaii has not been interpreted as granting same-sex couples a fundamental right of marriage

Despite the sovereign power of the state to regulate marriages, the extent of permissible state regulation of the right of access to the marital relationship is subject to constitutional limitations and constraints.[112] Historically, attacks on the constitutionality of statutes regulating marriages have been based on the right to personal privacy, equal rights amendments, and the equal protection clause. A brief history of each constitutional right as provided in the Constitution of the State of Hawaii is given below:

a. The right to privacy and marriage in Hawai'i

In Hawai'i, all persons have a constitutional right to personal privacy which must be recognized and not infringed upon without a

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[108] Salisbury v. List, 501 F. Supp. 105, 107 (D. Nev. 1980) (holding that a prison regulation prohibiting marriage was unconstitutional interference with right to marry).

[109] *see supra* part III(B).

[110] *See supra* note 10.

[111] Halsey v. Keau, 295 F. 636 (9th Cir. 1924); *see also* Parke v. Parke, 25 Haw. 397 (1920) (holding that common law marriages are not valid in Hawaii because a license is a prerequisite to a valid marriage).

For the full text of HRS §§ 572-1(6) and 572-6, *see supra* notes 10 and 7, respectively.

[112] Zablocki v. Redhail, 434 U.S. 374, 388-91 (1978); Loving v. Virginia, 388 U.S. 1, 7-12 (1967); Salisbury v. List, 501 F. Supp. 105, 107 (D. Nev. 1980).

showing of a compelling state interest.[113] It was the intent of the framers of the Hawai'i Constitution to have the "privacy concept" embodied in article I, section 6 "treated as a fundamental right."[114] The Hawaii Supreme Court has determined that the federal cases cited by the state Constitutional Conventions Committee should guide the construction of the scope of article I, section 6.[115] These federal cases include *Griswold v. Connecticut*,[116] *Eisenstadt v. Baird*,[117] and *Roe v. Wade*.[118] Accordingly, article I, section 6 encompasses all of the fundamental rights found within the privacy protections of the United States Constitution.

One of the fundamental rights found within the privacy protections of the United States Constitution's Due Process Clause is the right to marry.[119] Thus, following the dicta espoused by the Hawaii Supreme Court in *State v. Mueller*,[120] the right to marry is a fundamental right which is protected by the Hawai'i Constitution in article I, section 6. As a result, marriage can be impeded only with a showing of a compelling state interest.

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[113] The Hawai'i Constitution, art. I, section 6, provides in pertinent part: "The right of the people to privacy is recognized and shall not be infringed without the showing of a compelling state interest. The legislature shall take affirmative steps to implement this right." HAW. CONST. art. I, § 6 (added by Const. Con. 1978 and election Nov. 7, 1978).

[114] State v. Kam, 69 Haw. 483, 493, 748 P.2d 372, 378 (1988) (citing COMM. WHOLE REP. No. 15, *in* 1 PROCEEDINGS OF THE CONST. CON. OF HAW. OF 1978, 1024 (1978), holding, in appeal by seller, that a statute prohibiting promotion of pornographic adult magazines infringed upon customer's right to privacy under the state constitution).

[115] State v. Mueller, 66 Haw. 616, 618, 671 P.2d 1351, 1353 (1983) (citing COMM. WHOLE REP. No. 15, in 1 PROCEEDINGS OF THE CONST. CON. OF HAW. OF 1978, 1024 (1978); and discussed *in* 2 PROCEEDINGS OF THE CONST. CON. OF HAW. OF 1978, 628-44 (1978)). The court held that defendant's decision to engage in sexual activities for hire with another consenting adult in the privacy of one's own home was not a fundamental right protected by state or federal Constitutional guarantees of privacy. *Id.* at 629-30.

[116] 381 U.S. 479 (1965).

[117] 405 U.S. 438 (1972). The Court held that a Massachusetts statute permitting married persons to obtain contraceptives, but prohibiting single persons from obtaining contraceptives, violated the Equal Protection Clause. *Id.* at 454-55.

[118] 410 U.S. 113 (1973). The Court held that a woman's right to privacy includes the abortion decision under the Fourteenth Amendment. *Id.* at 154. The Court then concluded that this "right" prevented Texas from enacting severe restrictions that would result in a virtual ban on abortion. *Id.* at 162-64, 166.

[119] Zablocki v. Redhail, 434 U.S. 374, 384 (1978).

[120] 66 Haw. 616, 671 P.2d 1351 (1983).

b. Hawai'i's Equal Rights Amendment and the right to marry

The Hawai'i Constitution also provides for equal protection of the sexes under the law in its version of the Equal Rights Amendment, article I, section 3 (Hawai'i's ERA).[121] The Hawaii Supreme Court has examined Hawai'i's ERA on two occasions; neither examination, however, has led to a clear interpretation of Hawai'i's ERA provision.

The Hawaii Supreme Court first examined Hawai'i's ERA in *Holdman v. Olim.*[122] In *Holdman*, the court upheld a prison regulation requiring females to wear brassieres. In so holding, the court determined that regulations which depend for their applications on "physical characteristics" do not violate Hawai'i's ERA.[123] The court held that prison officials must be allowed to make regulations regarding the successful operation of the prison. The regulation requiring women visitors to wear brassieres was upheld when the court concluded that the state had a compelling interest that would survive a "strict scrutiny" test.[124] The court did not come to a final determination as to which test was appropriate for sex-based classifications, deciding instead to leave the issue for another day.[125]

Hawaii's ERA was next examined in *State v. Rivera.*[126] *Rivera* involved Hawai'i's former rape statute, which defined rape as an offense that only a male could commit. By the plain language of the rape statute, a sex-based classification was created. Yet, the Hawaii Supreme Court found that this statute did not violate article I, section 3 because "physical characteristics" could be taken into account in determining whether article I, section 3 had been violated.[127]

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[121] HAW. CONST., art. I, § 3 provides: "Equality of rights under the law shall not be denied or abridged by the State on account of sex." HAW. CONST., art. I, § 3 (renumbered by Const. Con 1978 and election, Nov. 7, 1978).

[122] 59 Haw. 346, 581 P.2d 1164 (1978).

[123] *Id.* at 354, 581 P.2d at 1170.

[124] *Id.* at 352, 581 P.2d at 1168. The court found that maintenance of security in the prison was a compelling interest sufficient to survive a strict scrutiny test. *Id.*

[125] *Id.* at 351-52, 581 P.2d at 1168.

[126] 62 Haw. 120, 612 P.2d 526 (1980).

[127] State v. Rivera, 62 Haw. 120, 125, 612 P.2d 526, 530 (1980). The Hawaii Supreme Court held that the:

> fundamental legal principle underlying the ERA. . . is that the law must deal with particular attributes of individuals. . . . A classification based on a physical characteristic unique to one sex is not an impermissive under- or over-inclusive classification because the differentiation is based on the unique presence of a

Holdman and *Rivera* are the only Hawai'i appellate cases which examined Hawai'i's ERA prior to *Baehr*.[128] From these two cases, one could only conclude that Hawai'i's appellate courts had not yet provided a clear interpretation of Hawai'i's ERA.

c. *Hawaii's Equal Protection Clause*

The Hawai'i State Constitution provides for equal protection under the law in article I, section 5.[129] Hawai'i's Equal Protection Clause, article I, section 5, is similar to the Fourteenth Amendment to the United States Constitution.[130] Hawai'i's Equal Protection Clause, however, grants more rights to its citizens than its national counterpart by specifically forbidding discrimination based on "race, religion, *sex*, or ancestry."[131]

Unlike the unclear interpretation of Hawai'i's ERA, a relatively clear test for violations of Hawai'i's Equal Protection Clause exists. The Hawaii Supreme Court has held that three interests must be examined in order to determine whether a classification of individuals by a statute violates Hawai'i's Equal Protection Clause: the character of the classification, the individual interests affected by the classification, and the governmental interests asserted in support of the classification.[132] Where a classification involves a "suspect class"[133] or

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> physical characteristic in one sex and not based on an averaging of a trait or characteristic which exists in both sexes. Two frequently-cited examples are laws relating to wet nurses, which would apply to all or some women but no men; or laws regulating sperm donation which would apply to all or some men, but no women.

Id. (omissions included) (citations omitted).

[128] Hawai'i's ERA might have been examined in *State v. Tookes*, 67 Haw. 608, 699 P.2d 983 (1985). In an examination of an appeal of a prostitution conviction, the court held that the defendant had not established discriminatory enforcement of the anti-prostitution law, and therefore, the court did not examine the ERA question.

[129] HAW. CONST., art. I, § 5. *See supra* note 10 (setting out text in full).

[130] The Fourteenth Amendment of the United States Constitution provides in pertinent part that no state shall "deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1.

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

[132] Maeda v. Amemiya, 60 Haw. 662, 594 P.2d 136 (1979). The Hawaii Supreme Court held that a statute favoring commercial tuna fishermen over other commercial fishermen was rationally related to conservation and allocation purposes. Thus, the

a fundamental right,[134] the court uses a strict scrutiny test and a statute is presumed unconstitutional unless the state can demonstrate that the classification is necessary in light of a compelling state interest and is the least drastic means of achieving that objective.[135]

A "suspect classification" exists where the individuals are burdened with such disabilities, or have been subject to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness, as to merit extraordinary protection from the majoritarian political process.[136] The United States Supreme Court has held that race, nationality, and alienage are suspect classes deserving of strict scrutiny.[137]

A plurality of the Supreme Court has also favored recognizing "sex" as a "suspect class" under the United States Constitution for the purposes of the strict scrutiny test.[138] Subsequent cases have made it clear, however, that classification by gender need not satisfy the strict scrutiny test, but only an intermediate test of being "substantially related" to "important" governmental objectives.[139]

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statute did not violate Hawai'i's Equal Protection clause. *Id.* at 673-74, 594 P.2d at 143-44.

[133] Nagle v. Board of Education, 63 Haw. 389, 392 n.2, 629 P.2d 109, 112 n.2 (1981) (citing San Antonio School Dist. v. Rodriguez, 411 U.S. 1, 28 (1973), *reh'g denied*, 411 U.S. 959 (1973)); *see also* Holdman v. Olim, 59 Haw. 346, 349, 581 P.2d 1164, 1167 (1978) (citing Nelson v. Miwa, 56 Haw. 601, 605 n.4, 546 P.2d 1005, 1008 n.4 (1976)).

[134] State v. Mueller, 66 Haw. 616, 671 P.2d 1351 (1983).

[135] *Nagle* at 392 n.2 , 629 P.2d at 112 n.2 (citing San Antonio School District v. Rodriguez, 411 U.S. 1, 28 (1973), *reh'g denied*, 411 U.S. 959 (1973)). On the other hand, where a statute's classification of individuals does not involve either a "suspect class" or a fundamental right, the Hawaii Supreme Court has held that a state need only fulfill a "rational basis" test. This "rational basis" test is fulfilled if the means used by the statute are rationally related to a legitimate state goal. *Nagle*, 63 Haw. at 394, 629 P.2d at 113.

[136] *Id.*

[137] *See* Yick Wo v. Hopkins, 118 U.S. 356 (1886); Brown v. Board of Education, 347 U.S. 483 (1954); Korematsu v. United States. 323 U.S 214 (1944), *reh'g denied*, 324 U.S. 885 (1945).

[138] Frontiero v. Richardson, 411 U.S. 677, 682 (1973). The Court held that federal statutes allowing quarters allowances and medical benefits for spouses of male members of the armed services without actual proof of dependency, but requiring proof of dependency to provide the same services for spouses of female members, violated the Due Process Clause because it failed the strict scrutiny test. *Id.* at 690-91.

[139] Holdman v. Olim, 59 Haw. 346, 350, 581 P.2d 1164, 1167 (1978) (citing Craig

The Hawaii Supreme Court has developed a long-standing principle that it is free to accord greater protections to Hawai'i's citizens under the State Constitution than are recognized under the United States Constitution.[140] Thus, before the *Baehr* decision, it was questionable whether sex-based classifications in Hawai'i were subject to the "compelling state interest" test or the "substantially related" test.[141] After *Baehr*, however, it is clear that under the Hawai'i Constitution, sex is a "suspect category" deserving of the "strict scrutiny" test.[142]

IV. Analysis

The Hawaii Supreme Court is the first state court in the United States to allow a same-sex marriage case to proceed to an evidentiary hearing.[143] Until *Baehr*, no court had gone further than recognizing that prohibiting people of the same sex from marrying did not constitute an equal protection violation.[144]

This section will briefly examine the traditional Judeo-Christian attitudes on marriage and homosexuality. Then, it will review the

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v. Boran, 429 U.S. 190, 197, *reh'g denied*, 429 U.S. 1124 (1976)). *See also* Califano v. Goldfarb, 430 U.S. 199, 299 (1977); Califano v. Webster, 430 U.S. 313, 316-317 (1977).

[140] Baehr v. Lewin, 74 Haw. 530, 576-77, 852 P.2d 44, 65-66 (1993) (citing State v. Texeira, 50 Haw. 138, 142 n.2, 433 P.2d 593, 597 n.2 (1967); State v. Grahovac, 52 Haw. 527, 531, 533, 480 P.2d 148, 151-52 (1971); State v. Santiago, 53 Haw. 254, 265-66, 492 P.2d 657, 664 (1971); State v. Kaluna, 55 Haw. 361, 367-69, 372-75, 520 P.2d 51, 57-58, 60-62 (1974); State v. Manzo, 58 Haw. 440, 452, 573 P.2d 945, 953 (1977); State v. Miyazaki, 62 Haw. 269, 280-82, 614 P.2d 915, 921-23 (1980); Huihui v. Shimoda, 64 Haw. 527, 531, 644 P.2d 968, 971 (1982); State v. Fields, 67 Haw. 268, 282, 686 P.2d 1379, 1390 (1984); State v. Wyatt, 67 Haw. 293, 304 n.9, 687 P.2d 544, 552 n.9 (1984); State v. Tanaka, 67 Haw. 658, 661-62, 701 P.2d 1274, 1276 (1985); State v. Kim, 68 Haw. 286, 289-90, 711 P.2d 1291, 1293-94 (1985); State v. Kam, 69 Haw. 483, 491, 748 P.2d 372, 377 (1988); State v. Quino, 74 Haw. 161, 164 n.2, 840 P.2d 358, 364 n.2 (1992), *reconsideration denied*, 843 P.2d 144 (1992), *cert. denied*, ___U.S. ___, 113 S.Ct 1849 (1993)) (Levinson, J., concurring).

[141] *Holdman*, 59 Haw. at 351-52, 581 P.2d at 1168. The court held that it was "open to this court, of course to apply the more stringent test of compelling state interest to sex-based classifications in assessing their validity under the equal protection clause of the state constitution . . . . We need not deal finally with that issue, and reserve it for future consideration." *Id.*

[142] *Baehr*, 74 Haw. at 579-80, 852 P.2d at 67.

[143] *See supra* part III(B).

[144] *Baehr*, 74 Haw. at 579-80, 852 P.2d at 67.

First Circuit Court's order granting judgment on the pleadings in favor of the defendants.[145] Next, the supreme court's denial of the plaintiffs' right to privacy and fundamental rights claims will be analyzed.[146] The Hawaii Supreme Court's reasoning in the plurality opinion leading to reversal of the lower court's order and remand for an evidentiary hearing on the state's compelling interest to deny same-sex marriages will be traced.[147] Finally, this section will review the concurrence and dissent for a further understanding of the holding in *Baehr*.

A. *Judeo-Christian Attitudes on Marriage and Homosexuality*

Public opinion polls have shown that attitudes on homosexuality tend to be very conservative nationwide. Since 1973, the National Opinion Research Center has asked Americans whether homosexual relations are wrong.[148] Consistently, between sixty-seven and seventy-six percent of the responses stated the view that homosexual relations are "always wrong."[149] Consistent with these figures, seventy percent

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[145] Order Granting Defendant's Motion for Judgment on the Pleadings, Civil No. 91-1394-05 (1st Cir. Ct., Haw., filed Oct. 1, 1991) (hereinafter "Order").

[146] *Baehr*, 74 Haw. at 550, 852 P.2d at 55.

[147] *Id.* at 583, 852 P.2d at 68.

[148] Surveys by the National Opinion Research Center printed in the 1993 Roper Center for Public Opinion Research, The Public Perspective: section "Public Opinion and Demographic Report"; vol. 4, No. 3; p. 82, 1993. Question: "What about sexual relations between two adults of the same sex—do you think it is always wrong, almost always wrong, wrong only sometimes, or not wrong at all?"

[149] "Always wrong" response:

1973	70%
1974	67%
1976	67%
1977	69%
1980	70%
1982	72%
1984	70%
1985	73%
1987	76%
1988	74%
1989	71%
1990	73%
1991	71%

Id.

of a nationwide survey indicated that same-sex marriages should not be legalized.[150] Additionally, twenty-two states and the military still have anti-sodomy laws.[151]

Perhaps an explanation for these figures lies the Judeo-Christian tradition prevalent throughout the United States. Some Christian denominations point out that the Bible is filled with references to the institution of marriage.[152] These same denominations also quote both Testaments of the Bible to demonstrate that homosexual behavior is un-Christian.[153]

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[150] Telephone survey of 818 adults conducted April 21-22, 1993 for the Washington Post by Penn & Schoen Associates of Washington and New York. Question: "Do you think that marriages between homosexual men or between homosexual women should be recognized as legal under the law?" Margin of error equals three percent. WASHINGTON POST, April 25, 1993.

[151] ALA. CODE §§ 13A-6-63 to 13A-6-64 (Michie 1982 & Supp. 1993); ARIZ. REV. STAT. ANN. §§ 13-1411, 12-1412 (West 1989); ARK. CODE ANN. § 5-14-122 (Michie 1987); FLA. STAT. ANN. § 800.02 (West 1992); GA. CODE ANN. § 16-6-2 (1992); IDAHO CODE § 18-6605 (Michie 1987 & Supp. 1993); KAN. STAT. ANN. § 21-3505 (1988 & Supp. 1992); LA. REV. STAT. ANN. § 14:89 (West 1986 & Supp. 1992); MD. CODE ANN. art. 27 §§ 553-554 (Michie 1988 & Supp. 1991); MASS. ANN. LAWS ch. 272, § 34 (Law. Co-op. 1990); MICH. COMP. LAWS ANN. § 750.158 (West 1991); MINN. STAT. ANN. § 609.293 (West 1987); MISS. CODE ANN. § 97-29-59 (Law. Co-op. 1972 & Supp. 1993); MO. ANN. STAT. §§ 566.090.1(2), 566.090(3) (Vernon 1979 & Supp. 1993); MONT. CODE ANN. §§ 45-2-101(20), 45-5-505 (1993); N.C. GEN. STAT. § 14-177 (1993); OKLA. STAT. ANN. tit. 21, § 886 (West 1983 & Supp. 1994); R.I. GEN. LAWS § 11-10-1 (Michie 1981 & Supp. 1993); S.C. CODE ANN. § 16-15-120 (Law. Co-op 1985 & Supp. 1993); TENN. CODE ANN. § 39-13-510 (Michie 1991); UTAH CODE ANN. § 76-5-403 (Michie 1990); VA. CODE ANN. § 18.2-361 (Michie 1988 & Supp. 1993); Uniform Code of Military Justice, 10 U.S.C. § 925, art. 125 (1988).

[152] "And the rib, which the LORD GOD had taken from man, made he a woman, and brought her unto the man . . . Therefore shall a man leave his father and his mother, and shall cleave unto his wife: and they shall be one flesh." *Genesis* 2:22, 24.

"[T]o avoid fornication, let every man have his own wife, and let every woman have her own husband. Let the husband render unto the wife due benevolence: and likewise also the wife unto the husband." I *Corinthians* 7:2-3.

[153] For example: "And if a man also lie with mankind, as he lieth with a woman, both of them have committed an abomination: they shall surely be put to death; their blood *shall be* upon them." *Leviticus* 20:13 (emphasis in original).

> For this cause God gave them up unto vile affections: for even their women did change the natural use into that which is against nature: And likewise also the men, leaving the natural use of the woman, burned in their lust one toward another; men with men working that which is unseemly, and receiving in themselves that recompense of their error which was meet.

Romans 1:26-27.

Judeo-Christian religious teachings, however, have been interpreted in other ways. William N. Eskridge, Professor of Law at the Georgetown University Law Center, recently wrote that "[r]eligious leaders accepting same-sex marriage are a growing minority."[154] In fact, Professor Eskridge posits that virtually all of the major Judeo-Christian religious denominations have performed or specifically sanctioned same-sex marriages.[155]

Professor Eskridge also traces the acceptability of homosexuality in Asian cultures, including the institutionalization of same-sex unions.[156] According to the 1990 census, Hawai'i's population is forty-five percent Asian.[157] In addition, there is a long history of acceptance of homosexuality in the Hawaiian culture.[158] Despite these factors, which Professor Eskridge might argue indicate that homosexuality might have deep roots and acceptance in Hawai'i's people, the disapproval rating of same-sex marriage in Hawai'i is consistent with the national average.[159]

B. *The Circuit Court Order*

In an opinion written by Judge Klein,[160] the circuit court held that article I, section 6 of the Hawai'i Constitution did not provide a fundamental right to enter into a homosexual marriage.[161] The Plaintiffs argued that the decision made by the delegates to the 1978

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[154] William N. Eskridge, Jr., *A History of Same-Sex Marriage*, 79 VA. L. REV. 1419, 1498 (1993).

[155] *Id.* Specifically, Professor Eskridge points to the Reformed Jewish, Unitarian universalist, Episcopalian, Lutheran, Presbyterian, and Methodist congregations. *Id.* at n. 269 (citing INTRODUCTION TO LESBIAN AND GAY MARRIAGE: PRIVATE COMMITMENTS, PUBLIC CEREMONIES 1, 4-7 (Suzanne Sherman ed., 1992)).

[156] Eskridge, *supra* note 154, at 1462.

[157] ALMANAC OF THE 50 STATES: BASIC DATA PROFILES WITH COMPARATIVE TABLES at 92 (Edith R. Hornor ed., 1993).

[158] See Curt Sanburn, *The Aikane Tradition: Homosexuality in Old Hawaii*, Honolulu Weekly, May 12, 1993, at 4.

[159] HONOLULU STAR-BULL. Poll, June 19, 1993, at A1: "Do you favor or oppose legalizing gay marriages in Hawaii?" 72% opposed, 22% favored, and 6% were unsure. *Id.*

[160] By the time *Baehr* was appealed to the Hawaii Supreme Court, Judge Robert G. Klein had become a Justice on the Hawaii Supreme Court. Thus, Justice Klein recused himself from the *Baehr* decision. In his place, Associate Judge Walter M. Heen of the Intermediate Court of Appeals heard the case.

[161] Order, *supra* note 145, 163 at 2.

Hawaii State Constitutional Convention to refrain from including sexual orientation in article I, section 6 was akin to determining that sexual orientation was a fundamental right.[162] The court disagreed, holding instead that the "delegates only meant what they said: sexual orientation was already covered under article I, section 5 of the state Constitution."[163] The court further held that rights which are protected under article I, section 5 may or may not be fundamental.[164]

Answering the Plaintiffs' due process argument, the circuit court held that Hawaii Revised Statutes section 572-1 did not violate the Due Process Clause of article I, section 5.[165] The circuit court found that the law did not "infringe upon a person's individuality or lifestyle decisions" because it did not "criminalize, restrict, prohibit, burden or regulate the exercise of the right to engage in a homosexual lifestyle."[166] Additionally, the circuit court noted that the plaintiffs had presented no evidence to contradict this finding.[167]

In its analysis of homosexuals as a possible suspect class, the court held that homosexuals "do not constitute a suspect class for purposes of equal protection analysis under article I, section 5."[168] Citing *City of Cleburne v. Cleburne Living Center*,[169] the circuit court defined "suspect class" as a group, of individuals who have experienced "political powerlessness."[170] The court stated that homosexuals have received the attention of the legislature which had prohibited employment discrimination based upon sexual orientation.[171] Thus, it can be inferred that the court did not consider homosexuals in Hawai'i to be a politically powerless group.

The court then cited *High Tech Gays v. Defense Indus. Sec. Clearance Office*[172] for the proposition that "homosexuality is not an immutable

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[162] Opening Brief in Appeal From Judgment, filed Oct. 1, 1991, in Civil No. 91-1394-05, filed February 24, 1992 at 27-29.

[163] Order, *supra* note 145, 163 at 2.

[164] *Id.*

[165] *Id.*

[166] *Id.* at 2-3.

[167] *Id.*

[168] *Id.* at 3.

[169] 473 U.S. 432, 433 (1985).

[170] Order, *supra* note 145, 163, at 4.

[171] *Id.* The court cited 1991 HAW. SESS. LAWS 2, which amended chapters 368 and 378 of the Hawaii Revised Statutes. *Id.*

[172] 895 F.2d 563, 573 (9th Cir. 1990), *reh'g denied*, 909 F.2d 375. In *High Tech Gays*, the court of appeals for the ninth circuit upheld the Defense Department's practice of

characteristic; it is behavioral and hence is fundamentally different from traits such as race, gender, or alienage, which define already existing suspect and quasi-suspect classes."[173]

The foregoing analysis brought the lower court to the conclusion that a "rational relationship" test was the test required for Hawaii Revised Statutes § 572-1, because the right to enter into homosexual marriage was not a fundamental right and homosexuals did not constitute a suspect class.[174] The court had no difficulty concluding that § 572-1 was rationally related to the legislature's goal because the law was "obviously designed to promote the general welfare interests of the community by sanctioning traditional man-woman family unit and procreation."[175]

C. *The Plurality's Decision*

1. *No Fundamental Right to Homosexual Marriage*

The Hawaii Supreme Court began its opinion by taking issue with the lower court's order granting judgment on the pleadings.[176] Citing *Ravelo v. County of Hawaii*,[177] the court stated that Plaintiffs' claim must be viewed by considering the facts in the complaint to be true.[178] Thus, on appeal the court would only consider the factual allegations of Plaintiffs' complaint and would ignore any findings of fact that were erroneously made by the circuit court.[179]

The Hawaii Supreme Court held that when the circuit court's order was "stripped of its improper factual findings," the order was contrary

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subjecting gay men and lesbians, automatically and as a class, to more burdensome security clearance procedures than it imposed on other classes of individuals. The Ninth Circuit held that homosexuals lack the indicia of a suspect or quasi-suspect class, and that accordingly the government need only pass a rational relationship test. *Id. But see* High Tech Gays v. Defense Indus. Sec. Clearance Office, 909 F.2d 375 (9th Cir. 1990). In a vigorous dissent from denial of rehearing en banc, Canby, J. joined by Norris, J. opined that homosexuals have been subject to an irrational and systematic prejudice in American society. In addition, the dissent challenged the court's conclusion that homosexuality was not immutable. *Id.*

[173] *High Tech Gays*, 895 F.2d at 573.

[174] Order, *supra* note 145, 163, at 5.

[175] *Id.* at 5-6.

[176] Baehr v. Lewin, 74 Haw. 530, 548, 852 P.2d 44, 52 (1993).

[177] 66 Haw. 194, 198, 658 P.2d 883, 886 (1983).

[178] 74 Haw. at 550, 852 P.2d at 52.

[179] *Id.* at 549-50, 852 P.2d at 53-54.

to the Equal Protection Clause of the Hawai'i Constitution.[180] The court concluded that the record before it left unanswered many factual questions which precluded entry of judgment as a matter of law in favor of Defendants.[181]

The Hawaii Supreme Court first addressed Plaintiffs' right to privacy argument, citing the Hawai'i Constitution's explicit right to privacy clause.[182] The question, as phrased by the court, was "whether the 'right to marry' protected by article I, section 6 of the Hawaii Constitution extends to same-sex couples."[183] Because the right to privacy in the Hawai'i Constitution is derived from the federal "right to privacy," the court looked to federal cases which have considered marriage as a fundamental right.[184] The court concluded that in all of these cases[185] marriage was clearly considered by the United States Supreme Court to be a union between a man and a woman.[186]

Because the United States Supreme Court had only recognized marriage between people of the opposite sex, the Hawaii Supreme Court recognized that the Plaintiffs' case really hinged on whether the Hawaii Supreme Court would be willing to extend the fundamental right of marriage to include a union between same-sex partners.[187]

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[180] *Id.* at 550, 852 P.2d at 54.

[181] *Id.*

[182] *Id.* at 551, 852 P.2d at 55. *See supra* at note 113 (setting out Hawaii's Equal Protection Clause).

[183] *Id.* at 552, 852 P.2d at 55.

[184] *Id.* at 551-54, 852 P.2d at 55-56.

[185] The court did not discuss *Turner v. Safley*, 482 U.S. 78 (1987), a case in which the United States Supreme Court struck down a state regulation barring prisoners from marrying. This may be an important oversight given the Hawaii Supreme Court's emphasis on procreation. The Hawaii Supreme Court later states that Hawaii Revised Statutes § 572-1 no longer requires that parties seeking a marriage license prove that they are able to have children. The court, however, still places a great deal of weight on the procreation aspect of marriage in the United States Supreme Court cases that deal with marriage as a fundamental right. *Turner*, on the other hand, noticeably omits discussion of procreation as a reason for marriage. Instead, in a situation where married couples are unable to procreate, the *Turner* Court declared that marriage is an expression of emotional support and public commitment. *Turner*, 482 U.S. at 96. Additionally, the *Turner* Court called marriage an exercise of religious faith as well as an expression of personal dedication, sexual intimacy, and a precondition to the receipt of governmental benefits (e.g., Social Security benefits), property rights (e.g., tenancy-by-the-entirety, inheritance rights), and other less tangible benefits (e.g., legitimation of children born out of wedlock). *Id.*

[186] *Baehr*, 74 Haw. at 555, 852 P.2d at 56.

[187] *Id.* at 555, 852 P.2d at 56-57.

Under *State v. Kam*,[188] the court stated that the Hawaii Supreme Court is "free to give broader privacy protection [under article I, section 6 of the Hawai'i Constitution] than that given by the federal constitution."[189] The court then concluded that because this right was derived from the federal cases which define the federal right to privacy, the same test that was used in *Griswold*[190] should be used in *Baehr* to determine whether the right to same-sex marriage is a fundamental right.[191]

Citing Justice Goldberg's concurrence in *Griswold*, the Hawaii Supreme Court stated that it was necessary to look:

> to the "traditions and [collective] conscience of our people" to determine whether a principle is "so rooted [there] . . . as to be ranked fundamental." . . . The inquiry is whether a right involved "is of such a character that it cannot be denied without violating those 'fundamental principles of liberty and justice which lie at the base of all our civil and political institutions'. . . ."[192]

The Hawaii Supreme Court also pointed to its decision in *State v. Mueller*,[193] in which the court cited *Palko v. Connecticut*[194] for the proposition that "only rights that are implicit in the concept of ordered liberty can be deemed fundamental."[195] Based on these tests, the *Baehr* court concluded that the right to same-sex marriage met neither the standards of *Griswold* nor *Palko*.[196] Thus, Plaintiffs did not have a "fundamental constitutional right to same-sex marriage arising out of the right to privacy or otherwise."[197]

The court next addressed the Plaintiffs' equal protection claim which, it concluded, gave them recourse to pursue their cause of action.[198]

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[188] 69 Haw. 483, 748 P.2d 372 (1988) (reversing on privacy grounds the conviction of a person who sold a pornographic magazine to an undercover police officer); *see supra* note 114.

[189] *Baehr*, 74 Haw. at 555, 852 P.2d at 57 (citations omitted).

[190] Griswold v. Connecticut, 381 U.S. 479 (1965).

[191] *Baehr*, 74 Haw. at 556, 852 P.2d at 57.

[192] *Id.* (citing *Griswold*, 381 U.S. at 493) (Goldberg, J., concurring)(citations omitted).

[193] 66 Haw. 616, 671 P.2d 1351 (1983).

[194] 302 U.S. 319 (1937).

[195] *Baehr*, 74 Haw. at 556 n.16, 852 P.2d at 57 n.16.

[196] *Id.* at 556-57, 852 P.2d at 57.

[197] *Id.* at 557, 852 P.2d at 57.

[198] *Id.* Interestingly, the Hawaii Supreme Court addressed Plaintiffs' equal protection

2. Equal Protection Analysis

On the record, the Hawaii Supreme Court did not feel the need to discuss further whether homosexuals constituted a suspect class. This was a significant departure from the lower court's order which based its holding, in large part, on its conclusion that homosexuals did not constitute a suspect class.[199] The Hawaii Supreme Court relegated this issue to a footnote: "[I]t is irrelevant, for purposes of the constitutional analysis germane to this case, whether homosexuals constitute a 'suspect class' because it is immaterial whether the plaintiffs, or any of them, are homosexuals."[200] Critical to the court's analysis was an assumption that the equal protection violation arose from discrimination against either the male or female partner of an all male or all female couple. The court stated that, in theory, Hawaii Revised Statutes § 572-1 discriminated against heterosexuals who wanted to obtain a license for a same-sex marriage just as it discriminated against homosexuals.[201]

The court did not deny that it is within a state's sovereign power to regulate marriage.[202] The court pointed to the *Zablocki* and *Loving* cases, among others, as standing for the proposition that a state cannot regulate this relationship to the extent that it conflicts with "constitutional limitations or constraints."[203] The court then conducted basic statutory interpretation to determine that, on its face, Hawaii Revised Statutes § 572-1 discriminates based on sex.[204] Therefore, the question before the court was whether this facial discrimination denied Plaintiffs equal protection of the laws in violation of article I, section 5 of the Hawai'i Constitution.[205]

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claim differently from the way Plaintiffs made their claim in their briefs. Plaintiffs' argument never addressed denial of equal protection based solely on their sex (i.e., in a couple where a male is denied a license to marry a male, one of them is being discriminated against for being a male). Instead, Plaintiffs concentrated on the fact that they were homosexual and argued that homosexuals constituted a "suspect class" for purposes of constitutional analysis.

[199] Order, *supra* note 145, 163, at 3-5.

[200] *Baehr*, 74 Haw. at 558 n.17, 852 P.2d at 58 n.17.

[201] *Id.* at 543 n.11, 852 P.2d at 51 n.11.

[202] *Id.* at 558, 852 P.2d at 58.

[203] *Id.* at 562, 852 P.2d at 59.

[204] *Id.* at 562-64, 852 P.2d at 60.

[205] *Id.* at 564, 852 P.2d at 60. *See supra* note 10.

Defendants argued that marriage, by its definition, is a union between a man and a woman.[206] Therefore, Defendants argued that Plaintiffs' applications for marriage were, by their nature, impossible to grant because Plaintiffs were not proposing unions between men and women.[207] Defendants relied on cases in other jurisdictions which had held that marriage can only be a union between a man and a woman.[208] Unlike the courts in these other jurisdictions, however, the Hawaii Supreme Court would not allow the case to hinge on an argument it termed "circular and unpersuasive."[209]

The Hawaii Supreme Court next compared marriage statutes that allow only men and women to marry to the miscegenation statutes that were on the books in sixteen states when the *Loving* case came before the United States Supreme Court.[210] Most pertinent to the *Baehr* court's analysis was its comparison with the Virginia court's reasoning in *Loving*.[211] The trial judge in *Loving* said:

> 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.[212]

The defendants in *Loving* had argued that the statutes which prevented nonwhites from marrying whites was not an equal protection violation because it affected nonwhites in the same manner that it affected whites: neither could marry the other.[213] The United States Supreme

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[206] *Baehr*, 74 Haw. at 565, 852 P.2d at 61.

[207] *Id.*

[208] *Id.* at 565-66, 852 P.2d at 61. The cases cited by the defendant were Baker v. Nelson, 191 N.W.2d 185 (Minn. 1971), *appeal dismissed for want of federal question*, 409 U.S. 810 (1972); De Santo v. Barnsley, 476 A.2d 952 (Pa. Super. Ct. 1984); Jones v. Hallahan, 501 S.W.2d 588 (Ky. Ct. App. 1973); and Singer v. Hara, 522 P.2d 1187 (Wash. App. 1974), *review denied*, 84 Wash. 2d 1008 (1974).

[209] *Id.* at 565, 852 P.2d at 61. For example, in *Jones v. Hallahan*, 501 S.W.2d 588 (Ky. Ct. App. 1973) the plaintiffs only argued that they were being denied a fundamental right to marriage, and not that the state was violating their equal protection rights. The Hawaii Supreme Court rather sarcastically addressed this fact, indicating that the *Jones* court was "relieved of the necessity of addressing and attempting to distinguish the decision of the United States Supreme Court in *Loving*." *Id.* at 567, 852 P.2d at 61.

[210] *Id.* at 567 n.24, 852 P.2d at 62 n.24.

[211] *Id.* at 567, 852 P.2d at 62.

[212] Loving v. Virginia, 388 U.S. 1, 3 (quoting Virginia trial judge).

[213] *Id.* at 7-8.

Court held that though there was equal application of the statutes, the rational relation test that had been used in other equal application cases[214] was not appropriate in this case because these statutes pertained to racial classifications.[215]

The *Loving* defendants also argued that the framers of the Fourteenth Amendment did not intend for it to strike down state miscegenation laws.[216] The United States Supreme Court conceded that "historical sources 'cast some light'"[217] but held that "they are not sufficient to resolve the problem; '[a]t best, they are inconclusive.'"[218] The Court then concluded that the only standard to judge a statute in which distinctions were racially-based was under the "most rigid scrutiny."[219] Once the Court had reached this test, it was not difficult for it to determine that "[t]here [was] patently no legitimate overriding purpose independent of invidious racial discrimination which justifies this classification."[220]

The Hawaii Supreme Court saw the miscegenation statutes in *Loving* and the Virginia state court's reasoning in protecting them as analogous to marriage statutes which give licenses only to couples whose members are of the opposite sex.[221] The *Baehr* defendants argued that a marriage between two people of the same sex is not, by definition, a marriage.[222] The Hawai'i court then took on decisions from other jurisdictions, pointing out the "tautological and circular nature" of this argument.[223]

The *Jones* court held that marriage had been a "custom long before the state commenced to issue licenses"[224] and that "marriage has always been considered as a union of a man and a woman."[225] The

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[214] *Id.* at 8-9 (citing New York City Railway Express Agency, Inc. v. People, 336 U.S. 106 (1949); Allied Stores of Ohio, Inc. v. Bowers, 358 U.S. 522 (1959)).

[215] *Id.* at 8.

[216] *Id.* at 9.

[217] *Id.* at 9 (quoting Brown v. Board of Educ., 347 U.S. 483, 489 (1954)).

[218] *Id.* (alterations in original).

[219] *Id.* at 11 (quoting Korematsu v. United States, 323 U.S. 214, 216 (1944)).

[220] *Id.* at 11.

[221] *Baehr*, 74 Haw. at 569-70, 852 P.2d at 63.

[222] *Id.* Defendants in *Baehr* did not argue that the statute discriminated against men and women equally. In his dissent, however, Judge Heen accepts the equal application argument as analogous to that advanced before and adopted by the Virginia state court. *Id.* at 590, 852 P.2d at 72. (Heen, J., dissenting).

[223] *Id.* at 569-70, 852 P.2d at 63.

[224] Jones v. Hallahan, 501 S.W 2d 588, 589 (Ky. Ct. App. 1973).

[225] *Id.* at 589.

Singer court held that "the legislature has not authorized same-sex marriages"[226] and that under an equal protection analysis, the statutes were sound because the compelling state interest in licensing only marriages which were possible (that is, marriages between men and women) was being accomplished.[227] The Hawai'i court concluded that it was "tortured and conclusory sophistry" for a court to hold that a marriage between two people of the same-sex was not possible because it did not meet the definition of a marriage.[228] The court reasoned similarly to the Supreme Court in *Loving*, where Virginia claimed a marriage between a white and a nonwhite was not possible because it did not meet the definition of marriage.[229]

3. *Strict Scrutiny or Rational Relationship?*

The *Baehr* court faced unchartered territory in defining the appropriate test for the equal protection analysis pertaining to gender.[230] The court acknowledged that if there is a "suspect classification" or a "fundamental right" at issue, the "strict scrutiny" test should be applied.[231] Consequently, the court felt it had to determine if gender is a "suspect class" in Hawai'i and, therefore, whether equal protection violations pertaining to gender are entitled to a "strict scrutiny" analysis.[232] The gender discrimination analysis begins with an examination of the Hawai'i Equal Rights Amendment.[233] To this end, the *Baehr* court acknowledged the *Holdman*[234] declaration that sex-based classifications are subject, per se, to some form of "heightened scrutiny."[235]

After discussing the Hawai'i Equal Rights Amendment, the *Baehr* court used an equal protection analysis to decide the case. The court first acknowledged that under the United States Constitution sex-

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[226] Singer v. Hara, 522 P.2d at 1189 (cited in Baehr v. Lewin, 74 Haw. at 570-71, 852 P.2d at 63).

[227] *Id.*

[228] *Baehr*, 74 Haw. at 571, 852 P.2d at 63.

[229] Loving v. Virginia, 388 U.S. 1 (1967) (cited in *Baehr*, 74 Haw. at 570, 852 P.2d at 63).

[230] *Baehr*, 74 Haw. at 571, 852 P.2d at 63.

[231] *Id.* at 571-72, 852 P.2d at 63-64.

[232] *Id.* at 572-77, 852 P.2d at 64-66.

[233] HAW. CONST., art. I, § 3. *See supra* note 124 for text of the Equal Rights Amendment.

[234] Holdman v. Olim, 59 Haw. 346, 581 P.2d 1164 (1978).

[235] *Baehr*, 74 Haw. at 576, 852 P.2d at 65.

based classifications have not been decided using a "strict scrutiny" analysis.[236] The court then cited several cases for the proposition that it was "free to accord greater protections of Hawai'i's citizens under the state constitution than are recognized under the United States Constitution."[237] The court concluded that because of the Hawai'i Equal Rights Amendment, and because of the United States Supreme Court's analysis of the pending national ERA in 1973 when it decided *Frontiero v. Richardson*,[238] the test to be used in sex-based classifications was "strict scrutiny."

The implication of *Baehr* is that sex-based classifications in Hawai'i are now considered "suspect classifications," and if these classifications are to be upheld, the state must prove that it has a compelling interest and that there is no less drastic alternative to pursue.[239] On remand, the circuit court must decide whether the state has a compelling interest in preventing individuals of the same sex from marrying. If the state can present no compelling interest, Hawaii Revised Statutes § 572-1 will be unconstitutional.

D. *The Concurrence*

When *Baehr* was first heard by the Hawaii Supreme Court, three opinions were issued.[240] The plurality opinion consisted of two votes,[241]

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[236] *Id.* at 576-77, 852 P.2d at 65-66.

[237] *Id.* (citing State v. Texeira, 50 Haw. 138, 142 n.2, 433 P.2d 593, 597 n.2 (1967); State v. Grahovac, 52 Haw. 527, 531, 533, 480 P.2d 148, 151-52 (1971); State v. Santiago, 53 Haw. 254, 265-66, 492 P.2d 657, 664 (1971); State v. Kaluna, 55 Haw. 361, 367-69, 372-75, 520 P.2d 51, 57-58, 60-62 (1974); State v. Manzo, 58 Haw. 440, 452, 573 P.2d 945, 953 (1977); State v. Miyazaki, 62 Haw. 269, 280-82, 614 P.2d 915, 921-23 (1980); Huihui v. Shimoda, 64 Haw. 527, 531, 644 P.2d 968, 971 (1982); State v. Fields, 67 Haw. 268, 282, 686 P.2d 1379, 1390 (1984); State v. Wyatt, 67 Haw. 293, 304 n.9, 687 P.2d 544, 552 n.9 (1984); State v. Tanaka, 67 Haw. 658, 661-62, 701 P.2d 1274, 1276 (1985); State v. Kim, 68 Haw. 286, 289-90, 711 P.2d 1291, 1293-94 (1985); State v. Kam, 69 Haw. 483, 491, 748 P.2d 372, 377 (1988); State v. Quino, 74 Haw. 161, 164 n.2, 840 P.2d 358, 364 n.2 (1992) (Levinson, J., concurring), *cert. denied*, ___U.S. ___, 113 S.Ct. 1849 (1993)).

[238] 411 U.S. 677 (1973). The United States Supreme Court concluded that the unequal treatment of men and women in the military was impermissible with regard to receipt of benefits for their respective spouses. The Court was divided, however, on the issue of what type of scrutiny should be used. The Brennan plurality held the view that "strict scrutiny" was appropriate. *Id.* at 688. On the other hand, the Powell concurrence felt that because the ERA was pending, it was not appropriate for the Court to decide the issue. *Id.* at 691-92. The assumption, therefore, was that when the ERA passed, gender-based classifications would be accorded "strict scrutiny." *Id.* at 692.

[239] *Baehr*, 74 Haw. at 580, 852 P.2d at 67.

[240] *See infra* notes 241-243 and accompanying text.

[241] *Id.* at 535, 852 P.2d at 48. Acting Chief Justice Moon and Justice Levinson,

the concurrence was made up of one vote,[242] and the dissent consisted of two votes.[243] The *Baehr* court included several judges who were not appointed to the Hawaii Supreme Court.[244] By the time the reconsideration motion was heard, Justice Nakayama had joined the Supreme Court, replacing Substitute Justice Hayashi, whose term of substitution had expired.[245] Justice Nakayama signed onto the plurality opinion's decision to deny the motion for reconsideration, giving the plurality a three-vote majority on this issue.[246]

Judge Burns' concurrence is brief and warrants attention because of its unique approach. The only issues on which Judge Burns concurred were the fact that there were genuine issues of material fact and therefore judgment on the pleadings could not be granted,[247] and that strict scrutiny applies to sex-based discriminations.[248]

Judge Burns was willing to consider the State's refusal to grant marriage licenses to same-sex couples to be sex discrimination only if the Plaintiffs could prove that sexual orientation was "biologically fated."[249] The judge believed that a determination of whether sexual orientation is "biologically fated" is a "relevant question of fact which must be determined before the issue presented in this case can be answered."[250] It is clear that Judge Burns' opinion originally gave

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[241] *Id.* at 535, 852 P.2d at 48. Acting Chief Justice Moon and Justice Levinson, with Justice Levinson writing the plurality opinion.

[242] *Id.* at 584, 852 P.2d at 68. James S. Burns, Chief Judge of the Intermediate Court of Appeals, sat in place of Chief Justice Lum, who was recused.

[243] *Id.* at 587, 852 P.2d at 70. Intermediate Court of Appeals Judge Walter M. Heen authored a dissent and was joined by Retired Associate Justice Yoshimi Hayashi, who was appointed by reason of vacancy. *Id.* at 530, 852 P.2d at 48. Justice Hayashi's appointment expired before the dissent was filed. *Id.* at 587 n.1, 852 P.2d at 70 n.1. Judge Heen sat in place of Justice Robert Klein, who was recused because he granted judgment on the pleadings in the Circuit Court before his appointment to the Hawaii Supreme Court.

[244] *Id.* at 530, 852 P.2d at 48.

[245] Baehr v. Lewin, 74 Haw. 645, 852 P.2d 74 (1993).

[246] *Id.*

[247] *Baehr*, 74 Haw. at 584, 852 P.2d at 68.

[248] *Id.* at 585, 852 P.2d at 69.

[249] *Id.*

[250] *Id.* at 587, 852 P.2d at 69-70. One wonders what kind of timeframe Judge Burns would propose for deciding this issue. The issue of the origins of sexual orientation has been unclear for decades with experts coming down on both sides. In addition, deciding whether or not sexual orientation is biologically fated seems a daunting task for any state trial court when the experts themselves are unable to agree.

the parties something to consider when attempting to address the issue on remand.[251] By clarifying the issue in response to Defendants' motion for reconsideration, however, the plurality effectively dismissed Judge Burns concurrence and the parties will not be expected to address the issue of the "biologically fated" nature of sexual orientation.[252]

E. The Dissent

Judge Heen's dissent is reasoned along the same lines as cases that have appeared on the issue of same-sex marriage in other jurisdictions.[253] Judge Heen did not believe that the *Baehr* case presented an issue of sex discrimination because both men and women were equally disadvantaged by the statute.[254] Although he stated that "*Loving* is simply not authority for the plurality's proposition that the civil right to marriage must be accorded to same sex couples,"[255] Judge Heen did not address the fact that the United States Supreme Court did not accept the equal application argument in *Loving*.[256] Since Judge Heen did not believe that the Hawai'i marriage statute could be considered to be discrimination based on sex, he felt that only a rational basis test should have been used to determine the constitutionality of the statute.[257] Under this test, Judge Heen had no doubt that the state could have prevailed.[258]

Judge Heen also took issue with the fact that the state would have to prove a compelling interest in order for the statute to remain

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[251] *Baehr*, 74 Haw. at 646, 852 P.2d at 74. To the plurality, however, was added a third voice, Justice Nakayama, which enabled the plurality to dictate the terms of the issue on remand. Judge Burns also wrote a brief response to Defendants' motion for rehearing. *Id.* at 646-47, 852 P.2d at 75.

[252] *Id.* at 646, 852 P.2d at 74.

[253] *Baehr*, 74 Haw. at 587, 852 P.2d at 70. In fact, Judge Heen cited Singer v. Hara, 522 P.2d 1187 (Wash. App. 1974), at length for the proposition that marriage is by definition a union between a man and a woman. *Id.* at 590, 852 P.2d at 71. Judge Heen stated that he does "not agree with the plurality's contention that those cases [in other jurisdictions] are not precedent for this case." *Id.* at 590, 852 P.2d at 71.

[254] *Id.*

[255] *Id.* at 588, 852 P.2d at 70.

[256] Loving v. Virginia, 388 U.S. 1 (1967).

[257] *Baehr*, 74 Haw. at 593, 852 P.2d at 72.

[258] *Id.* at 593, 852 P.2d at 72.

constitutional, whereas Plaintiffs would have no such burden of proof.[259] Judge Heen cited *Washington v. Davis*[260] for the proposition that the state must intend to discriminate and that Plaintiffs must prove that intent.[261] Although *Davis* stands for the above stated proposition, the intent requirement was to be applied in situations in which a statute creates discriminatory impact.[262] When a statute, like the Hawai'i marriage statute, discriminates on its face, Plaintiffs need not prove intent because that intent is obvious.[263]

V. IMPACT

On its face, Hawaii Revised Statutes section 572-1 restricts the granting of marriage licenses to heterosexual couples. Thus, *Baehr* viewed Hawaii Revised Statutes § 572-1 as a classic example of a sex-based classification.[264] Because sex is a "suspect class" for the purposes of equal protection analysis under the Hawai'i Constitution, Hawaii Revised Statutes § 572-1(6) is subject to the "strict scrutiny test".[265] As a result, this statute must be presumed unconstitutional unless the state can demonstrate a narrowly drawn compelling interest sufficient to pass the "strict scrutiny test."[266]

Assuming, for the sake of argument that Hawaii Revised Statutes § 572-1(6) is an impermissible sex-based classification that cannot be justified by a compelling state interest, one must ask: What impact will *Baehr* have? Many feel that because of *Baehr*, homosexuals from around the country will flock to Hawai'i in order to become legally married. A section of Reader's Digest called "That's Outrageous!" recently contained a typical example of this feeling:

STATE OF FOOLISHNESS

Hawaii's Supreme Court has come perilously close to ruling that marriage, as it now stands, is unconstitutional. Justice Steven H.

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[259] *Id.* at 593 n.7, 852 P.2d at 72 n.7.
[260] 426 U.S. 229 (1976).
[261] *Id.* (citing Washington v. Davis, 426 U.S. 229, 240 (1976)).
[262] *Davis*, 426 U.S. at 243-45.
[263] *See, e.g.*, *Loving*, 338 U.S. 1; Brown v. Board of Education, 347 U.S. 483 (1954).
[264] *Baehr*, 74 Haw. at 562-63, 852 P.2d at 60.
[265] *See supra* part IV(C)(3).
[266] *See supra* part III(C).

> Levinson wrote for the plurality that state marriage law discriminates because it "denies same-sex couples access to the marital status and its concomitant rights and benefits."
>
> The case in Hawaii has repercussions for all, since states are required to recognize the marriage laws of other states as valid. A gay couple with the money for a Hawaiian vacation could come back to New York or Oklahoma or Georgia a married couple. In effect, three justices in a tiny island state threaten to impose their will on us all.
>
> Because the ruling signals that the state courts will strictly scrutinize gender-bias cases in the future, Carl Varady, legal director of Hawaii's American Civil Liberties Union, hails it as an expansion of women's rights. But the reality is just the opposite. The resources that would go into new tax and health benefits for homosexual couples would in part be taken from American families, from women and children.[267]

The above view represents a fairly typical conservative reaction to the *Baehr* decision. The question arises, however, whether this reaction is accurate. This section analyzes the Full Faith and Credit implications of *Baehr* and the impact of this decision on daily life in Hawai'i.

A. *The Full Faith and Credit implications of Baehr*

Many people share the belief after *Baehr* that "gay couple[s] with the money for a Hawaiian vacation" will flock to Hawai'i to become married.[268] These people fear that because the Full Faith and Credit Clause of the Constitution requires all states to recognize the laws of all other states, same-sex couples who get married in Hawai'i will necessarily be allowed to retain their marital status upon returning home. This scenario represents the best and worst case scenarios for the homosexual and homophobic populations respectively. Despite the Full Faith and Credit Clause, it is questionable whether the above scenario will become a reality.

The United States Constitution requires that "Full Faith and Credit . . . be given in each State to the public Acts, Records, and judicial Proceedings of every other State."[269] The purpose of the Full Faith

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[267] READER'S DIGEST, Sept. 1993, at 96-97 (citing Maggie Gallagher in *Newsday*).

[268] *Id.*

[269] U.S. CONST., art. IV, § 1. *See also* Chicago & A. R. Co. v. Scenario Ferry Co., 119 U.S. 615, 622 (1887). The constitutional requirement that "full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state" implies that the public acts of every state shall be given the same effect by the courts of another state that they have by law and usage at home. *Id.*

and Credit Clause is to preserve rights acquired or confirmed under the public acts and judicial proceedings of the differing states.[270] Full Faith and Credit does not automatically compel a forum state to subordinate its own statutory policy to conflicting public acts of other states.[271] Rather, when a conflict arises between state statutory schemes or judicial decrees, the Supreme Court of the United States may balance the competing public policies involved and make a determination of the extent to which the Full Faith and Credit Clause applies.[272]

If the governmental interest of the forum state is less than the interest of the state from which the statute or judicial decree is sought to be applied, then the refusal of the forum state to give effect to the statute or judicial decree is a violation of the Full Faith and Credit Clause.[273] If, however, the governmental interest of the forum state outweighs[274] or equally balances[275] the interest of the state from which

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[270] Pink v. A.A.A. Highway Express, 314 U.S. 201, 210 (1941), *reh'g denied*, 314 U.S. 716 (1942); *see also* Pacific Employers Ins. Co. v. Indus. Accident Comm'n of California, 306 U.S. 493, 501 (1939).

[271] Hughes v. Fetter, 341 U.S. 609, 611 (1951). (holding that a Wisconsin statutory policy that would exclude an Illinois wrongful death action was forbidden by the full faith and credit clause). *See also Pink*, 314 U.S. at 210; State Farm Mut. Auto. Ins. Co. v. Duel, 324 U.S. 154, 160 (1945), *reh'g denied*, 324 U.S. 887 (1945); Alaska Packers Ass'n v. Industrial Accident Comm'n of California, 294 U.S. 532, 547 (1935); *Pacific Employers*, 306 U.S. at 501 (1939).

[272] *Pink*, 314 U.S. at 210. *Pink* demonstrates this balancing test. The court held that where a resident of one state has, by stipulation in a contract or by stock ownership, become a member of a corporation or association of another state, the state of his residence may have no domestic interest in preventing him from fulfilling the obligations of membership, but it does have a legitimate interest in determining whether its residents have assented to membership obligations sought to be imposed on them by extrastate law to which they are not otherwise subject. *Id. See also Hughes*, 341 U.S. at 611; *Alaska Packers*, 294 U.S. at 547.

[273] John Hancock Mut. Life Ins. Co. v. Yates, 299 U.S. 178, 181-82 (1936). The action was brought in Georgia on a life insurance policy which had been issued in New York state. The law of Georgia did not apply in respect to accrual of right denied on the grounds of material misrepresentation on application in New York. *Id.*

[274] Griffin v. McCoach, 313 U.S. 498, 506 (1941), *cert. denied*, 316 U.S. 683 (1942), *reh'g denied*, 316 U.S. 713 (1942). The Court held that a refusal on the part of Texas courts to enforce an insurance contract where the beneficiaries had no insurable interest on the ground of its interference with local law did not violate the Full Faith and Credit Clause. The Court reasoned that it is "rudimentary" that a state "will not lend the aid of its courts to enforce a contract founded upon a foreign law where to do so would be repugnant to good morals, would lead to disturbance and disorgani-

the statute or judicial decree is sought to be applied, then the refusal of the forum state to give effect to the statute or judicial decree does not violate the Full Faith and Credit Clause.[276]

On balance, it appears that every state should have the same governmental interest in controlling its own marriage laws. There is a general rule that a marriage which is valid in one state is valid in all states.[277] The purpose behind this rule is to prevent persons from being legally married in one state, but unmarried in another.[278] Also, a uniform recognition of marriage assures that children begotten of legally married couples in one state are not considered illegitimate in others.[279] States, however, are not bound to give effect to marriage laws that are repugnant to their own laws and policies.[280] Thus, even if same-sex marriage becomes legal in Hawai'i, it is likely that many states will find same-sex marriage to be repugnant to "good morals" and violative of their own state's public policies. As a result, same-sex marriages performed in Hawai'i might not be recognized in these other states. Undoubtably, same-sex couples "married" in Hawai'i, whose marriages are not recognized in other states, will call upon the United States Supreme Court to determine whether the Full Faith and Credit Clause is being violated. It is difficult to predict how the United States Supreme Court would rule on this issue.[281]

B. Implications on daily life in Hawai'i

Should same-sex marriages become legal in Hawai'i, gay and lesbian couples will enjoy the right of marriage and its concomitant

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zation of the local municipal law, or, in other words, violate the public policy of the state where the enforcement of the foreign contract is sought." *Id.* (citation omitted).

[275] Pacific Employers Ins. Co. v. Industrial Accident Comm'n of California, 306 U.S. 493, 503 (1939). Both Massachusetts and California had the same governmental interest of safeguarding the compensation of workers when injured on the job. When a Massachusetts worker was injured while temporarily working in California, the Full Faith and Credit Clause did not require the California Courts to recognize Massachusetts law. *Id.*

[276] *Id.*

[277] Henderson v. Henderson, 87 A.2d 403, 408 (Md. 1952). (recognizing a common-law marriage in the District of Columbia as valid in Maryland).

[278] *Id.*

[279] *Id.*

[280] *Id.* at 409. *See also* Griffin v. McCoach, 313 U.S. 498, 506 (1939).

[281] The Court's decision in Bowers v. Hardwick, 478 U.S. 186 (1986), *reh'g denied,* 478 U.S. 1039 (1986), in which it upheld a Georgia statute criminalizing sodomy, stands as the Court's most recent view toward homosexuality.

benefits.[282] The impact of *Baehr*, however, will not stop there. Indeed, many wide-reaching effects will be felt throughout the state.

1. A Boost to Hawai'i's Tourism Industry?

Same-sex couples coming to Hawai'i to marry could provide a much needed boost to Hawai'i's ailing tourism industry.[283] In recent years, partly due to the recession in the United States and the economic bubble bursting in Japan, Hawai'i's number one industry, tourism, has been in a slump.[284] In 1992, 6,513,880 visitors stayed overnight or longer in Hawai'i.[285] The 1992 figure was down 5.24% from 1991 and 6.56% from 1990.[286] Not only was the number of visitors lower in 1992, but visitor spending was also down.[287] After reaching a peak of $10.63 billion in 1991, visitor spending dropped 10.1% to $9.56 billion in 1992.[288] *Baehr* may represent an opportunity to take advantage of a large percentage of a pre-existing market—the homosexual market—to recoup some of the losses in visitor arrivals and spending.

The average visitor from the mainland United States spends about $140 per day in Hawai'i.[289] If same-sex couples come to Hawai'i to marry, the costs associated with their weddings will increase this

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[282] A partial list of these benefits include tax advantages, including deductions, credits, rates, exemptions, and estimates; public assistance benefits; control, division, acquisition and disposition of community property; rights relating to dower, curtesy and inheritance; award of child custody and support payments if there is a divorce; right to spousal support; right to enter into premarital agreements; right to change of name; right to file a nonsupport action; benefit of the spousal privilege and confidential marital communications; benefit of the exemption of real property from attachment or execution; and the right to bring a wrongful death action. Baehr v. Lewin, 74 Haw. at 560-61, 852 P.2d at 59.

[283] *See infra* notes 289-293 and accompanying text.

[284] *See infra* notes 285-288 and accompanying text.

[285] THE DEPARTMENT OF BUSINESS, ECONOMIC DEVELOPMENT & TOURISM, THE STATE OF HAWAII DATA BOOK 1992—A STATISTICAL ABSTRACT, *Table 190: Visitor Arrivals and Average Visitor Census*, at 185 (1992) (hereinafter "Hawaii Data Book").

[286] *Id.* In 1991, 6,873,890 visitors stayed overnight or longer in Hawaii. In 1990, 6,971,180 visitors stayed overnight or longer in Hawaii. *Id.*

[287] Ken Tucker, *Tourist Destination*, THE PRICE OF PARADISE: VOLUME II 87 (Randall W. Roth, ed. 1993).

[288] *Id.*

[289] Hawaii Data Book, *supra* note 285, at 196. Visitors spent, on average, $140.54 per day in Hawaii. *Id.*

average daily spending. In addition, friends and family who choose to attend these weddings will also visit the islands and spend money while in Hawai'i.

Not only will gay and lesbian couples come to Hawai'i to marry, but homosexuals in general might view Hawai'i as a more "tolerant" area and choose to vacation in Hawai'i over other popular gay and lesbian destinations. These visitors will also contribute to Hawai'i's economy. It has been estimated that nationwide the gay market represents about $394 billion.[290] Additionally, the average household income of gay men is $51,325 and for lesbians it is $45,927.[291] This is well above the national average household income of $36,520.[292] Gay and lesbian couples also have a higher discretionary income for dining out, entertainment, and travel than their heterosexual counterparts, because they are less likely to have children.[293] Consequently, homosexuals represent a potential boom to Hawai'i's ailing tourism industry.

The question remains, however, whether Hawai'i should want to tap into this market. The gain in homosexual tourists might be offset by a backlash of tourists who do not want to spend their vacations in a "homosexual paradise." Additionally, if same-sex marriages performed in Hawai'i are not recognized by other states, a pattern of homosexual migration to Hawai'i might occur. Whether this is a positive or negative effect depends on one's point of view. Regardless of one's political or moral views on this fact, the end result could mean more competition for Hawai'i's existing jobs and housing.

Perhaps, there will be neither a boom nor a backlash to the tourism industry in Hawai'i. Professor Sumner La Croix of the University of Hawaii Department of Economics recently wrote a pamphlet on the effects of same-sex marriage on Hawai'i's economy.[294] Professor La

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[290] E.P.M. Communications, Inc., *The Gay Consumer*, RESEARCH ALERT, September 6, 1991 (noting that this amount may be low because it was based on 1950s Kinsey data).

[291] THE ATLANTA JOURNAL AND CONSTITUTION, Section F, p. 5, December 1, 1991; THE SACRAMENTO BEE, p. D5, April 25, 1993; *see also* E.P.M. Communications, Inc., *The Gay Consumer*, RESEARCH ALERT, September 6, 1991, which puts this amount at $52, 081.

[292] *Id. See also* E.P.M. Communications, Inc., *The Gay Consumer*, RESEARCH ALERT, September 6, 1991, which puts this amount at $33,831.

[293] *Id.*

[294] SUMNER LA CROIX, REGARDING: SAME-SEX MARRIAGE & HAWAII'S ECONOMY (1993).

Croix posited that Hawai'i is already perceived as a tolerant state; thus, the effect of gay and lesbian couples on the state is likely to be "small."[295] As an example, he pointed to the effect on San Francisco's tourism since the mid-1970s.[296] Professor La Croix stated that despite the city's prohibition of discrimination against homosexuals in housing and employment, tourism seems to have thrived.[297]

2. *A Milestone in Gender Equality*

Although *Baehr* has gained notoriety as a gay rights case, it also represents a milestone in gender equality in Hawai'i. Before *Baehr*, no clear test existed as to what level of scrutiny a sex-based classification would have to meet. After *Baehr*, all classifications based on sex in Hawai'i are subject to strict scrutiny.[298] Thus, any sex-based discrimination by the state must be necessary and justified by a "compelling state interest."[299]

3. *Possible Responses by the State Legislature*

The Hawai'i Legislature has responded to the issue of same-sex marriage in several ways. It has examined a "domestic partnership" law as a lesser alternative to making same-sex marriage legal.[300] This state recognized domestic partnership arrangement would give homosexual couples the same legal rights as heterosexual married couples. Under this arrangement, the Hawaii Supreme Court might find that same-sex couples are no longer being denied equal protection because they would be receiving the same benefits as heterosexual married couples. A domestic partnership law, however, might still come under attack as a violation of Hawaii's Equal Protection Clause because it denies same-sex couples the intangible benefits that are associated with the institution of marriage.[301] This alternative was not adopted by the state legislature. Instead, the legislature choose to

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[295] *Id.*

[296] *Id.*

[297] *Id.*

[298] Baehr v. Lewin, 74 Haw. at 580, 852 P.2d at 67.

[299] *See supra* notes 237-239 and accompanying text.

[300] For a detailed discussion of domestic partnership laws *see* Craig A. Bowman & Blake M. Cornish, *Note: A More Perfect Union: A Legal and Social Analysis of Domestic Partnership Ordinances*, 92 COLUM. L. REV. 1164 (1992).

[301] *See supra* note 282.

make the language of Hawaii Revised Statutes § 572-1 more explicit.

The state legislature passed a bill that would amend § 572-1 to limit marriage contracts to those "between a man and a woman."[302] In the bill, the legislature admonished the Hawaii Supreme Court for "substitut[ing] its own judgment for the will of the people of this state."[303] Additionally, the legislature declared that the question in *Baehr* was one of policy, and therefore "more properly left to the legislature or the people of the State through a constitutional convention."[304] These declarations by the Hawaii state legislature ignore the *Baehr* decision which rejected this reasoning because the "state's powers to regulate marriage are subject to the constraints imposed by the constitutional right to the equal protection of the laws."[305] Additionally, it would seem that these statements by the legislature ignore a court's "action-forcing" role, the role adopted by many courts in desegregation matters. For without the *Brown v. Board of Education* or *Loving v. Virginia* courts, our nation would still be stuck with the antiquated ideas of "separate but equal" and miscegenation.

Citing *Baehr's* dissent, the Bill attempts to distinguish *Loving v. Virginia*,[306] stating that "the invalidation of the race-based classification in Loving is simply not parallel to the sex-based classification in Baehr."[307] To the court in *Baehr*, however, the race-based classification in *Loving* was not only parallel to, but persuasive on the issue of sex-based classification.[308] The *Baehr* court further pointed out that "constitutional law may mandate, like it or not, that customs change with

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[302] H.R. No. 2312 SD1, Leg., Reg. Sess. (1994). *See also* Shannon Tangonan, *Bill Would Ban Licensing of Same-Sex Marriages*, HONOLULU ADVERTISER, Dec. 2, 1993, at A1, A21 (discussing an earlier version of the bill that limited marriages only to those couples who had the "biological possibility" of having children); Helen Altonn, Tom Bill Would Bar Same-Sex Marriage: The Measure Puts Some Biology into the License, HONOLULU STAR-BULLETIN., Dec. 2, 1993, at A3 (discussing an earlier version of the bill that limited marriages only to those couples who had the "biological possibility" of having children).

[303] H.R. No. 2312 SD1, Leg., Reg. Sess (1994) at 3.

[304] *Id.* at 2.

[305] *Id.* (citing *Loving*, 388 U.S. at 7).

[306] 388 U.S. 1 (1967).

[307] *Id.* at 5.

[308] *See* 74 Haw. 530, 569-71, 852 P.2d 44, 63 (1993). "Substitution of "sex" for "race" and article I, section 5 for the fourteenth amendment yields the precise case before us together with the conclusion that we have reached." 74 Haw at 582, 852 P.2d at 68.

an evolving social order."[309] Perhaps same-sex marriages and homosexual rights are at a stage in history equivalent to the 1960s for racial discrimination.

The bill next attacks the Hawaii Supreme Court for "misinterpret[ing]" the word "sex" in Hawai'i's Equal Protection Clause to mean sexual orientation as well as gender. *Id.* at 6-9. By limiting marriage to only male-female relationships, the *Baehr* court found that Hawaii Revised Statutes § 572-1 becomes facially discriminatory on the basis of sex in that it "denies same-sex couples access to the marital status and its concomitant rights and benefits, thus implicating the equal protection clause of article I, section 5."[310] Thus, the bill makes Hawai'i's marriage laws less gender-neutral and still implicates the equal protection clause of article I, section 5.

Finally, by declaring a new legislative history, the bill clarifies the state interest in keeping the institution of marriage open only to male-female couples: "The legislature . . . finds that section 572-1, Hawaii Revised Statutes, and all of Hawaii's marriage licensing statutes, as originally enacted, were intended to foster and protect the propagation of the human race through male-female marriages."[311] In *Baehr*, the court rejected this reasoning because the Hawaii legislature removed procreation from the marriage statute in 1984.[312] This prior legislative history made it difficult for the court to conclude that procreation was the reason that marriage licenses should be issued to male-female couples only.[313]

Additionally, there has been commentary that this new legislative history has given the state only one compelling state interest to argue if the bill were to pass.[314] The analysis is as follows: if in the process of creating a legislative history for the Hawai'i marriage statute, the legislature identified only procreation as the reason for the state's licensing marriage, there must exist no other compelling interest.[315] Consequently, if the Hawaii Supreme Court chooses not to accept procreation as a compelling state interest, the state is left with no other argument.

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[309] *Id.*, 74 Haw. at 570, 852 P.2d at 63.

[310] *Baehr*, 74 Haw. at 581, 852 P.2d at 67.

[311] *Id.* at 9.

[312] *Id.* 74 Haw. at 536-37 n.1, 852 P.2d at 48-49 n.1.

[313] *Id.*

[314] Peter Rosegg, *Gay-wed Bill: Can It Be Upheld?*, HONOLULU ADVERTISER, Feb. 5, 1994, A1.

[315] *Id.* This interest has been implicitly hurst by *Turner*, *supra* note 185.

VI. Conclusion

Baehr v. Lewin represents an historic step in the legalization of same-sex marriages. While there is much yet to be decided in the State of Hawai'i on the issue,[316] *Baehr* represents the first time that a state court has addressed same-sex marriage discrimination as a violation of equal protection. It is also the first time that a court has been willing to look beyond the definition of marriage as a union between a man and a woman. Though there are many steps left to be taken before the resolution of the issue of same-sex marriage in Hawai'i, this case will certainly make other states consider the status of their own marriage laws and the future of the institution itself.

Nancy Klingeman
Kenneth May

[316] The parties have put the suit on hold until the end of this legislative session. Hearings on the state's compelling interest have been set for April of 1995. *Same-Sex Marriage Suit Put on Hold*, HONOLULU STAR-BULLETIN., Feb. 10, 1994, A3.

Even a War Has Some Rules: the Supreme Court Puts the Brakes on Drug-Related Civil Forfeitures

> "Previously, it was left to the standardless discretion (read 'greed', 'anger', 'political correctness') of the individual prosecutor to determine how much of a sanction to impose . . ."[1]
>
> "The (Justice) Department has exercised restraint in enforcing civil forfeiture laws and will continue to do so."[2]

Welcome to a debate through the curious looking glass of federal civil forfeiture law. One New York judge recently called it an "Alice-in-Wonderland universe in which the property owner generally has the burden of proof, lack of criminal culpability is often not a defense, and the government's rights vest from the time of illegality rather than from the time of judgment of forfeiture."[3] It is a procedural no-man's land somewhere between civil and criminal law,[4] protected by a veritable grab-bag of constitutional provisions: the Fourth and Fifth

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[1] Defendant's Memorandum in Opposition to Motion for Summary Judgment at 3, United States v. 4455 Kaluamakua Rd., Civ. No. 92-298 (D. Haw. filed May 13, 1992).

[2] Linda Campbell, *Justices Limit What Can Be Seized From Drug Dealers*, CHI. TRIB., June 29, 1993, at 6 (quoting statement of U.S. Justice Department following U.S. Supreme Court decision in Austin v. United States, 113 S. Ct. 2801 (1993)).

[3] Vito J. Titone, Associate Justice, New York Court of Appeals, *Curtail Use of Civil Forfeiture*, N.Y. L.J., June 29, 1993, at 2 (citing 1 DAVID B. SMITH, PROSECUTION AND DEFENSE OF FORFEITURE CASES ¶ 1.02, at 1-6 (1992)).

[4] Courts have sometimes spoken of forfeiture laws as "quasi-criminal"; *see, e.g.*, Boyd v. United States, 116 U.S. 616, 634 (1886) ("though technically a civil proceeding, [this forfeiture action] is in substance and effect a criminal one"); One 1958 Plymouth Sedan v. Pennsylvania, 380 U.S. 693, 700 (1965) ("forfeiture proceeding is quasi-criminal in character"). For a concise discussion of civil forfeiture's "hybrid procedure of mixed civil and criminal laws elements," see United States v. One 1985 Mercedes, 917 F.2d 415, 419-20 (9th Cir. 1990).

Amendments applied;[5] the Sixth and Eighth Amendments did not.[6] It has been a high-profile battleground in the "war on drugs," where a $20,000 yacht was taken after a single marijuana cigarette was found on board,[7] and a woman's car seized after United States Customs inspectors used tweezers to extract a tenth of a gram of marijuana from the bottom of her purse.[8] Most significantly, every prosecution has been shrouded by the historical legal fiction that in rem civil forfeiture punishes only the property, not the property owner.[9] No wonder defense attorneys sometimes felt like the embattled movie warrior who was told: "There's only one rule: there ain't no rules."[10]

That is, until the United States Supreme Court began forcing federal prosecutors to play by the rules. In 1993, the Court first firmly rejected the government's attempts to eviscerate the civil forfeiture "innocent

[5] United States v. United States Coin & Currency, 401 U.S. 715, 721-22 (1971) (holding Fifth Amendment privilege against self-incrimination applies in certain civil forfeiture cases); *One 1958 Plymouth Sedan*, 380 U.S. at 696 (extending Fourth Amendment exclusionary rule protection to civil forfeitures).

[6] *See, e.g.*, United States v. Zucker, 161 U.S. 475, 480-482 (1896) (holding civil in rem forfeitures not limited by Sixth Amendment Confrontation Clause). Six United States Circuit Courts of Appeals had ruled that the Eighth Amendment requires no proportionality analysis for civil in rem forfeitures, until the United States Supreme Court concluded otherwise in *Austin*. *See* United States v. One Parcel of Real Property, 960 F.2d 200 (1st Cir. 1992); United States v. 6250 Ledge Rd., 943 F.2d 721 (7th Cir. 1991); United States v. 3097 S.W. 111th Ave., 921 F.2d 1551 (11th Cir. 1991); United States v. One 107.9 Acre Parcel of Land, 898 F.2d 396 (3d Cir. 1990); United States v. Tax Lot 1500, 861 F.2d 232 (9th Cir. 1988), *cert. denied*, 493 U.S. 954 (1989); United States v. Santoro, 866 F.2d 1538 (4th Cir. 1989).

[7] Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663 (1974) (holding forfeiture of yacht not unconstitutional as a government taking of innocent party's property without compensation).

[8] This incident is one of several accounts of alleged forfeiture abuse detailed by Jon Nordheimer, *Tighter Federal Drug Dragnet Yields Cars, Boats and Protests*, N.Y. TIMES, May 22, 1988, at 1.

[9] *See, e.g.*, Various Items of Personal Property v. United States, 282 U.S. 577, 581 (1932) ("It is the property which is proceeded against, and, by resort to a legal fiction, held guilty and condemned as though it were conscious instead of inanimate and insentinent.") Courts have strained to distinguish between civil and criminal forfeitures. *See, e.g.*, United States v. Kingsley, 851 F.2d 16, 18 (1st Cir. 1988) ("Civil forfeiture is an in rem proceeding brought against property either used to facilitate a crime or acquired as proceeds from a criminal venture. . . . In personam criminal forfeiture, on the other hand, is intended to directly punish persons convicted of a criminal offense by forcing them to forfeit the proceeds obtained as a result of that offense.")

[10] MAD MAX: BEYOND THUNDERDOME (Warner Bros. 1985).

owner'' defense for claimants of property allegedly tainted by drug proceeds.[11] Then, in *Austin v. United States*,[12] the Court finally recognized that civil forfeiture serves, at least in part, to punish the property owner and is thus limited by the Eighth Amendment's Excessive Fines Clause.[13] Lastly, in a forfeiture case that originated in Hawai'i, the Court ruled the government may not seize someone's home or other real estate without first giving that person notice and an opportunity to be heard in an adversary hearing.[14]

Collectively, these cases represent an important symbolic shift in the judicial attitude towards the federal government's so-called ''war on drugs.'' How much practical effect they have on the street remains to be seen. Part I of this note looks at the legislative history behind the principal federal drug-related civil forfeiture law, how purported abuses led to a public outcry for oversight, and how the law has been used profitably in Hawai'i. Part II examines the Court's decision in *Austin*, focusing on what will become the applicable test for Eighth Amendment proportionality, and whether *Austin* raises double jeopardy concerns for prosecutors. Part III reviews the Court's preservation of the innocent owner defense, and explains its significance to lenders and the government. Part IV discusses the Fifth Amendment due process concerns debated by the Court in the Hawai'i case, and inquires how the decision might alter government procedures in pursuing civil forfeitures. Finally, Part V takes a brief look at the future of federal drug forfeiture law, and discusses whether the Court's pronouncements may have more effect in Congress than in the courtroom.

I. Background of Federal Civil Drug Forfeiture Laws

A. Legislative History

In 1970, the United States Congress (''Congress'') passed the Comprehensive Drug Abuse Prevention and Control Act,[15] the forfeiture

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[11] United States v. 92 Buena Vista Ave., 113 S. Ct. 1126 (1993).

[12] 113 S. Ct. 2801 (1993).

[13] *Id.* at 2812. Earlier in the Court's 1992-93 session, the government was dealt another defeat on a complex jurisdictional issue involving drug-related civil forfeitures. *See* Republic National Bank of Miami v. United States, 113 S. Ct. 554 (1992) (holding an appeals court is not divested of jurisdiction over a civil forfeiture action when the government sells seized property and then transfers the sales proceeds to the U.S. Treasury).

[14] United States v. James Daniel Good Property, 114 S. Ct. 492 (1993).

[15] Pub. L. No. 91-513, 84 Stat. 1236 (1970). For the applicable civil forfeiture provisions, see *id.* at 1276-78.

provisions of which are now codified as 21 U.S.C. § 881. It initially authorized in rem civil forfeiture of only the illegal substances themselves and the instruments (including aircraft and vehicles) by which the drugs were manufactured and delivered.[16] The reach of the law was substantively expanded in 1978 to allow for the forfeiture of all proceeds linked to drug deals,[17] and in 1984 to provide for the forfeiture of drug traffickers' real property.[18] Congress in 1984 also incorporated the "relation-back" doctrine into the statute in hopes of closing a purported loophole that might let drug law violators avert forfeiture through bogus transactions.[19] Clearly frustrated by rising drug abuse and the ineffectiveness of existing forfeiture law, Congress intended the 1984 amendments to provide a more "powerful weapon in the war on the drugs"[20] that could economically cripple drug dealing networks.[21]

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[16] *Id.* The same Congress also provided for *in personam* criminal forfeiture of property obtained through organized crime activity. *See* Organized Crime Control Act of 1970, Pub. L. No. 91-452, § 1963, 84 Stat. 922, 943 (1970). That statute is now commonly known as the RICO forfeiture statute, 18 U.S.C. § 1963 (1988). On the same day it issued *Austin*, the Supreme Court declared that the Eighth Amendment's Excessive Fines Clause also applies to RICO criminal forfeitures. Alexander v. United States, 113 S. Ct. 2766 (1993).

[17] Pub. L. No. 95-633, § 301, 92 Stat. 3768, 3777 (1978) (codified at 21 U.S.C. § 881(a)(6) (1988)) (allowing forfeiture of "all moneys, negotiable instruments, securities, or other things of value furnished or intended to be furnished by any person in exchange for a controlled substance in violation of this title, [and] all proceeds traceable to such an exchange.").

[18] Pub. L. No. 98-473, § 306, 98 Stat. 1837, 2050 (1984) (codified at 21 U.S.C. § 881(a)(7) (1988)) (allowing forfeiture of "all real property, including any right, title, and interest [including any leasehold interest] in the whole of any lot or tract of land and any appurtenances or improvements, which is used, or intended to be used, in any manner or part, to commit, or to facilitate the commission of, a violation of this title punishable by more than one year's imprisonment." (brackets in original)).

[19] *See* 21 U.S.C. § 881(h) (1988) (providing "all right, title and interest in property described in subsection (a) shall vest in the United States upon commission of the act giving rise to forfeiture under this section.").

[20] United States v. 141st Street Corp., 911 F.2d 870, 878 (2d Cir. 1990), *cert. denied*, 498 U.S. 1109 (1991). The Second Circuit cited S. REP. No. 225, 98th Cong., 2nd Sess. 191-92 (1984), *reprinted in* 1984 U.S.C.C.A.N. 3182, 3374-75. Noting that profits by drug traffickers may exceed "tens of billions of dollars annually," the Senate report made clear that "[t]his bill is intended to eliminate the statutory limitations and ambiguities that have frustrated active pursuit of forfeiture by Federal law enforcement agencies." *Id.*

[21] *See, e.g.*, 129 CONG. REC. 5607 (1983) (speech of Sen. Laxalt, calling for forfeiture reform so agents can "cripple and not merely wound the multi-billion-dollar organizations who deal in drugs").

Nonetheless, Congress retained section 881's "innocent owner" defense, protecting property owners who did not know about or consent to the illegal drug activity in question.[22]

Under section 881, the federal government can seize property either by filing a civil complaint under the Supplemental Rules for Certain Admiralty and Maritime Claims,[23] by moving for seizure without process under the four statutory exceptions,[24] or by obtaining a seizure warrant in the manner provided for in the Federal Rules of Criminal Procedure.[25] Instead of establishing separate procedures for drug-related civil forfeitures, Congress simply incorporated existing federal customs laws procedures into section 881.[26] Despite civil forfeiture's "quasi-criminal" status, the prosecutor does not have to prove a defendant's guilt beyond a reasonable doubt.[27] To create a prima facie case for forfeiture, the Government need only show "probable cause" that the property seized was used or intended to be used to violate federal drug laws.[28] Hearsay evidence may be used to establish probable cause.[29]

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[22] *See* 21 U.S.C. § 881(a)(6) (1988). The first "innocent owner" provision was added in 1978, in conjunction with the authorization for forfeiture of drug proceeds. A similar defense was included when Congress authorized forfeiture of real property in 1984. *See* 21 U.S.C. § 881 (a)(7) (1988).

[23] 21 U.S.C. § 881(b) (1988). The clerk of the court is authorized to issue a summons and warrant for arrest of the property upon the filing of a duly sworn complaint. FED. R. CIV. P. SUPP. R. ADMIRALTY & MAR. CLAIMS c(3).

[24] 21 U.S.C. § 881(b)(1)-(4) (1988). If the government seizes the property based only on a belief of "probable cause" under (b) 3 & 4, judicial forfeiture proceedings "shall be instituted promptly." 21 U.S.C. § 881(b) (1988).

[25] *See* FED. R. CRIM. P. 41(c). For a discussion of the three options, see United States v. 785 Nicholas Ave., 983 F.2d 396, 402 (2d Cir. 1993).

[26] 21 U.S.C. § 881 (d) (1988). *See, e.g.*, United States v. James Daniel Good Property, 971 F.2d 1376, 1379 (9th Cir. 1992) (interpreting Section 881 as incorporating the provisions set forth in 19 U.S.C. §§ 1602-1621), *aff'd in part and rev'd in part*, 114 S. Ct. 492 (1993) .

[27] *See, e.g.*, United States v. All Assets of Statewide Auto Parts, 971 F.2d 896, 903 (2d Cir. 1992) (noting that civil forfeiture affords property owners none of the three major protections available to defendants in criminal prosecutions; under criminal procedure, the government 1) must prove its case beyond a reasonable doubt, 2) may obtain only limited court-approved discovery, and 3) has no right of appeal from an adverse verdict).

[28] *See, e.g.*, United States v. One 1985 Mercedes, 917 F.2d 415, 419 (9th Cir. 1990). Probable cause in this setting has been defined as a "reasonable ground for belief. . . supported by less than prima facie proof but more than mere suspicion." United States v. One Parcel of Real Property, 960 F.2d 200, 204 (1st Cir. 1992). This is roughly equivalent to the generally lenient standard used to determine whether

Once the Government establishes "probable cause," the burden of proof shifts to the claimant to establish by a preponderance of the evidence that the property is not subject to forfeiture.[30] In essence, the claimant/property owner must show either: (1) that no probable cause existed (because the property was not used as alleged), or (2) that the drug activity took place without the claimant's knowledge or consent under the "innocent owner" defense.[31] Although one federal judge called the structure of civil forfeiture laws "inherently unfair to claimants,"[32] and the Second Circuit has questioned the wisdom of shifting the evidentiary burden from the government to claimant,[33] Congress' allocation of the burden of proof has survived constitutional challenges.[34] If a property owner introduces no evidence, the government may obtain forfeiture based solely on its showing of probable cause.[35]

B. *Public Outcry Over "Disproportionate" Forfeitures*

Armed with a sharpened procedural sword, federal prosecutors quickly carved out a lucrative drug forfeiture business. Between 1985 and 1992, more than $2.5 billion in illicit cash and proceeds from the sale of seized property were deposited in the Justice Department's Asset Forfeiture Fund.[36] But with increased volume came charges of abuse,

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criminal search and seizures are legal. *See, e.g.*, United States v. Lot 9, Block 2 of Donnybrock Place, 919 F.2d 994, 998 (5th Cir. 1990). When the government has previously obtained a criminal conviction against the property owner for the same incident, it may invoke collateral estoppel to meet its burden of probable cause. United States v. Section 18, Township 23, 976 F.2d 515, 517 (9th Cir. 1992).

[29] *See, e.g.*, United States v. 1012 Germantown Road, 963 F.2d 1496, 1501 (11th Cir. 1992). A finding of probable cause also may be based on hearsay from confidential informants or from circumstantial evidence. United States v. Daccarett, 6 F.3d 37, 53 (2d Cir. 1993).

[30] United States v. A Single Family Residence, 803 F.2d 625, 629 (11th Cir. 1986); *see also* 19 U.S.C. § 1615 (1988).

[31] United States v. 141st St. Corp., 911 F.2d 870, 876 (2d Cir. 1990), *cert. denied*, 498 U.S. 1109 (1991).

[32] United States v. All Funds on Deposit, 801 F. Supp. 984, 991 (E.D. N.Y. 1992).

[33] United States v. Daccarett, 6 F.3d 37, 57 (2d Cir. 1993).

[34] United States v. 228 Acres of Land, 916 F.2d 808, 814 (2d Cir. 1990), *cert. denied*, 498 U.S. 1091 (1991). *See also* Paul E. Becker, *The Fifth Amendment Dilemma in Forfeitures*, 39 PRAC. LAW 35 (1993).

[35] United States v. One 56-Foot Motor Yacht Named Tahuna, 702 F.2d 1276, 1287 (9th Cir. 1983).

[36] *Congress Hears Charges of Forfeiture Abuse*, NAT'L L.J., Oct. 12, 1992, at 5.

prominently displayed in the media.[37] Critics screamed that prosecutors had lost sight of the original law enforcement purpose of civil forfeitures, and were instead merely using the laws to grab badly needed new revenues.[38] Indeed, a 1990 Justice Department memo signed by then Attorney General Richard Thornburgh warned all federal prosecutors that they must "significantly increase production" to reach a $470 million yearly budget target for forfeiture deposits.[39] In one highly-publicized case, a 61-year-old Malibu, California, man was shot dead in a botched drug raid that was allegedly motivated by a desire to seize and forfeit the man's $5 million ranch.[40]

Fueling some of the furor was a relatively small group of allegedly disproportionate forfeitures stemming from the federal government's "zero tolerance" drug policy.[41] Federal courts quickly concluded that forfeiture could be enforced even for "truly de minimis infractions."[42] Particularly with regard to cars and boats, the transportation of any quantity of drugs however minute was enough to merit forfeiture.[43] In the case of real property, large lots were forfeited even though the alleged drug sale or production took place on only a small piece of the

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[37] Among others, the Pittsburgh Press, Orlando Sentinel, and "60 Minutes" produced investigative reports on alleged forfeiture abuse.

[38] Jed Rakoff, *Will the Supreme Court Restrain Forfeiture?*, N.Y. L.J., July 8, 1993, at 3.

[39] Stephen Labaton, *Seized Property in Crime Cases Causes Concern*, N.Y. TIMES, May 31, 1993, at 1. Justice Anthony Kennedy, writing for the majority in United States v. James Daniel Good Property, 114 S. Ct. 492 (1993), cited the same internal memo to show "the extent of the government's financial stake in drug forfeitures." *Id.* at 502 n.2.

[40] Henry Reske, *A Law Run Wild*, A.B.A.J., Oct. 1993, at 24. No drugs were ever found on the man's ranch. The Los Angeles County Sheriff later criticized a county district attorney's conclusion that the drug raid was not legally justified. Daryl Kelley, *Report: Sherman Block Clears His Deputies In the Fatal Malibu Raid on Donald Scott's Ranch*, L.A. TIMES, Sept. 10, 1993, at B-1.

[41] Jon Nordheimer, *Tighter Federal Drug Dragnet Yields Cars, Boats, and Protests*, N.Y. TIMES, May 22, 1988, at 1. For example, a Florida shrimp fisherman complained his 73-foot boat was seized when the Coast Guard found three grams of marijuana seeds and stems on board. *Id.*

[42] United States v. 566 Hendrickson Blvd., 986 F.2d 990, 999 (6th Cir. 1993) (citing United States v. 3639 2nd St., 869 F.2d 1093 (8th Cir. 1989)). In *566 Hendrickson*, a $65,000 home was forfeited after the claimant had used an attic to cultivate 40 marijuana plants. *Id.*

[43] United States v. One 1986 Mercedes Benz, 846 F.2d 2, 5 (2d Cir. 1988) (luxury car forfeited after single marijuana cigarette butt found in ashtray).

acreage.[44] Not surprisingly, the value of the property seized typically bore little relation to the value of the drugs involved.[45] In one oft-cited case, a $145,000 New York condominium unit was forfeited following a $250 sale of cocaine in the condominium.[46] Although Congress appeared to be principally attacking drug traffickers in enacting section 881,[47] courts applied it with equal gusto to so-called "personal users."[48] By mid-1993, the federal government had more than 31,500 pieces of real and personal property in its forfeiture inventory.[49]

C. *Drug Forfeitures in Hawai'i*

Given a marijuana crop valued at somewhere between $600 million and $10 billion a year,[50] it should be no shock that Hawai'i ranks high on the list of federal drug forfeitures. As then-United States Attorney Dan Bent put it: "The principle is, sue the man with the

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[44] *See, e.g.*, United States v. Santoro, 866 F.2d 1538 (4th Cir. 1989) (26-acre family property forfeited although small cocaine sales made only on five-acre portion); United States v. One 107.9 Acre Parcel of Land, 898 F.2d 396 (3d Cir. 1990) (entire property forfeited although marijuana grown and stored on only a portion of land); United States v. 3097 S.W. 111th Ave., 921 F.2d 1551 (11th Cir. 1991) ($250,000 house forfeited although attempted cocaine sale only took place in driveway).

[45] *See, e.g.*, United States v. Tax Lot 1500, 861 F.2d 232 (9th Cir. 1988), *cert. denied*, 493 U.S. 954 (1989) ($95,000 house forfeited although only 143 marijuana plants worth less than $1000 found growing on housedeck and in small garden).

[46] United States v. 38 Whalers Cove Drive, 954 F.2d 29 (2d Cir. 1992) *cert. denied*, 113 S. Ct. 55 (1992). The government informant who made the purchase requested the first sale take place in the condo. *Id.* at 32.

[47] *See* Austin v. United States, 113 S. Ct. 2801, 2811 (1993) ("inclusion of innocent owner defenses . . . reveals a similar congressional intent to punish only those involved in drug trafficking").

[48] United States v. One Parcel of Real Property, 960 F.2d 200, 205 (1st Cir. 1992) ("growing marijuana, whether or not for personal use, is an activity sufficient to subject the property on which the cultivation occurs to civil forfeiture"). *See also* United States v. One 1976 Porsche 911S, 670 F.2d 810 (9th Cir. 1979) (finding it not "unconscionable" to forfeit vehicle even though less than a quarter-gram of marijuana found inside car).

[49] Steven Kessler, *Forfeiture and the Eighth Amendment*, N.Y. L.J., July 26, 1993, at 1, (citing U.S. Justice Department statistics).

[50] *Cf. Hawaii Losing Drug War*, HONOLULU STAR BULL. & ADVERTISER, Mar. 5, 1989, at A1 (state Attorney General Warren Price values Hawaii marijuana crop at $10 a billion a year); *An Invisible, Invincible Industry*, HAWAII INVESTOR, Jan. 1987, at 37 (U.S. Drug Enforcement Administration estimates state's annual marijuana harvest to be worth between $600 million and $900 million).

money. In forfeiture cases, we're going after the money.''[51] The program kicked into high gear following the 1984 amendments to section 881; the first major bust netted a 141-acre Kauai estate, a 109-foot boat and $450,000 cash.[52] On one day in 1989, federal agents seized 12 properties in the pot-growing district of Puna, Hawai'i.[53] Million-dollar seizures are not uncommon.[54] Federal officials refuse to disclose their total take in Hawai'i, but the Justice Department's 1990 Annual Report listed $13.2 million in Hawai'i's ''Seized Asset Deposit Fund''—only four states had more.[55] The booty has been shared with state and county agencies who ''participated directly in the seizure or forfeiture of the property.''[56] In 1992 alone, the U.S. Attorney's Office presented checks of $876,000 and $904,000 to local Hawai'i law enforcement agencies.[57]

While some defense attorneys would no doubt disagree, the president of the Hawaii Association of Criminal Defense Lawyers says prosecutors in Hawai'i have used more discretion and better judgment in pursuing cases than some mainland United States Attorneys.[58] Whatever the reason, there have been relatively few highly-publicized allegedly disproportionate forfeitures in Hawai'i. In perhaps the most controversial case, an elderly couple had their Paia, Maui home seized—some four years after their mentally unstable adult son pled

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[51] Edwin Tanji, *Narcotics Trade Becoming Lucrative Even for Police*, HONOLULU ADVERTISER, Aug. 12, 1989, at A3.

[52] *An Invisible, Invincible Industry*, *supra* note 50, at 37.

[53] *Law Targets Drug Real Estate—$1.3 Million in Seizures just the Beginning*, HONOLULU ADVERTISER, Aug. 26, 1989, at A2.

[54] *See, e.g.*, 11 THE DEPARTMENT OF JUSTICE MANUAL B-1064 (Prentice-Hall Law & Business Supp. 1991). On September 30, 1990, the U.S. Marshal's Service reported it was holding two Hawaii properties worth more than $1 million: the ''Greenbank Estate'' on the Big Island (estimated value $1.265 million) and an Oahu home at 3457 Waikomo Road (estimated value $1.75 million). *Id.*

[55] *See id.* at B-1083 (Prentice-Hall Law & Business Supp. 1991). The four states with more money in their seizure holding accounts were California, New York, Florida and Texas. *Id.*

[56] 21 U.S.C § 881(e)(1)(A) (1988). Congress authorized this sharing of proceeds in the hope it will ''encourage further cooperation'' between federal and local officials. 21 U.S.C. § 881(e)(3)(B) (1988).

[57] *Isle Police Share over $800,000 in Forfeit Money*, HONOLULU ADVERTISER, May 8, 1992, at A2; *All Counties Benefit from Forfeiture of Assets*, HONOLULU ADVERTISER, Aug. 20, 1992, at A12.

[58] Telephone Interview with Earle Partington, President, Hawaii Association of Criminal Defense Lawyers (Aug. 28, 1993).

guilty to growing marijuana in their backyard for his own use.[59] The seizure provoked a storm of angry letters to the editor, calling the federal action "bounty hunting" and a "serious assault on the Constitution."[60] In its biggest case by dollar-value, federal prosecutors in Hawai'i filed 26 civil forfeiture actions seeking $10.7 million in mainland bank accounts allegedly tied to a convicted Peruvian cocaine trafficker.[61] Prosecutors had mixed success in court.[62]

These multi-million-dollar federal seizures in Hawai'i have overshadowed efforts to seek forfeitures under a similar state law, the Hawaii Omnibus Criminal Forfeiture Act (Hawaii Revised Statutes chapter 712A).[63] State and county seizing agencies found themselves under increasing financial pressure to use federal asset forfeiture law because they are eligible to receive up to 80% of the forfeited property, less the federal government's expenses. Under the analogous state law, state and county agencies initially share in only 50% of the proceeds.[64] The Hawai'i law was scheduled to "sunset" (a legislative term for terminate) on June 30, 1993, but was recently extended through at least mid-1996.[65]

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[59] Andrew Schneider & Mary P. Flaherty, *Maui Couple's Home Snared by Forfeiture Law*, HONOLULU STAR BULL., Aug. 13, 1991, at A1.

[60] *Maui Couple Shouldn't Lose Home*, HONOLULU STAR BULL., Aug. 19, 1991, at A11.

[61] Ken Kobayashi, *27-year Term, $4 Million Fine in Cocaine Case*, HONOLULU ADVERTISER, Sept. 12, 1989, at A9.

[62] *See* United States v. All Monies ($637,944) in the Name of Sami Jabra Abusada, 746 F. Supp. 1432 (D. Haw. 1990) (holding no probable cause shown and denying continuance to allow government "fishing expedition"); United States v. All Monies ($477,048) in Account No. 90-3617-3, 754 F. Supp. 1467 (D. Haw. 1991) (finding probable cause that bank account "facilitated" drug and money laundering activities).

[63] *See* DEPT. OF ATTORNEY GENERAL, PROCEEDINGS UNDER THE HAWAII OMNIBUS CRIMINAL FORFEITURE ACT, FISCAL YEAR 1992, at 7-9 (1992). Total seizures in fiscal 1992 under the state law were valued at $1.26 million, an 8 percent decrease from fiscal 1991. In fiscal 1992, prosecutors filed 217 petitions for administrative forfeiture, and most were uncontested. *Id.* at 10-11.

[64] *Id.* at 4. The remaining 50% of the proceeds is deposited into the criminal forfeiture fund administered by the state Attorney General. *Id.* at i.

[65] Act 196, June 10, 1993, 17th Leg., 1993 Reg. Sess., 1993 Haw. Sess. Laws 457.

II. The Supreme Court Applies Eighth Amendment Proportionality

A. *Austin v. United States*

Richard Austin's legal odyssey began in June 1990 with a seemingly unremarkable sale of two grams of cocaine.[66] Austin made the sale in his Garretson, South Dakota auto body shop, after apparently retrieving some cocaine from his nearby mobile home.[67] He was subsequently indicted on state drug charges, pled guilty to one count of possession with intent to distribute, and was sentenced to seven years in state prison.[68] While the state criminal case was pending, the federal government filed a section 881 complaint seeking forfeiture of Austin's body shop and mobile home, contending they were used to "facilitate" the drug deal.[69] The federal district court granted summary judgment for the government, and the Eighth Circuit Court of Appeals "reluctantly" agreed that the seizure did not violate the Eighth Amendment.[70] Calling proportionality a concept "deeply rooted" in the common law, the Eighth Circuit made clear its belief that "the principle of proportionality should be applied in civil actions that result in harsh penalties."[71] It presciently noted:

> [W]e are troubled by the government's view that *any* property, whether it be a hobo's hovel or Empire State Building, can be seized by the government because the owner, regardless of his or her past criminal record, engages in a single drug transaction.[72]

When the United States Supreme Court granted certiorari, only one Circuit Court of Appeals had ruled the Eighth Amendment applied to

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[66] United States v. 508 Depot Street, 964 F.2d 814, 815 (8th Cir. 1992), *rev'd sub. nom.*, Austin v. United States, 113 S. Ct. 2801 (1993).

[67] *Id.*; *see also* Brief of Petitioner at 4-5, Austin v. United States, 113 S. Ct. 2801 (1993) (No. 92-6073).

[68] Brief of Petitioner at 6, *Austin* (No. 92-6073). A search of the mobile home and body shop, conducted the day after the two-gram sale, uncovered small amounts of marijuana and cocaine, a .22 caliber revolver, drug paraphernalia, and $3,300 in cash.

[69] *Id.*

[70] *508 Depot Street*, 964 F.2d at 817. The Eighth Amendment provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. Const. amend. VIII.

[71] 964 F.2d at 817.

[72] *Id.* at 818 (emphasis in original).

in rem civil forfeitures.[73] Relying heavily on the legal fiction that civil forfeiture removes "offending" property, the government argued the Eighth Amendment would limit such forfeitures only if they had been recognized as "criminal punishment" when the Eighth Amendment was adopted.[74] The Supreme Court unanimously[75] rejected that argument: "The question is not, as the United States would have it, whether forfeiture under [section 881] is civil or criminal, but rather whether it is punishment."[76] After reviewing historical evidence and Congressional intent, the Court concluded that forfeiture under section 881 was "payment to a sovereign as punishment for some offense" and was thus limited by the Eighth Amendment's Excessive Fines Clause.[77] The Court declined to state any test for whether a forfeiture is constitutionally excessive, and remanded the case to the Eighth Circuit Court of Appeals to determine if Austin's forfeiture was indeed disproportionate.[78] In his concurring opinion, Justice Scalia argued that the excessiveness inquiry for statutory in rem forfeitures should be measured by an "instrumentality" test rather than the usual Eighth Amendment inquiry for monetary fines (comparing the value of the penalty relative to the committed offense).[79]

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[73] United States v. 38 Whalers Cove, 954 F.2d 29, 35, 38-39 (2d Cir.), *cert. denied*, 113 S. Ct. 55 (1992). Nonetheless, the Second Circuit found the condominium forfeiture at issue was not disproportionate to the drug offense. *See also supra* note 46. Other opinions had recognized the possibility that the Eighth Amendment might apply to civil forfeitures. United States v. On Leong Chinese Merchants Assn. Bldg, 918 F.2d 1289, 1299 (7th Cir. 1990) (Cudahy, J., concurring) (noting it would "defy common sense" to prohibit disproportionate forfeitures against a defendant convicted in a criminal case but not in a civil in rem action).

[74] *See* Brief for the United States at 13-26, Austin v. United States, 113 S. Ct. 2801 (1993) (No. 92-6073).

[75] Justice Blackmun delivered the opinion of the Court, joined by four justices. 113 S. Ct. at 2802. Justice Kennedy filed a concurring opinion, joined by two justices. *Id.* at 2815. Justice Scalia filed a separate concurring opinion. 113 S. Ct. at 2812.

[76] *Id.* at 2806.

[77] *Id.* at 2812. Significantly, the Court squarely rejected the Government's contention that drug forfeitures are "solely remedial" rather than punitive. *Id.* at 2811-12.

[78] *Id.* In so doing, the Court followed an amicus argument that the "Eighth Amendment question here should not be resolved so casually," without a complete record of the facts. *See* Brief Amicus Curiae of the American Civil Liberties Union in Support of Petitioner, Austin v. United States, 113 S. Ct. 2801 (1993) (No. 92-6073). As of this writing, the Eighth Circuit has not decided the case on remand.

[79] *Austin*, 113 S. Ct. at 2814 (Scalia, J., concurring). *See infra* notes 99-122 and accompanying text, on the proposed "instrumentality" test. Justice Scalia also sharply

B. Establishing a Test for "Proportionality"

News media around the country trumpeted *Austin* as a major setback for the government in its fight against drug trafficking,[80] but in fact the turf has merely shifted from the Supreme Court back to the federal district and circuit courts. If those lower courts apply the Excessive Fines Clause with the same deference they have historically shown to the government, very few seizures may be declared unconstitutionally excessive.

Because the Supreme Court offered absolutely no guidance on the appropriate test, some courts may be tempted to recycle their pre-*Austin* proportionality analyses.[81] For example, the Sixth Circuit simply noted that if forfeitures were enforced for even "de minimis" infractions, a man who grew 40 marijuana plants in his attic could not argue that forfeiture of his $65,000 home was "grossly disproportionate."[82] The Seventh Circuit also appeared to endorse a standard that would forbid only forfeitures that are grossly disproportionate to the drug offense committed.[83]

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criticized the Court's contention that in rem forfeitures require some sort of culpability or blameworthiness on the part of the affected property owner. He noted that if culpability is essential, then there is no difference (except perhaps the burden of proof) between in rem and in personam forfeitures. *Id.* at 2814.

[80] *Justices Limit Civil Forfeiture in Drug Cases*, N.Y. L.J., June 29, 1993, at 1 (reporting that the Supreme Court had "blunted a major weapon in the war on drugs"); Joan Biskupic, *Power to Seize Property in Drug Cases is Limited*, WASH. POST, June 29, 1993, at A-1 (reporting that the decision "sharply limited the government's power to seize homes and businesses").

[81] Even before *Austin*, a few courts had discussed whether the forfeiture in their case was disproportionate, assuming, *arguendo*, that the Eighth Amendment applied. *See, e.g.*, United States v. One Parcel of Real Property, 960 F.2d 200, 207 (1st Cir. 1992).

[82] United States v. 566 Henrickson Blvd., 986 F.2d 990, 999 (6th Cir. 1993).

[83] United States v. 6250 Ledge Road, 943 F.2d 721, 727-728 (7th Cir. 1991) (holding bare assertion that entire property was not connected to drug activity not sufficient to prove "gross disproportionality"); United States v. $288,930, 838 F. Supp. 367 (N.D. Ill. 1993). *$288,930* is also notable for its assertion that the U.S. Supreme Court's Eighth Amendment holding in *Austin* does not apply to seizure of drug proceeds under 21 U.S.C. § 881(a)(6). 838 F. Supp. at 370. The court rather obliquely reasoned that because a claimant does not rightfully own the proceeds from an alleged drug transaction, a forfeiture based on § 881(a)(6) "seems to be remedial, rather than punitive, in nature." *Id.* Another U.S. District Judge suggested that *Austin*'s Excessive Fines Clause mandate will not apply to a seizure of cash proceeds

The Second Circuit focused its analysis on the Cruel and Unusual Punishments Clause of the Eighth Amendment, determining whether the forfeiture was a punishment grossly disproportionate to the crime committed under *Solem v. Heim.*[84] Under *Solem*, three factors guide the proportionality analysis: (1) the gravity of the offense and the harshness of the penalty; (2) the sentences imposed on other criminals in the same jurisdiction; and (3) the sentences imposed for the commission of the same crime in other jurisdictions.[85] After considering the "serious threat to individuals and society posed by drug offenses" and the lengthy maximum prison sentences for similar drug crimes, the Second Circuit concluded the forfeiture would not violate the Eighth Amendment.[86] The *Solem* test has its supporters. Justice O'Connor, in a dissenting opinion, proposed applying the *Solem* framework to an Excessive Fines Clause analysis of a punitive damages award.[87] In one prominent Hawai'i case, the Ninth Circuit ruled that *Solem* provided the proper test for proportionality of criminal forfeitures under the

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under § 881(a)(6) if the money seized "constitutes contraband." United States v. $45,140, 839 F. Supp. 556, 558 (N.D. Ill. 1993).

It is true that *Austin* only dealt directly with forfeitures under § 881(a)(4) & (7), and the Court acknowledged its prior holding that "forfeiture of contraband itself may be characterized as remedial because it removes dangerous or illegal items from society." Austin v. United States, 113 S. Ct. 2801, 2811 (1993) (citing United States v. One Assortment of 89 Firearms, 465 U.S. 354, 364 (1984)). However, the subsequent discussion in *Austin* makes clear that the government will not be able to sidestep the Eighth Amendment by simply characterizing the seized property as "contraband" or "instruments" of the drug trade. *Id.* Moreover, given that Congress undoubtedly understood that § 881(a)(6) (like (a)(4) & (7)) also serves "to deter and punish," *id.* at 2812, it is difficult to see how forfeiture of drug proceeds escapes all scrutiny under *Austin*. It seems that whether seized property or proceeds may be labeled an "instrumentality" of the crime should be one of the key factors—but not the sole factor—in the Excessive Fines inquiry. *See infra* notes 130-139, and accompanying text.

[84] United States v. 38 Whaler's Cove, 954 F.2d 29, 39 (2d. Cir), *cert. denied* 113 S. Ct. 55 (1992) (citing Solem v. Heim, 463 U.S. 277, 290-92 (1983)).

[85] *Solem*, 463 U.S. at 292.

[86] *38 Whaler's Cove*, 954 F.2d at 39. The Second Circuit concentrated on the property owner's claim that the forfeiture violated the Cruel and Unusual Punishments Clause of the Eighth Amendment. The court also briefly mentioned the Excessive Fines Clause, noting "a fine of many thousands of dollars for a minor drug offense is not beyond the pale." *Id.*

[87] Browning-Ferris Industries of Vermont v. Kelco Disposal, Inc., 109 S. Ct. 2909, 2934 (1989) (O'Connor, J., dissenting).

RICO statute.[88] Some commentators had suggested that *Solem* should also be applied to section 881 forfeitures,[89] and the point was even argued by Austin himself at the Eighth Circuit.[90] However, *Solem* seems inappropriate after *Austin*. First, the Supreme Court did not characterize penalties under section 881 as criminal,[91] as many commentators had urged.[92] *Solem* clearly applies only to "criminal sentences."[93] Second, in the companion criminal forfeiture case *Alexander v. United States*,[94] the Court criticized a lower court for "lumping together" the Cruel and Unusual Punishments Clause with the Excessive Fines Clause in its analysis.[95] Unfortunately, the Court has examined the Excessive Fines Clause in detail only once,[96] and never in the context of a fine levied by the government.[97]

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[88] United States v. Busher, 817 F.2d 1409, 1413-19 (9th Cir. 1987). The forfeiture at issue was subsequently found "not so disproportionate as to be cruel and unusual." United States v. Busher, 872 F.2d 431 (unpublished disposition), 1989 WL 37281 (9th Cir. Apr. 7, 1989). However, when the Ninth Circuit ruled that the Eighth Amendment did not apply to § 881 forfeitures, it carefully distinguished in personam (criminal) forfeitures from in rem (civil) forfeitures. United States v. Tax Lot 1500, 861 F.2d 232, 233-34 (9th Cir. 1988), *cert. denied*, 493 U.S. 954 (1989).

[89] *See, e.g.*, Ron Champoux, Note, *Real Property Forfeiture Under Federal Drug Laws: Does the Punishment Outweigh the Crime?*, 20 HASTINGS CONST. L.Q. 247 (1992).

[90] United States v. 508 Depot St., 964 F.2d 814, 817 (8th Cir. 1992), *rev'd sub. nom.*, Austin v. United States, 113 S. Ct. 2801 (1993).

[91] Austin v. United States, 113 S. Ct. at 2806 n.6 (1993). The Court by-passed the tests it set forth in Kennedy v. Mendoza-Martinez, 372 U.S. 144 (1963), and United States v. Ward, 448 U.S. 242 (1980), to determine whether a nominally civil penalty should be reclassified as criminal for the purpose of determining constitutional safeguards. The parties had argued the point extensively in their briefs. Instead, the Court said it was addressing the "separate question" of whether punishment was being imposed. *Austin*, 113 S. Ct. at 2801 n.6.

[92] *See, e.g.*, Michael Schecter, Note, *Fear and Loathing and the Forfeiture Laws*, 75 CORNELL L. REV. 1151 (1990).

[93] *Solem*, 463 U.S. at 290. It should be noted that *Solem* itself may be short-lived, given the split on Eighth Amendment issues shown in the Court in Harmelin v. Michigan, 111 S. Ct. 2680 (1991).

[94] 113 S. Ct. 2766 (1993).

[95] *Id.* at 2775.

[96] Browning-Ferris Industries of Vermont, Inc. v. Kelco Disposal, Inc., 492 U.S. 257 (1989) (holding that Excessive Fines Clause does not apply to an allegedly excessive punitive damages award in a civil action between two private parties).

[97] Justice Scalia had suggested in dicta that government action should be scrutinized more closely under the Excessive Fines Clause, because the government will benefit from the fine. *Harmelin*, 111 S. Ct. at 2693 n.9.

It thus seems that courts are left to craft an entirely new proportionality test for section 881. The Supreme Court, without further comment, declined to adopt the eight-factor test proposed by petitioner Austin.[98] His proposal has the advantage of giving courts discretion to award partial forfeitures, but overall the test seems narrowly constructed to fit the facts in *Austin* and might be cumbersome to apply in practice.[99]

By contrast, Justice Scalia's concurrence proffers a deceptively-simple "instrumentality" test, in which "[t]he relevant inquiry for an excessive forfeiture under section 881 is the relationship of the property to the offense: Was it close enough to render the property, under traditional standards, 'guilty' and hence forfeitable."[100] Besides clinging to a bit of historical fiction, Scalia's test aids prosecutors by completely ignoring the value of the confiscated property.[101] Not surprisingly, the U.S. Attorney's office in Hawai'i immediately embraced Scalia's standard as the "most rational, practical and fair" Eighth Amendment analysis for civil forfeitures.[102] One federal district court ruling shortly after

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[98] United States v. Austin, 113 S. Ct. 2801, 2812 (1993). The proposed test had two steps. First, a prima facie case that the forfeiture was excessive would be established if 1) the value of the property seized is excessive compared to the value of the drugs involved in the statutory infraction, and 2) the value of the property seized is excessive relative to the financial condition of the owner. Second, the court would consider six factors in deciding whether the forfeiture was grossly disproportionate under the Eighth Amendment, including whether the property seized constitutes the owner's livelihood or home and the degree to which the owner's property had been involved in the drug activity. *See* Brief for Petitioner at 46-48, *Austin* (No. 92-6073).

[99] *Austin*, 113 S. Ct. at 2812. In addition to requiring several precise accountings (e.g. the value of the property, drugs, and the owner's financial condition), the judge would have to make highly subjective judgments based on vague criteria (e.g. the "extent of the criminal behavior," the "extent to which the government necessarily expended its funds.") Although it seems appropriate to consider the claimant's individual circumstances, see *infra* notes 127-32 and accompanying text, the mandatory evaluation of eight different factors in every case might confuse or obscure the central issue of proportionality.

[100] *Id.* at 2815 (Scalia, J., concurring).

[101] *Id.* "Scales used to measure out the unlawful drug sales, for example, are confiscable whether made out of the purest gold or the basest metal." *Id.*

[102] *See* Plaintiff United States Reply to Claimant's Memorandum of Points and Authorities, United States v. Real Property Titled in the Name of Bryan Lentz, Civ. No. 92-298 (D. Haw. filed Oct. 14, 1993). The United States Attorney in Hawai'i argued that basing an Eighth Amendment analysis on the value of the property, rather than its use, would lead to "inequitable and uneven enforcement" of forfeiture laws, because land values can vary significantly between geographical areas and jurisdictions. *Id.*

Austin blankly accepted Scalia's test as the "relevant inquiry."[103]

Stripped to its essentials, Scalia's proposal sounds an awful lot like the "substantial connection" test already used by some courts as a threshhold issue to determine if forfeiture is appropriate.[104] In essence, the test requires that there be a "substantial connection" between the property to be forfeited and the "underlying criminal activity."[105] The "substantial connection" concept can be traced back to a joint committee report when Congress amended section 881 in 1978.[106] It is, at least theoretically, a tougher standard than the simple "nexus" test advocated by other courts.[107] However, at least one court candidly

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[103] United States v. 9638 Chicago Heights, 831 F. Supp. 736, 737 (E.D. Mo. 1993) (concluding forfeiture of $37,000 property not excessive because it was used as site for storing and selling cocaine). *See also* United States v. 427 & 429 Hall St., 842 F. Supp. 1421 (M.D. Ala. 1994) (holding that forfeiture of $65,000 grocery store not excessive because there was "probable cause to believe" the owner was selling drugs out of the store). In a curious footnote, the court stated that even if it applied a "proportionality analysis," the fact that the store was near a junior high school would be "sufficient to hold that forfeiture is not excessive." *Id.* at 1430 n.19.

[104] At this writing, three Circuit Courts of Appeal follow the "substantial connection" test with regard to real property seizures under § 881(a)(7). *See, e.g.*, United States v. Schifferli, 895 F.2d 987, 989 (4th Cir. 1990); United States v. Four Parcels of Real Property in Greene and Tuscaloosa Counties, 941 F.2d 1428, 1440 (11th Cir. 1991); United States v. 28 Emery St., 914 F.2d 1, 3-4 (1st Cir. 1990). Other Circuits have followed the "substantial connection" test in seizures of drug proceeds under § 881(a)(6), United States v. $364,960, 661 F.2d 319, 323 (5th Cir. 1981), United States v. $67,220, 957 F.2d 280, 283-284 (6th Cir. 1992), and in vehicle seizures under § 881(a)(4). United States v. 1976 Ford F-150 Pick-up, 769 F.2d 525, 527 (8th Cir. 1985). There has been confusion within the Second Circuit. In United States v. $31,990, 982 F.2d 851 (2d Cir. 1993), judges applied the "substantial connection" standard, but another panel subsequently clarified in United States v. Daccarett, 6 F.3d 37, 53-54 (2d Cir. 1993), that the lower "nexus" test was still the prevailing standard in the Second Circuit. The Ninth Circuit has declined "to read a 'substantial connection' requirement into the statute," United States v. $5,644,540, 799 F.2d 1357, 1362 (9th Cir. 1986). *$5,644,540* has been cited with approval in the context of a real property seizure. United States v. Lot 4, Block 5 of Eaton Acres, 904 F.2d 487, 490 n.1 (9th Cir. 1990).

[105] United States v. Santoro, 866 F.2d 1538, 1541 (4th Cir. 1989).

[106] *See* JOINT EXPLANATORY STATEMENT OF TITLES II AND III, 95th Cong., 2d Sess. (1978), *reprinted in* 1978 U.S.C.C.A.N. 9510, 9518 (noting "it is the intent of these provisions that property would be forfeited only if there is a substantial connection between the property and the underlying criminal activity which the statute seeks to prevent.").

[107] *See, e.g.*, United States v. 916 Douglas Ave., 903 F.2d 490, 493 (7th Cir. 1990), *cert. denied*, 498 U.S. 1126 (1991) (stating that under nexus test, government need only demonstrate a nexus that is "more than incidental or fortuitous").

conceded that "the hurdle posed by the 'substantial connection' requirement is not . . . a particularly high one."[108] That has been true both in seizures of currency[109] and real property.[110] Echoing Scalia's language, the Fourth Circuit approved the forfeiture of an office building to "remove what had become a harmful instrumentality in the hands" of a doctor who had issued fraudulent prescriptions inside it.[111] Such an interpretation would do little to curb disproportionality.[112] As one judge cautioned, the *quantity* of the drug involved may be relatively small, but the *quality* of the relationship between the property and the crime must be substantial.[113] One post-*Austin* court seemed to blur that distinction.[114]

Another troubling aspect of the "instrumentality" test is its implicit rejection of any compelling individual circumstances. As both the petitioner and amicus pointed out in *Austin*, in assessing fines the federal sentencing guidelines already direct the court to consider such case-specific factors as the defendant's financial condition, the burden

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[108] United States v. Borromeo, 995 F.2d 23, 26 (4th Cir. 1993); *opinion adhered to in relevant part on reh'g*, 1 F.3d 219 (4th Cir. 1993).

[109] *See, e.g.*, United States v. $67,220, 957 F.2d 280, 286-287 (6th Cir. 1992) (finding substantial connection for forfeiture on minimal evidence that traveler used credit card to buy one-way plane ticket to Miami, "appeared nervous," and carried a large amount of cash).

[110] *See, e.g.*, United States v. 3097 S.W. 111th Ave., 921 F.2d 1551, 1556 (11th Cir. 1991) (finding substantial connection for forfeiture of house even though drug activity took place solely in open driveway).

[111] United States v. Cullen, 979 F.2d 992, 995 (4th Cir. 1992) ("The public danger that the building poses in the hands of the [doctor] bears little relationship to its monetary value, large or small"). The Fourth Circuit's discussion came in the context of Cullen's claim that the forfeiture violated the Fifth Amendment's Double Jeopardy Clause under United States v. Halper, 490 U.S. 435 (1989). See *infra* notes 133-163 and accompanying text for a detailed discussion of similar claims.

[112] Courts purporting to apply an instrumentality test have broadly defined "instrumentality" and typically have not even considered the value of the property or drugs involved. For example, in finding that a forfeiture satisfied the substantial connection test and was not punitive, one court said: "The 453 grams of cocaine . . . were found in his house. That house, the defendant to this action, was thus an instrumentality of Bottom's drug crime." United States v. 3840 Jackie Drive, 806 F. Supp. 681, 686 (S.D. Ohio 1992).

[113] United States v. 3639-2nd St., 869 F.2d 1093, 1098 (8th Cir. 1989) (Arnold, J., concurring).

[114] United States v. 2828 North 54th St., 829 F. Supp. 1071 (E.D. Wis. 1993) (finding no Eighth Amendment violation because owner had "established a substantial drug manufacturing operation at that property").

the fine will impose on him and dependents, and any loss that was inflicted on others.[115] Given that, it is startling that a court would blankly state "judicial restraint is not appropriate" in a forfeiture case.[116] It seems, as a matter of fairness and consistency, that the "instrument" test must be blunted by some individual considerations. Chief Judge McAvoy of New York came to a similar conclusion in a recent, thoughtful opinion rejecting a government claim for forfeiture as disproportionate under the Eighth Amendment.[117] The government had sought forfeiture of a family home, after an informant bought seven ounces of marijuana inside the house and a subsequent search uncovered six more ounces of marijuana. Judge McAvoy noted there remains a "gray area" where Eighth Amendment protection is neither clearly mandated nor clearly prohibited, and the facts of the case will be determinative.[118] Ultimately he found that forfeiture in this case would "greatly overcompensate the government" for its enforcement costs and "do little to remove 'an instrumentality of crime' from the streets."[119]

That approach may be antithetical to courts who have shown little sympathy for even minor drug offenders.[120] As one court opined, in rejecting a plea to limit the forfeitability to the costs incurred by the government: "So far as the public welfare is concerned, the Ferrari is at least as harmful an instrumentality as the Chevette."[121] If a court

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[115] 18 U.S.C. § 3572(a) (1988); *see also* 18 U.S.C. § 3553(a) (1988).

[116] United States v. 311 Cleveland Ave., 799 F. Supp. 824, 827 (S.D. Ohio 1992).

[117] United States v. 835 Seventh St. Rensselaer, 820 F. Supp. 688 (N.D. N.Y. 1993). Because the case was decided within the Second Circuit, Judge McAvoy initially analyzed the case using the *Solem* proportionality factors as applied in *38 Whaler's Cove*. *See supra* notes 84-86 and accompanying text. Ultimately, however, the decision rested on the judge's ad hoc weighing of the factors involved. *Id.* at 695-97. After *Austin* was handed down, the government moved for reconsideration, claiming that Justice Scalia's instrumentality test was now the appropriate Eighth Amendment standard. Judge McAvoy rejected the motion, saying *Austin* left it to lower courts to "fashion appropriate tests." United States v. 835 Seventh St. Rensselaer, 832 F. Supp. 43 (N.D. N.Y. 1993).

[118] *835 Seventh St. Rensselaer*, 820 F. Supp. at 695.

[119] *Id.* at 696. Judge McAvoy refused to reconsider his decision in light of other decisions like *Cullen*, *see supra* note 111 and accompanying text, that had broadly defined "instrumentality." *835 Seventh St. Rensselaer*, 832 F. Supp. at 48.

[120] *See, e.g.*, *311 Cleveland Ave.*, 799 F. Supp. at 824-25. ("While defendants' counsel make a sympathetic argument on their clients' behalf, the defendants have violated the law and must live with the repercussions of their actions.").

[121] United States v. Cullen, 979 F.2d 992, 995 (4th Cir. 1992).

weighs the assertedly huge societal costs of drug trafficking and addiction against the dollar value of any given forfeiture, then arguably no forfeiture will ever be found grossly disproportionate under the Eighth Amendment.[122] Such hard-line courts may find comfort (and justification) in dicta by Chief Justice Rehnquist in *Alexander*, the RICO criminal forfeiture case. Rehnquist said the excessiveness of the proposed $9 million forfeiture must be considered "in the light of the extensive criminal activities which petitioner apparently conducted through this racketeering enterprise"—even though the petitioner's conviction was based on a jury finding that only seven items in his bookstore were obscene.[123] If courts reviewing civil forfeitures can similarly massage the facts to boost the property owner's culpability, then the government may lose very few cases.[124]

Still, there are signs more courts are looking to the fairness of the individual forfeiture. Three weeks before *Austin* was decided, the Fourth Circuit rejected the government's attempt to forfeit a three-acre tract that a drug smuggler had used as a means of access to a public highway.[125] The smuggler had no legal interest in the land at the time of the crime. Brushing aside the government's argument that four tons of marijuana were transported across the property, the court found there was simply no "substantial connection" between the land and the crime.[126] While acknowledging the broad scope of section 881, the

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[122] *See, e.g.*, United States v. 40 Moon Hill Rd., 884 F.2d 41, 44 (1st Cir. 1989). In discussing whether a forfeiture should be termed punishment for double jeopardy analysis, the First Circuit made its feelings overwhelmingly clear: "The ravages of drugs upon our nation and the billions the government is being forced to spend on investigation and enforcement—not to mention the costs of drug-related crime and drug abuse treatment, rehabilitation and prevention—easily justify a recovery in excess of the strict value of the property actually devoted to the growing of the illegal substance, in this case marijuana." *Id.* The government made this same argument in *Austin*, citing a study that calculated the economic cost of drug addiction during 1985 at $44.1 billion. *See* Brief for the United States at 31, *Austin* (No. 92-6073).

[123] Alexander v. United States, 113 S. Ct. 2766, 2775-76 (1993).

[124] This seems rather ironic, in light of the Supreme Court's previous pronouncement that "the primary focus of the Eighth Amendment was the potential for governmental abuse of its 'prosecutorial power'." Browning-Ferris Industries of Vermont, Inc. v. Kelco Disposal, Inc., 492 U.S. 257, 266 (1989).

[125] United States v. Two Tracts of Real Property in Cateret County, North Carolina, 998 F.2d 204 (4th Cir. 1993). The land in question was thus a "quasi-servient tenement" for a "quasi-easement" used by the smugglers. *Id.* at 208.

[126] *Id.* at 211-13. The court was not actually conducting an Eighth Amendment analysis, but its review paralleled elements of the instrumentality test. *Id.*

Fourth Circuit cautioned "even warfare is conducted by rules."[127]

Although Scalia's excessive fines test may sound easier to apply, a multi-factor inquiry is consistent with the *Austin* majority's brief comment on Scalia's proposal.[128] The Third Circuit recently came to a similar conclusion, albeit with rather opaque reasoning.[129] The bottom line is that courts should weigh all the costs, to both the government and the property owner, to come up with what the Supreme Court has called "rough justice."[130] A straight dollar-for-dollar comparison is too simplistic,[131] but it is disingenuous to completely ignore the gravity of the offense and extent of involvement versus the value of the forfeited property.

The need for balancing is well illustrated by a recent California case, in which a father was threatened with forfeiture of his $925,000 home for allegedly failing to stop his son from distributing a small amount of cocaine from the house.[132] The court rejected the *Solem* and Scalia tests, and fashioned its own multi-part inquiry to determine whether a forfeiture violates the Excessive Fines Clause. Its test considers: (1) the

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[127] *Id.* at 213.

[128] Austin v. United States, 113 S. Ct. 2801, 2812 n.15 (1993). "We do not rule out the possibility that the connection between the property and the offense may be relevant, but our decision today in no way limits the Court of Appeals from considering other factors in determining whether the forfeiture of Austin's property was excessive." *Id.* One federal judge, obviously reluctant to adopt one test over another, applied *both* Scalia's test and a "value analysis" and concluded the forfeiture did not violate the Eighth Amendment under either standard. United States v. 11869 Westshore Dr., 848 F. Supp. 107 (E.D. Mich. 1994). The court massaged the facts to ensure that the values did not appear disproportionate. It compared the value of the house seized against the "street value" of the drugs (rather than the "wholesale" price actually charged) and against the maximum federal criminal penalty (rather than the state under which the property owner was actually prosecuted). *Id.* at 11.

[129] United States v. RR#1, Box 224, 14 F.3d 864 (3d Cir. 1994). The Third Circuit implicitly rejected Scalia's test when it recommended "the district court should avoid conflating the Eighth Amendment inquiry with section 881(a)(7)'s nexus requirement." While the court declined to formulate an explicit test, it did suggest that the three-factor inquiry of Solem v. Heim, 463 U.S. 277 (1983), would aid analysis. It also cited an earlier criminal forfeiture case, United States v. Sarbello, 985 F.2d 716 (3d Cir. 1993), which listed a variety of individualized factors to weigh in the excessiveness inquiry.

[130] United States v. Halper, 490 U.S. 435, 449 (1989).

[131] United States v. 3120 Banneker Drive, 691 F. Supp 497, 501 (D.D.C. 1988).

[132] United States v. 6625 Zumirez Dr., 845 F. Supp. 725 (C.D. Cal. 1994). The son was convicted of possessing 152 grams of cocaine for sale. The father was acquitted of all criminal charges. *Id.* at 730.

inherent gravity of the offense compared with the harshness of the penalty; (2) whether the property was an integral part of the commission of the crime; and (3) whether the criminal activity involving the defendant property was extensive in terms of time and/or spatial use.[133] In weighing the factors, the court noted that the father was acquitted of all criminal charges, had $625,000 equity in the home, and could not be expected to immediately evict his own son.[134] Declaring that the home was "nothing more than a place at which drugs were sold," the court found the father's house was not "integral" to the son's crime and thus forfeiture under these facts would violate the Eighth Amendment.[135]

One Hawai'i case filed shortly after *Austin* shows the fairness and flexibility of a multi-factor inquiry.[136] Federal agents found only 25 grams of marijuana in Vicki Jo-Ann Jensen's Big Island house, but also discovered a garden hose running from her water tank to a neighbor's irrigation pipe system. That irrigation system allegedly watered a nearby 1000-plant marijuana patch. Based solely on the small amount of drugs found and the significant value of the property, forfeiture of Jensen's home seems to raise an Eighth Amendment question.[137] The disproportionality claim would be bolstered if Jensen shows she is already financially distressed and forfeiture would leave her homeless.[138] But, if the government establishes that Jensen's hose helped irrigate her neighbor's marijuana patch with her consent, then Jensen's property clearly contributed to a major drug enterprise. In that case, forfeiture would not appear disproportionate under a sort of

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[133] *Id.* at 732.

[134] *Id.* at 735-39.

[135] *Id.* at *9-10. Moreover, evicting the father and son from their home would do little to deter them from future unlawful activities. *Id.* at 738 (citing United States v. 835 Seventh St. Rensselaer, 820 F. Supp. 688, 696 (N.D.N.Y. 1993)).

[136] United States v. Real Property Titled in the Name of Vicki Jo-Ann Jensen, Civ. No. 93-612, (D. Haw. filed Aug. 4, 1993).

[137] *See, e.g.*, United States v. 4455 Kaluamakua Rd., Civ. No. 92-298 (D. Haw. filed May 13, 1992). The drugs found in Jensen's house are worth roughly $250, based on a $300 per ounce Hawai'i price quoted in *4455 Kaluamakua Rd.* The property had a 1992 tax-assessed value of $58,900. *See* County of Hawaii, Real Property Tax Records (1992), *available in* LEXIS, Assets Library.

[138] *See* Verified Claim for Return of Property, *Jensen*, Civ. No. 93-612 (D. Haw. filed Sept. 3, 1993). Jensen's attorney claimed a forfeiture would make Jensen insolvent and unable to pay her creditors. Real estate records show the property is Jensen's residence and her sole piece of real property in Hawaii. *Id.*

true instrumentality/extent of involvement test targeted at actual drug trafficking.[139]

C. *Austin Raises Double Jeopardy Concerns for Prosecutors*

A closely-related question raised by *Austin* is whether some drug-related civil forfeitures will now be barred under the Double Jeopardy Clause of the Fifth Amendment.[140] Frequently, a drug offender is convicted and sentenced on criminal charges before the civil forfeiture of his property is completed.[141] The Supreme Court in *Austin* quoted *United States v. Halper*[142] four times to buttress its conclusion that forfeiture under section 881 must be understood at least in part as punishment.[143] In *Halper*, the Court focused on what it called the third prong of the Double Jeopardy Clause, protecting against multiple punishments for the same offense.[144] The Court held that under double jeopardy, a defendant who has already been punished in a criminal prosecution may not be subjected to an additional civil sanction to the extent that the second sanction may not be fairly characterized as

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[139] *See, e.g.*, United States v. 6625 Zumirez Dr., 845 F. Supp. 725 (C.D. Cal. 1994). Again, this is in line with the Supreme Court's view that the "inclusion of innocent-owner defenses [in § 881] reveals a similar congressional intent to punish *only* those involved in *drug trafficking*." Austin v. United States, 113 S. Ct. 2801, 2811 (1993)(emphasis added). The Eleventh Circuit employed similar reasoning in ruling the forfeiture of a home under the federal gambling statute violated the Eighth Amendment as interpreted in *Austin*. United States v. 18755 N. Bay Rd., 13 F.3d 1493 (11th Cir. 1994). The court noted that 18 U.S.C. § 1955 (like § 881) was designed to penalize substantial, continuing criminal enterprises, not the occaisional small-time player. *Id.* at 1498-99.

[140] The Double Jeopardy Clause reads: "[N]or shall any person be subject for the same offense to be twice put in jeopardy of life or limb." U.S. CONST. amend. V.

[141] Such was the case in *Austin*. However, a 1991 investigation by the Pittsburgh Press newspaper found that 80 percent of the people who lose property through federal forfeiture laws were never charged with any crime. Andrew Schneider and Mary Pat Flaherty, *Government Seizures Victimize Innocent*," PITTSBURGH PRESS, Aug. 11, 1991, at A-1.

[142] 490 U.S. 435 (1989).

[143] *Austin*, 113 S. Ct. at 2805, 2806, 2812.

[144] *Halper*, 490 U.S. at 440 ("The Double Jeopardy Clause protects against three distinct abuses: a second prosecution for the same offense after acquittal; a second prosecution for the same offense after conviction; and multiple punishments for the same offense.").

remedial, but only as a deterrent or retribution.[145] Given *Austin*, the question is whether the Court's characterization of section 881 forfeitures as punishment within the Eighth Amendment necessarily extends to Fifth Amendment protection under *Halper*. It seems that a forfeiture that is "grossly disproportionate" could now also be considered a second punishment under double jeopardy analysis.[146] The more difficult query is whether some forfeitures that might not violate a court's Eighth Amendment excessive fines test might still be disallowed as a "non-remedial" (punitive) second sanction under *Halper*.

What is clear is that courts can no longer simply dismiss double jeopardy claims under *Halper* on the grounds that section 881 is purely "remedial."[147] *Austin* explicitly rejected the Government's argument that such forfeitures should be classified as remedial, rather than punitive.[148] It follows from the Supreme Court's analysis in *Austin* that double jeopardy claims are not automatically moot even if the property to be forfeited is somehow deemed an "instrumentality" of the drug crime.[149]

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[145] *Id.* at 448-49. The Court set forth a "rule of reason," stating that when the civil penalty sought in the second proceeding bears "no rational relation" to the goal of compensating the Government for its loss, the defendant is entitled to an accounting of the Government's damages to determine if the second (civil) penalty in fact constitutes a second punishment. *Id.* at 449.

[146] Under *Halper*, a constitutionally excessive forfeiture would clearly "bear no rational relation to the goal of compensating the Government for its loss." *Id.*

[147] Several courts before *Austin* advanced the argument that forfeiture "is justifiable as a means of remedying the government's injury and loss." United States v. 40 Moon Hill Rd., 884 F.2d 41, 44 (1st Cir. 1989). *See also*, United States v. Cullen, 979 F.2d 992, 994-95 (4th Cir. 1992).

[148] Austin v. United States, 113 S. Ct. 2801, 2812 (1993). There is dispute over whether this analysis also applies to forfeiture of proceeds under § 881(a)(4). *See infra* note 83.

[149] The government argued that § 881 forfeitures should be considered "remedial" in part because they remove instruments of the drug trade from the community, "thereby protecting the community from the threat of continued drug dealing." Brief for the United States at 32, *Austin* (No. 92-6073). The Court agreed that forfeitures that removed "dangerous or illegal items from society," such as guns, were in fact remedial, but forfeitures of cars and other legal conveyances were not intrinsically remedial. *Austin*, 113 S. Ct. at 2811-12. Courts also should not cite United States v. One Assortment of 89 Firearms, 465 U.S. 354 (1984), for the blanket proposition that double jeopardy does not apply to § 881 forfeitures. *See, e.g.*, United States v. McCaslin, 959 F.2d 786, 788 (9th Cir. 1992). *McCaslin* summarily dismissed application of *Halper*, saying in civil forfeiture the "proceeding is directed against the property and not an individual." *Id. Austin* squarely rejects that rationale. For double jeopardy analysis,

Of course, not every drug-related forfeiture will be "so divorced from any remedial goal"[150] that it constitutes punishment under double jeopardy analysis. There can be no precise formula. In *Halper*, the Court said a civil penalty following a criminal penalty would appear to qualify as punishment if it "bears no rational relation to the goal of compensating the Government for its loss."[151] Gauging the government's "loss" in a drug case will be challenging.[152] How much "credit" should the government get for the costs of its investigation and prosecution,[153] or for the indirect social costs caused by drug dealers?[154] Citing language from *Halper*, some courts may limit double jeopardy protection to "small-gauge" offenders.[155] As in the Eighth Amendment analysis, other courts may refuse to apply *Halper* if they deem the property is an "instrumentality" of the crime.[156]

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89 Firearms holds only that the Fifth Amendment does not bar a civil, remedial forfeiture proceeding initiated following an acquittal on related criminal charges. *89 Firearms*, 465 U.S. at 361. It does not expressly deal with *Halper*'s "second punishment" issue.

[150] *Halper*, 490 U.S. at 443.

[151] *Id.* at 449. As Justice Kennedy's concurrence in *Halper* said, "Our rule permits the imposition in the ordinary case of at least a fixed penalty roughly proportionate to the damage caused or a reasonably liquidated amount, plus double damages." *Id.* at 452-53 (Kennedy, J., concurring).

[152] *Cf.* United States v. United States Fishing Vessel Maylin, 725 F. Supp. 1222, 1223 (S.D. Fla. 1989). In *Maylin*, a civil forfeiture case involving federal fish and wildlife violations, the government's loss for *Halper* analysis was defined very expansively. The court found that the government was entitled to compensation not only for the "investigation and enforcement" resources it expended, but also for the damage to wildlife caused by the violations. Thus, the forfeiture of a $55,000 boat only "compensated the government" and double jeopardy did not apply. *Id.*

[153] For example, in United States v. Fliegler, 756 F. Supp. 688 (E.D.N.Y. 1990), the District Court accepted the government's accounting of $110,564 in "costs" for prosecuting both the criminal and civil actions against the defendants. The Court found that under *Halper*, that amount bore a "rational relation" to the $115,000 civil penalty imposed for false claims violations. Hence, the Court rejected the defendants' double jeopardy claim. *Id.* at 697.

[154] United States v. 40 Moon Hill Rd., 884 F.2d 41, 44 (1st Cir. 1989).

[155] *See* United States v. Amiel, 813 F. Supp. 958, 963 (E.D.N.Y.) (18:1 ratio between civil penalty and violative conduct not so overwhelmingly disproportionate to trigger double jeopardy scrutiny), *aff'd*, 995 F.2d 367 (2d Cir. 1993) (holding it would be premature to decide double jeopardy motion).

[156] United States v. McCaslin, 959 F.2d 786, 788 (9th Cir. 1992). *See also* United States v. $145,139, 803 F. Supp. 592, 595-597 (E.D.N.Y. 1992) (holding forfeiture under currency laws is not double jeopardy because the money was "the very instrument of the crime"), *aff'd*, 1994 WL 56504 (2d Cir. Feb. 22, 1994) ; *accord* United States v. $446,172, 1993 WL 26769 (D.N.J. 1993) (unpublished disposition).

As a practical matter, drug dealers might find the Double Jeopardy Clause is a rather porous shield. Double jeopardy does not apply when separate governments prosecute and punish the same defendant, on the theory that the defendant has offended both sovereigns.[157] Hence, the Government would have no worries if, as is frequently the case, a drug offender was convicted in state court before section 881 proceedings were completed in federal court.[158] Further, double jeopardy concerns are not raised when criminal and civil penalties are sought "in the same proceeding."[159] A federal prosecutor could thus seek criminal forfeiture of drug-related property in the defendant's indictment.[160] However, the government prefers section 881, because criminal forfeiture requires that the defendant's guilt first be proven beyond a reasonable doubt.[161] Alternatively, the government might convince the court that civil and criminal actions filed separately are still "part of a single, coordinated prosecution."[162] The Second Circuit recently

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[157] *40 Moon Hill Rd.*, 884 F.2d at 43. *See* Heath v. Alabama, 474 U.S. 82, 87-89 (1985); Abbate v. United States, 359 U.S. 187, 195 (1959). *See also* United States v. Louisville Edible Oil Products, Inc., 926 F.2d 584, 587 (6th Cir.), *cert. denied*, 112 S. Ct. 177 (1991) (refusing to apply *Halper* to successive civil and criminal prosecutions because Double Jeopardy bars only additional prosecution and punishment by same sovereign). The so-called "dual sovereign" doctrine has been criticized in the wake of the two Rodney King prosecutions in Los Angeles. *See, e.g.*, Darlene Ricker, *Double Exposure: Did the Second Rodney King Trial Violate Double Jeopardy?*, A.B.A.J., Aug. 1993, at 66.

[158] United States v. 38 Whalers Cove, 954 F.2d 29, 38 (2d Cir.), *cert. denied*, 113 S. Ct. 55 (1992). The court rejected the argument that the federal government was acting as the "tool" of the state government, because the two sovereigns shared the forfeited property. *Id.*

[159] The Supreme Court recognized this exception in *Halper*, 490 U.S. 435, 450 (1989).

[160] 21 U.S.C. 853 (1988).

[161] Moreover, as Assistant U.S. Attorney Sonia Jaipaul points out, criminal forfeiture reaches only the defendant's interest in the property, and does not allow the government to simply seize the property at the beginning of the case. *See* Jaipul, *Asset Forfeiture: A Federal Prosecutor's View*, 40 FED. BAR NEWS & J. 176 (1993).

[162] United States v. Millan, 2 F.3d 17 (2d Cir. 1993). By contrast, the Eighth Circuit reached the opposite conclusion to allow the government to pursue a § 881 forfeiture. United States v. One Parcel of Real Property, 999 F.2d 1264 (8th Cir. 1993) (characterizing criminal prosecution and civil forfeiture as separate proceedings allows government to disregard plea bargain agreement in which it promised not to initiate any future proceedings within the scope of the criminal investigation and indictment).

concluded that double jeopardy did not bar criminal prosecution of alleged heroin traffickers, even though they had stipulated forfeiture of a substantial amount of money and real estate in a separate but parallel section 881 action.[163]

Courts seem especially reluctant to let an alleged drug offender escape criminal prosecution because of a prior section 881 forfeiture.[164] One judge contended that such a result "would seriously undermine efforts at law enforcement."[165] The Fifth Circuit recently concluded that a previous $650,000 forfeiture did not invoke *Halper* and double jeopardy because the forfeiture "failed to compensate fully for the wrongs done."[166] Another court, in refusing to dismiss a drug trafficking indictment under *Halper*, found that a prior civil forfeiture of $423,850 merely "maintained the status quo" by returning to society money taken through illegal activity.[167] In the four years since *Halper*, lower courts have shown great deference to the government and little sympathy to defendants.

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[163] *Millan*, 2 F.3d at 19-20. In finding a "single proceeding," the Court noted that the civil seizures and criminal arrests were issued on the same day, by the same judge, based on the same affidavit. *Id.*

[164] *See, e.g.*, United States v. McCaslin, 959 F.2d 786, 788 (9th Cir. 1992). The Ninth Circuit also refused to allow a shorter prison sentence (in a downward departure from federal sentencing guidelines) for a criminal defendant whose $75,000 house was previously taken in a related § 881 forfeiture. United States v. Crook, 9 F.3d 1422 (9th Cir. 1993).

[165] United States v. Amiel, 813 F. Supp. 958, 961 (E.D.N.Y. 1993). The defendant had argued that double jeopardy protection should apply regardless of whether the civil sanction preceded the criminal action. Dicta in a few cases support a defendant's argument. *See* United States v. Park, 947 F.2d 130, 134 (5th Cir. 1991), *vacated in part on reh'g*, 951 F.2d 634 (5th Cir. 1992); United States v. Marcus Schloss & Co., 724 F. Supp. 1123, 1126 (S.D.N.Y. 1989) (suggesting order of prosecution irrelevant for *Halper* analysis); United States v. Sanchez-Escareno, 950 F.2d 193 (5th Cir. 1991), *cert. denied*, 113 S. Ct. 123 (1992) (stating that under *Halper*, double jeopardy would bar subsequent criminal prosecution of accused drug smugglers if defendants actually pay civil fine).

[166] United States v. Tilley, 18 F.3d 295 (5th Cir. 1994) (holding that civil forfeiture of alleged drug sale proceeds does not constitute "punishment" and thus Double Jeopardy Clause does not bar subsequent criminal prosecution for sale of illegal drugs).

[167] United States v. Cunningham, 757 F. Supp. 840, 846 (S.D. Ohio 1991), *aff'd*, 7 F.3d 235 (6th Cir. 1993) (unpublished disposition). In affirming, the Sixth Circuit concluded that forfeitures of drug proceeds under 21 U.S.C. § 881(a)(6) are remedial in nature rather than punitive, so thus *Halper* would not apply. *Id.*

III. The Supreme Court Preserves the "Innocent Owner" Defense

A. *United States v. 92 Buena Vista Avenue*

United States v. 92 Buena Vista Avenue[168] may not have the enduring constitutional significance of *Austin*, but its statutory interpretation still forced an important practical and symbolic restraint on the government.[169] In 1982, alleged drug dealer Joseph Brenna gave his girlfriend Beth Ann Goodwin about $240,000 to purchase a house for her and her three children.[170] Seven years later, the government filed a section 881 forfeiture complaint against the property, claiming it was purchased with proceeds traceable to Brenna's drug dealings.[171] Goodwin attempted to invoke the statutory "innocent owner" defense,[172] insisting the money was a gift and that she did not consent to or have knowledge of any illegal activity."[173] The government argued that Goodwin could not assert the "innocent owner" defense, because under 21 U.S.C. § 881(h) and the common-law relation back doctrine,[174] all right and title in the money used to acquire the house vested in the government "at the moment of illegal use."[175] By a 6-3 vote, the Court rebuked the government:[176]

> Because neither the money nor the house could have constituted forfeitable proceeds until after an illegal transaction occurred, the Government's submission would effectively eliminate the innocent owner defense in almost every imaginable case in which proceeds could be forfeited. It seems unlikely that Congress would create a meaningless defense.[177]

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[168] 113 S. Ct. 1126 (1993).

[169] *Buena Vista* was issued four months before *Austin*.

[170] 113 S. Ct. at 1130.

[171] *Id.* The complaint was filed under 21 U.S.C. § 881(a)(6). *Id.*

[172] *See supra* note 22.

[173] 113 S. Ct. at 1130.

[174] Under the relation-back doctrine—which § 881(h) essentially codified—a civil forfeiture approved by a court relates back to the time the offense was committed, thus avoiding "all intermediate sales and alienations, even to purchasers in good faith." United States v. Stowell, 133 U.S. 1, 16-17 (1890).

[175] *See* Brief for the United States at 16, United States v. 92 Buena Vista Ave., 113 S. Ct. 1126 (1993) (No. 91-781).

[176] Justice Stevens wrote a plurality opinion, joined by three justices. 113 S. Ct. at 1130. Justice Scalia wrote a concurring opinion. *Id.* at 1138. Justice Kennedy wrote the dissent. *Id.* at 1143.

[177] *Id.* at 1135.

The Court also ruled that protection for "innocent owners" extended to recipients of gifts such as Goodwin, and was not limited to bona fide purchasers for value.[178] In his dissent, Justice Kennedy charged the plurality's opinion left Section 881 in "quite a mess," while crippling the government's ability to "drain the criminal's economic power."[179]

B. *Buena Vista Prevents a Costly Expansion of "Relation-Back"*

In retrospect, the result in *Buena Vista* might seem inevitable, given that the government was not merely finessing part of section 881 as much as it was simply ignoring it.[180] Moreover, the government's "indefensible" relation-back doctrine was of questionable constitutionality.[181] Still, lower courts looking solely to the statutory language before *Buena Vista* had agreed with the government, holding "no third party can acquire a legally valid interest in the property forfeited from anyone other than the government after the illegal act takes place."[182] This lack of protection for subsequent owners was of interest to more

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[178] *Id.* at 1134. In a one-paragraph analysis, the Court simply looked to the statutory language, and termed it "unqualified" and "sufficiently unambiguous." *Id.*

[179] *Id.* at 1143-46 (Kennedy, J., dissenting). Kennedy insisted that under the law of trusts and commercial transactions, a donee of drug proceeds could have no valid claim because she stands in the shoes of the wrongdoer. *Id.*

[180] *See* Brief for the United States at 31-35, *Buena Vista* (No. 91-781). Among other things, under the government's curious interpretation, a bona fide purchaser would not forfeit his property in a criminal forfeiture action, *see* 21 U.S.C. § 853, but could not even contest the seizure or demonstrate his innocence under Section 881.

[181] *See* Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663 (1974). In *Calero-Toledo*, the Supreme Court said in dictum: "(I)t would be difficult to reject the constitutional claim of an owner . . . who proved not only that he was uninvolved in and unaware of the wrongful activity, but also that he had done all that reasonably could be expected to prevent the proscribed use of his property." *Id.* at 689. The government argued that this "truly innocent" owner defense was still available to owners who held the property at the time of the offense. *See* Reply Brief for the United States at 12-13, *Buena Vista* (No. 91-781). Nonetheless, the government's reading of § 881 wiped away this constitutional defense for anyone—no matter how "innocent"—who acquired the property after any alleged drug activity.

[182] In Re One 1985 Nissan 300ZX, 889 F.2d 1317, 1320 (4th Cir. 1989); *see also*, Eggleston v. Colorado, 873 F.2d 242, 245-47 (10th Cir. 1989), *cert. denied*, 493 U.S. 1070 (1990) (finding that § 881 provides for "immediate forfeiture to the government at the time the illegal act is committed," cutting off all subsequent lienholders and purchasers "*subject to the so-called innocent owner exception in section 881(a)(6)*") (emphasis added).

than just friends and relatives of drug dealers. The government's blatant overreaching clearly worried banks and mortgage companies,[183] who use the innocent owner defense to protect their security interest in forfeited property.[184] In its amicus brief, the Federal Home Loan Mortgage Corporation warned that allowing the relation-back doctrine to "trump" any valid mortgage could seriously undermine the stability and predictability of the nation's mortgage lending market. Ultimately, if the government's position prevailed, "higher interest rates, decreased access to mortgage funds and perhaps longer delays prior to funding will be borne by the consumer."[185] While the argument may sound a little overwrought, perception is reality in financial markets. Such a credit squeeze could hurt selected communities like the Big Island of Hawai'i, which produces the bulk of Hawai'i's marijuana harvest and a substantial percentage of the state's drug-related real property seizures.[186] Lenders are now breathing easier.[187] Just five months after *Buena Vista*, banks scored a major "innocent owner" victory in a separate forfeiture case that had been remanded by the Supreme Court.[188] In another case, *Buena Vista* preserved a bank's "innocent lienholder" right to recover attorneys' fees and costs secured by the property even after the illegal activity had occurred.[189]

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[183] *See* David Smith, *Mortgage Lenders Beware: The Threat to Real Estate Financing Caused by Flawed Protection for Mortgage Lenders in Federal Forfeiture Actions Involving Real Property*, 25 REAL PROP., PROB. & TR. J. 481 (1990).

[184] *See, e.g.*, United States v. One Urban Lot Located at 1 St., 865 F.2d 427 (1st Cir. 1990); United States v. Federal Nat'l Mortgage Ass'n, 946 F.2d 264 (4th Cir. 1991).

[185] *See* Brief Amicus Curiae of FHLMC in Support of Respondent Beth Ann Goodwin, *United States v. 92 Buena Vista Ave.*, 113 S. Ct. 1126 (1993) (No. 91-781). In its amicus brief, the American Bankers Ass'n. similarly warned that finding for the government would produce a "credit tightening. . . no prudent lender can rest knowing that the potential exists that the property in a transaction may be seized and its value lost." Brief of the Amicus Curiae American Bankers Ass'n. in Support of Respondents, *United States v. 92 Buena Vista Ave.*, 113 S. Ct. 1126 (1993) (No. 91-781).

[186] A review of U.S. District Court records in Honolulu shows that between January 1992 and August 1993, six of the 13 Hawaii properties the government sought to forfeit under § 881 involved Big Island land.

[187] *See*, Carl Lowenstein, Jr. & Kathy Fallon, *Banks as Innocent Owner in Forfeiture Cases*, N.Y. L.J., March 17, 1993, at 1.

[188] United States v. 6960 Miraflores Ave., 995 F.2d 1558 (11th Cir. 1993). The Eleventh Circuit found the mortgagee bank had shown it did not have *actual knowledge* that drug proceeds were traceable to the mortgaged property. The court rejected a lower court interpretation that suspicious circumstances allowed an inference of actual knowledge. *Id.* at 1564.

[189] United States v. 41741 National Trails Way, 989 F.2d 1089, 1092 (9th Cir. 1993).

To date there is no evidence that *Buena Vista* "rips out the most effective enforcement provisions in all of the drug forfeiture laws,"[190] as the dissent had predicted. The government had argued that allowing the innocent owner defense for recipients of tainted property would enable drug dealers to realize benefits from their illegal activities by distributing their wealth to relatives, friends, and others with whom they seek to curry favor.[191] As the plurality rightly noted, such recipients or sham purchasers would not qualify as innocent owners anyway.[192] While banks and county tax collectors will now certainly be able to claim innocence to collect sums owed,[193] one recent Florida case indicates that judges may keep a tight rein on the defense for suspicious post-illegal act transferees.[194] The court in that case concluded that a claimant must show an absence of actual knowledge ("innocence") *at the time of the property transfer*, not at the time the illegal act was committed.[195] Such an interpretation supposedly closes a "loophole" that could enable a criminal to protect his property by keeping friends and family members (as future transferees) unaware of his illegal acts when he commits them.[196] Moreover, courts can limit fraud by forcing suspected "strawmen" to show they are the true owners of the property before they can contest the forfeiture.[197]

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[190] United States v. 92 Buena Vista Ave., 113 S. Ct. 1126, 1146 (1993) (Kennedy, J., dissenting).

[191] *See* Brief for the United States at 13, *Buena Vista* (No. 91-781).

[192] 113 S. Ct. at 1135-36 n.20.

[193] *See* United States v. 2350 N.W. 187 St., 996 F.2d 1141 (11th Cir. 1993) (remanding for reconsideration on whether Dade County tax collector qualifies as an innocent owner). *But see* United States v. 9901 Gladiolus Drive, 837 F. Supp. 1162 (M.D. Fla. 1993) (holding under "relation back" doctrine, drug properties forfeited are owned by U.S. as of the date of the illegal activity, so such properties are not subject to state and local taxes arising after that date).

[194] United States v. 6640 S.W. 48th Street, 831 F. Supp. 1578 (S.D. Fla. 1993) (denying innocent owner defense to attorney/claimant who received a $50,000 mortgage on property after his client's indictment but before the client's conviction).

[195] *Id.* at 1585.

[196] *Id. See also* United States v. 10936 Oak Run Circle, 9 F.3d 74 (9th Cir. 1993) (holding owner with knowledge of origin of property in drug proceeds or with knowledge that he should inquire further is barred from asserting innocent owner defense).

[197] United States v. Vacant Land Located at 10th St. & Challenger Way, 6 F.3d 662, 664 (9th Cir. 1993); United States v. One Parcel of Land Known as Lot 111-B, 902 F.2d 1443, 1444 (9th Cir. 1990); United States v. A Single Family Residence, 803 F.2d 625, 630 (11th Cir. 1986) ("Possession of mere legal title by one who does not exercise dominion and control over the property is insufficient even to establish standing to challenge a forfeiture").

C. *Must an "Innocent Owner" Show Both Lack of Knowledge and Lack of Consent?*

Now that the Supreme Court has preserved the innocent owner defense, the next great battle is how to define it. For both proceeds of a drug transaction and real estate, a property owner can establish the defense if he shows that the drug offense was committed "without the knowledge or consent of that owner."[198] As the Second Circuit noted, the statutory language is "at best, confusing."[199] Several Hawai'i cases have illustrated the conflict and confusion. In *United States v. One Parcel of Land Known as Lot 111-B*,[200] involving land in Kapaa, Kauai, the Ninth Circuit held that a claimant must demonstrate *both* lack of knowledge and lack of consent.[201] Nonetheless, later that year a federal judge in Hawai'i dismissed the Ninth Circuit's position as "mere dictum, and thus . . . not binding."[202] The court declared that the "both" interpretation rendered the words "or consent . . . completely superfluous," because obviously proof of no knowledge will automatically prove no consent.[203] The court thus followed other circuits in holding that a property owner who has knowledge of drug activity can still avoid forfeiture by establishing that the offenses took place without his consent.[204] The Ninth Circuit, however, has reaffirmed its stance without further comment.[205] One federal judge in Hawai'i adopted a sort-of hybrid position, precluding a claimant from simply turning a

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[198] 21 U.S.C. § 881(a)(6) & (7) (1988).

[199] United States v. 141st St. Corp., 911 F.2d 870, 878 (2d Cir. 1990), *cert. denied*, 498 U.S. 1109 (1991).

[200] 902 F.2d 1443 (9th Cir. 1990) (per curiam).

[201] *Id.* at 1445. The Ninth Circuit's one-paragraph analysis was based on a single sentence in a congressional joint committee report, JOINT EXPLANATORY STATEMENT OF TITLES II AND III, 95th Cong., 2d Sess. (1978), *reprinted in* 1978 U.S.C.C.A.N. 9510, 9522-23.

[202] United States v. 5.935 Acres of Land, 752 F. Supp. 359, 363 (D. Haw. 1990).

[203] *Id.* at 362. As the court pointed out, a person cannot consent to something he knows nothing about. *Id.*

[204] United States v. 141st Street Corp., 911 F.2d 870, 878 (2d Cir. 1990), *cert. denied*, 498 U.S. 1109 (1991); United States v. 6109 Grubb Rd., 886 F.2d 618, 626 (3d Cir. 1989); United States v. 1012 Germantown Rd., 963 F.2d 1496, 1503 (11th Cir. 1992).

[205] United States v. Real Property Located at 18 Township 23, 976 F.2d 515, 520 (9th Cir. 1992) (holding claimant who was familiar with smell of marijuana failed to prove he had no knowledge mobile home used to grow marijuana).

"blind eye" to the illegal activity.[206] Other courts have avoided deciding the issue.[207]

If the issue is soon taken up by the U.S. Supreme Court, it seems the logical extension of *Buena Vista* would be to reject the Ninth Circuit's overly restrictive view in favor of the "either/or" interpretation.[208] Why would the Court preserve a defense, only to see half of it disappear? It seems clear that the Congressional intent was to safeguard the rights of innocent persons,[209] even as section 881's reach was broadened.[210] The Court in *Buena Vista* showed tremendous deference to Congress' precise choice of statutory language and construction, knowing that its decision would occasionally make the government's case tougher.[211] Assuming that the Court honors the "or consent" language, a fairly narrow definition of consent would assuage concerns that Congress and the Court have created a giant loophole.[212] While a "bare denial" of

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[206] United States v. Property Titled in the Names of Moises Ponce, 751 F. Supp. 1436, 1441 (D. Haw. 1990) (Kay, J.) ("Mere knowledge of illicit activity on one's property is enough to allow forfeiture of that property, if the claimant does not do all that reasonably could be expected to prevent the illegal activity once he or she learns of it.").

[207] United States v. Lot 9, Block 2 of Donnybrook Place, 919 F.2d 994, 1000 (5th Cir. 1990) (stating it would be "unwise" to make Circuit law without a thorough briefing of issue); United States v. 7326 Highway 45 N., 965 F.2d 311, 314 (7th Cir. 1992) (finding no need to decide issue because claimant lacked actual knowledge).

[208] If it "seems unlikely Congress would create a meaningless defense," United States v. 92 Buena Vista Ave., 113 S. Ct. 1126, 1135 (1993), it seems equally unlikely it would create a meaningless part of a defense (the "or consent" language).

[209] *See, e.g.*, 124 CONG. REC. 23,056-57 (1978) (speeches of Sens. Culver and Nunn).

[210] As discussed *supra* note 22, the statutory innocent owner defense first appeared in the same bill that allowed the government to seek civil forfeiture of drug proceeds.

[211] As the plurality noted in its footnote responding to the dissent: "That a statutory provision contains 'puzzling' language, or seems unwise, is not an appropriate reason for simply ignoring its text." 113 S. Ct. at 1135 n.20.

[212] For example, in *141st St.* the Second Circuit decided that to show lack of consent a claimant must "prove that he did all that reasonably could be expected to prevent the illegal activity once he learned of it." United States v. 141st St. Corp., 911 F.2d 870, 879 (2d Cir. 1990), *cert. denied*, 498 U.S. 1109 (1991). This approach is taken from the Supreme Court's constitutional "innocent owner" dictum in Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663, 689 (1974). Other courts have rejected this definition, saying Congress would have incorporated such language in the statute if Congress meant for it to be applied. United States v. Lots 12,13,14,15, 869 F.2d 942, 946-47 (6th Cir. 1989). *See* discussion of conflicting views in United States v. $477,048, 754 F. Supp. 1467, 1476-78 (D. Haw. 1991), and United States v. 8848 S. Commercial St., 757 F. Supp. 871, 886 (N.D. Ill. 1990).

consent will certainly not be sufficient,[213] the defense should not be defined so narrowly as to completely vanish. The oft-quoted Second Circuit view, that consent will be inferred unless the claimant can prove he took all reasonable steps to stop the drug activity,[214] may have the practical effect of virtually eliminating the no-consent defense whenever drugs were visible.[215] Other courts concerned about fraudulent conveyances may distinguish between transfers made before and after the illegal act,[216] although the legislative history does not appear to support such a distinction.[217]

IV. THE SUPREME COURT CONSIDERS DUE PROCESS RIGHTS IN DRUG-RELATED CIVIL FORFEITURES

A. *United States v. James Daniel Good Real Property*

In *United States v. James Daniel Good Real Property*,[218] the Supreme Court took up a constitutional question it has often debated in other contexts: does the section 881 seizure of a home violate the Fifth Amendment's Due Process Clause if the homeowner is not given prior notice or an opportunity to be heard.[219] James Daniel Good's troubles began in January 1985, when Hawai'i police uncovered about 89 pounds of marijuana, marijuana seeds, hashish oil, and other drug

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[213] *See, e.g.*, United States v. 15 Black Ledge Drive, 897 F.2d 97, 102 (2d Cir. 1990); United States v. 31 Endless St., 8 F.3d 82, 1993 WL 441804 (4th Cir. 1993) (unpublished disposition).

[214] United States v. 418 57th St., 922 F.2d 129, 132 (2d Cir. 1990).

[215] *See* United States v. 755 Forest Rd., 985 F.2d 70 (2d Cir. 1993) (affirming summary judgment, denying homeowner wife a chance to prove she took reasonable steps to prevent husband from engaging in narcotics activity in the house).

[216] United States v. 6640 S.W. 48th Street, 831 F. Supp. 1578, 1585 n.4 (S.D. Fla. 1993).

[217] *See* JOINT EXPLANATORY STATEMENT OF TITLES II AND III, 95th Cong., 2d Sess. (1978), *reprinted in* 1978 U.S.C.C.A.N. 9510, 9522-23.

[218] 114 S. Ct. 492 (1993).

[219] The Fifth Amendment reads, in relevant part: "No person shall . . . be deprived of life, liberty, or property, without due process of law." U.S. CONST. Amend. V. In its phrasing of the question presented to the Court, the government stressed that the owner did not reside on the premises, and that the seizure was pursuant to a warrant issued by a magistrate based on a finding of probable cause. *See* Brief for the United States at I, United States v. Good, 114 S. Ct. 492 (1993) (No. 92-1180).

paraphernalia in a search of Good's Keeau, Hawai'i home.[220] In July 1985, Good pled guilty in state circuit court to one count of second-degree promotion of a harmful drug.[221] More than four years later, in August 1989, the federal government filed a section 881(a)(7) complaint against Good's home and the four acres it sits on.[222] A federal magistrate issued a warrant authorizing the government to seize the defendant property.[223] In finding probable cause that the property was subject to forfeiture, the magistrate relied on an affidavit of a U.S. Drug Enforcement Administration agent, who in turn relied on evidence gathered in the 1985 search.[224] Good was given no notice of this probable cause hearing; in fact, he was in Nicaragua and his home was temporarily rented out to tenants.[225]

The District Court of the State of Hawai'i granted the government's summary judgment motion for forfeiture.[226] On appeal, the Ninth Circuit first remanded the case to determine whether the government had failed to act "in a prompt and timely fashion" in compliance with the statute.[227] Second, the court found that Good's rights to due process

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[220] United States v. James Daniel Good Property, 971 F.2d 1376, 1378 (9th Cir. 1992), *aff'd in part and rev'd in part*, 114 S. Ct. 492 (1993).

[221] *Id.* Good was sentenced to one year in jail, placed on five years probation, and was subsequently ordered in a state court forfeiture action to surrender $3,187 in cash found on the property.

[222] *Id.*

[223] *Id.*

[224] *Id.*

[225] Good claimed he was working in Central America for a charitable organization. He said he lived in his Keeau house from 1980 to 1987, and stayed in the home during return visits to Hawai'i. Brief for Respondent at 3, United States v. Good, 114 S. Ct. 492 (1993) (No. 92-1180).

[226] 971 F.2d at 1378.

[227] *Id.* at 1378-82. This issue was also decided by the Supreme Court. While only the constitutional question is discussed here, the timeliness issue had practical significance. In essence, the issue was whether the government may bring a forfeiture action at any time within five years after the alleged offense is discovered, 19 U.S.C. § 1621 (1988), or whether the government must "immediately" and "forthwith" file an action if Drug Enforcement Administration or Federal Bureau of Investigation agents obtain actual knowledge of a drug offense. 19 U.S.C. §§ 1602-1604 (1988). The government argued that the Ninth Circuit's interpretation would "create incentives to conduct investigations with undue haste and lead to windfalls for drug offenders." Brief for United States at 11, United States v. James Daniel Good Property, 114 S. Ct. 492 (1993) (No. 92-1180). Good responded that the statutory language was clear, and that unless there was a requirement for prompt action "the Government will continue to dredge up and prosecute stale cases like Good's." Brief for Respondent at 9, United

were violated because he was deprived of notice and an opportunity to be heard before his home was seized.[228] The Ninth Circuit recognized that other circuits had split on the due process issue.[229] After analyzing the facts under the multi-factor procedural due process tests set forth by the Supreme Court,[230] the Ninth Circuit concluded that the balance tipped in Good's favor. The court reasoned that Good had a substantial and unique interest in his home, that the government's interest in avoiding a pre-seizure hearing was not significant since "the house is not going anywhere," and that the government could protect its interest through less restrictive means.[231]

B. "Due Process" in accord with the Fifth or Fourth Amendment?

At first glance, the government appeared to have an uphill struggle. As every first-year law student learns, a property owner is entitled to

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States v. James Daniel Good Property, 114 S. Ct. 492 (1993) (No. 92-1180). The Supreme Court unanimously sided with the government, and reversed the Ninth Circuit. 114 S. Ct. at 505-507. The high court held that a court may not dismiss a forfeiture action filed within the five-year statute of limitations solely because government officials failed to comply with the "internal timing requirements" of 19 U.S.C. §§ 1602-1604. 114 S. Ct. at 507. The court reasoned that Congress' failure to specify a consequence for noncompliance with those statutory timing requirements implied that Congress intended to give government officials discretion to determine appropriate sanctions when subordinates delay in filing a forfeiture action. *Id.* at 506. Since the purpose of the statutory directives is to ensure expeditious collection of revenues, the Court opined it would "make little sense" to interpret them so that the government couldn't collect revenues at all. *Id.* at 507.

[228] 971 F.2d at 1382-84.

[229] Compare United States v. 4492 S. Livonia Road, 889 F.2d 1258, 1265 (2d Cir. 1989) (finding no exigent circumstances to justify seizure of home without prior hearing); United States v. A Single Family Residence, 803 F.2d 625, 632 (11th Cir. 1986) (holding no pre-seizure hearing necessary, with scant discussion of competing interests). Several U.S. District Courts had followed *Livonia Road. See, e.g.*, United States v. Parcel I, 731 F. Supp. 1348, 1353 (S.D. Ill. 1990); United States v. 850 S. Maple, 743 F. Supp. 505, 511 (E.D. Mich. 1990); United States v. 14128 South School Street, 774 F. Supp. 475 (N.D. Ill. 1991). The Fourth Circuit took *Livonia Road* a step further, requiring a pre-seizure hearing before public housing tenants could be evicted for suspected drug activity. Richmond Tenants Org., Inc. v. Kemp, 956 F.2d 1300, 1306-08 (4th Cir. 1992).

[230] *See* Fuentes v. Shevin, 407 U.S. 67 (1972); Mathews v. Eldrige, 424 U.S. 319 (1976). *See also infra* notes 228-32 and accompanying text (discussing tests).

[231] 971 F.2d at 1384. The Ninth Circuit wryly noted that after a four-and-a-half-year delay, the government still argued that no pre-seizure hearing should be required because quick action was needed. "Government claims of urgency do not inspire confidence." *Id.*

notice and an opportunity to be heard *before* being deprived of any significant property interest, except in "extraordinary situtations" which are "truly unusual."[232] The United States Supreme Court in *Fuentes v. Shevin*[233] set forth a three-part requirement for these limited situations: *first*, the seizure must be directly necessary to secure an important governmental or general public interest; *second*, there must be a special need for very prompt action; *third*, the state must keep strict control over its monopoly of legitimate force.[234] The Court in *Mathews v. Eldridge*[235] subsequently established a separate balancing test to determine whether due process requires a hearing before the government deprives an individual of a property interest. Three factors must be considered: *first*, the private interest that will be affected by the official action; *second*, the risk of erroneous deprivation of such interest through the procedures used, and the probable value, if any, of any additional or substitute procedural safeguards; and *third*, the government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.[236] Those were the factors the Ninth Circuit said shifted the balance in favor of a pre-seizure hearing before a home is seized.[237] The government responded with a remarkable argument attempting to transform the Fifth Amendment issue into a Fourth Amendment case.[238]

In essence, the government claimed that the Fifth Amendment is irrelevant in *Good* or any other real property seizure. Because the

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[232] *See Fuentes*, 407 U.S. at 83-90; Boddie v. Connecticut, 401 U.S. 371, 378-79 (1971). Unfortunately, this clear statement of law has been rather muddied by subsequent due process cases. *See* Mitchell v. W.T. Grant Co., 416 U.S. 600 (1974) (upholding no-notice seizure by creditor where state law provides opportunity for immediate post-seizure hearing); North Georgia Finishing, Inc. v. Di-Chem, Inc., 419 U.S. 601 (1975) (finding garnishment of corporate bank account without notice or hearing violates due process); Connecticut v. Doehr, 111 S. Ct. 2105 (1991) (holding ex parte attachment of real property without notice, hearing, or showing of exigent circumstances violates due process).

[233] 407 U.S. 67 (1972).

[234] *Id.* at 91-92 (noting the Court has allowed summary seizure to collect taxes, meet the needs of national war efforts, protect against economic disaster from bank failures, and to protect the public from misbranded drugs and contaminated foods).

[235] 424 U.S. 319 (1976).

[236] *Id.* at 335.

[237] United States v. James Daniel Good Property, 971 F.2d 1376, 1383 (9th Cir. 1992), *aff'd in part and rev'd in part*, 114 S. Ct. 492 (1993).

[238] Brief for the United States at 12-31, United States v. James Daniel Good Property, 114 S. Ct. 492 (1993) (No. 92-1180).

seizure of Good's home was made pursuant to a warrant issued by a magistrate on the basis of probable cause, the government maintained it was "reasonable" under the Fourth Amendment.[239] That, the government said, is enough. The Due Process Clause required nothing more, it insisted, because it is through the Fourth Amendment, not the Fifth, that the United States Constitution balances private interests against the public interest in conducting searches and seizures for forfeiture and other law enforcement purposes.[240] If an adversary hearing is not required when showing probable cause to restrain a defendant in a criminal prosecution, the government asked, why mandate a hearing when it merely moves to restrain property?[241] Anyway, even under the balancing test, the value of a pre-seizure hearing would be slight in determining probable cause, and the government's interest is strong in avoiding "costly and burdensome new procedures."[242] In an amici brief, 18 states (not including Hawai'i) echoed the government's concerns, saying the Ninth Circuit's interpretation would seriously impair their ability to target real property assets of drug dealers.[243]

C. *The Supreme Court Protects Due Process for All Real Property Owners*

By a 5-4 vote the Court agreed with Good and the Ninth Circuit,[244] holding that—absent exigent circumstances—due process in a civil

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[239] *Id.* at 9.

[240] *Id.* at 13, 24-26. The government relied principally on two criminal cases: United States v. Monsanto, 491 U.S. 600, 615-16 (1989) ("It would be odd to conclude that the government may not restrain property, such as the home and apartment in respondent's possession, based on a finding of probable cause, when we have held . . . the government may restrain persons where there is a finding of probable cause to believe that the accused has committed a serious offense."); Gersten v. Pugh, 420 U.S. 103, 120 (1975) (holding existence of probable cause "can be determined reliably without an adversary hearing").

[241] Brief for the United States at 18-21, *Good* (No. 92-1180). The government's point here was that seeing as how it must ultimately prove guilt beyond a reasonable doubt in a criminal action, it should face no stricter pre-detention standards in civil forfeiture, where "probable cause" shifts the burden of proof to the claimant and forfeiture is decided on a preponderance of the evidence. *Id.*

[242] *Id.* at 33-35.

[243] *See* Brief of Amici Curiae States in Support of Petitioner, *Good*, (No. 92-1180). The Supreme Court's due process ruling in *Good* of course affects application of Hawai'i state forfeiture laws. However, the state seldom seizes real property. Of the $4.2 million seized under Hawai'i law between 1988 and 1992, only $400,000 was "miscellaneous property"—the category that includes real property. The biggest seizure category, with more than $3 million, was currency. *See* DEPARTMENT OF THE ATTORNEY GENERAL, *supra* note 63.

[244] Newly-appointed Justice Ruth Bader Ginsburg provided the decisive fifth vote.

forfeiture case prohibits the government from seizing real property without first giving the owner notice and an opportunity to be heard.[245] The Court initially disposed of the government's expansive Fourth Amendment argument. Cases relied on by the government concerned criminal suspects, not property seizures, and the Fourth Amendment does not simply end the constitutional inquiry for all seizures.[246] Moreover, while the Fourth Amendment may apply to searches and seizures in a civil context, taking ownership and control of Good's home went beyond any traditional search and seizure.[247] Thus the Fifth Amendment's Due Process Clause still had to be satisfied.

Paralleling the Ninth Circuit's analysis, the Supreme Court applied the three-part due process inquiry set forth in *Mathews*.[248] First, Good's right to control his home free from government interference was a significant private interest, even though in this seizure the actual loss was only the $900-a-month rent from Good's tenants.[249] Second, an ex parte seizure creates an unacceptable risk of error, because innocent owners cannot protect themselves without an adversary hearing.[250] Finally, those concerns for the property owner were not outweighed by the government's interest, because in this case there was no "pressing need for prompt action."[251] Here the Court strained to distinguish *Calero-Toledo v. Pearson Yacht Leasing Co.*,[252] a 20-year-old case in which the Court found that the ex parte seizure of a yacht under a similar drug forfeiture statute satisfied the *Fuentes* due process test.[253] The

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A conservative legal scholar suggests the man Ginsburg replaced, Justice Byron "Whizzer" White, would likely have voted for the government on the due process claim. *See* Bruce Fein, *Indentation in Anti-Drug Arsenal*, WASH. TIMES, Dec. 20, 1993, at A-24.

[245] United States v. James Daniel Good Property, 114 S. Ct. 492, 497 (1993). Justice Kennedy delivered the majority opinion. Justices Rehnquist, O'Connor, and Thomas each wrote separate dissents on the due process issue, while all concurred on the statutory interpretation question.

[246] *Id.* at 499-500.

[247] *Id.* at 500.

[248] *Id.* at 500-04.

[249] *Id.* at 501.

[250] *Id.*

[251] *Id.* at 502 (citing *Fuentes v. Shevin*, 407 U.S. 67, 91 (1972)).

[252] 416 U.S. 663 (1974).

[253] *Id.* at 679. "[P]re-seizure notice and a hearing might frustrate the interests served by the statutes, since the property seized—as here, a yacht—will often be of a sort that could be removed to another jurisdiction, destroyed, or concealed, if advance

majority contended that immediate seizure without notice was necessary in *Calero-Toledo* to establish the court's jurisdiction over the property, and more importantly, the yacht might have disappeared if the government gave advance warning of its forfeiture action.[254] Like the Ninth Circuit, the Supreme Court drew a bright line between personal property, which can be easily moved or destroyed, and real property.[255] With real property, the government has other options short of seizure to protect its interest. Sale of the forfeitable property can be prevented by filing a notice of lis pendens under state law, or the government may obtain an ex parte restraining order in federal court if there is specific evidence an owner is likely to damage or destroy the structures on his property.[256] A pre-hearing seizure of real property will never be allowed unless the government shows that less-restrictive measures—for example, a lis pendens, restraining order, or bond—are not enough to prevent the sale, destruction, or continued unlawful use of the property.[257] While recognizing Good's prior drug conviction and the weakness of his case, the Court insisted "fair procedures are not confined to the innocent."[258]

The principal dissent was authored by Chief Justice Rehnquist, who called the majority opinion "ill-considered and disruptive."[259] Rehn-

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warning of confiscation were given." *Id.* The Court upheld the seizure and forfeiture even though the owner of the yacht had no idea his lessee had taken a marijuana cigarette on board. Justice Douglas' scathing dissent called it a "classic case of lack of procedural due process." *Id.* at 692 (Douglas, J., dissenting).

[254] *Good*, 114 S. Ct. at 502-05.

[255] United States v. James Daniel Good Property, 971 F.2d 1376, 1384 (9th Cir. 1992), *aff'd in part and rev'd in part*, 114 S. Ct. 492 (1993) (noting that unlike a yacht, a house "is not going anywhere").

[256] *Good*, 114 S. Ct. at 503. The Court pointed out government policy currently recognizes that ordinarily there is no concern that a property owner will destroy his property before a forfeiture order. *See* Brief for the United States at 14 n.6, *Good* (No. 92-1180) (quoting Directive No. 90-10 (Oct. 9, 1990), the Executive Office for Asset Forfeiture in the Office of the Deputy Attorney General: "As a general rule, occupants of real property seized for forfeiture should be permitted to remain in the property pursuant to an occupancy agreement pending forfeiture.").

[257] *Id.* at 505.

[258] *Id.* This phrase is somewhat ironic coming from Justice Kennedy, who dissented so vigorously in the *Buena Vista* innocent owner case. *See supra* note 175 and accompanying text.

[259] *Id.* at 507 (Rehnquist, J., concurring in part and dissenting in part). Rehnquist was particularly concerned with a purported impact on historical precedents allowing the government to collect income taxes through summary proceedings including seizures.

quist unreservedly accepted the government's argument that the Fourth Amendment gave Good all the process he was due; he also accused the majority of misrepresenting the reasoning in *Calero-Toledo*.[260] In her dissent, Justice O'Connor said neither precedent nor common sense support the majority's due process distinction between real and personal property.[261] She also wondered what difference an adversary hearing would make in this or any case where the government need only show probable cause that the property was used to facilitate a drug crime.[262] Justice Thomas said he sympathized with the majority's desire to protect private property rights, and its implicit "distrust of the government's agressive use of broad civil forfeiture statutes."[263] Nonetheless, given that Good was a convicted drug offender rather than an innocent owner, Justice Thomas argued this was not an appropriate case from which to create a far-reaching constitutional rule.[264]

D. Good's Impact on Prosecutors and Procedure

Predictably, much of the national media characterized *Good* as "another well-deserved hit" for the government.[265] One news story even suggested that "[p]iece by piece, federal judges are dismantling a powerful weapon used by lawmen in the war on the drugs."[266] On the other side, just as predictably, the United States Attorney General declared that *Good* would have little effect on the federal drug forfeiture program.[267] As in most cases, the truth lies somewhere in between.

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[260] *Id.* at 507-10. Unlike the majority, Rehnquist found a strong government interest in the *Good* seizure. The Chief Justice argued that the seizure helped combat illegal drugs, that pre-seizure notice would permit Good to destroy or damage the buildings, and that government officials made the seizure rather than self-interested private parties. *Id.* at 510.

[261] *Id.* at 511-12 (O'Connor, J., concurring in part and dissenting in part).

[262] *Id.* at 513.

[263] *Id.* at 516 (Thomas, J., concurring in part and dissenting in part).

[264] *Id.* at 516-17.

[265] *Due Process Gets Its Due*, ST. LOUIS POST-DISPATCH, Dec. 17, 1993, at 14E. *See also* Marcia Coyle & Claudia MacLachlan, *Forfeiture Notice*, NAT'L L.J., Dec. 27, 1993, at 7 ("[T]he U.S. Supreme Court has applied significant brakes to the government's use of civil forfeiture as a powerful law enforcement tool"); David Savage, *High Court Curbs Drug Case Forfeitures*, L.A. TIMES, Dec. 14, 1993, at A-27.

[266] John Dillin, *Supreme Court Curbs Police Property Seizures*, CHRISTIAN SCIENCE MONITOR, Dec. 20, 1993, at 8.

[267] Dennis Cauchon, *Forfeiture Laws Under Study*, USA TODAY, Dec. 14, 1993, at 3A (quoting U.S. Attorney General Janet Reno: "We should be able to continue to utilize the tools that are at our disposal in the appropriate way.").

Good's mandate applies only to real property; no hearing would be required in the many cases where the government seeks to forfeit bank accounts or cash,[268] or automobiles.[269] However, the majority somewhat surprisingly stressed that its due process ruling applies to *all* real property, not just residences.[270] Previous lower-court cases had generally limited any pre-seizure hearing requirement to homeowners, claiming that an individual's expectation of privacy and freedom from government intrusion in the home merits "special" constitutional protection.[271] Now that protection extends to absentee apartment building owners, even so-called slumlords.[272] *Good* would also seem to apply to government seizures of businesses, at least those that involve some real property interest. In one prior well-publicized forfeiture, the Second Circuit found the government violated due process with an ex parte seizure and shutdown of an auto parts business suspected of trafficking in stolen cars.[273] Until now, however, courts have been reluctant to extend pre-seizure rights to ongoing commercial businesses in the context of a section 881 forfeiture.[274]

More importantly from a property owner's viewpoint, an illegal seizure—that is, one that violates due process—will still not immunize

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[268] United States v. $8,850, 461 U.S. 555, 562 (1983).

[269] *See, e.g.*, United States v. One 1985 Mercedes, 917 F.2d 415, 419-20 (9th Cir. 1990) (noting that due process does not even require an immediate *post*-deprivation hearing for forfeiture of car).

[270] United States v. James Daniel Good Property, 114 S. Ct. 492, 505 (1993).

[271] United States v. 4492 S. Livonia Rd., 889 F.2d 1258, 1264 (2d Cir. 1989) (citing United States v. Karo, 468 U.S. 705, 714 (1984)). The majority in *Good* also cited *Karo*, *see* 114 S. Ct. at 501, but promptly expanded protection beyond the home. *Id.* at 505.

[272] This apparently rejects the view of United States v. 141st Street Corp., 911 F.2d 870, 875 (2d Cir. 1990), *cert. denied*, 498 U.S. 1109 (1991) (holding non-resident owner lacked sufficient interest in apartment building to be entitled to pre-seizure adversarial hearing, especially where government has shown a strong interest and need for prompt action). *But see* United States v. Hanson Brook, Townhouse Road, 770 F. Supp. 722 (D. Me. 1991) (reaching opposite result).

[273] United States v. All Assets of Statewide Auto Parts, 971 F.2d 896 (2d Cir. 1992) (addressing civil forfeiture under 18 U.S.C. § 981, for alleged violations of federal money laundering statutes). Noting that the government made absolutely no attempt to preserve the claimant's property rights, the court found no exigent circumstances to justify the seizure and closure of the business. *Id.* at 901-905.

[274] *See, e.g.*, United States v. Parcel I, 731 F. Supp. 1348 (S.D. Ill. 1990) (finding notice and hearing required for seizure of claimant's home but not for trucking company and auto parts business).

a property from forfeiture.[275] The illegal seizure will not preclude forfeiture so long as the government can still establish probable cause with evidence that was not impermissibly obtained.[276] The Ninth Circuit recognized this principle in *Good,* finding that if the forfeiture action was timely Good was entitled only to the "rents accrued during the illegal seizure of his home."[277] Thus Good will likely recover only 16 months rent, or about $14,400, that the government collected between the time it seized the property and when it obtained the forfeiture order.[278]

As a procedural matter, there is also an issue as to what form this newly mandated pre-seizure hearing should take. Justice Kennedy's majority opinion clearly intimates that a property claimant should be allowed to raise the "innocent owner" defense,[279] a point advocated by Good's attorney.[280] Additionally, the majority hints that an owner might raise "other potential defenses," including the Excessive Fines claim under *Austin.*[281] That language led Justice O'Connor to worry that the practical effect of requiring such a pre-seizure hearing will be that the government must conduct a "full forfeiture hearing on the merits before it can claim its interest in the property."[282] One recent

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[275] *4492 S. Livonia Rd.*, 889 F.2d at 1265 (citing cases from three Circuits). For a proper post-*Good* application of this principle, see United States v. 4204 Thorndale Ave., 1994 WL 92005 (N.D. Ill. March 18, 1994) (unpublished disposition) (ordering government to release seizure of real properties, but refusing to dismiss pending forfeiture action).

[276] United States v. One 1985 Cadillac Seville, 866 F.2d 1142, 1146 (9th Cir. 1989).

[277] United States v. James Daniel Good Property, 971 F.2d 1376, 1384 (9th Cir. 1992), *aff'd in part and rev'd in part*, 114 S. Ct. 492 (1993).

[278] Walter Wright, *Court: Puna Drug Dealer's Home Seized Unjustly*, HONOLULU ADVERTISER, Dec. 14, 1993, at A1. The government later sold the forfeited home for $234,000, although Good claimed it was worth $310,000. *Id.*

[279] United States v. James Daniel Good Property, 114 S. Ct. 492, 501 (1993).

[280] Brief for Respondent at 26, *Good* (92-1180), (citing United States v. 121 Van Nostrand Ave., 760 F. Supp. 1015, 1029 (E.D.N.Y. 1991) (holding occupant should be given opportunity at hearing before eviction to prove innocent owner defense)).

[281] 114 S. Ct. at 501.

[282] *Id.* at 514 (O'Connor, J., concurring in part and dissenting in part). Justice O'Connor feared that the Court's opinion creates an incentive for property owners to contest forfeitures, thereby increasing the workload of federal prosecutors and courts. Justice Kennedy replied that forcing the government to postpone seizure until after an adversary hearing "creates no significant administrative burden," because the property owner is already entitled to such a hearing before a final forfeiture judgment. *Id.* at 504.

New York case weighed the competing interests.[283] The government argued that the preliminary inquiry should be very limited in scope, while the homeowner maintained he had a right to challenge the evidence on constitutional grounds.[284] Seeking some sort of middle ground that would still protect the homeowner's meaningful opportunity to be heard, Judge McAvoy found that the government must demonstrate "a likelihood of success on the merits" to justify an arrest warrant (seizure) of the property.[285] At the oral argument in *Good*, Good's attorney similarly suggested that the government should have to show a "reasonable likelihood of success" on its forfeiture claim.[286]

In Hawai'i, federal prosecutors say they have been following the procedural mandate of *Good* since the Ninth Circuit's ruling in April 1992.[287] Instead of pre-forfeiture seizure of real property, prosecutors have (absent exigent circumstances) simply filed a civil forfeiture complaint and then recorded a notice of lis pendens against the property. Federal prosecutors in the Second Circuit have followed a similar procedure.[288] Given *Good*'s clear directive, it seems likely that most federal prosecutors will not seek pre-forfeiture seizure of real estate unless they have solid evidence the property is actually being used to store, transfer, or produce drugs.

V. Conclusion

Austin, *Buena Vista*, and *Good* in and of themselves may have little immediate, practical effect in federal courtrooms if lower court judges continue historic patterns of deference to the government and suspicion of accused drug dealers. Narrow readings of Eighth and Fifth Amendment protections would blunt the legal impact of the Supreme Court's rulings in borderline cases. Yet collectively the cases may represent a climactic shift in judicial attitude, a recognition of a need to keep

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[283] United States v. R.D. 1, Box 152, Scotch Hill Rd., 831 F. Supp. 66 (N.D.N.Y. 1993).

[284] *Id.* at 70.

[285] *Id.* at 71-72. This standard is comparable to the requirement for a plaintiff seeking injunctive relief. In this case, the court found that the government had made a sufficient showing. *Id.*

[286] *Supreme Court Hears Oral Arguments Concerning Criminal Law and Procedure*, U.S.L.W., Oct. 29, 1993.

[287] Wright, *supra* note 278, at A1.

[288] *See, e.g.*, United States v. 64 Lovers Lane, 830 F. Supp. 750 (S.D.N.Y. 1993).

"prosecutorial zeal" for forfeitures within reasonable boundaries.[289] Cases now abound with comments that the United States Constitution must not become a casualty of any symbolic war on drugs.[290] Supreme Court Justice Thomas, eager to protect private property rights, suggests it may be necessary to "reevaluate our generally deferential approach to legislative judgments in this area of civil forfeiture."[291] Justice Stevens, speaking at the University of Hawai'i, said *Good* simply reflected a feeling within the Court that the government had "gone too far."[292] Another federal judge, clearly disgusted by the government's failure to return $3,000 it improperly seized eleven years earlier, said the government's tactic "erodes public confidence rooted in the trust that governmental powers will be exercised with restraint and discretion."[293]

Some practitioners believe that, especially in light of *Austin*, federal prosecutors will be far more reluctant to bring civil forfeiture actions in marginal cases.[294] In January 1993, the Justice Department issued a sort of "Ten Commandments" for asset forfeiture, in the form of a National Code of Professional Conduct for prosecutors and drug agents.[295] The first commandment dictates that "potential revenue must not be allowed to jeopardize . . . the due process rights of citizens."[296] It does not say that forfeitures should be proportionate to the crime.

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[289] *See, e.g.*, In re Assets of Myles Martin, 1 F.3d 1351, 1361 (3d Cir. 1993).

[290] United States v. 835 Seventh St. Rensselaer, 820 F. Supp. 688, 696 (N.D.N.Y. 1993); United States v. Millan, 2 F.3d 17, 20 (2d Cir. 1993); United States v. Lasanta, 978 F.2d 1300, 1305 (2d Cir. 1992).

[291] United States v. James Daniel Good Property, 114 S. Ct. 492, 515 (1993) (Thomas, J., concurring in part and dissenting in part).

[292] Justice John Paul Stevens, Remarks to the Constitutional Law Class at the University of Hawai'i Jurist-in-Residence Program (Jan. 25, 1994).

[293] Calabro v. United States, 830 F. Supp. 175, 178 (E.D.N.Y. 1993). In another recent swipe at the so-called "war on drugs," the Ninth Circuit harshly criticized the government's failure to show any probable cause at the time agents seized several envelopes of cash from a airplane passenger's luggage. United States v. $191,910, 16 F.3d 1051 (9th Cir. 1994) ("[S]uspicions of general criminality are not enough. To obtain forfeiture under § 881, the government must have probable cause to believe that the money is connected specifically to drug activities.").

[294] *See Austin Loss Might Undermine Forfeiture Program*, 3 DOJ ALERT 16, (Prentice Hall Law & Business 1993).

[295] 11 THE DEPARTMENT OF JUSTICE MANUAL B-584.138-16 (Prentice Hall Law & Business Supp. 1993) (detailing "National Code of Professional Conduct for Asset Forfeiture").

[296] *Id.*

Austin and other highly-publicized forfeiture cases will likely trigger the most immediate changes in Congress. Two weeks before *Austin* was handed down, conservative Republican U.S. Representative Henry Hyde of Illinois introduced a Civil Asset Forfeiture Reform Act.[297] Among other things, the bill would change the government's burden of proof from probable cause to "clear and convincing evidence," and clarify that the innocent owner defense applies to either lack of knowledge *or* consent.[298] Another Congressional leader, Democratic U.S. Representative John Conyers of Michigan, is proposing changes that would require a conviction before assets are forfeited, and would make the value of the property seized proportionate to the severity of the crime.[299] After grudgingly recognizing the congressional bandwagon, the Justice Department is trying to cobble together its own package of proposed reform legislation.[300] The irony is unmistakable—by the time the Supreme Court finally forces the government to play by the rules, Congress is ready to change them.

Bruce Voss

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[297] H.R. 2417, 103rd Cong., 1st Sess. (1993).

[298] *Id.* at §§ 4&8.

[299] H.R. 3347, 103rd Cong., 1st Sess. (1993). *See also* Naftali Bendavid, *Asset Forfeiture, Once Sacrosanct, Now Appears Ripe for Reform*, LEGAL TIMES, July 5, 1993, at 1.

[300] Dennis Cauchon, *Forfeiture Laws Under Study: Rulings Prompt Reform Plans*, USA TODAY, Dec. 14, 1993, at 3A.