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The Kamehameha Schools/Bishop Estate and the Constitution

by
Jon M. Van Dyke*

I. Introduction

The Bishop Estate, established in 1884 by the will[1] of Princess Bernice Pauahi Bishop, plays a central role in Hawaii because it owns 336,373 acres of land (almost ten percent of all the land in Hawaii), controls $1.2 billion in assets, and runs the important Kamehameha Schools and other educational programs for children of Hawaiian ancestry.[2] This article examines the constitutional questions that have been raised recently regarding the manner in which the Estate operates and the trustees are selected.

In 1993, the U.S. Court of Appeals for the Ninth Circuit agreed with the U.S. Equal Employment Opportunity Commission (EEOC) that The Kamehameha Schools' policy of hiring only Protestant teachers violated Title VII of the 1964 Civil Rights Act.[3] This decision does not contest the Schools' policy of admitting only students of Hawaiian

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* Professor of Law, William S. Richardson School of Law, University of Hawai'i at Manoa. J.D. 1967, Harvard University. The author would like to thank Professors Paul Finkelman and Eric Yamamoto for their review of an earlier draft of this article, and Karl Espaldon, University of Hawaii Law School Class of 1996, for his assistance with research.

[1] The text of the will is reprinted in In re Bishop Estate, 250 Fed. 145, 145 (9th Cir. 1918).

[2] Shannon Tangonan, *Hawaiians-Only Admission Policy Appears Safe*, Honolulu Advertiser, May 2, 1993, at A3.

[3] Equal Employment Opportunity Commission v. Kamehameha Schools/Bishop Estate, 990 F.2d 458 (9th Cir. 1993), *cert. denied*, 114 S. Ct. 439 (1993). The statutory provision violated is found in 42 U.S.C. § 2000(e)-2(a)(1) (1988).

ancestry, but observers sometimes wonder whether that policy is legitimate. Also controversial are the provisions in the Princess's will that require the five trustees to be Protestant and state that the Justices of the Hawaii Supreme Court should select the trustees. This article will address these issues and explain the constitutional principles that govern the Estate's activities and the selection of trustees.

II. The Nature of a Charitable Trust

Under the law of trusts applicable in Hawaii and other states, persons are free to dispose of their property as they wish when they die.[4] The law favors the formation of charitable trusts, and money may be left in trust for any purpose that is charitable, educational, or religious. As long as the trust is private, a deceased person may define the beneficiaries of their bounty in any way they wish. Private trusts for the education of boys only or girls only, for example, are normally upheld despite our public policy against sex-based discrimination. Once the government becomes involved with a private trust, however, or once the trust takes on a public character of some sort, courts place limits on certain types of restrictions. The Equal Protection Clause of the Fourteenth Amendment of the U.S. Constitution generally prohibits direct public involvement in trusts that discriminate on the basis of race and religion.

Because charitable trusts operate indefinitely, the charitable purpose or administrative provisions sometimes become impossible, impractical, or illegal. In that case, courts apply legal theories called the "*cy pres* doctrine" or the "doctrine of equitable deviation" to reform the trust to approximate the general charitable intent of the deceased person.[5] In these instances, the court will normally eliminate the inappropriate provision so that the charitable purpose can be fulfilled.

III. The Preference for Children of Hawaiian Ancestry

It was argued by Justice Kazuhisa Abe in a concurring opinion in *Estate of Bishop*,[6] that The Kamehameha Schools' restriction to Hawaiian

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[4] *See generally* George G. Bogert, The Law of Trusts and Trustees (2d ed. 1991); Restatement (Second) on the Law of Trusts (1987).

[5] *See* Stuart M. Nelkin, *Cy Pres and the Fourteenth Amendment: A Discriminating Look at Very Private Schools and Not So Charitable Trusts*, 56 Georgetown L.J. 272 (1967). *Cf.* Evans v. Abney, 396 U.S. 435 (1970).

[6] 53 Haw. 604, 499 P.2d 670 (1972).

children and Protestant teachers violated the Equal Protection Clause because of the public nature of the schools. Justice Abe was correct that courts generally refuse to participate in any trust with a racially restrictive provision.[7] For example, in *Howard Savings v. Peep*,[8] the New Jersey Supreme Court applied the *cy pres* doctrine to remove the racial restriction from a scholarship trust limited to white students at Amherst College, because the restriction violated the policy and charter of the college. Similarly, in *Evans v. Newton*,[9] the U.S. Supreme Court ruled that the City of Macon, Georgia could not limit a park to only whites even though that was the express wish of the deceased individual who bequeathed the land to the city. Because of the strong national policy against racial discrimination, even if the only public act is to appoint the trustees who are to administer the racially restrictive activity, such an act is viewed as sufficient "state action" to render it unconstitutional, requiring that the racial limitation be removed.[10]

Serious constitutional questions would therefore be raised if the preference in Princess Pauahi's will were designed to favor any racial or ethnic group other than Hawaiians. Preferences for native peoples are, however, treated differently under U.S. law. Such preferences have been upheld repeatedly in recent years by the U.S. Supreme Court, which has stated that they are "political" and not "racial" in nature.[11]

Preferences for native peoples are upheld not for racial reasons, but because of the unique legal and political status that native groups have under the U.S. Constitution and laws. Unlike other ethnic groups in our multicultural community, native peoples have no "mother culture" in another land where their culture is maintained and developed. Unless they are given the opportunity to protect their culture, language, religion, and traditions in their place of origin, their unique heritage will be lost forever. We all benefit by having diverse and strong cultures thriving in our community.[12]

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[7] *Id.* at 611, 499 P.2d at 675.

[8] 170 A.2d 39 (N.J. 1961).

[9] 382 U.S. 296 (1966).

[10] Pennsylvania v. Brown, 392 F.2d 120 (3d Cir. 1968), *cert. denied*, 391 U.S. 921 (1968).

[11] The leading case is *Morton v. Mancari*, 417 U.S. 535, 553 n. 24, 554 (1974), which upheld a hiring preference for Indians for positions in the Bureau of Indian Affairs. *See generally* Jon M. Van Dyke, *The Constitutionality of the Office of Hawaiian Affairs*, 7 U. HAW. L. REV. 63, 73-79 (1985).

[12] *See* Van Dyke, *supra* note 11, at 90-92.

Furthermore, native peoples — and particularly persons of Hawaiian ancestry — have strong claims to reparations and lands based on early interactions with, and abuses by, the federal government.[13] Preferences granted to Native Americans are, therefore, sometimes viewed as partial responses to the obligations owed to these peoples. The Hawaii Supreme Court analogized persons of Hawaiian ancestry to other Native Americans in *Ahuna v. Department of Hawaiian Homelands*,[14] and drew upon the rich body of federal cases involving North American natives to determine trust duties owed to Native Hawaiian homesteaders. U.S. District Judge David Ezra has also explicitly ruled that persons of Hawaiian ancestry are entitled to governmental preferences.[15] Charitable trusts limited to beneficiaries of Hawaiian ancestry are thus clearly acceptable under the law.

IV. Is the Estate's Protestant-Only Hiring Policy Legal?

As mentioned above, the policy of The Kamehameha Schools to hire only Protestant teachers was recently struck down by the U.S. Court of Appeals for the Ninth Circuit as a violation of Title VII of the 1964 Civil Rights Act.[16] This decision was based on the court's view that The Kamehameha Schools are not sufficiently religious in character to justify an exemption from the general statutory rule that no discrimination based on religion is allowed in employment situations. This decision is somewhat troubling because the court has assumed the role of determining what is and what is not a bona fide religion.

In the U.S. District Court, Judge Alan Kay had upheld the Protestant-only restriction because of the "religious purpose and character" of The Kamehameha Schools, ruling that requiring teachers to be Protestant was a bona fide occupational qualification.[17] Certainly there

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[13] *See, e.g.*, Karen N. Blondin, *A Case for Reparations for Native Hawaiians*, 16 Haw. B.J. 13 (1981); S. James Anaya, *The Native Hawaiian People and International Human Rights Law: Toward a Remedy for Past and Continuing Wrongs*, 28 Ga. L. Rev. 309 (1994); Melody K. MacKenzie, *Historical Background*, in Native Hawaiian Rights Handbook 3 (Melody K. MacKenzie ed. 1991).

[14] 64 Haw. 327, 640 P.2d 1161 (1982).

[15] Naliielua v. State of Hawaii, 795 F. Supp. 1009 (D.Haw. 1990), *aff'd*, 1991 WL 148771 (9th Cir. Aug. 5, 1991).

[16] Equal Employment Opportunity Commission v. Kamehameha Schools/Bishop Estate, 990 F.2d 458 (9th Cir. 1993), *cert. denied*, 114 S. Ct. 439 (1993).

[17] Equal Employment Opportunity Commission v. Kamehameha Schools/Bishop Estate, 780 F. Supp 1317, 1323 (D.Haw. 1991), *rev'd*, 990 F.2d 458 (9th Cir. 1993), *cert. denied*, 114 S.Ct. 439 (1993).

can be no doubt that Princess Pauahi desired that the schools have a Protestant orientation, although she did not require that the students themselves be Protestant.

Just as we permit religions to operate freely in the United States, U.S. courts generally permit private trusts to maintain a religious preference, reforming the trusts only if the charitable purposes cannot be carried out. In a 1979 case, for example, the Connecticut Supreme Court examined a trust created to benefit white Protestant boys.[18] The court struck down the preference for whites and males, but allowed the religious preference to stand because it was central to the decedent's charitable goals.

Of even more direct relevance to the Ninth Circuit's decision is *Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*.[19] In that case, the Supreme Court upheld the decision of the Mormon Church to fire an employee at a gymnasium it owned and operated because he had failed to qualify as a "temple recommend," that is, as a member of the Church eligible to attend its temples. He had argued that his work had nothing to do with religion and that his firing violated his First Amendment rights. The Court unanimously rejected his claim, stressing that practitioners of many religions feel that the ability to create an exclusive community of believers is an essential component of their religion.

The Bishop Estate/Kamehameha Schools had argued similarly that the Princess wanted to create a school with a religiously-oriented Protestant community for its students and employees. The Ninth Circuit rejected this argument concluding that the Schools are not sufficiently religious to qualify for the exemption. The appellate court stressed that no religious test is required of the teachers (they simply certify that they are Protestants), that students are accepted from all religions, and that no attempt is made to convert the non-Protestant students. According to the Ninth Circuit, the "generic" Protestant religion community at The Kamehameha Schools was not sufficiently religious to qualify for an exemption, even though the more rigorous Mormon religious community does qualify. It is troubling to have a court determine what a "true" religious community is. Once Congress provided a religious exemption in the 1964 Civil Rights Act, however, it was inevitable that courts would have to undertake this assignment,

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[18] Lockwood v. Killian, 425 A.2d 909 (Conn. 1979).

[19] 483 U.S. 327 (1987).

and it is natural for a court to want to interpret this exemption narrowly to ensure that religious nondiscrimination is adhered to as a general norm.

V. Can the Trustees Be Restricted to Protestants Only?

If teachers at the schools cannot be limited to Protestants because the schools do not have a bona fide religious orientation, then it must also be illegitimate to require that the trustees be Protestants. Certainly the trustees are "employees" of the estate, and governed by the same norm of nondiscrimination as the teachers.[20]

In 1993-94, the Hawaii Supreme Court Justices went through an elaborate process to pick a new trustee, and received widespread criticism for their actions.[21] The Court first appointed an 11-member panel of citizens[22] who nominated five candidates.[23] Then the Justices received a ruling from the Commission on Judicial Conduct stating that it does not violate the law or judicial ethics for them to select the Bishop Estate Trustees.[24] The Commission's report also stated, however, that the justices should avoid activities that would create the perception that the process:

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[20] If, on the other hand, the appellate court had agreed with District Judge Kay that the schools were designed to establish a religious foundation for their students based on the Protestant religion, then it would have been legitimate to require the teachers, administrators, and trustees to be Protestants, just as a Catholic school could require that its teachers, administrators, and trustees be Catholic.

[21] The Honolulu Advertiser, for instance, called this selection process a "fiasco." Editorial, *Bishop Trustee: Selection Now a Fiasco*, Honolulu Advertiser, Oct. 16, 1994, at B2. The Honolulu Star Bulletin has repeatedly called for the Supreme Court Justices to end their role in the selection process. *See, e.g.*, Editorial, *Justices Should Sever Ties to the Bishop Estate*, Honolulu Star-Bulletin, April 12, 1994, at A10, col. 1.

[22] The list included University of Hawaii President Kenneth P. Mortimer, Catholic Monsignor Charles A. Kekumano, Robert J. Pfeiffer, then-chair of Alexander & Baldwin, Inc., William S. Richardson and Matsuo Takabuki, both former Bishop Estate Trustees, educator Gladys Ainoa Brandt, business executives Herbert Cornuelle and Henry A. Walker Jr., attorneys Melody K. MacKenzie and Alvin T. Shim, and union leader Gary W. Rodrigues. Editorial, *A Better Way to Choose Bishop Estate Trustees*, Honolulu Star-Bulletin, Jan. 14, 1994, at A12, col. 1.

[23] James Dooley, *Five Finalists on Bishop Trustee List*, Honolulu Advertiser, April 1, 1994, at A1, col. 4.

[24] Ken Kobayashi, *Panel: Court Can Pick Trustees*, Honolulu Advertiser, April 9, 1994, at A1, col. 6; Mary Adamski, *State Justices Get Green Light on Trustee Picks*, Honolulu Star-Bulletin, April 9, 1994, at A3, col. 6.

* Is influenced by political factors or favors.
* Will influence the judicial process when Bishop Estate is involved in the court case.
* Uses judicial resources to the detriment of the judiciary.
* Is influenced in "any way by religious or racial discrimination."
* Lends the prestige of the high court to the estate or its trustees.[25]

After the Justices received this qualified green light, they reopened the process, but this time without the help of the blue-ribbon citizens panel they had previously relied upon,[26] and added ten new names to the list of candidates to make a list of 15.[27]

The Justices never formally announced that non-Protestants would be eligible to be considered for the new position, but they did state that their selection process would follow the guidelines set forth in the advisory opinion of the Commission on Judicial Conduct (which states that the Justices should avoid actions that are "likely to create a perception . . . that the selection process . . . is . . . influenced by . . . religious or racial discrimination."[28] The Justices then offered as an explanation for their reopening of the nominating process that:

> We believe that some eminently qualified individuals may have refrained from applying for the vacancy because of (1) the well-known provision of the Will of Princess Bernice Pauahi Bishop that only Protestants may be appointed as trustees and (2) the mistaken perception that only native Hawaiians or part-Hawaiians may be appointed as trustees.[29]

This statement is included in a paragraph that also refers to the Commission on Judicial Conduct's advisory opinion, so it appears that these statements are to be read in light of the Commission's admonitions. Nonetheless, it is regrettable that the Justices did not make a more direct statement that religion would no longer be a factor in the

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[25] Ken Kobayashi, *Panel: Court Can Pick Trustees*, HONOLULU ADVERTISER, April 9, 1994, at A1.

[26] *See* News Release issued by "Ronald T.Y. Moon, Robert G. Klein, Steven H. Levinson, Paula A. Nakayama, and Mario R. Ramil, Justices of the Supreme Court of the State of Hawaii, In Their Individual Capacities," Aug. 24, 1994 [hereafter cited as News Release]; Ken Kobayashi, *Reopening of Trustee Selection a 'Shock,'* HONOLULU ADVERTISER, Aug. 26, 1994, at A1.

[27] James Dooley, *High Court Adds 10 to Trustee List*, HONOLULU ADVERTISER, Oct. 26, 1994, at A1.

[28] News Release, *supra* note 26.

[29] *Id.*

selection process. It is also regretable that the Justices lumped the religious-discrimination issue together with whether persons of Hawaiian ancestry should be preferred as Trustees. As explained above,[30] preferences for Native Hawaiians are viewed as "political" in nature and thus are not "racial" discrimination in violation of the concerns addressed by the advisory opinion of the Commission on Judicial Conduct.[31]

The list of ten new names added by the Justices did not contain any person who was identified as a Catholic, Jew, Buddhist, Muslim, or Hindu, but one candidate was listed as a Mormon.[32] The person finally selected, Gerard Jervis,[33] listed himself as a Lutheran.[34] He is of Hawaiian ancestry.

VI. Is It Proper for the Hawaii Supreme Court to Appoint the Bishop Estate Trustees?

This question is more difficult and requires a more detailed analysis. The Princess' will provides that "the number of my said trustees shall be kept at five; and that vacancies shall be filled by the choice of a majority of the Justices of the Supreme Court, the selection to be made from persons of the Protestant religion."[35]

Courts have twice upheld the role of Hawaii's Supreme Court Justices. In 1918, the U.S. Court of Appeals for the Ninth Circuit held in *In Re Bishop's Estate*[36] that the Supreme Court Justices were acting in their individual capacities when appointing Bishop Estate

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[30] *See supra* notes 6-15 and accompanying text.

[31] News Release, *supra* note 26; *see also* William Kresnak, *Justices Will Pick Bishop Trustees*, Honolulu Advertiser, Aug. 25, 1994, at A1, col. 6.

[32] The Morman was John Hoag, president of First Hawaiian, Inc. James Dooley, *High Court Adds 10 to Trustee List*, Honolulu Advertiser, Oct. 26, 1994, at A1. Although the Dooley article cited above characterizes Mr. Hoag as a "non-Protestant," *id.* at A2, it is not clear that Mormons should be so characterized. One definition of "Protestant" is "a Christian not of a Catholic or Eastern church." Webster's Seventh New Collegiate Dictionary 686 (7th ed. 1963). Under this definition, a Morman would be viewed as a "Protestant."

[33] Ken Kobayashi, *Jervis Picked as Bishop Trustee*, Honolulu Advertiser, Nov. 11, 1994, at A1, col. 1.

[34] James Dooley, *High Court Adds 10 to Trustee List*, Honolulu Advertiser, Oct. 26, 1994, at A2, col. 3.

[35] In re Bishop's Estate, 250 Fed 145, 145 (9th Cir. 1918).

[36] *Id.*

trustees, because the Justices' normal duties do not include trust administration. In the second case, *Kekoa v. Supreme Court of Hawaii*,[37] the Hawaii Supreme Court (with all five justices replaced by circuit court judges for this decision) held that the selection process did not violate the due process clause of the Fourteenth Amendment, noting that it was well-established that the Justices were acting in their individual capacities when appointing Bishop Estate trustees.

This rationale can no longer be viewed as credible, because the Hawaii Supreme Court Justices select the trustees specifically because of their status as Supreme Court Justices, and not as named individuals or because of anything they have accomplished or attained as individuals outside the court.[38] Judges and justices do have a realm of private life in which they can act as individuals, and it is proper for them to participate in certain nonpartisan community activities.[39] Here, however, they are given the job of selecting the trustees explicitly because of their positions as taxpayer-supported Supreme Court Justices. They meet to discuss trustee appointments during normal working hours and interview prospective trustees at their offices while they are being paid by the taxpayers. They correspond regarding these appointments using their official stationery and make no effort to separate themselves from their official status when reaching these decisions. And as Supreme Court Justices, they must adhere to the principles of the U.S. and Hawaii Constitutions, which include avoiding any action that would indicate a preference for one religion over another. The Hawaii Constitution is explicit in saying that "No person shall 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."[40]

A recent case that addresses a situation similar to the appointment of the Bishop Estate Trustees is the case of *In Re Certain Scholarship*

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[37] 55 Haw. 104, 516 P.2d 1239 (1973), *cert. denied*, 417 U.S. 930 (1974).

[38] *See, e.g.*, Metropolitan Washington Airports Authority v. Citizens for the Abatement of Aircraft Noise, 501 U.S. 252, 111 S. Ct. 2298 (1991), where the U.S. Supreme Court ignored Congress's attempt to insulate a board from separation-of-powers analysis by characterizing the members of Congress on the board as serving in their "individual capacities." The Court cited *Mistretta v. United States*, 488 U.S. 361, 393 (1989), for the proposition that "separation-of-powers analysis does not turn on the labeling of an activity." 501 U.S. at 267.

[39] *See generally* AMERICAN BAR ASSN. CODE OF JUDICIAL CONDUCT, Canon 4, 5 (1990).

[40] HAW. CONST. Art I, § 5 (emphasis added).

Funds,[41] which involved a will that instructed the principal of a high school and the local school board to award a college scholarship to a "worthy protestant boy." The New Hampshire Supreme Court ruled that it would violate both the New Hampshire and U.S. Constitutions for public officials such as the high school principal and the school board members to engage in activity that would discriminate among the students that might be eligible for such a scholarship on the basis of sex or religion. The court noted that it was required to choose between the competing values of protecting the right of individuals to dispose of their property as they wish and the public policy of ending discrimination, and ruled that the state and federal constitutions required it to choose the latter. The New Hampshire Supreme Court further stated that it would not violate these constitutions for a state court or other public body merely to facilitate or permit a "privately administered lawful discriminatory trust" to function.

Applying these principles to the Bishop Estate situation leads to the conclusion that it is a violation of the Hawaii and U.S. Constitutions for public officers such as our Supreme Court Justices to appoint only Protestant trustees to administer the Bishop Estate, because to do so would express a state preference for one religion and discriminate against non-Protestants. If the trustees were selected on a nondiscriminatory basis, however, it would be constitutionally permissible for the justices to appoint the trustees because the Bishop Estate, with its Hawaiian beneficiaries, and even if it still hired only Protestant teachers, would then be a "privately administered lawful discriminatory trust."

VII. The Potential For Conflicts of Interest

Another potential problem with the trustee appointment process is that the appointment of Bishop Estate trustees by Supreme Court Justices creates apparent or real conflicts of interest. Canon 2 of the Hawaii Code of Judicial Conduct says that "A judge should avoid impropriety and the appearance of impropriety in all his activities." According to Canon 5, "A judge should regulate his extrajudicial activities to minimize the risk of conflict with his judicial duties."

Judges, in general, are held to a higher standard of conduct than ordinary citizens. Judges are precluded from serving on non-law-related commissions because to do so would politicize the court and create an

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[41] 575 A.2d 1325 (N.H. 1985).

appearance of partiality. Judges may participate in charitable organizations, but their activities are restricted in several important respects. They must not raise funds and are prohibited from working with organizations that would give the appearance of bias, such as the Legal Aid Society, or organizations that frequently litigate, such as the American Civil Liberties Union. They must refrain from any activity that takes up so much time that it interferes with their judicial duties. In the past, when challenges concerning the Bishop Estate have reached the Hawaii Supreme Court, the justices have all felt obliged to recuse themselves from sitting on the dispute because of their past participation in the selection of trustees. In these cases, the Supreme Court has had to be restaffed with lower court judges,[42] thus inevitably casting doubt on the authority and legitimacy of the decision.

Furthermore, the principles of judicial ethics place restrictions on a judge's personal conduct. Judges may not belong to clubs that discriminate on the basis of race, sex, or religion, and must refrain from appearing at political functions. Judges must meet high standards of speech, avoiding racial slurs and swearing, and must avoid sexual misconduct. All of these restrictions are meant to preserve a high standard of impartiality so that judges may effectively carry out their role. It follows that they must avoid even the appearance that they favor a certain religious group.

VIII. Summary and Conclusions

To summarize:

1. It is legitimate for the Bishop Estate to use its resources for persons of Hawaiian ancestry, without regard to whether one characterizes the Estate as a public or private entity, because U.S. and Hawaii law clearly permit preferential programs for native people. In this instance, the preference is particularly logical because the lands came from the *ali'i* (chiefs) of the Hawaiian monarchy who held these lands in trust for the Hawaiian people. It would also be constitutional to require the Trustees to be persons of Hawaiian ancestry, because such a preference would be viewed as "political" — and related to the propriety of Hawaiians governing their own resources — and not as a "racial" discrimination.

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[42] *See, e.g.*, Kekoa v. Supreme Court of Hawaii, 55 Haw. 104, 516 P.2d 1239 (1973), *cert. denied*, 417 U.S. 930 (1974).

2. The U.S. Court of Appeals for the Ninth Circuit has ruled that The Kamehameha Schools cannot hire only Protestants as teachers, despite the fact that the schools are run by a private charitable trust, because the schools cannot be characterized as a bona fide religious institution.

3. If this decision is correct, then it is similarly unconstitutional to limit the trustees to persons of the Protestant faith, because the trustees are also employees governed by the 1964 Civil Rights Act.

4. It would also be unconstitutional for the members of the Hawaii Supreme Court to appoint the trustees of the Estate if such appointments must be limited to persons of the Protestant faith. It is not credible for the justices to pretend that they are acting in their individual capacity in making these appointments. They are making the appointments solely because they are Supreme Court Justices and thus are acting in an official capacity when they choose the trustees. For them to prefer persons of one religious belief over those of another religious belief would, therefore, be an explicit violation of their oath to adhere to the state and federal constitutions. This question would be more difficult if the appointment were limited to persons of a native religion, because — as explained above — preferences for natives are legitimate. Many Hawaiians, of course, are Protestants, but it cannot realistically be argued that the Protestant faith is the native religion of persons of Hawaiian ancestry. Many Hawaiians are Catholic, and some today still adhere to the traditional Hawaiian religious beliefs.

IX. What Remedies Are Appropriate

If it is inappropriate and unconstitutional for the members of the Hawaii Supreme Court to appoint the members of the Bishop Estate if the trustees must be Protestant, what changes must take place to allow the Estate to continue its important mission?

The justices could continue to appoint the trustees, but could more formally eliminate the requirement that the trustees be Protestants. Or, the trustees could be selected by some other mechanism. Under our constitutional principles, we can modify the goals of Princess Pauahi to conform to our modern notions of religious tolerance and diversity.

The State Legislature is empowered to intervene and introduce a new method of selecting trustees. Probably the best solution would be to have the beneficiaries — persons of Hawaiian ancestry — select the trustees through an election process, because they are the ones who ultimately stand to benefit if the trust is managed well, and to lose if

it is not. In a democracy, this approach seems like the only truly defensible solution.

It has also been suggested that the remaining trustees pick the new trustees, but a self-perpetuating board could eliminate the possibility of new blood being brought into the process, and would eliminate any sense of accountability for this important organization.

The eleven-member screening commission of the Hawaii Supreme Court appointed in January 1994 to evaluate trustee candidates[43] provided some opportunity for community input, but, as explained above, the justices scuttled that process in August 1994 and supplemented the committee's five nominees with ten of their own.

The person finally selected, Gerard Jervis, is a respected member of the community who has the ability to become an outstanding trustee, but some viewed his appointment with skepticism because he had previously served on the Judicial Selection Commission and thus had helped nominate some of the judges who in turn selected him.[44] Such suspicions, however unfounded, will be inevitable as long as the Hawaii Supreme Court continues to select the trustees.[45] It would be fairer both to the trustees and to the justices if a different process were used, and ultimately the Hawaiian beneficiaries should play a central role in this process.

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[43] *See* Pat Omandam, *High Court Panel to Screen for a Trustee*, HONOLULU STAR-BULLETIN, Jan. 13, 1994, at 1; Ken Kobayashi, *A Long List for Trustee Job*, HONOLULU ADVERTISER, March 11, 1994, at A7.

[44] Ken Kobayashi, *Jervis Picked as Bishop Trustee*, HONOLULU ADVERTISER, Nov. 11, 1994, at A1, col. 1.

[45] *See, e.g.*, Richard Borreca, *Bishop Trustee Reform a Wish*, HONOLULU STAR-BULLETIN, Dec. 10, 1993, at A3 (sharply criticizing several recent appointments of trustees as examples of cronyism).

Native Hawaiian Entitlement to Sovereignty: An Overview

by
Noelle M. Kahanu* and
Jon M. Van Dyke**

I. Introduction

The indwelling yearning for sovereignty among the Hawaiian people burst forth in 1993 — 100 years after the illegal overthrow of the Kingdom of Hawai'i[1] — with a cacophonous display of demonstrations, protests, demands, and legislative proposals. A process is now underway to reestablish an autonomous Hawaiian nation, and it appears likely that a constitutional convention will be held to enable all persons of Hawaiian ancestry to draft an organic governing document that will allow them to manage their resources and govern themselves once again.[2]

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* Staff member, U.S. Senate Committee on Indian Affairs. J.D. 1992, William S. Richardson School of Law, University of Hawai'i at Mānoā. Ms. Kahanu would like to note that her work on this article was undertaken prior to her joining the staff of the Senate Committee on Indian Affairs.

** Professor of Law, William S. Richardson School of Law, University of Hawai'i at Mānoā. J.D. 1967, Harvard University. Professor Van Dyke has served as a consultant for the Office of Hawaiian Affairs on matters related to claims against the state and federal governments during the past several years. The authors gratefully acknowledge the assistance of Melody MacKenzie and Paul Finkelman in providing useful critiques of earlier drafts of this paper. The authors would also like to thank Karl Espaldon, University of Hawaii School of Law Class of 1996, for his help in the research related to this article.

[1] *See, e.g.*, Karen Blondin, *A Case for Reparations for Native Hawaiians*, 16 Haw. B. J. 13, 20-25 (Winter, 1981); Melody K. MacKenzie, *Historical Background*, *in* Native Hawaiian Rights Handbook 3 (Melody K. MacKenzie ed., 1991).

[2] *See infra* notes 133-40 and accompanying text.

The Native Hawaiian claim to sovereignty is based largely upon established precedents related to Native Americans in North America. Many Hawaiians, however, want to develop a status that provides more autonomy than that provided to Indians and other Native Americans. Judicial recognition of Indian tribal sovereignty is constantly being tested, and a majority of the present Supreme Court appears to favor limiting the sovereignty of Indian tribes.[3] The Native Hawaiian effort cannot be based solely upon the current nature of Indian sovereignty, but must instead be rooted in the Native Hawaiian experience, as well as the past willingness of Congress to recognize aboriginal sovereignty. The Hawaiians wish to build on the experiences of Indians but to avoid the problems that have impeded those efforts.

II. The Doctrine of Indian Sovereignty

Indian tribes exercised self-governance and self- determination long before the establishment of the United States of America. When these tribes dealt with the federal government in the early 1800s, they did so as sovereign entities. Indian tribes have an inherent right to self-governance, which is derived not from powers granted by express acts of Congress, but from the powers of a sovereignty that has never been extinguished.[4] Two clauses in the U.S. Constitution reflect the understanding that Indians are a distinct and separate peoples: (1) the Indian Commerce Clause[5] and (2) the clause recognizing that Indian tribes were beyond the jurisdiction of the state and federal governments for most purposes, including taxation.[6]

This inherent right to self-governance was first articulated by Chief Justice John Marshall writing for the Supreme Court in *Worcester v. Georgia*,[7] which involved the imprisonment by the state of Georgia of two non-Indians living on Cherokee land.[8] The U.S. Supreme Court held that this imprisonment was unconstitutional because Georgia did

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[3] *See, e.g., infra* notes 106-11 and accompanying text.

[4] *See infra* notes 7-19 and accompanying text.

[5] U.S. Const. art. I, § 8, cl. 3 states that Congress has the power "[to] regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." Note how this provision equates the status of Indian tribes to that of states and foreign nations. *Id.*

[6] U.S. Const. art. I, § 2, cl. 3 states that "[r]epresentatives and direct taxes shall be apportioned among the several States . . . excluding Indians not taxed . . ." *Id.*

[7] 31 U.S. 515 (1832).

[8] *Id.* at 536.

not have general regulatory power over Indian land.[9] Marshall recognized the "Indian nations as distinct political communities, having territorial boundaries, within which their authority is exclusive."[10] He further found that because of the nature of the federal-Indian relationship, the United States had assumed a protectorate over Indian tribes.[11] This protectorate did not extinguish tribal sovereignty, but was designed to preserve and insulate it from state interference.[12] Chief Justice Marshall drew upon international law to conclude that:

> [T]he settled doctrine of the law of nations is that a weaker power does not surrender its independence—its right to self-government, by associating with a stronger and taking its protection. A weak State in order to provide for its safety, may place itself under the protection of one more powerful without stripping itself of the right of government, and ceasing to be a State.[13]

The decision is important because it recognizes the autonomy of the Indian tribe. Within its lands, Cherokee activity could not be interfered with by the State of Georgia:

> The Cherokee nation, then, is a distinct community, occupying its own territory, with boundaries accurately described, in which the laws of Georgia can have no force, and which the citizens of Georgia have no right to enter but with the assent of the Cherokees themselves or in conformity with treaties and with the acts of Congress.[14]

In the 1978 case of *United States v. Wheeler*,[15] the Supreme Court recognized Indian tribes to be "unique aggregations possessing attributes of sovereignty over both their members and their territory."[16] The *Wheeler* Court also emphasized that the sovereignty of native peoples is not something granted by the federal government, but rather is an attribute that they have always possessed:

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[9] *Id.* at 561, 562.

[10] *Id.* at 557.

[11] *Id.* at 560-61.

[12] *Id.* at 561.

[13] *Id.* at 560-61. Tribal sovereignty may, however, be limited by the federal government, through congressional statutes, treaties, and by restraints inherent in the protectorate relationship itself. *See* FELIX COHEN HANDBOOK OF FEDERAL INDIAN LAW 235 (Rennard Strickland et al. eds., 2d ed., 1982).

[14] *Id.* at 561.

[15] 435 U.S. 313 (1978).

[16] *Id.* at 323.

> [T]he power to punish offenses against tribal law committed by Tribe members, which was part of the Navajos' primeval sovereignty, has never been taken away from them, either explicitly or implicitly, and is attributable in no way to any delegation to them of federal authority. It follows that when the Navajo Tribe exercises this power, it does so as part of its retained sovereignty and not as an arm of the Federal Government.[17]

Under certain circumstances, tribal power may even extend over nonmembers or extend beyond territorial limits. The determinative issue is "whether the matter falls within the ambit of internal self-government."[18] On the other hand, most external powers of sovereignty, such as the ability to enter into treaties with nations other than the United States, have been implicitly lost by virtue of the incorporation of tribes within the United States.[19]

III. The Varieties of Native Sovereign Nations

A. Traditional Tribes

Tribal lands are typically located within reservations that were set aside by the federal government for the "benefit" of the Indians. These lands are rarely the same lands traditionally occupied by the tribe, but instead have been chosen by the federal government. Large areas of the reservation lands are arid and unusable, and so are not profitable for the tribes. The lands are held in trust by the U.S. Secretary of the Interior and usually cannot be sold without consent of the United States. Tribal authority over the regulation and zoning of tribal lands (a power necessary for self-determination) may be restricted by the U.S. Bureau of Indian Affairs (BIA), which has the power of approval over tribal ordinances, tribal trust funds, and tribal attorneys' contracts.[20] Under recent Supreme Court decisions,[21] states may also be permitted to interfere in tribal sovereignty via certain taxation, regulation, and zoning powers.

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[17] *Id.* at 328. *See also* Talton v. Mayes, 163 U.S. 376, 384 (1896)("The powers of local self-government enjoyed by the Cherokee nation existed prior to the Constitution.").

[18] Cohen, *supra* note 13, at 246.

[19] *See* Johnson v. M'Intosh, 21 U.S. (8 Wheat.) 543 (1823).

[20] *See* Michael D. Mason, *Canadian and United States Approaches to Indian Sovereignty*, 21 Osgoode Hall L.J. 422, 459 (1983).

[21] *See, e.g., infra* notes 106-11 and accompanying text.

In 1934, Congress enacted the Indian Reorganization Act (IRA) to aid in the tribal self-determination of federally recognized tribes.[22] The IRA encouraged and funded the adoption of either tribal constitutions or federally chartered corporations. Although the tribes had a choice whether or not to proceed under the IRA, many federal programs were earmarked specifically for IRA tribes. According to one set of figures, 181 tribes chose to adopt a form of government under the IRA.[23] Although these tribes had congressional approval to establish tribal governments, their right to do so was grounded, not on delegated authority, but on their inherent right to self-governance. The constitutions adopted by these tribes were based largely upon sample governing documents developed by the BIA. Under the provisions of the IRA, however, each tribal constitution is subject to the approval of the Secretary of the Interior. Many tribes were, therefore, not able to incorporate all their sovereign powers into their constitutions. Furthermore, IRA tribes are subject to periodic review by the Secretary. The typical IRA tribe resembles a municipal government, vesting legislative authority in a tribal council with elected members.[24] Only IRA tribes are permitted to become federally-chartered native corporations.

Because of the paternalistic rules established by the IRA for establishing tribal governments, some 77 federally-recognized tribes chose not to adopt IRA constitutions.[25] These "non-IRA" tribes have often adopted forms of governments that resemble IRA approved tribes, but "non-IRA" tribal governments have more independence because their constitutions are not subject to Secretarial approval. Courts have validated "non-IRA" governments, even those without written constitutions,[26] but these tribes may be denied funding specifically earmarked for IRA tribes.[27]

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[22] Pub. L. No. 73-383, 48 Stat. 984 (1934) (codified at 25 U.S.C. §§ 461-492 (1983)).

[23] AMERICAN INDIAN LAWYER TRAINING PROGRAM, INC., INDIAN TRIBES AS SOVEREIGN GOVERNMENTS 10 (1988) [hereafter cited as "AILTP"].

[24] The council may be authorized to "determine membership, regulate family relations and probate, hire legal counsel, make municipal-type regulations, . . . prevent land alienation and lease, regulate land allotment among members, control other assets, tax reservation residents, negotiate with other governments and set up tribal courts." Mason, *supra* note 20, at 458.

[25] *Id.*

[26] *See* Kerr-McGee Corp. v. Navajo Tribe of Indians, 471 U.S. 195 (1985).

[27] The IRA also specifically provides for the incorporation of a tribe for tribal management and business purposes, and broad powers are granted in order to meet

The governing body of a non-IRA tribe need not be elected, and a tribe may be run by leaders determined by heredity or religious tradition.[28] The tribes, however, are still bound by the Indian Civil Rights Act[29] and by state and federal restraints on criminal and civil jurisdiction.[30] Several non-IRA tribes, such as the Navajo, exercise considerable powers as sovereign entities. As of 1983, the Navajo had not written a constitution and had not developed a form of government pursuant to the IRA.[31] They had, however, set up their own agencies, such as the Department of Justice, the Tax Commission, the Environmental Protection Commission, and the Legal Aid and Defenders Department.[32] Whether a tribe is organized under the IRA or under custom and tradition, it is a sovereign entity and is thus protected from suit under the doctrine of sovereign immunity.

The traditional tribal model has, therefore, been that of a federally recognized tribe whose land base (linked to aboriginal title) consists of a federal reservation held in trust by the United States. The BIA is the federal agency that oversees all matters relating to federally recognized tribes. In theory, the states are precluded from interfering with a tribe's autonomy absent congressional consent, but in fact some state action is permitted.[33] Even within this tribal model, a number of variations can be found. According to the BIA, 499 tribal groups had received federal recognition as of 1984, and T.W. Taylor, a BIA official, suggested categorizing these groups as follows:

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that end. 25 U.S.C. § 477 (1982). The assumption of tribal responsibility under IRA corporate procedures, has, however, been limited (until 1970, only three tribes had done so), and most tribes have not carried on business under their charters. Theodore W. Taylor, THE BUREAU OF INDIAN AFFAIRS 82 (1984) [hereinafter TAYLOR, BIA]. This process of incorporation is not the same as a tribe's inherent power to charter its own business corporations, nor is it the same as a tribe's ability to incorporate under state law.

[28] *Kerr-McGee Corp.*, 471 U.S. at 198 ("[T]he terms of the IRA do not govern tribes, like the Navajo, which declined to accept its provisions.")

[29] Indian Civil Rights Acts, Pub. L. No. 90-284, 82 Stat. 77 (1968) (codified at 25 U.S.C. §§ 1301-41 (1982)) The sole federal remedy for alleged violation of section 1302 constitutional rights is application for habeas corpus relief to test legality of detention by order of an Indian tribe. *Trans-Canada Enterprises, Ltd. v. Muckleshoot Indian Tribe*, 634 F.2d 474 (9th Cir. 1980).

[30] *See infra* notes 99-105 and accompanying text.

[31] TAYLOR, BIA, *supra* note 27, at 83.

[32] Mason, *supra* note 20, at 459.

[33] *See, e.g., infra* notes 106-11 and accompanying text.

Indian organizations officially approved pursuant to federal statutory authority — 224 (lower 48: 154, consisting of 132 under the IRA and 22 under the Oklahoma Indian Welfare Act; Alaska: 70, under the Alaska Native Act;

2. Indian organizations officially approved outside of specific federal statutory authority — 56 (lower 48: 55; Alaska: 1); and

3. traditional Indian organizations recognized without formal federal approval of organizational structure — 219 (lower 48; 71; Alaska: 148)[34]

One other category can also be identified — the approximately 136 tribes (as of 1986), that have been awaiting federal recognition.[35] These tribes are not eligible for BIA services until they attain federal recognition.

B. State Chartered Corporations

Congress has, on a number of occasions, authorized the creation of state chartered tribal corporations. These corporations have the option of operating on a profit or nonprofit basis. They often function as vehicles to receive settlement funds, as in the case of the Alaska Native Claims Settlement Act (ANCSA).[36] In 1971, Congress authorized the transfer of $962.5 million and 44 million acres to 200 native villages and twelve native regional corporations, all incorporated under state law.[37] One of the more attractive aspects of this model is that the corporation is granted greater control over tribal property. In the Alaska case, however, this approach may ultimately prove to be fatal to the native communities. Ownership of land as a tribe severely restricts the alienability of the land, but a corporation may be dissolved, and consequently, corporate property may end up in the hands of non-natives.

The Alaska experience has brought to light the basic problem in the corporate scheme — the capitalist notion that corporations exist solely

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[34] TAYLOR, BIA, *supra* note 27, at 83. Taylor does not describe his categorization any further, except to point out that the Navajo fall within the second group since they rejected IRA adoption.

[35] BARRY T. KLEIN, REFERENCE ENCYCLOPEDIA OF THE AMERICAN INDIAN 82-87 (4th ed. 1986). This information, which lists the individual entities according to the states wherein they reside, was also provided by the Bureau of Indian Affairs.

[36] Pub. L. No. 92-203, 85 Stat. 688 (1971) (codified at 43 U.S.C. §§ 1601-28 (1982)).

[37] A thirteenth regional corporation was created for those who did not reside permanently in Alaska. Although the corporation did not receive any land, it did receive its pro rata share of the $962.5 million. THOMAS R. BERGER, VILLAGE JOURNAL 24 (1985).

to make a profit and not to meet the political and social needs of the native people. University of Colorado Law Professor David Getches has argued that the ANCSA Conference Committee ignored congressional intent, which was to create nonprofit village corporations, and instead created an elaborate system of business corporations, without establishing any incentives for the bodies to provide social services.[38]

Alaska was a corporate model taken to its extreme, and the experience of the Narragansett Indians of Rhode Island may prove to be a more appropriate example. In 1978, Congress enacted the Rhode Island Indian Claims Settlement Act.[39] The Act mandated the establishment of a state corporation to "acquire, perpetually manage, and hold" settlement lands.[40] Thus, Rhode Island statutes[41] provided for the establishment of the Narragansett Indian Land Management Corporation as a "permanent, public corporation of the state having a distinct legal existence from the State and not constituting a department of state government," whose purpose is to manage and hold real property for the benefit of the Narragansett Indians.[42] The Land Management Corporation's powers include the rights to have perpetual succession; to adopt bylaws; to elect or appoint officers and agents and to define their duties; to sue and be sued; to acquire "settlement lands"; to make and execute necessary leases, mortgages, construction contracts, etc.; to invest and reinvest its funds; and to adopt rules and regulations for hunting and fishing on corporate lands.[43] The corporation is exempt from taxes levied by either the town of Charlestown or Rhode Island, but is subject to all their criminal and civil laws.[44]

Even without federal impetus, states may provide for the incorporation of tribes under state law. For instance, the nonbusiness corporation known as the Narragansett Tribe of Indians was in existence in Rhode Island even before the passage of the federal Settlement Act. This nonbusiness corporation operates as the tribal government, and

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[38] DAVID GETCHES, *Alternative Approaches to Land Claims, Alaska and Hawaii*, *in* IRREDEEMABLE AMERICA: THE INDIANS' ESTATE AND LAND CLAIMS 301, 309 (I. Sutton ed. 1985).

[39] Pub. L. No. 95-395, 92 Stat. 813 (codified at 25 U.S.C. secs. 1701-16 (1982)); *see infra* note 173 and accompanying text.

[40] Pub. L. No. 95-395, § 7(a)(1), § 25 U.S.C. 1706 (1982).

[41] R.I. GEN. LAWS §§ 37-18-1 to -15 (1979) (Supp. 1989) (as amended by 1985 R.I. Pub. Laws 386).

[42] R.I. GEN. LAWS §§ 37-18-3(a) (as amended by 1985 R.I. Pub. Laws 386 § 1).

[43] *Id.*

[44] *Id.* §§ 37-18-10 to 11.

both state and federal statutes relating to the Settlement Act provide for the tribe's input.[45] Specifically, the state tribal corporation has the power to appoint five out of the nine members of the board of directors of the Land Management Corporation described above.[46] The tribal corporation has yet to be recognized by the federal government, although it has applied for such status. If and when the tribal corporation receives federal recognition, the Land Management Corporation will expire and will transfer "all powers, authority, rights, privileges, title, and interest it may possess to any and all real property [it has] acquired, owned, and held" to the tribal corporation.[47] State law would still apply to tribal property even after transference to the tribal corporation.

Many other tribes, particularly in the East Coast, have not been granted federal recognition. In the absence of federal authority over these Indians, states are permitted to deal with them in whatever manner they choose. Some states have specific statutes providing for the establishment of state chartered tribal corporations. The procedure in other states, such as Rhode Island, are not so formal.[48]

C. *Municipalities Pursuant to State Law*

Tribal governments operate similarly to municipalities, insofar as they operate with the general health and welfare of the reservation residents in mind. Several tribes have established themselves as municipalities, pursuant to state law. In 1870, Massachusetts permitted the Mashpee Indians to incorporate as a town,[49] and, in that same year, Connecticut granted municipal status to the Gay Head Wampanoag Indian community.[50] In Alaska, prior to the enactment of the Alaska Native Claims Settlement Act, roughly half of the native villages were organized as municipalities under state law.[51]

The Maine Indians also present examples of Indian municipal organizations. In 1979, federal[52] and state legislation provided for the

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[45] *Id.* §§ 37-18-5 and Pub. L. No. 95-395, 92 Stat. 813 (1978) (codified at 25 U.S.C. §§ 1701-16 (1982)).

[46] *Id.* § 37-18-5.

[47] *Id.* §§ 37-18-12 to 13.

[48] *Id.* §§ 37-18-1 to 15.

[49] *See infra* notes 161-62 and accompanying text.

[50] *See infra* note 163 and accompanying text.

[51] GETCHES, *supra* note 38, at 316.

[52] Maine Indian Claims Settlement Act, Pub. L. No. 96-420, § 2, 94 Stat. 1785 (1980) (codified at 25 U.S.C. §§ 1721-1735 (1983)).

pre-existing state reservations of the Passamaquoddy and Penobscot Indians to become municipalities under state law.[53] The tribes have been granted all the "rights, privileges, powers and immunities [of a municipality], including, but without limitation, the power to enact ordinances and collect taxes."[54] The tribes are subject to all the duties, obligations, liabilities and limitations of a municipality, and are subject to state law as well. On the other hand, internal tribal matters, such as tribal organization, tribal government, and tribal elections, are not subject to state regulation.[55] The tribes are eligible for the same state funds that flow to other municipalities.[56] The legislation also made it clear that the tribes could continue to receive BIA benefits.[57]

As municipalities, the tribes are obligated to provide general assistance, such as welfare, to all residents, whether they be Indians or non-Indians. Reimbursement from federal and state funds exists only so long as the tribal municipality provides this assistance without discrimination between benefits to Indians and non-Indians.[58] The tribes also run their own schools and operate under state education statutes. The State of Maine previously funded the costs, but the BIA does so now.[59] The tribal police are equivalent to municipal police and can enforce both state and tribal laws within tribal territories. Under state law, tribal police must receive the same training as local police officers.[60]

Although the Passamaquoddy and Penobscot Indians achieved their municipal status through congressional and state legislation, incorporation as a state municipality has usually occurred in the absence of federal authority over the tribes. As mentioned earlier, many tribes are not federally recognized, and in these situations, states are permitted to legislate in Indian matters. Some states have permitted Indian tribes to register as municipalities.

This system of internal self-government, however, may not be appropriate if the tribe does not have exclusive jurisdiction over the

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[53] ME. REV. STAT. ANN. tit. 30, § 6206(1) (Supp. 1989).

[54] *Id.*

[55] *Id.*

[56] THEODORE W. TAYLOR, AMERICAN INDIAN POLICY 124-25 (1983) [hereinafter TAYLOR, AMERICAN INDIAN POLICY].

[57] Pub. L. No. 96-420, § 6, 94 Stat. 1793 (codified at 25 U.S.C. § 1725 (i) (1983)).

[58] *Id.*

[59] *Id.*

[60] *Id.* at 125.

municipality's land (with the right to exclude non-Indians as recognized in *Worcester v. Georgia*)[61] and if the growth of the non-Indian population in the municipality jeopardizes the control of the government.[62] In other words, organization as a municipality is not necessarily akin to a reservation, and the tribe would not necessarily be permitted to exclude non-Indians, unless such a provision were explicitly provided for by law. It is therefore entirely possible that the non-Indian population might exceed the Indian population, thereby placing municipal control in the hands of non-Indians.[63]

The other main drawback of municipal organization is the extension of state law into tribal affairs. In particular, a "municipal" tribe could be restrained by the same laws that bind all the state municipalities. Such limits may not be overly burdensome where the tribe is not federally recognized, because the tribe may already be bound by state and county laws. The state and federal governments can grant exemptions to tribal municipalities where circumstances warrant. Legislation regarding settlement acts are often fashioned to reflect historical circumstance and are often restricted only by the imaginations of the settlement negotiators.

IV. Fundamental Powers Available to Sovereign Native Nations

A. The Power to Establish a Form of Government

Native nations within the United States have claimed a wide variety of governmental powers.[64] The Hawaiian community has, therefore, a range of options before it as it begins the process of restoring its sovereign government.

The power to establish a form of government is the most fundamental element of sovereignty. The choice of government should reflect the practical, cultural, historical, and religious needs of the native group itself. Indian tribes do not have to conform to the model established in the U.S. Constitution. They need not necessarily have, for instance,

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[61] 31 U.S. 515 (1832).

[62] Cohen, *supra* note 13, at 755.

[63] *See* the discussion of the Mashpees of Massachusetts *infra* notes 161-62 and accompanying text.

[64] *See generally* Nell Jessup Newton, *Federal Power over Indians: Its Sources, Scope, and Limitations*, 132 U. Pa. L. Rev. 195 (1984).

a republican form of government, a government with a separation of powers, or a prohibition against the establishment of religion.[65]

Congress does have the potential power to dictate aspects of a native nation's form of government, i.e., how to choose tribal officials. But if Congress attempts to replace an existing form of government, its intent must be clear and specific. Native authority will continue to exist to the extent that it does not interfere with the alteration made by Congress.[66]

B. The Power to Determine Membership

The ability to define membership is crucial to a sovereign entity. The Supreme Court stated in *Santa Clara Pueblo v. Martinez* that "[a] tribe's right to define its own membership for tribal purposes has long been recognized as central to its existence as an independent political community."[67] The case involved an Indian mother, Martinez, who challenged a tribal ordinance that denied tribal membership to children of Santa Clara women who were married to nonmembers.[68] The same ordinance permitted children of Santa Clara men who married outside the tribe to be members, thus providing males a benefit denied to females.[69] Martinez claimed that she and her daughter had been denied equal protection and due process under tribal laws, in violation of the 1968 Indian Civil Rights Act (ICRA).[70] The ICRA restricts tribal governments insofar as it extends many protections of the U.S. Bill of Rights to tribal members.[71] The Supreme Court held that it lacked jurisdiction to review tribal enrollment disputes, at least in that stage of the litigation, in spite of the argument that the tribe's ordinance amounted to sexual discrimination.[72] The Court ruled that tribal insti-

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[65] Cohen, *supra* note 13, at 247.

[66] *Id.*

[67] 436 U.S. 49, 72 (1978).

[68] *Id.* at 51 (1978).

[69] *Id.*

[70] Indian Civil Rights Act, *supra* note 29.

[71] Rights protected include: free exercise of religion, freedom of speech and of the press, freedom of assembly (25 U.S.C. § 1302(1) (1982)); freedom from unreasonable search and seizures (25 U.S.C. § 1302(2) (1982)); freedom from self-incrimination (25 U.S.C. § 1302(4) (1982)); the right to a speedy and public trial (25 U.S.C. § 1302(6) (1982)); equal protection and due process under tribal law (25 U.S.C. § 1302(8) (1982)); and the right to a jury trial (25 U.S.C. § 1302(10) (1982)).

[72] 436 U.S. at 72.

tutions must address membership disputes, and that any federal court review is limited to habeas corpus petitions.[73] In doing so, the Court emphasized the "extraordinarily broad"[74] powers of Congress over Indian matters, and stated that in the absence of express provisions for judicial intrusion, the Court would be restrained from interfering in relations among tribes and their members.[75]

Although Congress has broad authority to legislate in the area of tribal membership, it has in fact left the vast majority of tribes free from federal restriction.[76] In only a few cases has Congress specified the scheme of tribal membership or what constitutes tribal membership for the purposes of descent and distribution and for the purposes of distributing tribal funds and other trust property.[77]

Tribal membership determines, among other things, who may run for office, who may vote, who may utilize tribal resources, and who may receive payments from tribal funds. Eligibility for federal benefits and assistance provided to Indians is often based upon tribal membership.

C. The Power to Legislate

Tribes have the authority to enact substantive civil and criminal laws on internal matters. Such power is considered inherent because it is necessary for the maintenance of an ordered and peaceful society. This legislative authority includes the power to regulate the conduct of individuals within the tribe's jurisdiction, to determine domestic rights and relations, to dispose of nontrust property and establish rules for inheritance, to regulate commercial and business relations, to levy taxes, to zone trust lands, and to administer justice.[78] A tribe's ability to regulate trust lands and resources is essential to maintain any degree of sovereignty, especially where it is necessary to protect tribal interests.[79]

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[73] *Id.*

[74] 436 U.S. at 72.

[75] *Id.*

[76] STEPHAN L. PEVAR, THE RIGHTS OF INDIANS AND TRIBES 74 (1983).

[77] Cohen, *supra* note 13, at 248. *See, e.g.*, 25 U.S.C. § 763 (1982) (prerequisites for inclusion in membership roll for Paiute Indians of Utah). One common method of restriction appears to be membership rolls that are subject to the approval of the Secretary of Interior.

[78] AILTP, *supra* note 23, at 35.

[79] *But see infra* notes 106-11 and accompanying text.

Congress has, however, extended federal jurisdiction over 13 enumerated felonies, including the offenses of murder, manslaughter, rape, incest, kidnapping, and assault with intent to kill.[80] In some statutes, Congress has explicitly authorized states to exercise jurisdiction. For instance, Congress subjected the settlement lands of the Narragansett Tribe of Indians to the civil and criminal laws of Rhode Island.[81] Similarly, Congress has granted authority to Kansas, North Dakota, and Iowa to prosecute crimes committed by and against Indians within the borders of certain Indian reservations.[82]

Tribal laws regulating the manner of descent and distribution have been recognized, as have laws levying a variety of taxes, including license and use fees, property taxes, sales taxes, and mineral extraction or severance taxes.

D. The Power to Administer Justice

The maintenance of law and order is an inherent attribute of sovereignty. Included in this right is the power to establish criminal laws, to form a police force, to establish courts and jails, and to prosecute and punish tribal members who violate tribal law.[83] As mentioned above, Congress has specifically removed some offenses from tribal jurisdiction. Otherwise, the tribes are free to structure and operate their own court systems as they see fit, so long as they do not contravene the Indian Civil Rights Act (ICRA).[84] Tribes possess broad authority to administer justice within their territories, and may fashion a system that best reflects their practical and cultural needs. The ICRA limits tribal punishments to six months imprisonment or $500 in fines, requires a speedy and public trial in criminal matters, and requires a trial by jury for offenses punishable by incarceration.[85] Moreover, tribal criminal jurisdiction does not extend to non-Indians.[86]

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[80] Indian Major Crimes Act, Pub. L. No. 94-297, 90 Stat. 585 (1885) (codified at 18 U.S.C. § 1153 (1982)).

[81] 25 U.S.C. § 1708 (1982). *See also* 25 U.S.C. §§ 1321-22 (1982) (providing for the assumption of state jurisdiction over certain criminal and civil matters, subject to the consent of the tribes themselves).

[82] Negonsott v. Samuels, 113 S.Ct. 1119, 1120 (1993) (citing Act of June 8, 1940, ch. 276, 54 Stat. 249 (1940) (codified at 18 U.S.C. § 3243 (1988)); Act of May 31, 1946, ch. 279, 60 Stat. 229; and Act of June 30, 1948, ch. 759, 62 Stat. 1161).

[83] Pevar, *supra* note 76, at 84.

[84] Indian Civil Right Act, *supra* note 29.

[85] 25 U.S.C. § 1302(6)-(7) (1982).

[86] Oliphant v. Suquamish Indian Tribe, 435 U.S. 192 (1978).

Although tribal court systems vary from tribe to tribe, most appear to follow state and federal court models, with procedural and evidentiary rules. Some tribes, however, such as the Pueblo in New Mexico, rely heavily on customary procedure, and may operate quite informally, relying on traditional methods of dispute resolution.[87]

E. The Power to Exclude Persons from the Reservation

Worcester v. Georgia[88] recognized that the only persons allowed on Cherokee land were those who had "the assent of the Cherokees themselves."[89] This exclusionary power has been treated as a distinct and fundamental right of sovereignty that is "intimately tied to a tribe's ability to protect the integrity and order of its territory and the welfare of its members."[90] As such, tribes do not need Congressional authority to determine who may enter onto tribal lands and under what conditions. This right may be particularly important in light of *Oliphant*,[91] which held that nonmembers could not be subject to tribal prosecution. The tribes may at least remove the law breaker.

Nonmembers who hold valid federal patents to fee lands within the reservation cannot, however, be excluded from their property.[92] Tribes are also obligated to keep open to the public tribal roads constructed with federal funds, and tribes may also be required to grant access to federal officials servicing the tribe.[93]

F. The Power to Charter Business Organizations

Indian tribes have the authority to establish business organizations for the management of tribal assets. These tribally chartered enterprises

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[87] Pevar, *supra* note 76, at 86. Pevar contrasts this approach with that of the Blackfeet tribe of Montana, which possesses a comprehensive tribal court system, involving a small claims court, a traffic court, a juvenile court, a court of general civil and criminal jurisdiction, and an appellate court.

[88] 31 U.S. (6 Pet.) 515 (1832).

[89] *Id.* at 535.

[90] Cohen, *supra* note 13, at 252.

[91] *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978). In *Oliphant*, petitioners were non-Indian residents of the Port Madison Reservation. They were arrested separately and charged with offenses under the Tribe's Law and Order Code which purported to extend the Tribe's criminal jurisdiction over both Indian and non-Indians. Petitioners argued that the Tribe does not have jurisdiction over non-Indians. *Id.* at 193.

[92] *See* Hardin v. White Mountain Apache Tribe, 779 F.2d 476 (9th Cir. 1985).

[93] AILTP, *supra* note 23, at 36.

may have the same status as the tribe itself for purposes of governmental immunity from taxation and lawsuits.[94] Businesses contemplating transactions with tribes are often wary of liability in case of a tribal breach, and thus tribes may waive their immunity with regard to a specific business transaction. Tribes may also charter private corporations and may regulate their activities pursuant to tribal law.[95] The power of a tribe to charter a business corporation is separate from the power of the Secretary of the Interior to incorporate tribes in accordance with the IRA.[96]

G. *The Power to Be Free from State Taxing Authority*

States cannot tax Indians for income that they earn from reservation sources without express authorization from Congress.[97] This rule applies throughout Indian Country, and it is not necessary that an Indian live on a formal reservation to be able to benefit from this rule.[98]

V. Criminal and Civil Jurisdiction Within Indian Country

A. *Criminal Jurisdiction*

Indian tribes possess an inherent right to exercise criminal and civil jurisdiction within Indian Country. Indian Country is defined as all lands within Indian reservations, all dependent Indian communities, and all Indian allotments, the titles to which have not been extinguished.[99]

Tribal criminal jurisdiction is exclusive in Indian Country, except to the extent it has been limited by an act of Congress. Three such acts currently curtail the exercise of tribal criminal jurisdiction: Public Law 280 (P.L. 280),[100] the General Crimes Act,[101] and the Major Crimes Act.[102]

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[94] *Id.*

[95] *Id.*

[96] 25 U.S.C. § 477 (1982).

[97] McClanahan v. Arizona State Tax Comm'n, 411 U.S. 164 (1973); Oklahoma Tax Comm'n v. Sac and Fox Nation, 113 S.Ct. 1985 (1993).

[98] Oklahoma Tax Comm'n v. Sac and Fox Nation, 113 S.Ct. 1985 (1993).

[99] Pub. L. No. 80-722, 62 Stat. 757 (1948) (codified at 18 U.S.C. § 1151 (1982)).

[100] Pub. L. No. 83-280, 67 Stat. 588 (1953) (codified at 18 U.S.C. § 1162 (1982)); Pub. L. No. 90-284, 82 Stat. 78 (1968) (codified at 25 U.S.C. §§ 1321-26 (1982)), Pub. L. No. 85-615, 72 Stat. 545 (1958) (codified at 28 U.S.C. § 1360 (1982)).

[101] Pub. L. No. 80-722, 62 Stat. 757 (1948) (codified at 18 U.S.C. § 1152 (1982)).

[102] Pub. L. No. 80-722, 62 Stat. 758 (1948) (codified at 18 U.S.C. § 1153 (1982)).

P.L. 280 was purportedly enacted to help tribes control crimes within the reservations by allowing extensive state jurisdiction over Indians. The Act was extremely broad and is now seen as a congressional attempt to terminate Indian tribes and effectuate their assimilation into society. The General Crimes Act permits the application of federal criminal laws in Indian Country, *except* for crimes committed by one Indian upon another. The Major Crimes Act was enacted in response to *Ex Parte Crow Dog*[103] where the Supreme Court held that the federal government did not have criminal jurisdiction over the murder of one Indian by another. The Act provides for federal jurisdiction over major crimes, such as murder, manslaughter, kidnapping, rape, incest, burglary, and robbery.

In states where P.L. 280 applies, the state has exclusive criminal jurisdiction (and some civil jurisdiction) over all Indian reservations.[104] If P.L. 280 does not apply, then Indian criminal defendants go to federal courts for most major crimes, and to tribal courts for all minor and some major crimes, but not to state courts.[105] Non-Indians can go either to federal or to state court, but they cannot go to tribal court. Not surprisingly, such a complicated scheme has resulted in inefficient law enforcement in Indian Country. In some cases, tribal governments lack the necessary resources to enforce tribal laws.

B. Civil Jurisdiction

Indian tribes possess greater jurisdiction in civil matters than criminal matters. Indian tribes have the inherent right to exercise civil jurisdiction in Indian Country when the matter involves tribal Indians, unless limited by P.L. 280. Where a non-Indian sues an Indian for events that took place within Indian Country, tribal courts have exclusive jurisdiction.

Even though tribes have extensive civil jurisdiction, tribal courts will often waive civil jurisdiction because of the complexities of the case. If tribal jurisdiction is waived, the case will go to state court, unless federal jurisdiction exists, or it will not be heard at all.

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[103] 109 U.S. 556 (1883).

[104] Six states have "mandatory" state jurisdiction: Alaska, California, Minnesota, Nebraska, Oregon, and Wisconsin. In addition, P.L. 280 authorizes any other state to assume the same jurisdictional status as the "mandatory" states. Ten states have chosen to acquire some degree of jurisdiction: Arizona, Florida, Idaho, Iowa, Montana, Nevada, North Dakota, South Dakota, Utah, and Washington.

[105] AILTP, *supra* note 23, at 42-43.

VI. The Current Status of Indian Sovereignty: The Impact of the Brendale Decision

A 1989 Supreme Court decision appears to have reduced tribal sovereignty substantially. The narrow issue in *Brendale v. Confederated Tribes and Bands of the Yakima Indian Nation*[106] was whether the tribe could zone both the open and closed areas of its Yakima reservation in Washington State.[107] The state asserted its authority to zone by granting petitioners the right to develop property, despite the fact that the development was barred under tribal zoning ordinances.[108] Both petitioners' properties were located within the Yakima reservation. The Supreme Court, in a complicated opinion, affirmed the county's zoning authority for fee lots in the open areas, but denied state authority over the fee lots in the closed areas.[109] The test utilized by the Court is extremely difficult to meet — for a tribe to regulate the conduct of non-Indians, the tribe must show a "demonstrably serious impact" that "imperils tribal political integrity, economic security, or health and welfare."[110] The larger implication seems to be that every parcel of land that passes from trust status carries away the tribe's sovereign regulatory power over it.[111]

VII. Native Hawaiian Entitlements to Sovereignty

The *Brendale* decision has broad implications for Native Hawaiian claims. Given the limited land and natural resources available in Hawai'i, it is imperative that Native Hawaiians have extensive regulatory power over their own trust lands. Although the Indian experience serves as a starting point for the Native Hawaiian claim to sovereignty, Native Hawaiians should not limit their claims to what the Indians have, but must seek to establish their own appropriate form of self-government.

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[106] 492 U.S. 408 (1989).

[107] 492 U.S. at 414.

[108] *Id.* at 418.

[109] *Id.* at 409-10.

[110] *Id.* at 410.

[111] *See also* South Dakota v. Bourland, 113 S. Ct. 2309, 2320 n. 15 (1993)(ruling that Congress had abrogated the Sioux Tribe's right to regulated hunting and fishing rights of non-Indians, and reaffirming the proposition from Montana v. United States, 450 U.S. 544, 565 (1981) "that the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe").

As described above,[112] some 499 federally recognized tribal entities and 136 nonrecognized tribal entities exist in the United States, with no two being exactly alike. The one factor they have in common is the right to internal self-governance. Native Hawaiians have yet to have their self-governing status formally recognized by the U.S. Congress or by the State of Hawai'i, despite strong historical similarities to other native peoples. In 1993, the U.S. Congress took a significant step toward recognizing the rights of Hawaiians to sovereignty and redress by passing an "apology" acknowledging the illegal complicity of the United States in the overthrow of the Hawaiian monarchy in 1893.[113] The Kingdom of Hawai'i was an established, recognized, and lawful sovereign nation until direct interference by the United States led to its overthrow in 1893.[114] President Grover Cleveland acknowledged the wrongful role of the United States in the affair.[115] Congress has on several occasions acknowledged the trust relationship between the federal government and the Native Hawaiian people.[116]

Despite the lack of formal Congressional recognition, Native Hawaiians retain their inherent right to self-determination and self-governance. The most fundamental element of sovereignty is the right to choose and establish a form of government. An established Native Hawaiian sovereign nation would want external powers as well as internal domestic powers. Although Native Hawaiians may not achieve sovereign status akin to the Onandaga,[117] it is important that persons of Hawaiian ancestry be able to interact with other Pacific peoples and nations on a formal basis.

The new Native Hawaiian government should receive beneficial title to all lands returned by the federal government. Lands should be forthcoming on each island, and the sovereign entity should hold the lands in a perpetual trust status, with alienation restrictions. Given the geography of the Hawaiian Islands, a decentralized form of government

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[112] *See supra* notes 34-35 and accompanying text.

[113] 100th Anniversary of the Overthrow of the Kingdom of Hawaii, Pub. L. No. 103-150 (1993).

[114] Blondin, *supra* note 1, at 20-22; MacKenzie, *supra* note 1, at 10-14.

[115] MACKENZIE, *supra* note 1, at 12.

[116] *See, e.g.*, Native Hawaiian Health Care Improvement Act (Oct. 6, 1992), Pub. L. No. 102-396, 106 Stat. 1948 (codified at 42 U.S.C. §§ 11701-11714).

[117] The Onandaga, members of the Iroquois tribes, maintain that they are a foreign nation. They have also continually challenged the federal selective service laws and state taxation. THE CONFEDERATION OF AMERICAN INDIANS, INDIAN RESERVATION, A STATE AND FEDERAL HANDBOOK 198 (1986).

may be appropriate. It would even be possible to break down the political regions further, into ahupua'a. A kind of loose federation is thus possible, maximizing the autonomy of each political region. All persons of Hawaiian ancestry should participate in selecting delegates to draft the organic document that would detail the sovereign entity to be established and in the ratification vote on this document. The Hawai'i Legislature established a Sovereignty Advisory Commission in 1993 to examine how this process should unfold.[118] In 1994, the Legislature renamed the Commission as the Hawaiian Sovereignty Elections Council and authorized it to implement the process of self-determination by organizing a plebescite in 1995 or 1996.[119]

VIII. Can A State-Affiliated Entity Serve as a Vehicle for Self-Determination for Native Peoples?

One question that comes up regularly with regard to the efforts of the Hawaiian community to achieve self-determination is whether it is appropriate for the Office of Hawaiian Affairs (OHA), or the Sovereignty Advisory Commission/Elections Council to play any role in this process in light of their affiliation with the state. Does a state-affiliated organization have the degree of independence necessary to facilitate the development of a sovereign entity?

A. OHA's Creation

OHA was conceived during the State of Hawai'i's 1978 Constitutional Convention. This body was considered by many to be a "people's convention," because very few previously-elected politicians were elected to be delegates. Grass roots and community members were chosen to represent the electorate at the Constitutional Convention. A number of committees were formed, and one such committee was the Hawaiian Affairs Committee, chaired by Adelaide "Frenchy" DeSoto.[120] This Committee proposed the creation of OHA to manage and administer the resources held for the benefit of persons of Hawaiian ancestry and

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[118] 1993 Haw. Sess. Laws 349.

[119] 1994 Haw. Sess. Laws 200.

[120] Also on this committee were Vice-Chair Leon Sterling, Hartwell Blake, and Michael Crozier. Staff members included Stephen Kuna, Francis Kauhane, and Walter Ritte. Significant support was also provided by delegates John Waihee and Kekoa Kaapu.

to formulate policy for them. The Committee's proposal was approved by the Convention as a whole and then in November 1978 by the voters of Hawai'i. The provisions establishing OHA are now found in Article XII, Sections 5-6 of the Hawai'i's Constitution.[121]

The Committee on Hawaiian Affairs described OHA's status and powers in Standing Committee Report No. 59, which was issued August 29, 1978.[122] Excerpts from this report are quoted at length here because of their relevance to the autonomy of OHA:

> *Your committee is unanimously and strongly of the opinion that people to whom assets belong should have control over them* . . . . In order to insure accountability, it was felt that the board [of trustees] should be composed of elected members . . . . The election of the board will enhance representative governance and decision-making accountability and, as a result,

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[121] Haw. Const. art. XII, § 5:

OFFICE OF HAWAIIAN AFFAIRS;
ESTABLISHMENT OF BOARD OF TRUSTEES

There is hereby established an Office of Hawaiian Affairs. The Office of Hawaiian Affairs shall hold title to all the real and personal property now or hereafter set aside or conveyed to it which shall be held in trust for native Hawaiians and Hawaiians. There shall be a board of trustees for the Office of Hawaiian Affairs elected by qualified voters who are Hawaiians, as provided by law. The board members shall be Hawaiians. There shall be not less than nine members of the board of trustees; provided that each of the following Islands have one representative: Oahu, Kauai, Maui, Molokai and Hawaii. The board shall select a chairperson from its members.

§ 6:

POWERS OF BOARD OF TRUSTEES

The board of trustees of the Office of Hawaiian Affairs shall exercise power as provided by law: to manage and administer the proceeds from the sale or other disposition of the lands, natural resources, minerals and income derived from whatever sources for native Hawaiians and Hawaiians, including all income and proceeds from that pro rata portion of the trust referred to in section 4 of this article for native Hawaiians; to formulate policy relating to affairs of native Hawaiians and Hawaiians; and to exercise control over real and personal property set aside by state, federal or private sources and transferred to the board for native Hawaiians and Hawaiians. The board shall have the power to exercise control over the Office of Hawaiian Affairs through its executive officer, the administrator of the Office of Hawaiian Affairs, who shall be appointed by the board.

[122] *See* 1 *Proceedings of the Constitutional Convention of Hawaii of 1978* at 643-47.

The Hawaii Supreme Court has repeatedly referred to the committee reports of the 1978 Constitutional Convention as a reliable and authoritative source when interpreting the provisions that were developed there. *See, e.g.*, Trustees of the Office of Hawaiian Affairs v. Yamasaki, 69 Haw. 154, 162-64, 737 P.2d 446, 451-52 (1987) (interpreting the provisions establishing OHA); McCloskey v. Honolulu Police Department, 71 Haw. 568, 573-75, 799 P.2d 953, 956-57 (1990) (interpreting the right to privacy).

> strengthen the fiduciary relationship between the board member, as trustee, and the native Hawaiian, as beneficiary . . . .
>
> Finally the committee agreed that the board should be elected by all the beneficiaries. *Certainly they would best protect their own rights* . . . .
>
> *The committee intends that the Office of Hawaiian Affairs will be independent from the executive branch and all other branches of government although it will assume a status of a state agency* . . . . *The status of the Office of Hawaiian Affairs is to be unique and special.* The establishment by the Constitution of the Office of Hawaiian Affairs with power to govern itself through a board of trustees . . . results in the creation of a separate entity independent of the executive branch of the government . . . . The committee developed this office based on the model of the University of Hawai'i. In particular the committee desired to use this model *so that the office could have maximum control over its budget, assets and personnel.*[123]

The recommendations of the Hawaiian Affairs Committee were considered by the Committee of the Whole, which consisted of all 102 delegates, and it strongly endorsed the proposal to create OHA.[124] Again, extensive quotes are presented from this report because of their relevance to OHA's status and autonomy:

> Members were impressed by the concept of the Office of Hawaiian Affairs which establishes a public trust entity for the benefit of the people of Hawaiian ancestry. Members foresaw that it will provide Hawaiians the right to determine the priorities which will effectuate the betterment of their condition and welfare and promote the protection and preservation of the Hawaiian race, and that it will unite Hawaiians as a people . . . .
>
> Your Committee found that the Office of Hawaiian Affairs is appropriately modelled after that of the University of Hawai'i so as to give it *maximum independence.* The most important aspect of this model is *the power to govern itself.* The public trust entity provides a democratic process for the beneficiaries in order to insure accountability and opportunity for scrutiny of the trustees by the beneficiaries. It is an umbrella organization that is designed to embrace native Hawaiians and Hawaiians, the management of their assets and resources, the receipt of any future benefits, and possibly the administration of the department of Hawaiian home lands . . . .
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> . . . If one looks to the precedent of other native peoples, one finds that they have traditionally enjoyed self-determination and *self-government.*

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[123] 1 *Proceedings of the Constitutional Convention of Hawaii of 1978* at 644-45 (emphasis added).

[124] *Id.* at 1017-19 (Committee of the Whole Report No. 13 (issued Sept. 5, 1978)).

> *They have power to make their own substantive rules in internal matters.* Although no longer possessed of the full attributes of sovereignty, *they remain a separate people with the power of regulation over their internal and social problems. The establishment of the Office of Hawaiian Affairs is intended to grant similar rights to Hawaiians . . . .*[125]

During the discussions that took place on September 2, 1978, preceding the issuance of this report, a number of delegates stated explicitly that the creation of OHA was designed to give self-governance to persons of Hawaiian ancestry.[126] When Delegate Akira Sakima inquired whether allowing only persons of Hawaiian ancestry to vote for the OHA Trustees raised any constitutional difficulties, Delegate John Waihee responded by saying that "we're delegating the running of the trust to the beneficiaries, which is the normal setup when you're setting up a trust like this, where you elect the board of directors for the trust."[127] The Hawai'i Supreme Court reviewed this constitutional history in 1987,[128] and confirmed that Article XII, sections 5 and 6, which established OHA in 1978, had created a "self-governing corporate body."[129]

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[125] *Id.* at 1018-19.

[126] 2 *Proceedings of the Constitutional Convention of Hawaii of 1978* at 456-62; *see, e.g.*, the statement of Delegate C. Randall Peterson, *id.* at 459: "the transfer to Hawaiians of the responsibilities of self-government is only right and proper."

[127] *Id.* at 459.

[128] Trustees of the Office of Hawaiian Affairs v. Yamasaki, 69 Haw. 154, 737 P.2d 446 (1987).

[129] *Id.* at 163, 737 P.2d at 452. The court reached this conclusion by summarizing the committee reports of the 1978 Constitutional Convention and reviewing the material described in this text *supra* at notes 121-25. The court's summary closes with the following language:

> Another amendment [Article XII, Section 6] establishing OHA as *a self-governing corporate body* with a separately elected Board of Trustees was proposed by the Convention and accepted by the voters. This amendment expressly empowered the Trustees "to administer and manage the pro rata share of assets derived from the public lands granted to . . . native Hawaiians . . . under Section 5(f) of the Admission Act." [Stand. Comm. Rep. No. 59, in *1978 Proceedings*,] at 646. (Emphasis added.)

See also Ako v. Office of Hawaiian Affairs, Civ. No. 87-0330 (1st Cir. Haw. Order Granting Motion to Dismiss Appeal, May 27, 1987), where Circuit Judge Wendell Huddy dismissed the appeal of a former OHA employee on the ground that OHA is "separate and independent of all three branches of government" and "not subject to HRS chapter 91," the Hawaii Administrative Procedure Act. *Aff'd on other grounds*, Hawaii Supreme Court, No. 12124 (Memorandum opinion, March 8, 1988).

B. The Statutory Implementation of the Constitutional Provisions.

The Hawai'i Legislature implemented Article XII, sections 5 and 6, which established OHA, during the 1979 legislative session by enacting what is now Chapter 10 of the Hawai'i Revised Statutes. This Chapter contains many details regarding OHA's powers and responsibilities, but the key language is: "There shall be an office of Hawaiian affairs constituted as a body corporate *which shall be a separate entity independent of the executive branch.*"[130] Chapter 10 also contains several specific provisions describing the powers of the Trustees with regard to financial decisions:

> Section 10-4. . . . The office, under the direction of the board of trustees, shall have the following general powers:
>
> (3) To determine the character of and the necessity for its obligations and expenditures, and the manner in which they shall be incurred, allowed, and paid, *subject to provisions of law specifically applicable to the office of Hawaiian affairs* . . . (Emphasis added.)
>
> Section 10-5. Board of trustees; powers and duties. The board shall have the power in accordance with law to:
>
> (1) Manage, invest and administer the proceeds from the sale or other disposition of lands, natural resources, minerals, and income derived from whatever sources for native Hawaiians and Hawaiians, including all income and proceeds from that pro rata portion of the trust referred to in section 10-3, of this chapter . . . .
>
> (3) Collect, receive, deposit, withdraw, and invest money and property on behalf of the office . . . .
>
> Section 10-6. GENERAL DUTIES OF THE BOARD.
>
> . . . (b) *The board shall have any powers which may be necessary for the full and effective performance and discharge of the duties imposed by this chapter,* and which may be necessary to fully and completely effectuate the purposes of this chapter.[131]

These provisions thus provide broad powers to OHA's Trustees to make financial decisions for the benefit of persons of Hawaiian ancestry.

The legislative history that led to the enactment of Chapter 10 in 1979 reinforces this conclusion. The Senate Committee on Housing and Hawaiian Homes, for instance, included the following strong language in its committee report:

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[130] Haw. Rev. Stat. § 10-4 (1985)(emphasis added).

[131] *Id.* Ch. 10 (emphasis added).

> Your Committee agrees with the intent of the Constitutional Convention in keeping the Office of Hawaiian Affairs *independent of the executive and other branches of government*. The members of the board governing the Office are elected and responsible to those people who elected them. Your Committee notes that heads of executive departments are appointed by the governor unlike the Office's board members who are elected and who should be *directly accountable* to the people electing them as with other elective officers. Making the Office subject to another agency's jurisdiction would only add more red tape and interfere with the Office's efficient operation, would be contrary to the goal of direct accountability of the board members to the people electing them, and might make the Office subject to interests which are competitive or even conflicting with the interests of the Hawaiian people for whom the Office is created. Your Committee further notes the creation of this Office *independent of the executive branch* has precedent in the University of Hawai'i which is an independent corporate body created under the Hawai'i Constitution.[132]

To summarize this section, the State Legislature in Chapter 10 implemented Article XII, sections 5 and 6 of the Hawai'i Constitution by creating a strong and semi-autonomous "self-governing corporate body"—the Office of Hawaiian Affairs. OHA's Trustees are given broad powers to administer and spend available funds. They are accountable primarily to the persons of Hawaiian ancestry who elect them and who are the beneficiaries of OHA's resources. The broad language in Haw. Rev. Stat. § 10-6(b), quoted above, recognizes the broad powers of the OHA Trustees to act as they deem appropriate to fulfill their obligations to their beneficiaries.

C. Hawaiian Sovereignty Elections Council

Another state-created entity designed to promote Hawaiian self-determination and self-governance is the Hawaiian Sovereignty Advi-

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[132] S. STAND. COMM. REP. No. 773, 10th Leg., Reg. Sess. (1979), *reprinted in* 1979 HAW. SENATE. J. 1339, 1342 (emphasis added).

Although some of the comments in the committee reports of the Senate Judiciary Committee struck a different tone than this language, *see, e.g.*, S. STAND. COMM. REP. No. 784, 10th Leg., Reg. Sess. (1979), *reprinted in* 1979 HAW. SENATE J. 1350, 1352, the Judiciary Committee's concern was focused only on whether OHA would have *exclusive* control over its internal operations. The Judiciary Committee argued that OHA should be subject to the power of the Legislature and the State and U.S. Constitutions, but it nonetheless supported the language of Section 10-4(3) quoted above which requires a specific act of the Legislature to set aside an expenditure decision of the OHA Trustees.

sory Commission which was established in 1993 as an advisory body to the Legislature on matters concerning efforts to achieve Hawaiian sovereignty.[133] In 1994, the Legislature renamed this body as the Hawaiian Sovereignty Elections Council and gave it the additional authority to help implement self-determination for Hawaiians.[134] The Council is authorized to plan and conduct a plebiscite in 1995 or 1996 to determine the will of the Hawaiian people to be governed by an indigenous sovereign nation of their own choosing. Should the plebiscite be approved by the majority of qualified voters, the Council would facilitate development of the form, structure, and status of a Hawaiian nation. The Council is also responsible for Hawaiian voter education and registration.[135]

In establishing the Council, the Legislature's stated intention was to:

> (1) Create an *independent* entity to carry out the purposes of . . . [the] . . . . Act; and
>
> (2) Provide for a fair and *impartial* process to determine the will of the indigenous people to restore a nation of their own choosing.[136]

This language is based on the Legislature's finding that the Hawaiians wanted the sovereignty process to be as independent as possible of the State.[137] Thus, the Council now has the sole responsibility for conducting the plebiscite and if necessary, determining the method of implementing its results. Nonetheless, the Council does receive state funds and operates under a mandate approved by the State Legislature. In 1994, the Council was moved from the Office of State Planning to the Department of Accounting and General Services for administration purposes. The Legislature appropriated $900,000, for the Council to carry out its duties, contingent upon a match of funds by OHA.[138]

The makeup and appointment process of the twenty-member Council reflects the goal that the process be conducted primarily by Hawaiians with minimal state interference. The Governor formally appoints the members, but he must appoint at least twelve selected from nominations

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[133] 1993 Haw. Sess. Laws 359.

[134] 1994 Haw. Sess. Law 200.

[135] 1993 Haw. Sess. Laws 359, *amended by* 1994 Haw. Sess. Laws 359.

[136] 1994 Haw. Sess. Laws 200 at § 2 (emphasis added).

[137] H.R. Conf. Comm. Rep. No. 127, H.B. 3630, HD3, SD2, CD1, 17th Leg., Reg. Sess. (1994).

[138] Act 359, *supra* n. 135, at § 4.

submitted by Hawaiian organizations. Among these twelve are members designated by OHA, Ka Lahui Hawai'i,[139] the State Council of Hawaiian Homestead Associations, and the Association of Hawaiian Civic Clubs. Furthermore, at least one member from each of the islands and one member representing nonresident Hawaiians must be appointed to the Council. In the event of a vacancy, the Governor shall make an appointment from a list of nominations presented by the Council itself within thirty days of receiving the list. Otherwise, the Council shall make an appointment from the list.[140]

The Hawaiian Sovereignty Elections Council was established to give the Hawaiian people the authority and resources to determine and implement their will for self-government with reduced state involvement. The state role is limited to the formal appointments by the Governor, the requirement that the Council submit its plan to the Legislature for funding purposes, and the establishment of an interagency task force to support the needs of the Commission.

IX. State-Native Relationships

Is it appropriate for the state to play an active role in promoting the economic development and self-determination of native people? Although the "classic" model of a Western Indian tribe recognized by the federal government is contrary to this approach, in fact many native groups do have strong links with their states, sometimes because the federal government has refused to acknowledge the existence of the native group and sometimes because of historical ties.

The federal government has refused to apply the doctrine of native sovereignty to those Indian groups that are no longer recognized as "tribes," such as those affected by the termination policy and those that have never been federally recognized. Between 1954 and 1966, Congress terminated over 100 tribes, and effectively ended their federal status. Responsibility for the tribes either transferred to the states or the tribes disbanded and thus interacted with the states as citizens rather than as Indians. The federal government has also refused to extend recognition to those tribes which, at some point in their history, lacked a unifying leadership or were effectively assimilated into American society. Such arbitrary distinctions have resulted in many tribes

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[139] Ka Lahui has declined to participate in this process.

[140] *Id.*

existing without federal recognition or federal aid. As stated above,[141] in 1986, 136 Indian tribes, groups, bands, and tribal organizations remained unrecognized.

Another set of Indian tribes that have long been denied federal recognition are those located within the thirteen original states that evolved from the original thirteen colonies. Because these tribes had extensive dealings with the colonies prior to the American Revolution, it was thought that U.S. Indian policy did not apply retroactively to them. In the absence of federal jurisdiction over the affairs of the tribes, a special status for these Indians evolved in many of these states. Maine, for example, went so far as to reserve two non-voting seats in its state legislature for the Penobscot Nation and Passamaquoddy Tribe.[142]

The state-tribal relationships that evolved in the Eastern states were a result of the historical relations between Indians and non-Indians. Indian lands were frequently taken to benefit the states where the Indians resided, as well as the non-Indian residents. These states developed special obligations because they wrongfully took advantage of the Indian lands and resources. These state-tribal relationships do not necessarily preclude federal recognition for the tribes, and, during the 1970s, several of the tribes received such recognition.

In theory, states are precluded from interfering in the affairs of Indian tribes, absent express congressional consent. In reality, however, many states are intimately involved in the welfare and community life of their Indian residents. State and local governments may provide as much as 80 to 85 percent of the government services received by Indians.[143] In addition, more than twenty states have Indian commissions or the functional equivalent to act as liaisons between tribal, state, and local governments.[144]

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[141] *See supra* note 35 and accompanying text.

[142] *See supra* notes 52-57 and accompanying text.

[143] TAYLOR, BIA, *supra* note 27, at 120.

[144] *See* listing in Jon M. Van Dyke, *The Constitutionality of the Office of Hawaiian Affairs*, 7 U. Haw. L. Rev. 63, 81-83 (1985). The activities of these commissions include:

> gathering information on Indian needs and the adequacy of serving them; working with Indian, local, state, and federal governments to help coordinate action to provide adequate services; acting as a liaison between Indians and the state when regular state services do not seem to fit or serve a particular need; working with tribes when requested to help develop effective relationships between

According to 1980 figures, the BIA provided at least half the funds to support the Indians in only twelve states.[145] Even in states where the Indian tribes are federally recognized, the states remain extensively involved in tribal affairs. This substantial state role is not well known by the public, because Indians, the BIA, and Indian interest groups play down the state services and emphasize the federal relationship. Even the states themselves tend to emphasize the federal relationship because their tax burden is lessened when the federal government assumes responsibility.[146]

States are even more involved where the federal government has refused tribal recognition. Typically, federal jurisdiction applies only over federal Indian reservations. But many tribes have long existed on lands that were not established as federal reservations, and have survived without federal protection. Several states have created state reservations for their resident tribes after the federal government has abandoned the tribe as a result of a tribal nonrecognition or tribal termination.[147] Moreover, at least four states, Connecticut, Massachusetts, Maine, and Alaska, have permitted native communities to incorporate as municipalities.[148] Prior to the enactment of the Alaska Native Claims Settlement Act (ANCSA),[149] an estimated one half of all native villages had organized municipal governments under state law.[150] Although most federal programs are available only to federally recognized tribes and their members, municipalities controlled by natives are also eligible for some programs.

State statutes may provide for a specific type of tribal organization and may be specific in terms of who may run for office, how many positions are available, the duration of a term for office, and the powers available to the office holders. New York, for example, has extensive statutes relating to Indians.[151]

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state service agencies and Indian citizens; and advising and recommending policies and legislation on Indian matters to the governor, legislature, and the state's congressional delegation.

TAYLOR, BIA, *supra* note 27, at 121.

[145] TAYLOR, AMERICAN INDIAN POLICY, *supra* note 56, at 6-7.

[146] TAYLOR, BIA, *supra* note 27, at 121.

[147] *Id.*

[148] *See supra* notes 49-63 and accompanying text.

[149] 43 U.S.C. §§ 1601-28 (1982).

[150] Getches, *supra* note 38, at 316.

[151] *See, e.g.*, N.Y. Indian Law § 1-153 (McKinney 1993).

It should also be noted that states can be required by the federal government to cooperate with regard to settlement agreements with native peoples. Some of these arrangements are discussed below.[152] One recent dramatic example is the 1992 settlement in the long and acrimonious dispute between the Navajos and the Hopis in Arizona. Under this agreement, 500,000 additional acres were awarded to the Hopis, of which 165,000 acres came from state lands.[153]

X. New Models of Native Governing Entities

To settle disputes between states and natives, Congress and the states have created a number of new and innovative tribal governing entities. The settlement statutes usually extinguish all aboriginal claims to lands within the state in exchange for tribal lands and money. The settlements vary and reflect the historical context. For instance, because Connecticut provided years of service to the Mashantucket Pequot Indians in the absence of federal aid, Congressional statutes mandated that the federal government carry out the majority of the settlement obligations.[154]

The land base has sometimes consisted of lands contributed by the state[155] or has involved state money with which to purchase tribal lands.[156] The federal government may contribute federal lands, but has more often contributed federal money to allow the tribe to purchase tribal lands. Both lands and funds may be held in trust by federal or state governments, or title may be transferred to the tribes. Jurisdiction is determined by the settlement statutes. Indian communities have been incorporated as municipalities via settlement statutes, as in the case of

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[152] *See infra* notes 168-74 and accompanying text.

[153] Louis Sahagun, *500,000 Acres Going Back to Hopis; Navajos OK Pact*, Honolulu Advertiser, Nov. 26, 1992, at A19, col. 1; *Uproar Greets Indian Pact in Arizona*, N.Y. Times, Dec. 13, 1992, at 17, col. 4 (nat'l ed.).

[154] Mashantucket Pequot Indian Claims Settlement Act, Pub. L. No. 98-134, § 2, 97 Stat. 851 (1983) (codified at 25 U.S.C. §§ 1751-60 (Supp. 1994)). The recent activities of this tribe are described in Kirk Johnson, *Tribe's Promised Land Is Rich But Uneasy*, N.Y. Times, Feb. 20, 1995, at A1, col. 2 (nat'l ed.), and Kirk Johnson, *Gambling Helps Tribe Invest in Education and the Future*, N.Y. Times, Feb. 21, 1995, at A1, col. 5 (nat'l ed.).

[155] *See* discussion of Wampanoag Tribal Council of Gay Head Settlement Act, *infra* note 163 and accompanying text.

[156] *See* Maine Indian Claims Settlement Act, discussed *infra* at notes 168-70 and accompanying text.

the Passamaquoddy and Penobscot Indians of Maine.[157] Indian corporations may be established pursuant to state law to hold title to lands (or funds), as in the cases of Alaskan natives and the Narragansett Indians of Rhode Island.[158]

Tribal, federal, and state and local relations are determined by the statutes relating to the settlement. Federal recognition may be granted in the settlement or federal obligations may be terminated or transferred completely to the tribe or state. Any conceivable combination is possible.

Settlement statutes may also dictate the nature of tribal organization. These organizations may be governmental (*i.e.*, Penobscot and Passamaquoddy municipalities) or may be managerial (*i.e.*, Narragansett Land Management Corporation). The powers granted to the tribe can be quite extensive, such as the power to levy taxes and the power to zone, regulate, and manage trust lands and settlement funds. Usually, some form of tribal entity exists prior to the settlement act, and the settlement statutes may delegate duties or powers to that entity. For instance, the Narragansett tribe appoints five of the nine board members of the state-chartered Land Management Corporation, and if and when the tribe is granted federal recognition, the tribe takes over all the duties and powers of the Land Management Corporation.[159]

XI. Examples of State-Affiliated Entities with Sovereign Powers

Natives contemplating the organization of a sovereign native government have a wealth of alternative models to consider. In the past, tribes have organized as tribal governing bodies pursuant to tradition or federal statutory authority, as state chartered business corporations, or as statutory municipalities. The tribal-federal-state relationships already in existence determine the course they will take.

Although state governments have not always been thought of as appropriate participants in the self-determination process, the reality is that they have often been active participants when the federal government has neglected the native group. Even when the tribe is federally recognized, the state may be intimately involved in tribal matters

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[157] *See supra* notes 52-60 and accompanying text.

[158] *See supra* notes 36-47 and accompanying text.

[159] *See supra* notes 39-47 and *infra* note 173 and accompanying text.

relating to the welfare and well-being of tribal members. What follows are specific examples of native movements towards self-determination. The historical relationship between the parties involved, particularly between the natives and state, will often have profound effects on the native entity that is eventually adopted.

A. Incorporation as a Municipality in the Absence of Federal Recognition

1. Mashpees of Massachusetts

In 1870, Massachusetts passed legislation that made Mashpee a town, granted citizenship to its Indian residents, and allowed for the alienation of its lands. Nonresidents were able to purchase lands held in common by the tribe, but tribal governance remained in the hands of the Mashpee. After World War II, however, an influx of non-Indians moved to Mashpee. By 1970, the tribe had lost political control of the town, because out of a population of 1,288, fewer than 400 were tribal members. To deal with this situation, the tribe formed the Mashpee Wampanoag Tribal Council, Inc., which was chartered to seek funds for the preservation of tribal identity. The Council unsuccessfully challenged the state land transactions that had resulted in the loss of tribal lands. It brought suit under the Federal Non-Intercourse Act[160] which permitted the invalidation of land sales not approved by the federal government.[161] The federal district court in *Mashpee Tribe v. Town of Mashpee*[162] held that the Mashpee were not a tribe for purposes of the Act and thus lacked standing to sue.

2. Gay Head Wampanoag Tribe of Connecticut

This Indian community was also granted municipal status in 1870, but unlike the Mashpee, the common tribal lands were never sold, nor did the tribe lose political control. An influx of non-Indians since the

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[160] 2 Stat. 528, March 1, 1809, ch. 24.

[161] Campisi, *The Trade and Intercourse Acts*, *in* IRREDEEMABLE AMERICA: THE INDIANS' ESTATE AND LAND CLAIMS 347 (I. Sutton ed. 1985).

[162] 447 F. Supp. 940, 950 (1978), *aff'd in* Mashpee Tribe v. New Seabury Corp., 592 F.2d 575 (1st Cir. 1979), *cert. denied*, 444 U.S. 866 (1979), 464 U.S. 866 (1983). Although the district court ruled that the Mashpees were not a tribe for purposes of the Non-Intercourse Act, it did not exclude the tribe from participating in other state and federal programs. *Id.*

1960s, however, led to friction over taxes, land use, and town services. A tribal council was formed and incorporated to protect the common lands by requesting that the town government transfer the common lands to the council. Because of strong non-Indian influences, the tribally-controlled town government (all three selectmen were tribal members) refused to authorize the transfer of lands. A suit by the tribe was averted by the enactment of a settlement in 1987. During the settlement process, the tribe was granted federal recognition. As a result, the town of Gay Head's contribution of approximately 50% of the settlement lands, and the state's contribution of $2,250,000 for the purchase of other lands were held in trust for the tribe by the Secretary. The trust lands are generally exempt from state and local assessment. The tribal council, which operates as the tribal governing entity, does not have any jurisdiction over nontribal members, although it does have the authority to regulate Indians hunting on settlement lands. Today, the tribal council and the "tribally" controlled municipal government co-exist.[163]

3. Alaska Natives Prior to ANCSA.

Both the territorial organic act[164] and the act admitting Alaska to the Union[165] recognized the special status of the Alaska natives. Prior to the Alaska Native Claims Settlement Act,[166] approximately one-half of all existing native villages were incorporated as towns under the 1926 Alaska Native Townsite Act.[167] Many of the native villages had traditional tribal governments which operated separately from the municipal government.

B. Incorporation as a State Municipality or State Corporation with Federal Impetus

1. Passamaquoddy and Penobscot Indians of Maine

As explained above,[168] the Maine Indians have had a recognized status under Maine laws and have been incorporated as political

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[163] *Id.* at 354-56.

[164] Alaska Organic Act of 1884, 23 Stat. 24, ch. 53 (May 17, 1884).

[165] Alaska Statehood Act, Pub. L. No. 85-508, 72 Stat. 3391 (1958).

[166] Pub. L. 92-203, 85 Stat. 688 (1972) (codified at 43 U.S.C. §§ 1601-28 (1982)).

[167] 44 Stat. 629, ch. 379 (May 25, 1926).

[168] *See supra* notes 52-60 and accompanying text.

subdivisions. Until 1976, however, the BIA believed no federal obligations existed towards the Indians of Maine. In that year, during litigation involving claims brought under the Non-Intercourse Act,[169] BIA services were finally offered to the tribes. In 1979, federal and state legislation provided for settlement lands and funds to be held by the Secretary in trust for the tribes. The statutes also provided for pre-existing state reservations to become municipalities under state law.[170]

2. Alaska Natives After ANCSA

Under ANCSA, as explained above,[171] lands in and surrounding the native villages had to be reconveyed from the 200 village corporations to state-chartered municipal governments, and existing tribal entities were eclipsed in the process. As with other municipalities, state law applies in these municipal villages. Cognizant of ANCSA failures, several tribes have voted to dissolve the state-chartered governments and to reinstate tribal governments in their place. Alaskan tribes continue to receive some BIA benefits.[172]

3. Narragansett Indians of Rhode Island[173]

As with other Eastern states, Rhode Island assumed it had obligations to the Indians within its borders, even though the federal government had not recognized the tribe. In 1978, the Narragansett tribe sued the state under the Non-Intercourse Act for 3,200 acres of tribal lands taken as a result of state action in 1880. Although the tribe lacked consistent political organization, it had continued to exist as its own separate community. At the time of the litigation, the tribal government was organized as a state-chartered nonbusiness corporation. As a result of the settlement, the Narragansett tribe was awarded 1,800 acres of land, 900 of which was state land specifically sought by the tribe. Congress also appropriated $3.5 million for the purchase of other lands.

Statutes mandated the formation of a corporation by the tribe and state, which would hold title to and administer the settlement lands. The tribal government was authorized to select a majority of the board

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[169] Non-Intercourse Act, 2 Stat. 528, ch. 24 (March 1, 1809).

[170] TAYLOR, BIA, *supra* note 27, at 124-25; *see supra* notes 52-60 and accompanying text.

[171] *See supra* notes 36-38 and accompanying text.

[172] *See generally* BERGER, *supra* note 37.

[173] *See supra* notes 39-47 and accompanying text.

of directors who controlled the land corporation. In reality, the intent behind the settlement was to give control over the lands to the tribal government corporation. Apparently, the settlement was conditioned upon tribal recognition, to provide federal protections that were otherwise nonexistent. The tribe has not yet received federal recognition, and, until it does so, the tribal lands and funds are to remain in the hands of the state-chartered land corporation. Once recognition is granted, the land corporation will transfer all the rights, title, and powers to the tribal corporation.

4. Jurisdictional Conflicts

As this section has explained, in the absence of federal assumption of jurisdiction over native matters, states have maintained their relations with native groups within their borders. Even after the natives receive federal recognition, states may continue their relations so long as the federal government does not prohibit such activity. Problems can arise where federal and state obligations to native groups intertwine, because of overlapping jurisdictions. The St. Regis Mohawk reservation in upstate New York is a good example. The tribe is federally recognized, but its land base continues as a state reservation. Taxation and law enforcement problems developed as a result of gambling casinos, and violence erupted between opposing gambling factions. The BIA has treated the matter as a state problem, but the state has been reluctant to send in state troopers to end the violence. Moreover, some tribal members do not recognize the authority of either the federal or state government and have requested that the tribe be allowed to settle the dispute for themselves. Meanwhile, terrified Indian residents have been left waiting as jurisdictional issues are ironed out.[174]

XII. Conclusion

The foregoing material illustrates that many varieties of native sovereign governments exist, and that the structure of the tribal governing entity is largely dependent upon cultural and historical circumstances. The Native Hawaiian experience, although unique, is similar to the experiences of Indians in Connecticut, Maine, Massachusetts, New York, North Carolina, Rhode Island, Alaska, and elsewhere. All

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[174] James Dao, *Casino Issue Hotly Divides Mohawks as New York Reservation Arms Itself*, N.Y. Times, March 22, 1993, at A9.

have experienced extensive state involvement in native affairs, and a lack of enthusiasm by the federal government to acknowledge its responsibilities.

The most successful relations between federal, tribal, and state governments have been achieved through settlement agreements. Settlement negotiators have been able to fashion a variety of innovative settlements and to create imaginative tribal systems. No rule prevents state-affiliated entities from having self-governing powers. Historical circumstances may make such state participation appropriate in some areas. This option is open to the parties involved.

If a state-affiliated entity such as the Office of Hawaiian Affairs or the Hawaiian Sovereignty Elections Council (HSEC) were to play a role facilitating the creation of a sovereign Native Hawaiian government, legislation could be drafted to provide even greater separation between OHA and HSEC, on the one hand, and the State of Hawai'i, on the other, and to grant federal recognition. The separation would ensure the independence of OHA and HSEC and the recognition would allow OHA and HSEC to deal with the state and federal governments on a government-to-government basis.

The essential element is that the decision about what entity will govern the Hawaiian people must remain in the hands of persons of Hawaiian ancestry. The present evolution of Hawaiians towards self-determination must continue. Thomas Berger, in the aftermath of ANCSA, observed that the movement towards tribal governance was once again gathering strength. In his travels, he recorded the testimony of native villagers across Alaska. The sentiments expressed by Willie Kasayulie, a native of Akiachak, sound all too familiar:

> One of the things that keeps coming out is that our government has existed from time immemorial. So the government we have, the tribal government, has existed and was a legal government when Columbus supposedly discovered America . . . There has been a crying need to re-establish the tribal government. The government that now exists, specifically the federal government and the state government, is not our way . . . The elders are saying, re-establish your tribal governments, make your own laws, practice your self-determination . . . .[175]

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[175] BERGER, *supra* note 37, at 16.

One Hundred Years of Illegitimacy: International Legal Analysis of the Illegal Overthrow of the Hawaiian Monarchy, Hawai'i's Annexation, and Possible Reparations

I. Introduction

A. The Hawaiian Kingdom: internationally recognized state

During the reign of King Kamehameha III, the great foreign powers of the world recognized the independence of the Kingdom of Hawai'i.[1] In a letter dated December 19, 1842, U.S. Secretary of State Daniel Webster wrote "that the Government of the Sandwich Islands ought to be respected; that no power ought either to take possession of the islands as a conquest, or for the purpose of colonization, and that no power ought to seek for any undue control over the existing government . . . . [2]"

In 1843, France and Great Britain signed a joint declaration recognizing Hawai'i's independence and the ability of the Hawaiian government to perform foreign relations capably.[3] The United States was invited as a signatory to the document, but refused on the grounds

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[1] John Westlake, Chapters on the Principles of International Law 81 (1894). "International society was comprised of the European states, the American states (they inherited the international law of Europe upon gaining their independence), and a few Christian states in other parts of the world such "as the Hawaiian Islands, Liberia, [and] Orange Free State . . . " *Id.*

[2] Ralph S. Kuykendall, The History of Hawai'i 157 (1945) [hereinafter Kuykendall, History].

[3] *Id.* at 163.

that such action was contrary to its policy against entangling alliances.[4] The United States stated, however, that it would always solemnly respect Hawai'i's independence.[5] In 1849 the United States entered into and ratified the Treaty of Friendship, Commerce and Navigation with the Hawaiian Kingdom.[6] Also, King Leopold of Belgium promised to support Hawai'i's continued independence.[7] Furthermore, the island kingdom executed treaties[8] with Sweden-Norway,[9] the Netherlands,[10] Italy,[11] Spain,[12] Switzerland,[13] Russia,[14] Austria-Hungary,[15] Portugal,[16] Denmark[17] and Japan.[18] Within fifty years, however, the Hawaiian

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[4] RALPH S. KUYKENDALL AND A. GROVE DAY, HAWAII: A HISTORY FROM POLYNESIAN KINGDOM TO AMERICAN STATE 69 (1961) [hereinafter KUYKENDALL & DAY, HAWAII].

[5] *Our Control in Hawaii*, N.Y. TIMES, Feb. 2, 1893, at 2; SEN. EX. DOCS. No. 77, 52d Cong., 2d Sess. 35-37 (1893).

[6] 3 CHARLES BEVANS, TREATIES AND OTHER INTERNATIONAL AGREEMENTS OF THE UNITED STATES OF AMERICA 1776-1949 874 (1971) [hereinafter BEVANS], 19 Stat. 625.

[7] Treaty of Amity, Commerce and Navigation between Belgium and Hawai'i, Oct. 14, 1862, Belg.-Hawai'i, 126 Consol. T.S. 329.

[8] The treaties that Hawai'i executed established the commercial and diplomatic foundation for relations between the parties. Treaty provisions included certain protection and rights for foreigners residing in the Islands. For example, the 1846 treaty between Denmark and Hawai'i established commercial relations between the two kingdoms. The treaty also regulated Danish citizens residing in Hawai'i. Treaty between Denmark and Hawai'i. Oct. 19, 1846, Den.-Hawai'i, 100 Consol. T.S. 13.

[9] Treaty of Friendship, Commerce and Navigation, July 1, 1852, Hawai'i-Swed., 108 Consol. T.S. 217.

[10] Treaty of Amity, Commerce and Navigation between Hawai'i and Netherlands, Oct. 14, 1862, Neth.-Hawai'i, 126 Consol. T.S. 343.

[11] Treaty of Friendship, Commerce and Navigation between Italy and Sandwich Islands, July 22, 1863, Italy-Hawai'i, 128 Consol. T.S. 109.

[12] Treaty of Friendship, Commerce and Navigation between Hawaiian Islands and Spain, Oct. 29, 1863, Hawai'i-Spain, 128 Consol. T.S. 251.

[13] Treaty of Amity, Establishment of Commerce between Hawai'i and Switzerland, July 20, 1864, Hawai'i-Switz., 129 Consol. T.S. 333.

[14] Convention of Commerce and Navigation between Hawai'i and Russia, June 19, 1869, Hawai'i-Russia, 139 Consol. T.S. 351.

[15] Treaty of Commerce and Navigation between Austria-Hungary and Hawai'i, June 18, 1875, Aust-Hung.-Hawai'i, 149 Consol. T.S. 305.

[16] Convention between Hawai'i and Portugal for the Provisional Regulation of Relations of Amity and Commerce, May 5, 1882, Hawai'i-Port., 160 Consol. T.S. 209.

[17] Treaty between Denmark and Hawai'i. Oct. 19, 1846, Den.-Hawai'i, 100 Consol. T.S. 13.

[18] Treaty of Commerce and Navigation, Aug. 19, 1870, Hawai'i-Japan, 141 Consol. T.S. 447.

Kingdom lost its independence to foreigners, and later to a country that once had recognized its independence.

In the late nineteenth century, a group of pro-annexationists Americans living in Hawai'i formed the Committee of Safety.[19] On January 17, 1893, the Committee seized control of a Hawai'i government building located across from 'Iolani Palace.[20] Backed by 160 armed U.S. Marines mobilized under the direction of United States Minister John L. Stevens, the insurrectionists declared the abolishment of the monarchy and proclaimed the provisional government as Hawai'i's sovereign until annexation with the United States could be negotiated. Although Queen Lili'uokalani's[21] line of defense had not yet surrendered, Stevens immediately recognized the provisional government and placed it under the protection of the United States.[22]

The Queen, hoping to avoid the needless loss of life,[23] issued a conditional and temporary surrender

> until such time as the government of the United States shall, upon the facts being presented to it, undo the action of its representative and reinstate . . . [her] as the constitutional sovereign of the Hawaiian Islands.[24]

The United States, despite having existing treaty obligations with the Hawaiian Monarchy, executed an annexation treaty with the provisional government on February 14, 1893.[25] Before the United States Senate could ratify the treaty, however, newly elected President Cleveland withdrew it to examine the United States' role in the overthrow.[26] Cleveland's presidential commission concluded that the

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[19] LORRIN THURSTON, MEMOIRS OF THE HAWAIIAN REVOLUTION 249-50 (1936); KUYKENDALL & DAY, *supra* note 4, at 475.

[20] 'Iolani Palace was the seat of Hawai'i's government and the residence of the reigning monarch.

[21] Queen Lili'uokalani reigned from 1892 until her overthrow in January 1893. Melody K. MacKenzie, *Historical Background*, *in* NATIVE HAWAIIAN RIGHTS HANDBOOK 11 (Melody K. MacKenzie ed., 1991) [hereinafter MacKenzie, *Background*].

[22] *Id.* at 12.

[23] *Id.*

[24] Bradford W. Morse & Kazi A. Hamid, *American Annexation of Hawaii: An Example of the Unequal Treaty Doctrine*, 5 CONN. J. OF INT'L L. 407, 415 (1990).

[25] SEN. EXEC. DOC. No. 76, 52d Cong., 2d Sess. (1893), *reprinted in* PAPERS RELATING TO THE FOREIGN RELATIONS OF THE UNITED STATES, 1894, H.R. EXEC. DOC. No. 1., 53d Cong., 3d Sess., pt. 1, at 202; William J. Hough, III, *Baltic State Annexation*, 6 N.Y.L. SCH. INT'L & COMP. L. 300, 317 (1985).

[26] THOMAS J. OSBORNE, EMPIRE CAN WAIT: AN OPPOSITION TO HAWAIIAN ANNEXATION (1893-1898) 10-12 (1981).

United States was responsible for the ousting of Lili'uokalani.[27] Cleveland recommended reinstating the Queen,[28] but left that decision to Congress.[29] Congress chose neither to reinstate Lili'uokalani nor to annex Hawai'i[30].

The Republic of Hawai'i, an oligarchy controlled by American citizens, replaced the interim government on July 4, 1894.[31] The Republic continued attempts to annex the Islands to the United States.[32] In 1897 the Republic was successful and executed the Annexation Treaty of 1397.[33] The U.S. Senate, however, failed to ratify the treaty. To circumvent this set-back, pro-annexation Congressmen passed a joint resolution annexing Hawai'i[34]. Hawai'i's admission to statehood followed in 1959.

B. Modern rule against the use of force

Current international law opposes the use of force or threat of force against another state. The United Nations Charter, Article 2(4) states:

> All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence

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[27] *See generally* JAMES BLOUNT, REPORT OF COMMISSIONER TO THE HAWAIIAN ISLANDS, EXEC. DOC. NO. 47, 53d Cong., 2d Sess. (1893).

[28] Cleveland states:

> [I]f a feeble but friendly state is in danger of being robbed of its independence and its sovereignty by a misuse of the name and power of the United States, the United States can not fail to vindicate its honor and its sense of justice by an earnest effort to make all possible reparations.

PRESIDENT'S MESSAGE RELATING TO THE HAWAIIAN ISLANDS, H.R. EXEC. DOC. NO. 47, 53d Cong., 2d Sess., at 15 (1893) [hereinafter INTERVENTION].

[29] The U.S. Senate Foreign Relations Committee, controlled by pro-annexationists, issued a report regarding the United States' role in the overthrow. *See* MacKenzie, *Background*, *supra* note 21, at 12. Even though no one visited Hawai'i in conducting research for the report, the committee decided to condone Steven's actions and formally recognize the provisional government. The committee justified Stevens' actions by characterizing Hawai'i as "a virtual suzerainty of the United States." Because of this special relationship, the committee asserted that the United States' actions were legal and did not violate any international protocol. S. REP. NO. 277, 53d Cong., 2d Sess. 21 (1894).

[30] Mackenzie, *Background*, *supra* note 21, at 12.

[31] *Id.* at 13.

[32] THOMAS J. OSBORNE, EMPIRE CAN WAIT: AN OPPOSITION TO HAWAIIAN ANNEXATION (1893-1898) 10-16 (1981).

[33] SEN. REP., No. 681, 55th Cong., 2d Sess. 96-97 (1898).

[34] Joint Resolution of Annexation of July 7, 1898, 30 Stat. 750; 2 Supp. R.S. 895.

> of any state, or in any other manner inconsistent with the Purposes of the United Nations.[35]

The numerous countries comprising the international community have adopted various resolutions and charters codifying this general non-aggression principle.[36]

Under the current status of International Law, the actions by the United States and its Minister Stevens in 1893 clearly violate the rule against the use of force against another state.

This paper addresses whether international law in 1893 subscribed to similar anti-aggression prohibitions. This paper also explores what

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[35] U.N. CHARTER art. 2, ¶ 4.

[36] The U.N. General Assembly has also issued the Declaration on Principles of International Law concerning Friendly Relations. This resolution states: "Every State has the duty to refrain in its international relations from the threat or use of force against the territorial integrity or political independence of any State . . . Such a threat or use of force constitutes a violation of international law . . . . " DECLARATION ON PRINCIPLES OF INTERNATIONAL LAW CONCERNING FRIENDLY RELATIONS AND CO-OPERATION AMONG STATES IN ACCORDANCE WITH THE CHARTER OF THE UNITED NATIONS, G.A. Res. 2625(XXV), U.N. GAOR, 25th Sess., Supp. No. 28, at 212, U.N. Doc. A/8028 (1970), *reprinted in* 9 I.L.M. 1292 (1970).

Aggression, as defined by the U.N. General Assembly Resolution 3314, Art. I, is: the use of armed force by a State against the Sovereignty, territorial integrity or political independence of another State, or any other manner inconsistent with the Charter of the United Nations. G.A. Res. 3314(XXIX), U.N. GAOR, 29th Sess., Supp. No. 31, at 142, U.N. Doc. A/9631(1975), *reprinted in* 13 I.L.M. 710 (1974). Art. III continues:

Any of the following acts, regardless of a declaration of war, shall . . . qualify as an act of aggression:

(a) The invasion or attack by the armed forces of a State of the territory of another State, or any military occupation, however temporary, resulting from such invasion or attack, or any annexation by the use of force of the territory of another State or part thereof.

Id.

The Nuremburg Tribunal Charter offers another articulation of the centuries-old anti-aggression concept. Art. 6(1) states:

"Crimes against Peace: namely, planning, preparation, initiation or waging of a war of aggression, or a war in violation of international treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing." *Judicial Decisions, International Military Tribunal(Nuremburg), Judgment and Sentences*, 41 AM. J. INT'L L. 174 (1947). The United Nations affirmed the Charter.

See G.A. Res. 95(I), U.N. Doc. A/64, at 188 (1946).

types of remedies might be available to Native Hawaiians today if the United States violated such prohibitions.

II. Sources of Internation Law

In 1893, international law had not yet been codified as it is presently recorded in the United Nations Charter. The lack of formal international state organizations in the Nineteenth century similarly presents another difficulty in assessing what constituted international law because no entity could speak on behalf of the international community regarding what conduct was and was not acceptable. Nineteenth century international law, however, generally condemned the use of force, especially when conquest was utilized to gain a fellow state's territory.

A. Treaties

A treaty is an international contract of agreement between states in which the states expressly consent to be legally obligated by the contract's terms.[37] States conclude treaties for innumerable purposes, including stipulating international laws. Treaties which specify general rules of future international conduct, or which confirm, define, or abolish existing customary law, are called law-making treaties.[38] When all or practically all of the international states conclude a law-making treaty, universal international law is created.[39] When a majority of states, including the leading powers, execute a law-making treaty, general international law is created.[40] Although only treaty signatories are bound by these general laws, non-signatories may become bound when they recognize those stipulated rules through their customary state practice.[41] Thus, general law may develop into universal law through the operation of a state's customary practices.[42]

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[37] James L. Brierly, The Law of Nations, an Introduction to the International Law of Peace 45 (1928).

[38] Lassa F.L. Oppenheim, International Law §18 (1948). One such law-making treaty is the Charter of the United Nations.

[39] *Id.* and Brierly, *supra* note 37, at 46. *See* General Treaty for the Renunciation of War, Aug. 27, 1928, T.S. No. 29 (1929), Cmd. 3410; 94 L.N.T.S. 57.

[40] Oppenheim, *supra* note 38, § 18. A law-making treaty executed by a number of states creates particular international law that is only binding upon the parties to that treaty. *Id.*

[41] *Id.*

[42] *Id.* Particular international law is created when a number of states conclude a law-making treaty. *Id.*

B. *State custom*

Custom is the second source of international law. Unlike law-making treaties in which a state expressly consents to be bound by the law created, custom provides a state's tacit consent to be bound, implied through that state's conduct.[43] Thus different states' habitual international practices define, create, and confirm a customary rule.[44] Customary law may be either general or particular. Once the vast majority of states recognize a custom as law, then the entire international community is bound by that law, unless dissenting states clearly express that they will not be bound by that principle.[45] With particular customary law, only the states that participated in its creation are bound by its rule.[46]

1. *Usage and customary law.*

International law describes custom as usage that has achieved the force of law.[47] In lay terms custom and usage are interchangeable ideas, however, they are distinguishable terms of art. Usage is a clear and continuous state practice or international habit that is adhered to without the conviction that the act is a legal duty.[48] Usage attains the status of custom when the habitual conduct is accompanied by the state's conviction that the conduct is required by law.[49] Thus custom is a state's clear and continuous habit which is adhered to because the state believes that the practice is a legal obligation under international law.[50]

Constant and uniform state habit crystallizes into customary international law when two requirements are met: 1) the state's conduct is

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[43] *Id.* § 16.

[44] MARK E. VILLIGER, CUSTOMARY INTERNATIONAL LAW & TREATIES ¶ 91 (1985).

[45] 1 JAN VERZIJL, INTERNATIONAL LAW IN HISTORICAL PERSPECTIVE 38 (1968).

[46] VILLIGER, *supra* note 44, ¶ 39-41.

[47] J. STARKE, INTRODUCTION TO INTERNATIONAL LAW 34-38 (9th ed. 1984).

[48] *Id.*

[49] *Id.*

[50] MARK E. VILLIGER, CUSTOMARY INTERNATIONAL LAW & TREATIES ¶ 17 (1985). The Statute of the International Court of Justice defines customary law as an "international custom as evidence of a general practice accepted as law." Statute of the International Court of Justice, June 26, 1945, art. 38, 59 Stat. 1055, T.S. No. 993, 3 Bevans 1179.

a material practice; and 2) the state follows the practice out of the conviction that the practice is law.[51]

a. Constant and uniform usage: generality, uniformity, duration.

Before an international habit or state practice qualifies as usage, the practice must be regular and repeated, as determined by the practice's generality, uniformity, and duration.[52]

Generality refers to the number of states that support the practice, as demonstrated through their active or passive acts.[53] Legal scholars have never established a minimum number of states necessary to meet the generality factor. The number of states required depends upon the type of customary law created. General customary law develops from a general usage embraced by a vast majority of nations.[54] Once a custom is embraced by the international community, it is enforceable against all members who do not specifically dissent from the rule.[55] Particular customary law develops from usage embraced by only a small number of states. Only states agreeing to the particular usage will be legally bound by the resulting particular customary law.[56]

Uniformity refers to the consistent and repetitious practice of individual states. The manner in which each state applies the practice defines the usage. Once each state's conduct becomes substantially the same as the other states' conduct, then uniformity of the practice is achieved.[57] If a state that once embraced the practice later acts contrary

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[51] *See infra* text at II.B.a.a and II.B.1.b.

[52] J. STARKE, INTRODUCTION TO INTERNATIONAL LAW 34-38 (9th ed. 1984).

[53] MARK E. VILLIGER, CUSTOMARY INTERNATIONAL LAW & TREATIES ¶ 17 (1985).

[54] *Id.*

[55] 1 JAN VERZIJL, INTERNATIONAL LAW IN HISTORICAL PERSPECTIVE 38 (1968). Absent an explicit reservation, a state may be considered to have acquiesced to the customary rule. *Id.*

[56] *Id.*; RESTATEMENT OF THE LAW OF FOREIGN RELATIONS §102 cmt. b (Tentative Draft 1985), states: "Failure of a significant number of important states to adopt a practice can prevent a principle from becoming general customary law though it might become 'particular customary law' for the participating states." *Id.*

[57] VILLIGER, *supra* note 53, ¶ 61. States' application of the practice need not be identical. The International Court of Justice stipulated that before a customary rule can be formed,the state practice was "*virtually uniform* in the sense of the provision invoked." *Id.* (quoting *North Sea Continental Shelf* (W. Ger. v. Den.; W. Ger. v. Neth.), 1969 I.C.J. 3 (Judgment of Feb. 20) [hereinafter *Continental Shelf*]).

to it, this interruption of uniformity will not necessarily destroy the development of usage or abrogate its authority.[58]

Duration refers to the lapse of time that is required to establish usage. Legal scholars have not agreed upon what length of time is required before a practice becomes a usage. Nevertheless, once the practice is uniformly followed, the period of time before the practice acquires the status of a customary rule need not be very long.[59] And the lapse of the practice for a brief period "is not necessarily . . . a bar to the formation of a new rule."[60] Accordingly, the practice's duration is sufficient when "within the period in question, short though it may be, State practice . . . [was] both extensive and virtually uniform."[61]

b. Opinio juris: accepting the practice as law

Opinio juris sive necessitatis has been described as "the invariable test that usage has crystallized into custom."[62] *Opinio juris* is a state's conviction that it is acting in accordance with a certain usage as a matter of law, and that departure from that practice will or should result in sanctions.[63] Thus once a state demonstrates that it believes that the usage is required by a legal obligation, customary law is created.[64] A state conforming to the usage for reasons other than legal obligation, such as comity or courtesy, do not possess the cognitive recognition that will transform the usage into customary law. Under these circumstances that customary law is not binding on such a state.[65]

2. Evidence of state practice and opinio juris

Before a state practice achieves the status of a customary rule, that practice must first meet the required generality, uniformity, and du-

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[58] 1 JAN VERZIJL, INTERNATIONAL LAW IN HISTORICAL PERSPECTIVE 35 (1968); MARK E. VILLIGER, CUSTOMARY INTERNATIONAL LAW & TREATIES ¶ 61 (1985).

[59] CLIVE PARRY, JOHN P. GRANT, ANTHONY PARRY & ARTHUR D. WATTS, eds., ENCYCLOPEDIA DICTIONARY OF INTERNATIONAL LAW 81 (1986) [hereinafter DICTIONARY OF INTERNATIONAL LAW]; RESTATEMENT OF THE LAW OF FOREIGN RELATIONS § 102 cmt. b (Tent. Draft 1985).

[60] Bradford W. Morse & Kazi A. Hamid, *American Annexation of Hawaii: An Example of the Unequal Treaty Doctrine*, 5 CONN. J. OF INT'L L. 407, 448-49 (1990).

[61] *Continental Shelf*, *supra* note 57.

[62] J. STARKE, INTRODUCTION TO INTERNATIONAL LAW 34-38 (9th ed. 1984).

[63] MARK E. VILLIGER, CUSTOMARY INTERNATIONAL LAW & TREATIES ¶ 69 (1985).

[64] 1 JAN VERZIJL, INTERNATIONAL LAW IN HISTORICAL PERSPECTIVE 38 (1968).

[65] STARKE, *supra* note 62, at 34-38.

ration thresholds. A state's acts, articulations, and behavior in the national and international arenas may satisfy those requirements.[66] In 1950 the International Law Commission listed the classical forms evidencing state practice. The examples include "treaties, decisions of national and international courts, national legislation, diplomatic correspondence, opinions of national legal advisers, [and the] practice of international organizations."[67] Diplomatic correspondences, general declarations of foreign and legal policy, instructions to state representatives (diplomats, consuls, military commanders), legal arguments delivered before international tribunals, statements made before the United Nations committees and organs, and written reservations on the text of a resolution may also denote a state practice.[68]

Evidence of a state's *opinio juris* regarding a usage need not be explicit but may be inferred from that state's acts or omissions.[69] The clearest evidence of a state's legal conviction is an express statement to that effect.[70] But the state actions, articulations, and conduct that demonstrate state usage may also demonstrate a state's *opinio juris*.[71]

It is not unusual that a state's conduct satisfies both requirements of customary law: usage and opinio juris. International conferences and treaties are examples of this phenomenon.

States may form international organizations and convene conferences to take a collective stand on certain issues.[72] Their actions as a group constitute state practice, provided that the organization's decision may be attributed to the individual participating states.[73] And while mere state attendance or participation in a conference does not automatically indicate *opinio juris*, how a state votes on a resolution, or arguments it

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[66] MARK E. VILLIGER, CUSTOMARY INTERNATIONAL LAW & TREATIES ¶ 19, 27-29 (1985).

[67] *Id.* ¶ 19. The list is only intended to be illustrative.

[68] *Id.* ¶ 28; JAMES L. BRIERLY, THE LAW OF NATIONS, AN INTRODUCTION TO THE INTERNATIONAL LAW OF PEACE 40-41 (1928).

[69] RESTATEMENT OF THE LAW OF FOREIGN RELATIONS §102 cmt. c (Tent. Draft 1985). Failure of a state to opt out of a newly emerging general customary law will result in that state being bound through acquiescence. 1 JAN VERZIJL, INTERNATIONAL LAW IN HISTORICAL PERSPECTIVE 38 (1968).

[70] *Id.* ¶ 73.

[71] MARK E. VILLIGER, CUSTOMARY INTERNATIONAL LAW & TREATIES ¶ 27 (1985).

[72] *Id.* If any customary law derives from these conferences, only the members participating and exhibiting their *opinio juris* are bound by the customary rule. *Id.* ¶ 27-33.

[73] VILLIGER, *supra* note 71, ¶ 33.

makes during debate, may reflect whether that state views the drafted rule as having the force of law.[74]

A treaty, while it may create explicit law itself,[75] may also be the foundation for demonstrating customary international law. Ordinarily, a treaty is legally binding only upon signatories.[76] However, frequent repetition of a certain phrase or concept in numerous treaties may demonstrate that the practice is general, uniform, and of sufficient duration to qualify as state usage.[77] This usage becomes customary law when the different states conclude this usage-articulating-treaty, thus exhibiting their *opinio juris*.[78] If a vast majority of states embrace the articulated usage as a general custom, then all states, even non-signatories to those treaties, are bound by the new rule.[79]

III. Customary Law Condemned the Use of Force in 1893

During the nineteenth century, the norm prohibiting the use of force between states evolved from a mere custom to binding customary law. American states primarily developed this rule through the American Continental System.[80]

A. Regional customary law deplored the use of force.[81]

1. The non-aggression evidenced in inter-american treaty provisions.

At the beginning of the nineteenth century, American states signed treaties not to enter into war.[82] These treaties characterized the use of

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[74] *Id.*, ¶ 30-31.

An abstention from voting is likely to be interpreted as passive approval of the draft rule. But consensus voting for a draft concept will not necessarily demonstrate *opinio juris* since this type of forum reduces the opportunity for states to voice reservations or opposition to an issue. *Id.*

Under these circumstances, only members of the group are held to the regional custom declared, until such time as the world community at large also decides to be bound by the rule. William J. Hough, III, *Baltic State Annexation*, 6 N.Y.L. Sch. Int'l & Comp. L. 300, 343 (1985).

[75] For a discussion on law-making treaties, *see infra* text at II.A.

[76] Bradford W. Morse & Kazi A. Hamid, *American Annexation of Hawaii: An Example of the Unequal Treaty Doctrine*, 5 Conn. J. of Int'l L. 407, 422 (1990).

[77] 1 Jan Verzijl, International Law in Historical Perspective 40 (1968).

[78] Morse & Hamid, *supra* note 76, at 422.

[79] Verzijl, *supra* note 77, at 40. But states always have the option of choosing not to be bound by the custom.

[80] *See infra* text at III.A.

[81] Francis A. Boyle, *American Foreign Policy Toward International Law and Organizations:*

force as "an evil act" to be avoided.[83] For example, the Treaty of Peace and Friendship executed between Guatemala and Salvador on July 4, 1839 read: "they will not declare war nor commit any positive act of hostility against each other, for any cause or pretext, not even for the alleged violation . . . of this treaty . . . ."[84] The Treaty of Peace and Friendship between Guatemala and Honduras on February 1856 similarly stated:

> they establish as a permanent rule of conduct, that in no event will they levy war against each other, nor consent that any hostile operations may be carried on . . . against the other under any pretext or motive; and in case any differences should occur, they will make each other adequate explanations, and have recourse . . . to the arbitration of some government of a friendly nation.[85]

The Treaty of Friendship, Commerce and Navigation signed by Peru and Venezuela on April 1, 1859 declared: "neither of the contracting parties shall declare war against the other, nor order or authorize act of reprisal or hostility, except in the case the other shall make impossible a settlement through diplomatic channels or the arbitral decision of a friendly government.[86]

1898-1917, 6 LOY. OF L.A. INT'L & COMP. L.J., No. 2, at 291 (1983). The American system of international relations essentially differed from the European system. The European system was grounded in monarchism, the balance of power, spheres of influence, war, conquest, imperialism, and the threat and use of force. Although the American states, especially the United States, also practiced some of these policies, the similar heritage of the American states permitted principles "more exacting, humane, enlightened, liberal and moral than those currently in operation between the states of the Old World." *Id.*

These principles of sovereign equality, state independence, noninterventionalism, peaceful settlement of disputes, mutual cooperation, are evident in the treaties the American states executed. *Id.*

[82] William J. Hough, III, *Baltic State Annexation*, 6 N.Y.L. SCH. INT'L & COMP. L. 300, 421-22 (1985).

[83] *Id.* at 422.

[84] TRATADOS DE GUATEMALA (DERECHO INTERNACIONAL GUATEMALTECO), vol. 1, at 560 (1892), *translated and quoted in* WILLIAM MANNING, ARBITRATION TREATIES AMONG THE AMERICAN NATIONS 18 (1924).

[85] TRATADOS DE GUATEMALA, *supra* note 77, at 522, *quoted in* MANNING, *supra* note 77, at 33.

[86] Aranda, Tratados del Peru, vol. 12, at 623, *translated and quoted in* MANNING, *supra* note 77, at 48.

These three excerpts are representative of the common ideas found within the treaties which demonstrate both the non-aggression usage and the individual state's *opinio juris*.[87]

The first regional custom recognizes solving international disputes primarily through mediation or arbitration channels. The second re-

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[87] This concept of non-aggression and arbitration are also found in many treaties. *See* Treaty of Peace & Friendship between Guatemala and Salvador signed July 4, 1839. MANNING, *supra* note 77, at 18:

> Art. 3. They likewise agree that they will not declare war nor commit any positive act of hostility against each other, for any cause or pretext, not even for the alleged violation of the whole or a part of this treaty, without having previously presented claims and asked due explanations of the offense, grievance, or damage that may give rise to the complaint . . . Should either party fail to comply with what is herein stipulated, it shall be answerable to the other for all the expenses, damages and losses that the war may occasion to the same.

Id.; Treaty of Peace, Friendship, Commerce and Navigation, Argentina and Chile, Aug. 30, 1855. *Id.* at 33.

> Art. 39 . . . to discuss them [boundary questions] pacifically and amicably afterwards, without ever having recourse to violent measures, and in case a complete settlement should not be arrived at, to submit the decision to the arbitration of a friendly nation.

Id.; Treaty of Friendship, Commerce, & Navigation, Ecuador & New Grenada July 9, 1856. *Id.* at 34:

> Art. 3: . . . the contracting parties solemnly pledge themselves not to appeal to the grievous recourse of arms before exhausting that of negotiation . . . .

Id.; Treaty of Friendship, Commerce, & Navigation, Guatemala & Nicaragua, Sept. 20, 1862. *Id.* at 56:

> Art. 7: The two republics agree that in no case shall there be war between them; and should any differences arise, proper explanations shall first be given, recourse being had eventually, failing mutual agreement, to the arbitration of the government of some friendly nation.

Id.; Treaty of Friendship, Commerce, & Navigation, Columbia & Peru, Feb. 10, 1870. *Id.* at 84:

> Art. 32: In general, in all cases of controversy . . . they shall have recourse to an arbitrator for peaceful and definitive arrangement of their differences, and neither of them shall declare war or authorize acts of reprisal against the other, except in the event of a refusal to submit to the decision of a friendly power, or to fulfill the sentence which may be issued.

Id.; Treaty of Friendship, Commerce, & Navigation, Ecuador & Salvador, Mar. 29, 1890. *Id.* at 190:

> Art. 1:
>
> All questions . . . which cannot be settled in a friendly manner, shall be referred to arbitration. Consequently in no case, and on no grounds whatever, can war be declared between the two nations.

Id.

gional custom permits the use of force, but only after all diplomatic recourses fail. These treaties evidence the *opinio juris* of the signatories and also demonstrate that States in this hemisphere clearly condemn unjustified aggression.

2. Inter-American conferences demonstrate the customary law of non-aggression in the American continents and Hawai'i

Although the United States did not enter into specific arbitration and non-aggression treaties with other American states during the nineteenth century, the United States supported the concept.

In 1890, the United States, under the leadership of then Secretary of State James Blaine, convened the International Conference of American States.[88] During the Conference, participants adopted the idea of the mutual respect for territorial integrity between states.[89] The committee on general welfare reported that the concept of conquest should never thereafter be recognized as permissive American public law.[90] Fifteen members adopted the report.[91] The United States dissented,

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[88] Francis A. Boyle, *American Foreign Policy Toward International Law and Organizations: 1898-1917*, 6 LOY. OF L.A. INT'L & COMP. L.J., No. 2, 245, 292 (1983). The first Inter-American conference was called on Nov. 29, 1881 by Secretary of State Blaine. The agenda was to discuss the prevention of warfare between American states. The conference, however, became sidetracked when Blaine resigned his post following President Garfield's assassination. *Id.*

[89] William J. Hough, III, *Baltic State Annexation*, 6 N.Y.L. SCH. INT'L & COMP. L. 300, 317, 434-35 (1985).

[90] John Bassett Moore, *Fifty Years of International Law*, 50 HARV. L. REV. 395, 435 (1937).

In response to Chile's forcible annexation of parts of Bolivia and Peru, delegates from Argentina and Brazil proposed resolutions declaring acts of conquest to be illegal under "the public law of America." *Id.*

The committee on general welfare issued a report declaring (1) that the principle of conquest should never, in the future, be recognized as admissible under American public law; (2) that, after the declarations were adopted, all cessions of territory made under threats of war or in the presence of armed forces, should be absolutely void; (3) that the nation making such cessions should always have the right to demand that the question of their validity be arbitrated; and (4) that any renunciation of this right should be "null and void, without regard to the time, circumstances, and conditions" under which it was made. Hough, *supra* note 89, at 317 n.56; *see also*, *International American Conference*, 2 REPORTS OF COMMITTEES AND DISCUSSIONS THEREON 1123-24 (Eng. ed. 1890).

[91] The Chilean delegation abstained from participating in the debates and voting of the report. Their refusal to participate was not surprising because the anti-conquest resolutions were in response to Chile's use of force in gaining territory from the Pacific War. Moore, *supra* note 90, at 435.

concerned that Chile would withdraw from the conference, thus jeopardizing the validity of the conference and its resolutions.[92] James Blaine, hoping to preserve the conference, proposed amending the resolutions which would go into effect only after the delegates concluded a mandatory arbitration treaty.[93] The conference unanimously adopted the compromise plan.[94] It read:

> 1. The principles of conquest is eliminated from American public law during the period in which the treaty of arbitration is in force.
> 2. All cessions of territory made during the continuance of the treaty of arbitration shall be void if made under threats of war or as a result of the pressure of armed force.
> 3. Any nation from which such cessions shall be extracted may demand that the validity of the cessions so made shall be decided by arbitration.
> 4. Any renunciation of the right to arbitrate, made under conditions named in the second section, shall be null and void.[95]

The conference, with the exception of Chile, adopted the revised resolutions. The conference also adopted blueprints for the arbitration treaty, but the plan failed to become operative and the treaty was never concluded.[96] Consequently the anti-conquest principle never expressly became law.[97] Under the Blaine amendments, because the conference never concluded the arbitration treaty, the anti-conquest resolution never achieved the status of a law. These resolutions, how-

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[92] *Id.*

[93] International American Conference, 2 Reports of Committees and Discussions Thereon 1078 (Eng. ed. 1890); Francis A. Boyle, *American Foreign Policy Toward International Law and Organizations: 1898-1917*, 6 LOY. OF L.A. INT'L & COMP. L.J., No. 2, 245, 292 (1983). The treaty would require mandatory arbitration of disputes not affecting a state's independence. *Id.*

[94] *Id.* at 185, 294.

[95] William J. Hough, III, *Baltic State Annexation*, 6 N.Y.L. SCH. INT'L & COMP. L. 300, 317 n.56 (1985). The original report declared (1) that the principle of conquest should never, in the future, be recognized as admissible under American public law; (2) that, after the declarations were adopted, all cessions of territory made under threats of war or in the presence of armed forces, should be absolutely void; (3) that the nation making such cessions should always have the right to demand that the question of their validity be arbitrated; and (4) that any renunciation of this right should be "null and void, without regard to the time, circumstances, and conditions" under which it was made. *Id.*

[96] John Bassett Moore, *Fifty Years of International Law*, 50 HARV. L. REV. 395, 436 (1937).

[97] Boyle, *supra* note 93, at 295.

ever, demonstrate the customary norm against conquest in the American System and the *opinio juris* of the participating states.

The Kingdom of Hawai'i, although not an American State, was intended to be included in the American System. The U.S. Congress extended a conference invitation to Hawai'i, but unfortunately Hawai'i's acceptance arrived after the Conference had adjourned.[98] Despite Hawai'i's non-participation, the invitation extended by the United States illustrates that the American Continental Legal system included the Kingdom of Hawai'i.

Blaine's communications with Great Britain further illustrates that the United States regarded Hawai'i as an independent state[99] within the American Continental system. In a letter to the British on November 19, 1881, Blaine announced:[100]

> This policy has been based upon our belief in the real and substantial independence of Hawai'i. The government of the United States has always avowed and now repeats that, under no circumstances, will it permit the transfer of the territory or sovereignty of these islands to any of the European powers.[101]

3. *Other evidence of regional state practice*

In 1883, Simon Bolivar met with representatives of Latin American republics in Caracas, Venezuela. They issued the Caracas Protocol which upheld the integrity of Latin American territory and recognized the obligation to ignore "the so-called right of conquest."[102]

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[98] ALICE FELT TYLER, THE FOREIGN POLICY OF JAMES G. BLAINE 183 (1927). Hawai'i's absence disappointed Blaine. He wrote to the Hawaiian government: "in view of those well known qualities which would have rendered [Hawai'i's] participation of signal value to the work of the Conference." *Id.*

[99] *Id.* The United States favored the Native rule. It stated it would continue to strengthen the economic relations with the Kingdom. *Id.* at 198-99.

[100] *Id.* at 199.

[101] *Id.* at 198. Blaine's support for Hawai'i's independence was the official policy of the Arthur Administration. Blaine himself, however, ultimately supported Hawai'i's annexation to the United States. Blaine recognized that the goal of annexation could similarly be achieved through distinct protection and increased U.S. immigration and investment; a *de facto* rather than *de jure* control. This conforms with Blaine's extension of the Monroe Doctrine to Hawai'i. British or European intrusions into the political or economic affairs of the Kingdom might jeopardize the United States' attempt to control Hawai'i. *Id.* at 200 n.18.

[102] ALICE FELT TYLER, THE FOREIGN POLICY OF JAMES G. BLAINE 317 (1927).

This concept against the use of force also surfaced in the *Drago Doctrine*. The Argentine Foreign Minister Louis M. Drago formulated the concept in December 1902, stating that "the public debt cannot occasion armed intervention nor even the actual occupation of the territory of American nations by a European power."[103] Read narrowly, this doctrine condemns the use of force by European powers in the American nations. Read liberally, it condemns any use of force. A broader reading is appropriate here since Drago's articulation was echoed in 1907 at the Second Hague Convention where signatory states agreed not to use force for debt collecting without first attempting arbitration.[104]

The arbitration treaties, resolutions from the Inter-American Conference, and foreign policy statements illustrate the non-aggression practice was sufficiently general, uniform, and of sufficient duration to qualify as a regional usage. States in the American system, the United States included, embraced this non-aggression usage, and their actions elevated this usage to the status of a customary law.

B. United States: opinion juris through its foreign policy

The United States demonstrated its willingness to be bound by the emerging law against the use of aggression through its reactions to international skirmishes. The United States issued an official statement denouncing Chile's annexation of Peruvian provinces and the Bolivian seacoast during the Pacific War (1879-1883).[105] The United States, which had never previously voiced its position on the right of conquest, issued this statement through Secretary Blaine:

> This Government feels that the exercise of the right of absolute conquest is dangerous to the best interest of all the republics of this continent . . . This government also holds that between two independent nations, hostilities do not, from the mere existence of war, confer the right of conquest until the failure to furnish the indemnity and guarantee which can rightfully be demanded. Nor can this government admit that a cession of territory can be properly exacted for exceeding in value that amplest estimate of a reasonable indemnity.[106]

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[103] 1 JAN VERZIJL, INTERNATIONAL LAW IN HISTORICAL PERSPECTIVE 217 (1968).

[104] JAMES L. BRIERLY, THE LAW OF NATIONS, AN INTRODUCTION TO THE INTERNATIONAL LAW OF PEACE 300 (1928).

[105] William J. Hough, III, *Baltic State Annexation*, 6 N.Y.L. SCH. INT'L & COMP. L. 300, 314 (1985).

[106] *Id.* at 315.

The United States offered to arbitrate a peace settlement between Chile and Peru, but the attempts failed.[107] Chile and Peru eventually signed the Ancon Peace Treaty without the aid of the United States.[108]

The United States also showed its *opinio juris* through a revised Monroe Doctrine. As originally declared in 1823, the Monroe Doctrine articulated the United States's special position to safeguard the stability of the Western Hemisphere against European intrusion.[109] During the late 1800s, the Monroe Doctrine escalated from a mere "veto" of European intervention to the affirmative right of the United States to intervene on behalf of American nations. The United States reserved the right to act as friendly counselor, mediator, or advisor to prevent the outbreak of war.[110] In one instance when a border dispute arose between Great Britain and Venezuela in 1895, the United States intervened by demanding that Great Britain submit to impartial arbitration.[111] Although Great Britain initially rejected arbitration, it reconsidered and agreed on February 2, 1897 it agreed to the arbitration.[112]

C. The customary law against the use of force began to emerge in the world community by the end of the nineteenth century

The principle of non-aggression originated as regional customary law between the members of the American Continental System. This concept against the use of force eventually found recognition and acceptance in the European community.

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[107] ALICE FELT TYLER, THE FOREIGN POLICY OF JAMES G. BLAINE 109 (1927). Chile desired to annex nitrate-rich areas of Tarapaca in Peru. *Id.* at 120 n.27.

[108] *Id.* at 118-25; Chile and Peru signed the treaty on Oct. 20, 1883. Chile gained the Peruvian department of Tarapaca and the Bolivian province of Antofagasta. HISTORICAL DICTIONARY OF CHILE 31 (Salvatore Bizarro ed., 2d ed. 1987).

[109] JAMES L. BRIERLY, THE LAW OF NATIONS, AN INTRODUCTION TO THE INTERNATIONAL LAW OF PEACE 162-63 (1928). The American Continents were no longer open to European colonization and, in return, the United States would not interfere with the European community. *Id.*

[110] ALICE FELT TYLER, THE FOREIGN POLICY OF JAMES G. BLAINE 17 (1927). The revised Monroe Doctrine forbade any act, hostile or friendly, violating or compromising the independence of the American community of states. BRIERLY, *supra* note 109, at 33.

[111] *Id.* at 163.

[112] 1 CHARLES CHENEY HYDE, INTERNATIONAL LAW: CHIEFLY AS INTERPRETED AND APPLIED BY THE UNITED STATES 143-46 (1922). After Great Britain initially refused the United States' demand, President Cleveland authorized funds for the formation of a committee to determine the border and, if necessary, a military presence to enforce the border. Great Britain later reconsidered and agreed to arbitration. *Id.*

The European powers first articulated the laws of war and the peaceful settlement of disputes at the Hague Peace Conferences of 1899 and 1907.[113] Czar Nicholas II convened the First Conference to discuss universal peace through armament reductions.[114] At the second Hague Peace Conference, the Porter Convention condemned the use of force to collect debts.[115] This European counterpart to the *Drago Doctrine* conditioned debt collection through force only when the debtor state refused to arbitrate the claim.[116]

International codification of the customary rule against aggression continued with the League of Nations. Article 10 of the League of Nations Covenant discouraged the use of force to resolve international disputes and guaranteed member States the right of political independence and territorial integrity against external aggression.[117] The Kellogg-Briand Pact, signed in July 1929, also generally renounced war. Article One renounced war to end international controversy, and Article Two advocated settlement of disputes through peaceful means.[118] The regional customary rule against aggression gradually gained acceptance and crystallized into the current law.

IV. The United States Violated the Customary Law of Non-Aggression

A. The United States was obligated to uphold the customary rule against aggression

The concept of non-aggression fully matured into regional customary law within the American Continental System. Beginning in the mid-

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[113] Bradford W. Morse & Kazi A. Hamid, *American Annexation of Hawaii: An Example of the Unequal Treaty Doctrine*, 5 Conn. J. of Int'l L. 407, 442 (1990).

[114] Lassa F.L. Oppenheim, International Law § 31 (1948).

[115] *Id.* § 136 n.4.

[116] *Id.* § 136.

[117] League of Nations Covenant, art. 10 (1919) states: "The members of the league undertake to respect and preserve as against external aggression the territorial integrity and existing political independence of all Members of the League." *Id.*

[118] Aug. 27, 1928, 46 Stat. 2343, T.S. No. 796, 94 L.N.T.S. 57. Art. I states:

> "The High Contracting Parties solemnly declare in the names of their respective peoples that they condemn recourse to war for the solution of international controversies, and renounce it as an instrument of national policy in their relations with one another."

Id. Art. II states:

> "The High Contracting Parties agree that the settlement or solution of all disputes or conflicts of whatever nature or of whatever origin they may be, which may arise among them, shall never be sought except by pacific means."

Id.

nineteenth century, the practice among the American nations consistently and uniformly condemned the use of force to acquire territory or to resolve international disputes. The United States, through its foreign policy declarations and expansion of the Monroe Doctrine demonstrated an acceptance of the practice as a legal obligation. Thus, under customary international law, the United States was bound not to use aggression, force, or the threat of force against any other state.

B. The United States violated its legal obligation not to use force against the Hawaiian Kingdom.

1. The landing of 160 Marines in Honolulu constituted the use of force against the Hawaiian Kingdom

Minister Stevens ordered the landing of 160 armed Marines in Honolulu, allegedly to protect American lives and property. Under international law, a state has the inherent right to self-defense against armed attack. Logically, this right extends to the protection of its citizens abroad. Under these circumstances, the use of force is permissible for the *limited* purpose of self-defense. In this situation, however, the military occupation was not a vehicle of self-defense, but an affirmative tactic to discourage any opposition to the impending insurrection.[119] Although Minister Stevens claimed to mobilize the Marines for the protection of American citizens, the location of the troops in the vicinity of the insurrectionists suggests a different purpose. A later investigation ordered by newly elected President Grover Cleveland found Stevens' argument unconvincing. No riot or disturbance was ongoing when the troops landed.[120] Admiral Skerrett, officer in command of the naval force on the Pacific station, added that the troops' location would have been ineffective to defend U.S. interests since the U.S. consulate, and citizens' residences and businesses were situated in a different area of Honolulu. The troops' position, across from 'Iolani palace and adjacent to the building seized by the insurrectionists, was the ideal location to support the provisional government as it

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[119] ALICE FELT TYLER, THE FOREIGN POLICY OF JAMES G. BLAINE 215 (1927).

[120] JAMES BLOUNT, REPORT TO UNITED STATES CONGRESS: HAWAIIAN ISLANDS, EXEC. DOC. NO. 47, 53d Cong., 2d Sess., at 10 (1893) [hereinafter BLOUNT, REPORT]. Fear of rioting was unfounded. Men, women and children in Honolulu were going about their business in an ordinary and routine fashion.

declared the Hawaiian monarchy's abolition.[121] Following the investigation, Cleveland addressed Congress and declared: "[T]he military occupation of Honolulu by the United States on the day mentioned was wholly without justification, either as an occupation by consent or as an occupation necessitated by dangers threatening American life and property."[122] Although the Marines never opened fire or otherwise performed an act of war, under the customary rule against aggression, the *threat* of force or hostility was sufficient to violate international law.[123]

2. The United States planned the aggression against the Kingdom of Hawai'i

In 1882, Lorrin Thurston, a U.S. citizen living in Hawai'i, approached U.S. officials in Washington D.C. about the possibility of annexing the Kingdom. He received a positive response from Navy Secretary Tracy.[124] He received a similar assurance from the Harrison Administration: "[I]f conditions in Hawai[']i compel you to act as you have indicated [a revolution], and you come to Washington with an annexation proposition, you will find an exceedingly sympathetic administration here." [125]

Harrison's appointment of known annexationists, James Blaine and John Stevens, to Secretary of State and Minister to Hawai'i, also reflected his desire to gain legal control over the islands.[126] The design to annex Hawai'i is revealed in a letter Blaine sent Harrison on August 10, 1891: "I think there are only three places that are of value enough to be taken, that are not continental. One is Hawai[']i . . . Hawai[']i may come up for decision at any unexpected hour and I hope we shall be prepared to decide it in the affirmative."[127] And by appointing the

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[121] *Id.* at 9.

[122] PRESIDENT'S MESSAGE RELATING TO THE HAWAIIAN ISLANDS, H.R. EXEC. DOC. No. 47, 53d Cong., 2d Sess., at 10 (1893) [hereinafter INTERVENTION]

[123] TYLER, *supra* note 119, at 215.

[124] Bradford W. Morse & Kazi A. Hamid, *American Annexation of Hawaii: An Example of the Unequal Treaty Doctrine*, 5 CONN. J. OF INT'L L. 407, 413 (1990). The Secretary assured Thurston that the Arthur Administration favored the takeover of Hawai'i. *Id.*

[125] Secretary Tracy's statement to Thurston, as authorized by Harrision, 2 NATIVE HAWAIIAN STUDY COMMISSION, REPORT ON THE CULTURE, NEED AND CONCERNS OF NATIVE HAWAIIANS (MINORITY REPORT) 57 (1983) [hereinafter 2 NHSC, (MINORITY)].

[126] 1 NATIVE HAWAIIAN STUDY COMMISSION, REPORT ON THE CULTURE, NEED AND CONCERNS OF NATIVE HAWAIIANS (MAJORITY REPORT) 294 (1983) [hereinafter 1 NHSC, (MAJORITY)].

[127] Letter from Blaine to Harrison of Aug. 10, 1891, ALICE FELT TYLER, THE FOREIGN POLICY OF JAMES G. BLAINE 208 (1927).

annexation advocate Stevens as Minister, Harrison created a potentially volatile situation. Given the physical isolation of Hawai'i and Stevens' sympathies, the United States was in the ideal position to trigger a chain of events that would topple the monarchy while maintaining the semblance of propriety, and thus gain control of Hawai'i.

3. The United States is liable for the actions of minister Stevens under international and domestic agency law

Minister Stevens was clearly the United States' agent in the Kingdom of Hawai'i. The ordering of the Marine landing, recognizing the provisional government, and placing the provisional government under the United States' protection was, arguably, within the scope of Stevens' agency. However, in 1983, the federally created Native Hawaiians Study Commission concluded in its majority report that the actions of Stevens were unauthorized.[128] Because neither the U.S. President nor Congress did not explicitly sanction Stevens' actions, the report concluded that "as an ethical or moral matter, Congress should not provide for native Hawaiians to receive compensation either for loss of land or of sovereignty."[129] Arguably, Stevens acted without explicit authorization. In a letter to Secretary of State James Blaine on March 8, 1892, Minister Stevens requested official instructions in the event of a revolution. Blaine chose not to send a reply, leaving the decision to Stevens' discretion.[130] Because Blaine knew of Stevens' pro-annexation

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[128] 2 NHSC, (MINORITY), *supra* note 125, at iv-vii. The Native Hawaiian Study Commission's nine members disagreed on all the major issues, including the liability of the United States in the overthrow of the monarchy. The Minority, comprised of three Native Hawaiians, believed that the Majority's findings were "inaccurate and fatally-flawed." Therefore, they issued a dissenting minority report. *Id.*

[129] 1 NHSC, MAJORITY, *supra* note 126, at 25, 28. The Majority recognized the role Minister Stevens and the U.S. troops played in the overthrow of the Queen. These actions, however, were not expressly authorized by the United States. Thus, Native Hawaiians did not qualify for redress from the United States. *Id.* Native Hawaiians, however, have never conceded that Stevens' acted without authorization. But this statement leaves open a legal argument. If the United States did, in some fashion, sanction or ratify Stevens' actions, then the United States would be liable for compensation for Native Hawaiians' loss of land and sovereignty. *Id.* at 28.

[130] ALICE FELT TYLER, THE FOREIGN POLICY OF JAMES G. BLAINE 210 (1927). In a letter to Blaine, Stevens practically unveils the conspiracy to control Hawai'i and reveals the matter's delicacy:

> Believing that the views I have herein expressed are in accord with much in the past course of the American Government and in harmony with the opinions of

journalism activities in Hawai'i and never explicitly disapproved or approved of Stevens' actions, Blaine knew, or should have known, that the State Department's silence would be interpreted as consent. Thus it is reasonable to infer that Stevens would support a revolution if it would procure annexation.[131]

Even if the United States argues no liability because of a lack of authorization, under both international and U.S. agency law, the government is responsible for all illegal acts of its agents. The Inter-American Court of Human Rights articulated the international rule in the *Velasquez Rodriguez*[132] case:

> "[U]nder international law a State is responsible for the acts of its agents undertaken in their official capacity and for their omissions, even when those agents act outside the sphere of their authority or violate internal law."[133]

Under U.S. agency law, acts committed within an agent's actual or apparent authority are binding upon the principal, and a principal is liable for all acts committed by the agent within the scope of his agency.[134] A principal is also liable for the unauthorized acts of its agent if the principal ratifies, or fails to repudiate, those acts.[135] The

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> the President and of the Secretary of State, I submit them for what they are worth . . . As an official representative of the government of the United States in these special circumstances I can properly say no more.

Stevens to Blaine, September 5, 1891, FOREIGN RELATIONS OF THE UNITED STATES IN 1894: AFFAIRS IN HAWAI[']I, H.R. EXEC. Doc. No. 1, 53d Cong., 3d Sess., pt. 1, at 350-52, *quoted in id.* at 209.

Stevens' strong annexationist views were common knowledge in Hawai'i. The Majority NHSC report admits "it was obvious that he would not oppose a change." 1 NHSC, MAJORITY, *supra* note 129, at 294. James Blaine similarly supported Hawai'i's acquisition. The two men were friends and although Stevens was appointed by President Harrison, "[i]t is quite obvious that Stevens was a Blaine appointee." TYLER at 202.

[131] *See also infra* text at IV.B.2, for a discussion of President Harrison's possible secret agenda of annexing the Hawaiian Kingdom.

[132] Velasquez Rodriguez case, *Inter-Am. Ct. H.R.*, *reprinted in* 28 I.L.M. 291, 325 (July 29, 1988).

[133] *Id.*

[134] 3 C.J.S. *Agency* § 390 (1973). An agency relationship is characterized by the power of the agent to act on the principal's behalf in a representative capacity. 2A C.J.S. *Agency* § 5 (1972).

[135] 3 C.J.S. *Agency* § 390 (1973). A principal may repudiate or ratify the acts of the agent. *Id.* § 70 (1972). But repudiation of the agent's unauthorized acts must be

United States never repudiated the Marine deployment, the recognition of the provisional government, or the placement of the provisional government under U.S. protection.[136] Instead the United States, in conduct and declaration, ratified Stevens' acts. Harrison negotiated and signed an annexation treaty with the provisional government on February 15, 1893,[137] demonstrating the United States' intent to ratify and approve its agent's actions, especially because the United States would benefit from these acts. The following year the United States Senate's Foreign Relations Committee condoned Stevens' actions.[138] The Committee also recognized the provisional government, thus expressly ratifying Stevens actions.[139]

The United States did not repudiate Stevens' unauthorized actions. Instead, the United States, in conduct and declaration, ratified Stevens' acts. Therefore, the United States was responsible for the overthrow of the Hawaiian sovereign and is liable for the damages and injuries stemming from this illegality.

4. President Cleveland's admission of the United States' role in the Queen's overthrow confirmed the acceptance of customary law against aggression.

On February 14, 1893, Secretary of State John W. Foster, concluded the treaty of annexation with the provisional government.[140] Before the Senate could ratify it, newly elected President Cleveland withdrew the document, "for the purpose of re-examination" of the events leading

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prompt. *Id.* § 402.

A principal's ratification may be express or implied. 2A C.J.S. *Agency* § 83. Implied ratification may be construed if a principal's conduct or action: (1) tends to show the intent to ratify, 2A C.J.S. *Agency* § 84. (2) is inconsistent with the intent to repudiate, or (3) shows apparent approval or recognition of the unauthorized act. 2A C.J.S. *Agency* § 88.

[136] MacKenzie, *Background*, supra note 21, at 12.

[137] *Id.*

[138] S. REPT. No. 77, 53d Cong., Sess. 21 (1894). The Committee, controlled by pro-annexationists, held hearings on the Hawaiian Question and issued the Morgan report in February 1894. The report, not surprisingly, condoned Stevens' actions. THOMAS J. OSBORNE, EMPIRE CAN WAIT: AN OPPOSITION TO HAWAIIAN ANNEXATION (1893-1898) 74-80 (1981).

[139] S. REPT. No. 77, 53d Cong., Sess. 21 (1894). The Committee states that because relations between the United States and the Hawaiian Kingdom were akin to "a virtual suzerainty," international norms of conduct between countries did not apply. S. REPT. No. 77, 53d Cong., Sess. 21 (1894); Karen Blondin, *A Case for Reparations*, 16 HAW. B.J., 13, 22 (1981).

[140] William J. Hough, III, *Baltic State Annexation*, 6 N.Y.L. SCH. INT'L & COMP. L. 300, 317 (1985).

to the overthrow of the Hawaiian sovereign.[141] James H. Blount investigated the Hawai'i situation and concluded that the overthrow resulted from a conspiracy between the insurrectionists and John L. Stevens, and that the Marines from the *Boston* were landed to aid the U.S-led coup.[142]

Cleveland addressed the joint Houses of Congress declaring that the aid of U.S. diplomatic and naval agents enabled the Committee of Safety to dethrone the legitimate sovereign.[143]

> [B]ut for the lawless occupation of Honolulu under false pretexts by the United States forces, and but for Minister Stevens' recognition of the provisional government when the United States forces were its sole support and constituted its only military strength, the Queen and her government would never have yielded to the Provisional government.[144]

Cleveland characterized the participation of Minister Stevens in the conspiracy as unauthorized acts of war committed under the misappropriation of the United States name. He added, "the United States can not fail to vindicate its honor and its sense of justice by an earnest effort to make all possible reparation."[145] In support of these findings, Cleveland sent a new minister, Albert S. Willis, to Hawai'i to restore the legitimate government. Willis arrived in November 1893, and after negotiating the restoration with Lili'uokalani, he asked provisional government President Sanford Dole to relinquish the government to Lili'uokalani.[146] Dole refused.[147] And since Cleveland did not have Congressional authorization to use force to restore Lili'uokalani, and since Congress's support was unlikely, he could act no further.[148]

By 1893, the United States had bound itself to the customary law of non-aggression against a fellow-state. By landing U.S. armed forces in Honolulu for no apparent reason, the United States violated that law. And although the Marines and battleship never opened fire, the imminent threat of hostilities by the troops were sufficient to qualify

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[141] Mackenzie, *Background*, *supra* note 21, at 12.

[142] KUYKENDALL, HISTORY, *supra* note 2, at 280.

[143] Bradford W. Morse & Kazi A. Hamid, *American Annexation of Hawaii: An Example of the Unequal Treaty Doctrine*, 5 CONN. J. OF INT'L L. 407, 415 (1990).

[144] INTERVENTION, *supra* note 28, at 13.

[145] MacKenzie, *Background*, *supra* note 21, at 12.

[146] KUYKENDALL, HISTORY, *supra* note 2, at 280-81.

[147] *Id.* at 281. Dole refuted Blount's findings and claimed the United States was interfering with the internal affairs of Hawai'i. *Id.*

[148] *Id.*

as aggression. Given the circumstances, Lili'uokalani reasonably inferred that the United States intended to forcefully remove her from power. Realizing the futility of resisting and hoping to prevent bloodshed, she relinquished her authority over Hawai'i to the United States.[149] President Cleveland himself later admitted that the United States's role in the overthrow was clearly illegal.

V. The United States Violated Its Treaties With the Hawaiian Kingdom

The United States entered into a series of treaties with the Kingdom of Hawai'i prior to Lili'uokalani's overthrow. The two states executed their first formal agreement in 1826.[150] Although never ratified by the U.S. Senate and thus never legally binding, United States officials sought to impress upon the chiefs the moral duty to respect "the sanctity of this agreement."[151] In 1849, the United States signed and ratified the Treaty of Friendship, Commerce and Navigation.[152] Article One stated that "[t]here shall be perpetual peace and amity between the United States and the King of the Hawaiian Islands, his heirs and his successors."[153] The two nations entered into the Treaty on Commercial Reciprocity on January 30, 1875.[154] And in 1884 the Reciprocity treaty was amended to give the United States the exclusive right to enter and use Pearl Harbor as a coaling and repair station.[155]

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[149] MacKenzie, *Background*, *supra* note 21, at 12.

[150] *See* Treaty with Hawai'i on Commerce, Dec. 23, 1826 *in* Bevans, *supra* note 6, at 861. Section One stated that "peace and friendship . . . are hereby confirmed and declared to be perpetual." *Id.*

[151] Melody K. MacKenzie, *Self-Determination and Self-Governance*, in Native Hawaiian Rights Handbook 77-78 (Melody K. MacKenzie ed., 1991) [hereinafter MacKenzie, *Self-Determination*] *quoting* H. Bradley, *Thomas Ap Catesby and the Hawaiian Islands, 1826-1829* 39 Hawaiian Hist. Soc'y Rep. 23 (1931).

[152] Treaty of Friendship, Commerce and Navigation, Dec. 20, 1849, United States-Hawai'i, 9 Stat. 977, *in* Bevans, *supra* note 6, at 864; The treaty was effective for ten years after which either party could terminate treaty obligations one year after notifying the other state. Because neither party exercised the termination provision, this treaty was in effect at the time of the overthrow. *Id.*

[153] *Id.*

[154] Treaty with Hawai'i on Commercial Reciprocity, Jan. 30, 1875, United States-Hawai'i, 19 Stat. 625, *in* Bevans, *supra* note 6, at 874. This treaty was amended in 1884.

[155] Treaty with Hawai'i on Commercial Reciprocity, Dec. 6, 1884, United States-Hawai'i, 25 Stat. 1399, *in* 3 Charles Bevans, Treaties and Other International Agreements of the United States of America 1776-1949 at 878 (1971) [hereinafter Bevans]. This treaty amended the earlier 1875 treaty and was still in effect in 1893. *Id.*

At the time of the overthrow, the Treaties of 1849 and 1884 were still in force. The United States clearly violated its express promise of "peace and amity" when it landed in peaceful Honolulu to provide military support for the overthrow of the legitimate sovereign. By recognizing the provisional government and later the Republic of Hawai'i, and eventually annexing the Republic further, the United States continually contradicted the explicit and implicit obligations found within the different treaties.

VI. The Republic of Hawai'i Lacked the Legitimate Authority to Annex Hawai'i

A. The overthrow of the Sovereign failed to qualify as an authentic revolution and was therefore illegal

Under principles of international law, an authentic revolution staged by the people dissatisfied with the government is not illegal. In practice, the United States readily recognized governments that emerged from revolution, provided that citizenry supported the change.[156]

In Hawai'i, however, the "revolution" was not an uprising of dissatisfied masses. A small, select group of pro-annexation United States citizens staged the revolt. Only through the combined forces of a military presence and apparent diplomatic support did the overthrow succeed. Since the revolt was not an authentic revolution of the citizenry but an insurrection by foreign interests, the successive government and its subsequent acts were illegitimate.

B. The Republic of Hawai'i did not have the authority to annex Hawai'i

Once McKinley entered the White House, Republic President Dole sent representatives to Washington, D.C. to negotiate a possible transfer of Hawai'i. The Republic and the United States signed the Treaty of Annexation on June 16, 1897. The treaty stated:

> The Republic of Hawai'i hereby cedes absolutely and without reserve to the United States of America all rights of sovereignty of what so ever in and over the Hawaiian Islands and their dependencies; and it is agreed that all the territory of and appertaining to the Republic of

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[156] Intervention, *supra* note 28, at 13.

> Hawai'i is hereby annexed to the United States of America under the name of the Territory of Hawai'i.[157]

The proposed annexation of the Republic of Hawai'i lacked two vital elements: one, approval by the majority of the people; and two, the legitimate authority to represent Hawai'i.

The Republic in name and form resembled the United States and British governments, but its true form was an oligarchy intended to keep the U.S.-citizen minority in control of Hawai'i.[158] After the annexation treaty of 1893 failed, the provisional government convened a constitutional convention to create the Republic.[159] Insurrection leader Sanford Dole personally selected 19 of the 37 delegates so that the insurrectionists would have a majority and retain control of Hawai'i.[160] The remaining delegates were elected, but many of the previously qualified voters were excluded by strict voting requirements.[161] To further insure control of the convention by pro-U.S. individuals, all voters were required to declare allegiance to the Provisional government.[162] To oppose this political oppression, those Hawaiians who could fulfill the voting requirements refused to register to vote or to otherwise participate in the newly established government.[163] The result: government by the few, for the few.

An editorial in the *New York Times* in July 1893 denounced the provisional government because it was "not set up by the people of the Hawaiian Islands as the result of overturning the former rule because it was unsatisfactory to them."[164] The author argued that under the political principles the United States embraced, the People of Hawai'i had the right to determine their own political destiny. Hawai'i could be legally transferred only if Hawaiian citizens, dissatisfied with the monarchy, revolted and then asked the United States

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[157] Bradford W. Morse & Kazi A. Hamid, *American Annexation of Hawaii: An Example of the Unequal Treaty Doctrine*, 5 CONN. J. OF INT'L L. 407, 418 (1990).

[158] MacKenzie, *Background*, *supra* note 21, at 13.

[159] *Id.*

[160] Poka Laenui (Hayden F. Burgess), *Hawaiian Independence: Its Legal Basis*, SYMPOSIUM ON NATIVE HAWAIIAN SOVEREIGNTY 85, 102 (Dec. 2-3, 1994); MacKenzie, *Background*, *supra* note 21, at 13.

[161] MacKenzie, *Background*, *supra* note 21, at 13.

[162] *Id.*

[163] MacKenzie, *Background*], *citing* W.A. RUSS, JR., THE HAWAIIAN REPUBLIC (1894-1898), 33-34 (1961).

[164] Editorial, *To Convey a Stolen Kingdom*, N.Y. TIMES, July 28, 1893, at 4.

to assume control of the government.[165] Nevertheless, because of the lack of Hawaiian involvement in the overthrow and voting, the United States should not have accepted Hawai'i's annexation.

Renowned legal scholar Thomas M. Cooley, echoed the anti-annexationist position. Cooley, former justice of the Michigan Supreme Court (1864-85), Chairman of the Interstate Commerce Commission[166] and professor of constitutional law at the University of Michigan[167] discussed the constitutionality of the proposed annexation in his article"Grave Obstacles to Hawaiian Annexation."[168] Although this work addressed the annexation treaty the United States and the provisional government executed, Cooley's basic constitutional analysis regarding any Hawaiian annexation is instructive. He asked: (1) did the provisional government possess the authority to cede the Hawaiian Islands? And if so, (2) did the United States have the constitutional power to accept the annexation?[169]

Cooley concluded that annexation would be unconstitutional. First, the provisional government could not legitimately offer Hawai'i to the United States because Hawaiian citizens never consented to the secession.[170] Second, the United States lacked the constitutional power to annex Hawai'i under the terms offered the provisional government offered.[171] Cooley characterized the provisional government as seeking the status of an "outlying colony" as opposed to the status of a state or conventional territory.[172] And because "outlying colonies are not within the contemplation of the Constitution of the United States[,]" annexing the Islands would be unconstitutional.[173]

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[165] *Id.*

[166] THOMAS J. OSBORNE, EMPIRE CAN WAIT: AN OPPOSITION TO HAWAIIAN ANNEXATION (1893-1898) 32 (1981).

[167] *Id.*

[168] *Id.*, at 33 (citing Thomas M. Cooley, *Grave Obstacles to Hawaiian Annexation*, THE FORUM 15, 392 (June 1893)).

[169] *Id.*

[170] *Id.* But were either the provisional government or the Republic of Hawai'i ever legitimate governments? Consider this argument: Lili'uokalani never surrendered to the Provisional government; instead she relinquished her authority to the President of the United States. Thus, the sovereign power to govern Hawai'i never "passed" to either government but remained with the United States. And when President Cleveland instructed to have Lili'uokalani restored, the sovereign power to govern Hawai'i lay with Lili'uokalani. *Id.*

[171] *Id.*

[172] *Id.*

[173] *Id.*

The second U.S. attempt to annex Hawai'i would also be unconstitutional following Cooley's analysis. Under the first part of the analysis, the offer to cede Hawai'i was invalid because the Republic lacked the legitimate power to act in that fashion since the inhabitants of Hawai'i never gave their consent.[174]

Members of the Canadian parliament similarly objected to annexation actions by the United States. Parliament member N.F. Davin stated: "[t]o annex forcibly on the part of any power would be contrary to modern ideas of the obligations which control the actions of the great powers."[175] Parliament member Alexander McNeill added: "If it be true that the native population is opposed to a change, any interference by the United States would be contrary to [the United States'] own principles."[176]

When the U.S. Senate failed to ratify the Treaty of 1897, the pro-annexationist McKinley administration turned to the House of Representatives.[177] On May 4, 1898, Representative Francis G. Newlands introduced a resolution to annex Hawai'i.[178] Hawai'i's annexation was put to joint resolution of both Houses of Congress. The constitutionality of annexing Hawai'i's by joint resolution instead of by a treaty was hotly debated in the Senate. Georgia Senator Augustus O. Bacon argued that the United States Constitution only authorized acquiring territory pursuant to treaty.[179] Bacon and other anti-imperialists maintained that annexing territory through a joint resolution infringed upon the exclusive powers of the Senate and President to deal in matters relating to the incorporation of foreign territory.[180] Furthermore a

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[174] *Id.* While the Republic's Senate debated the annexation treaty, Native Hawaiians met and on September 6, 1896 and passed resolutions voicing their opposition to annexation and their desire for their independence under a monarchy. The next day these resolutions were given to U.S. Minister to Hawai'i, H.M. Sewall and to the Republic's President Dole. W.A. Russ, Jr., The Hawaiian Republic (1894-1898) 198, 209 (1961).

[175] *Canadians Don't Like It: They Think Annexation Would Mean Trouble for U.S.*, N.Y. Times, Feb. 16, 1893, at 1.

[176] *Id.*

[177] Thomas J. Osborne, Empire Can Wait: An Opposition to Hawaiian Annexation (1893-1898) 109 (1981).

[178] MacKenzie, *Background*, *supra* note 21, at 15.

[179] 31 Cong. Rec. 6138, 6149 (1898). *See also* 31 Cong. Rec. 6293, 6310, 6518 (1898).

[180] 31 Cong. Rec. 6516, 6518 (1898). Minnesota Senator Cushman K. Davis believed that the passage of the Newlands resolution would impinge upon senatorial prerogatives.

dangerous precedent might be established whereby the senate's treaty-ratifying power could be circumvented and usurped by a legislative act of Congress.[181] Lastly, even if territorial acquisition through joint resolution was constitutional, the Newlands Resolution would not be operative in Hawai'i since a resolution cannot bind people residing outside of the United States' jurisdiction.[182]

With only a simple majority needed to pass the resolution, the former independent Kingdom of Hawai'i became the territory of its former sister state on July 7, 1898 when President McKinley signed the Newlands joint resolution.[183] Because the provisional government came to power through an illegal uprising, the government it established was illegitimate and thus the Republic's cession of Hawai'i was similarly illegitimate.[184]

VII. CONCLUSIONS

The United States breached its express obligations under the Treaty of 1849, of peace and amity with the Hawaiian Kingdom. It also violated the customary rule against planning and initiating the con-

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In a letter to his law partners, he wrote:

> It may be that those who are opposing the [Newlands] resolutions upon Constitutional grounds may come to me with a proposition to let them drop it, and advise and consent to the treaty instead. If this proposition is made, I shall accept it, because I have been exceedingly reluctant all through to proceed by way of resolutions. Which I have little doubt of their Constitutionality, I dislike very much to see the treaty making prerogatives of the Senate maimed by that method of procedure.

Letter from Senator Cushman K. Davis to Frank B. Kellogg and Cordenio A. Severance (June 30, 1898) *in* CUSHMAN K. DAVIS PAPERS, at 9 (Minnesota Historical Society), *quoted in* THOMAS J. OSBORNE, EMPIRE CAN WAIT: AN OPPOSITION TO HAWAIIAN ANNEXATION (1893-1898) 159 n.12 (1981).

[181] 31 CONG. REC. 6516, 6518 (1898).

[182] 31 CONG. REC. 6516, 6518 (1898).

[183] Joint Resolution of Annexation of July 7, 1898, 30 Stat. 750; 2 Supp. R.S. 895.

[184] Even under the Territorial government, Native Hawaiians were denied the right to political participation. The U.S. Congress erected the territorial administration, reserving the right to abolish or change its form. Congress could also amend or invalidate any territorial law, even if passed by the territory's bicameral legislature. The U.S. President appointed the Governor and Department heads and the top level judges. Lower level judges were appointed by the Chief Justice of the Territorial Supreme Court. KUYKENDALL, HISTORY, *supra* note 2, at 195.

spiracy using force against the Hawaiian ruler.[185] Since the overthrow of the legitimate sovereign was indeed illegal, the provisional government and its successor, the Republic of Hawai'i, were also illegitimate. Consequently, the illegitimate governments' negotiations and obligations would not be binding upon the parties and were invalid. Accordingly, the United States is an alien colonial power that has occupied the Hawaiian nation for over one century.[186]

VIII. What Remedy is There For the Loss of Native Hawaiian Sovereignty?

A. The International community supports remedying violations of international law

International law articulates the standards governing how a state conducts itself with other states and how a state treats its people. The United Nations Charter, international conventions, treaties, and customary law provide the source for these standards. When a state violates one of these recognized laws, the world community, often through the United Nations, will respond to the illegality through diplomatic, economic, or military channels.

1. Form of the reparations

International reparations traditionally include monetary compensation and satisfaction.[187] The form of the reparations depends upon the classification of injury. Damages, and thus reparations, can be classified into two major categories: moral and material injury. A material injury is the "damage to persons or property."[188] Monetary compensation is the common reparation form.[189]

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[185] Bradford W. Morse & Kazi A. Hamid, *American Annexation of Hawaii: An Example of the Unequal Treaty Doctrine*, 5 Conn. J. of Int'l L. 407, 425 (1990).

[186] *Id.* at 449.

[187] Dictionary of International Law, *supra* note 59, at 336. "Satisfaction" is defined as a term used to "describe any form of redress that is available under international law to make good a wrong done by one State to another . . . In a narrower sense, it refers to measures other than reparation proper, such as punitive damages, apology." *Id.*

[188] Carl Q. Christol, *International Liability for Damage Caused by Space Objects*, 74 Am. J. Int'l L. 346, 362 (1980) [*hereinafter* Christol].

[189] Robert F. Turner, *Justice: What Iraq Owes Its Victims; After the Fighting, the Principle of Law Must Still be Defended*, The Wash. Post, Mar. 3, 1991, at C4.

A moral injury to a state is an "injury to the dignity or sovereignty of a state,"[190] for example the violation or breach of a treaty. The remedy could include a monetary award,[191] punishment of the wrongdoer, an apology to the victim, acknowledgment of wrongdoing by the guilty party, and other measures necessary to prevent the recurrence of the illegal act.[192]

The reparations package for a moral injury depends upon the facts of the claim. Whatever the form of reparation, the Permanent Court of International Justice (P.C.I.J.) explained in the *Chorzow Factory* case that the "reparation must, as far as possible, wipe out all the consequences of the illegal act and reestablish the situation which would, in all probability, have existed if that act had not been committed."[193] However, all reparation packages must meet the standards of justice and reasonableness.[194] Any award of an excessive or disproportionate

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[190] LASSA F.L. OPPENHEIM, INTERNATIONAL LAW 352 (1948). *See also* SENATE COMM. ON FOREIGN RELATIONS, CONVENTION ON INTERNATIONAL LIABILITY FOR DAMAGE CAUSED BY SPACE OBJECTS, S. EXEC. REP. 38, 92d Cong., 2d Sess. 9 (1972), *quoted in* Carl Q. Christol, *International Liability for Damage Caused by Space Objects*, 74 AM. J. INT'L L. 346, 363 (1980) ("The United States government also recognizes the principles of moral and material damages"). In a statement relating to the liability for damage caused by space objects, the spokesperson for the Department of State notes: "claims covering moral damage aspects are well-known in international legal and United States domestic practices, and hence the United States would not hesitate to include them in claims we might present [for injuries caused by space objects]." *Id.*

Punitive damages are not a generally acceptable form of reparations. OPPENHEIM at 320. Even though a claim is not so labeled, an excessive or disproportionate amount of compensation that would have the penal effect would be contrary to international law principles. *Letelier and Moffitt Case* (United States v. Chile), *reprinted in* 31 I.L.M. 1, 22 (Jan. 11, 1992)(concurrence of Professor Francisco Orrego Vicuna) [*hereinafter* Letelier and Moffitt].

[191] Christol, *supra* note 188, at 362-63. The violating state is obligated to make monetary amends to the injured state. GOVERNMENT OF CANADA, DEPT. OF EXTERNAL AFFAIRS COMMUNIQUE NO. 8, Jan. 23, 1979, *quoted in id.* at 363.

[192] DICTIONARY OF INTERNATIONAL LAW, *supra* note 59, at 356.

[193] *Chorzow Factory* (Ger. v. Pol.), 1928 P.C.I.J. No. 17, at 47 (1928), *quoted in* Robert F. Turner, *Justice: What Iraq Owes Its Victims; After the Fighting, the Principle of Law Must Still Be Defended*, WASH. POST, Mar. 3, 1991, at C4.

[194] *Letelier and Moffitt*, *supra* note 190, at 25. "In calculating the amount for moral damages, factors which might mitigate the award include a formal apology, a non-judicial inquiry into the situation, enactment of legislation to prevent future illegalities, criminal prosecution for the wrongful conduct, and other actions demonstrating that the violating state "is not indifferent to the moral issues involved in the matter." *Id.*

amount may be challenged and disallowed as being penal in nature (even though not labeled punitive damages), and thus prohibited under international law.[195]

2. Examples of reparations for violations

International law recognizes that "the principal legal consequences of an international delinquency are reparation of the moral and material wrong done."[196]

The *Trail Smelter*[197] case reinforces the sense that when one state inflicts injury upon another state, the offending party must redress that wrong. The arbitration tribunal ruled "under the principles of international law . . . no State has the right to use or permit the use of its territory in such a manner as to cause injury . . . in or to the territory of another or the properties or persons therein . . . ."[198]

This sense of state responsibility is also illustrated in the Cosmos 954 claim and the *Lucky Dragon* compensation. In 1978, the Soviet's nuclear-powered satellite, Cosmos 954, reentered the earth's atmosphere and crashed in Canada. On January 1979, Canada presented its $6 million claim for "those costs . . . which would not have been incurred had the satellite not entered Canadian territory."[199] Two years later, the Soviet Union paid the Canadian government $3 million, about half of the cleanup costs.[200]

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[195] LASSA F.L. OPPENHEIM, INTERNATIONAL LAW 156a (1948). Although punitive damages are generally not included as reparations, Oppenheim cited cases in which victims were awarded punitive-like compensation. *Id.* at 156a, 321 n.1.

[196] *Id.* at 318.

[197] *United States v. Canada*, in popular name *Trail Smelter Case*, 3 R.I.A.A. 1965 (1938) (1941) [hereinafter *Trail Smelter*].

[198] *Id.* The case involved sulphur dioxide fumes from a Canadian smelter plant that caused to land in Washington State. *Id.* RESTATEMENT OF RESTITUTION § 1 (1936).

The domestic law also supports the proposition of redressing the breach of a legal obligation. The Restatement states in pertinent part "[a] person who has been unjustly enriched at the expense of another is required to make restitution to the other." Restitution is viewed as an act of restoring or giving equivalent for any loss, damage or injury. BLACK'S LAW DICTIONARY 682 (5th ed. 1983). A similar concept, reparations, is defined as "[P]ayment or otherwise making amends for an injury or for damages that have been committed on or to another. *Id.* The international community and the United States accepts the remedy of reparations to redress a wrong or injury.

[199] Government of Canada, Dept. of External Affairs, Communique No. 8, Jan. 23, 1979, *quoted in* Carl Q. Christol, *International Liability for Damage Caused By Space Objects*, 74. AM. J. INT'L L. 346 (1980).

[200] Ronald J. Ostrow, *Soviets Probably Not Required to Pay Damages, Law Experts Say*,

The *Lucky Dragon* claim arose from a hydrogen bomb test on Bikini Atoll on March 1, 1954.[201] The *Lucky Dragon* vessel and its twenty-three Japanese fishermen were 160 kilometers from the blast site when the bomb exploded. Although the boat was clearly within the danger zone, the United States failed to warn them of the impending blast. Consequently, the twenty-three were exposed to nuclear fallout that resulted in radiation sickness.[202] A year later, the United States tendered to the Japanese government an *ex gratia* payment of two million dollars for the damages and injuries the thermonuclear tests caused.[203]

And when Iraq annexed neighboring Kuwait through force in 1990, the world community united against Iraq. The United Nations' Security Council utilized condemning resolutions, economic sanctions,[204] and eventually military force to restore Kuwait's independence. Following the surrender of Iraq's forces, the United Nations passed several resolutions requiring Iraq to pay restitution to Kuwait and its citizens for the invasion's physical and economic injuries.[205]

B. The United States violated international law against aggression and benefitted from the violation, resulting in injury to Native Hawaiians.

The world community, in 1893 and through to the present, condemned the gaining of land through conquest. The United States

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L.A. TIMES, May 4, 1986, at Part 1, p. 19.

The Soviets did not compensate for Canada's ecological damage caused. Laurie Watson, *Canada Prepares for Possible Satellite Crash,* U.P.I., Sept. 12, 1988, LEXIS, in Nexis library.

[201] *Livermore Lab Scientists Cleaning up Bikini Atoll,* PR Newswire, Oct. 21, 1985, *available in* Lexis, in Nexis library.

[202] Jeff Adams, *Remembering the Horror,* CALGARY HERALD, Apr. 23, 1992, at A5.

[203] Luke T. Lee, *The Right to Compensation: Refugees and Countries of Asylum,* 80 AM. J. INT'L L. 532, 565 n.174 (1986). The U.S. government never admitted liability for the damages. *Id.*

[204] *See* S. RES. 662, U.N. SCOR, 45th Sess., U.N. Doc. S/Res/662 (1990), *reprinted in* 29 I.L.M. 1327 (1990). Paragraph two calls upon states not to recognize the annexation of Kuwait. S. RES. 661, U.N. SCOR, 45th Sess., 2933d, U.N. Doc. S/Res/661 (1990), *reprinted in id.* at 1325. Paragraph 5 established an economic embargo against Iraq. *Id.*

[205] S. RES. 687 (Apr. 3, 1991), *reprinted in* 30 I.L.M. 846 (1991). U.N. Security Council passed Resolution 687 on April 3, 1991. It reaffirmed Iraq's liability for any loss, damage, or injury to foreign governments, nationals, and corporations as a result of the unlawful invasion and occupation of Kuwait. *Id.* Resolution 692, adopted on May 20, 1991 established a Fund and Commission to award compensation for damages. S. RES. 692 (May 20, 1991), *reprinted in id.* at 864.

violated international customary law by participating in the overthrow of Hawai'i's legitimate sovereign.[206] The United States also benefitted from the changed government which enabled it eventually to annex the formerly independent Kingdom.

Native Hawaiians suffered two principle injuries because of the United States's military aggression during the insurrection.[207] First, Native Hawaiians lost 1.75 million acres of lands the sovereign held in trust for the people's benefit.[208] Second, Native Hawaiians lost their right to political self-determination.[209]

The Republic of Hawai'i ceded approximately 1.75 million acres of lands to the United States upon annexation.[210] These lands, illegally seized from the Hawaiian Kingdom[211] during the insurrection, were comprised of Government Lands and Crown lands.[212] These lands were

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[206] The United States also violated the principle of non-intervention in the internal affairs of another state, and it violated the treaties it signed with the Hawaiian Kingdom in 1849 and 1884. *Id.*

[207] *But see* Patrick W. Hanifin, *Hawaiian Reparations: Nothing Lost, Nothing Owed*, 17 HAW. B.J., at 107 (1982). Hanifin argues that Native Hawaiians, as individuals, held neither land nor political power at the time of the overthrow and consequently are not owed reparations. *Id.* But Hanifin fails to consider that the United States has attempted to address "wrongs" to a group through restitution or reparations to individuals. For example, the General Allotment Act placed Native American individuals on a parcel of land as a means to rehabilitate and prepare the individual for citizenship. The United States has established scholarships for Japanese-American individuals to "make amends" for the internment of that group during World War II. *See also* Ramon Lopez-Reyes, *The Demise of the Hawaiian Kingdom: A Psycho-Cultural Analysis and Moral Legacy (Something Lost, Something Owed)*, 18 HAW. B. J., at 3, 4 (1983). Lopez-Reyes discusses the psychological injuries that resulted from the loss of sovereignty and land. "[T]he loss of sovereignty set in train repercussions that most likely would not have occurred in the same manner had the Kingdom survived." *Id.*

[208] Melody K. MacKenzie, *Self-Determination and Self-Governance, in* NATIVE HAWAIIAN RIGHTS HANDBOOK 79 (Melody K. MacKenzie ed., 1991) [hereinafter Mackenzie, *Self-Determination*].

[209] *Id.* Very few Native Hawaiians could participate in the political process under either the provisional government or the Republic of Hawai'i. The Republic's property requirement for voter qualification screened out most Native Hawaiians. *Id.*

[210] Melody K. MacKenzie, *The Ceded Lands Trust, in* NATIVE HAWAIIAN RIGHTS HANDBOOK 26 (Melody K. MacKenzie ed., 1991) [hereinafter MacKenzie, *Ceded Lands*], *citing* 42 Stat. 108 *reprinted in* 1 Haw. Rev. Stat. 167-205 (1985, 1989 Supp.).

[211] MacKenzie, *Ceded Lands*, *supra* note 210, at 26.

[212] *Id.* Both of these land classifications were held in trust by the Hawaiian sovereign on behalf of the gods for the benefit of all the people. The Government Lands were set aside 1848 by Kamehameha III for the benefit of the chiefs and the people. The Crown lands, created by an 1865 act, were set aside to support the sovereign's expenses. *Id.*

held in trust by the Hawaiian sovereign for the benefit of the Hawaiian people. Thus, when the insurrectionists seized the land from the Queen-trustee, Native Hawaiians lost the benefits from their land.[213]

Sovereignty is "the international independence of a state, combined with the right and power of regulating its own internal affairs without foreign dictation."[214] Basic to the concept of sovereignty is the right to exist.[215]

Other rights also stem from the right to exist: the right to control domestic affairs, the right to choose the government's form, the right to provide for the people, and the right to enter into intercourse and agreements with other nations.[216]

The Kingdom of Hawai'i was sovereign in 1893.[217] It possessed the signposts of sovereignty which the international community of civilized sovereign nations, including the United States, recognized.[218] But after the overthrow of the Lili'uokalani, Hawaiians could no longer exercise domestic and international rights nor control their future.[219] Restrictive voter qualifications under the provisional government and Republic excluded most Native Hawaiians from the political process.[220] One historian characterized the Republic's legislature as "predominately American, Republican, and Annexationist."[221] By depriving Hawaiians of political power, the Republic could impede opposition to Hawai'i's annexation and admittance as a state.[222]

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[213] Ramon Lopez-Reyes, *The Demise of the Hawaiian Kingdom: A Psycho-Cultural Analysis and Moral Legacy (Something Lost, Something Owed)*, 18 HAW. B. J., at 3, 11-13 (1983). The value of land, or *'aina*, to Native Hawaiians was not based on economic or political power. Its value was based upon a spiritual and cultural "connectedness." Because the Native Hawaiian culture was so tied to the land, its loss resulted in a psychological separation from "a fundamental source which fashioned [the Native Hawaiian's] identity . . . . " To compensate for this loss, Native Hawaiians turned to coping strategies, such as alcohol. *Id.*

[214] BLACK'S LAW DICTIONARY 1252 (5th ed. 1983).

[215] MacKenzie, *Self-Determination*], *supra* note 208 at 77 (citing C.H. RHYNE, INTERNATIONAL LAW 77 (1971)).

[216] 1 CHARLES CHENEY HYDE, INTERNATIONAL LAW: CHIEFLY AS INTERPRETED AND APPLIED BY THE UNITED STATES 77 (1922); *see also* MacKenzie, *Self-Determination*, *supra* note 215, at 77.

[217] MacKenzie, *Background*, supra note 21, at 10-11.

[218] Karen Blondin, *A Case for Reparations*, 16 HAW. B.J., at 13, 21 (1981).

[219] Melody K. MacKenzie, *Self-Determination and in* NATIVE HAWAIIANS HANDBOOK 78 (Melody K. MacKenzie ed., 1991) [hereinafter MacKenzie, *Self-Determination*].

[220] *Id.* at 79 (citing W.A. RUSS, THE HAWAIIAN REPUBLIC (1894-1898) 46 (1961)).

[221] *Id.*

[222] During Blount's investigation in Hawai'i, he reported to Secretary of State

C. Restoration of the status quo of 1893: land and sovereignty

The United Nations Charter denounces gaining territory through conquest or aggression.[223] To this end, the international community has attempted to restore land occupied by an aggressor to the legitimate sovereign.[224] Kuwait is a modern example of the return to the status quo following an invasion.

Although the United Nations acted quickly to quash Iraq's invasion and restore Kuwait's independence, a longer passage of time will not bar the restoration remedy. For example, following World War II, African and Asian kingdoms, formerly absorbed by the stronger states in the eighteenth and nineteenth centuries, regained their independence.[225] Although these former colonies endured foreign occupation for over a century, major European powers restored independent to their previously annexed territories.[226] After the Allied power restored these territories' self-governance, these countries were accorded the status of independent members of the world community.[227] This territorial restoration illustrates that the passage of time does not legitimize the illegal acquisition of land. Also significant is the fact that the extended passage of time between the harm and the remedy did not bar restoration.

Gresham that no annexationist he met expressed a willingness to submit the question of annexation to a vote of the people. JAMES BLOUNT, REPORT TO UNITED STATES CONGRESS: HAWAIIAN ISLANDS, EXEC. DOC. No. 47, 53d Cong., 2d Sess., at xv, xxvi (1893) [hereinafter BLOUNT, REPORT]

In response to the eminent annexation of Hawai'i, Native Hawaiians presented petitions and resolutions in 1897 to the Republic's representative and the United States Minister protesting the annexation and requesting a vote on the issue. MacKenzie, *Self-Determination*, *supra* note 151, at 79.

The Hawaiian sovereignty coalition, Ka Pakaukau, states: "We Native Hawaiians have never voluntarily surrendered our sovereignty. We were never allowed to vote on the Republic or Annexation, and we had no chance to vote separately on statehood." Letter to the Forum by Paul D. Lemke, member of Ka Pakaukau, Garden Isle, Mar. 21, 1991, *cited in* MacKenzie, *Self-Determination*, *supra* note 151, at 80.

[223] U.N. CHARTER art. 2, ¶ 4.

[224] William J. Hough, III, *Baltic State Annexation*, 6 N.Y.L. SCH. INT'L & COMP. L. 300, 449-50 (1985).

[225] *Id.* at 450 n.514.

[226] *Id.* at 460.

[227] *Id.*

1. Material injury and the return of land.

One type of reparation for Native Hawaiians is the return of lands the provisional government seized from the Monarchy. Aboriginal groups have regained portions of land illegally taken and received redress payments. For example, different Native American groups in Canada have signed agreements with the Canadian federal government.[228] The Gwich'in Indians recently approved a $75 million dollar land settlement whereby the tribe was given 24,000 square kilometers of land in the northwest territories and the Yukon.[229] Included in the agreement are exclusive hunting and trapping rights to another 60,000 square kilometers.[230] Subsurface rights to 6,000 square kilometers and 50% membership on various environmental and land use boards are also included.[231] In return, however, the tribe relinquished all other aboriginal claims, rights, and interests to any other lands or waters in Canada.[232]

The Aborigines of Australia have also successfully asserted land claims. Australia's treatment of its natives has been peppered with the continually changing policy of assimilation, private homesteading, isolation on reserves, and again assimilation.[233] The first attempt to assert Aboriginal land claims through litigation in 1971 failed.[234] However, by 1972 Australia established the Aboriginal Land Rights Commission to explore land claims outside of reserves and to consider the possibility of Aborigine self-determination over tribal lands.[235]

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[228] *Natives OK Major Land-Claims Deal*, CALGARY HERALD, Sept. 22, 1991, at D1.

[229] *Id.*

[230] *Id.*

[231] *Id.*

[232] *Natives OK Major Land-Claims Deal*, CALGARY HERALD, Sept. 22, 1991, at D1.

The Inuits and Champagne-Aishihiks also signed similar agreements where they would receive a reparations package of land and payments. The settlements, however, are conditioned upon a "extinguishment" or "certainty clause" in which future land and resources claims are surrendered. But not all Native American groups are willing to waive aboriginal rights and future claims against Canada. A $500 million agreement with the Dene-Metis bands collapsed when the tribe refused to waive their rights. *Id.*

[233] Karen Blondin, *A Case for Reparations*, 16 HAW. B.J., at 13, 18-19 (1981).

[234] *See Millirrpum and Ors v. Nabalco Proprietary, Ltd., and the Commonwealth of Australia* (1971) 17 F.L.R. 141 (S.C.N.T.).

[235] *Id.* Its report in 1974 rejected the assimilation policy and suggested a means to provide Aborigines with a viable economy which would support a "state within a state" governing entity.

Returning land to cure an injustice is not exclusively reserved to aboriginal groups. In the closing days of World War II, the Soviet military commandeered four Japanese islands.[236] Japan viewed the seizure of land as an illegal act of aggression and has demanded the return of these "Northern Territories" as a precondition to a peace treaty with Moscow.[237] Until Mikaihail Gorbachev's arrival at the Kremlin, the Soviet Union denied any territorial dispute.[238] As of early 1992, Russian President Boris Yeltsin's Adviser, Vladlen Martynov, has proposed the immediate return to Japan of the islands of Shikotan and Habomai, with a proposal for opening negotiations over the return of Etorofu and Kunashiri.[239] The United States, which similarly seized Okinawa at the end of World War II, formally returned control of the island to Japan in 1972, reserving 20% of the land for itself.[240] By 1980 other parcels were returned, and in 1990 the United States concluded negotiations to return another 4% from its base installation.[241]

Furthermore, under the Camp David peace accords, Egypt and Israel executed a peace treaty that included a "framework" for the comprehensive settlement of the Mideast land dispute.[242] The 1979 peace treaty established a "Joint Commission" to determine the location of approximately 100 pillars marking the boundary between Egypt and Israel.[243] When disputes arose over fourteen of the Com-

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[236] Steven R. Weisman, *Dispute Over Seized Islands Delays Tokyo Aid to Russia*, N.Y. TIMES, Feb. 7, 1992, at A7.

[237] *Russia Must Overcome 1960 Memo Negating 1956 Declaration*, Japan Economic Newswire, Feb. 10, 1992, LEXIS, in Nexis library. The Soviet Union agreed to return the two smaller islands in 1956 as part of a joint declaration ending hostilities between the two states. But the Soviets negated the declaration when Japan entered into a security treaty with the United States. *Id.*

[238] *Id.*

[239] *Yeltsin Adviser Proposes 2-Stage Solution to Territories*, Japan Economic Newswire, February 20, 1992, LEXIS, in Nexis library. It is likely that Yeltsin is hoping to gain Japanese economic aid once the disputed territory is returned. If this is the case, the return of the two smaller islands may be a good faith showing of Russia's desire to resolve the dispute, conclude the peace treaty, and begin a new era of Sino-Russian relations. *Id.*

[240] James Sterngold, *U.S. is to Return Land in Okinawa*, N.Y. TIMES, June 20, 1990, at A6.

[241] *Id.*

[242] William J. Lanouette, *Carter Moves to Center Stage As Middle East Peacemaker*, NATIONAL JOURNAL, Dec. 9, 1978, vol. 10, no. 49, at 1968.

[243] Haihua Ding & Eric S. Koenig, *Arbitral Decision: Treaties — Treaty of Peace Between Egypt and Israel — Demarcation of Internationally Recognized Boundaries — Arbitration of Disputes — Taba*, 83 AM. J. INT'L L. 550 (1989).

mission's findings, Egypt and Israel agreed to submit to binding arbitration to resolve their boundary dispute on the Sinai Peninsula.[244] Following the arbitration decision, both countries moved to implement the decision, resulting in Israel's transfer of land and sovereignty on March 15, 1989.[245]

2. Moral injury and the restoration of sovereignty

Generally, the return of land necessarily includes the transfer of sovereignty over the land. The transfer is feasible and uncomplicated when the land is merely reinstated to an existing country, as in the cases of the Sinai Peninsula and Okinawa. A more difficult situation develops, however, when land is awarded to a people or group whose

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[244] *Id.*

[245] *Id.* at 591-95. Another interesting wrinkle added by the Egyptian-Israeli arbitration over Taba was the transfer of a beach resort facility developed during Israel's administration over the disputed area. An Egyptian private-sector tourism company agreed to pay the Resort's owner $38.7 million for the hotel and tourist complex. It will continue to be operated and managed by Sonesta International, with a gradual replacement of Israeli workers with Egyptian workers. *Id.*

This raises the issue of reimbursements for improvements to land returned. If Native Hawaiian groups receive land with infrastructure and commercial improvements, will they similarly have to reimburse the owner or government for these "improvements?" Nevertheless, if the modernization is at the expense of Native Hawaiian cultural sites or indigenous plants and animals, would Native Hawaiians have a claim for environmental damage which justifies compensation?

If Hawaiian Home Lands and ceded lands are returned to the control of Native Hawaiians, then the status of U.S. or state facilities and programs currently located on these lands would present a dilemma. The state and federal governments might purchase the returned lands, lease the property, or condemn them under eminent domain. Furthermore, the State and Federal governments may also be liable for back-rent for unauthorized use of property. At the end of Hawai'i Governor John Waihee's term in 1994, he signed a settlement agreement with the Department of Hawaiian Home Lands to settle claims of the State's mismanagement of the Hawaiian Home Lands Trust and trust property. The Hawaii legislature is currently debating whether the State should make a single lump sum payment of $320 million which would be funded through an excise tax increase. William Kresnak, *Sales Tax Hike in Works*, THE HONOLULU ADVERTISER, Mar. 2, 1995, at A1. Current Governor Ben Cayetano favors a plan which would pay the settlement by borrowing $30 million each year over 20 years, at a total cost of $600 million. *Id.*

These issues are outside this paper's scope but illustrate the possible magnitude of the compensation Native Hawaiians and a sovereign Native Hawaiian government are entitled.

de facto or *de jure* sovereignty has not been wholly exercised by a governing entity for a period of time.

The United Nations supports the idea of returning sovereignty to territories formerly under the control of a foreign state.[246] Chapter Twelve of the United Nations Charter establishes the International Trusteeship System. Article 76 describes the objectives of the system as promoting the "political, economic, social, and educational advancement of the inhabitants of the trust territories, and their progressive development towards self-government or independence . . . ."[247]

Other international declarations also support self-determination of peoples once under foreign domination.[248] The 1960 Declaration on Granting of Independence to Colonial Countries and Peoples declared: "All peoples have the right to self-determination; by virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development."[249] And the 1970 Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Among States provides: "all peoples have the right freely to determine, without external interference their political status and to pursue their economic, social and cultural development."[250] This resolution extended the scope of the right to self-determination to all people, regardless of their *current* political status.[251]

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[246] U.N. CHARTER art. 76, ¶ 1.

[247] U.N. CHARTER art. 76, ¶ 1.

[248] *See, e.g.*, the Universal Declaration of Human Rights which states: "The will of the people shall be the basis of the authority of government; this will shall be express in periodic and genuine elections which shall be held by universal and equal suffrage . . . . " This was unanimously passed by the U.N. in 1948. G.A. Res. 217A(III), U.N. Doc. A/810 (1948), art. 15, *cited in* MacKenzie, *Self-Determination*, *supra* note 151, at 79.

The International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights was approved by the General Assembly in 1966 and became legally binding upon the signatories in 1977. The U.S. has only been legally bound since April 2, 1992 when the U.S. Senate ratified the treaty which President Carter had signed. Art. I reads: "All 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." G.A. Res. 2200A, 21 U.N. GAOR SUPP. No. 16 at 52, U.N.Doc. A/6546 (1966). G.A. Res.2200, 21 U.N. GAOR SUPP. (No. 16) at 49, U.N. Doc. A/6316 (1966).

[249] G.A. RES. 1514, 15 U.N. GAOR Supp. No. 16 at 66-67, U.N. Doc. A/4684 (1960), *quoted in* MacKenzie, *Self-Determination*, *supra* note 208, at 96.

[250] G.A. RES. 2625, 25 U.N. GAOR Supp. No. 28 at 121, U.N. Doc. A/8082 (1970), *quoted in* MacKenzie, *Self-Determination*, *supra* note 208, at 96.

[251] MacKenzie, *Self-Determination*, *supra* note 208, at 96.

Based on these documents, Native Hawaiians could possibly claim an international right to sovereignty and self-determination.[252]

The concepts of sovereignty and self-determination are also familiar to the United States. A "nation within a nation" characterizes the current Native American relationship to the federal government in which *complete* sovereignty is divided between the tribal and federal governments.[253] Tribes exercise fundamental powers of self-governance, such as deciding their government's form and membership, exercising police powers, administering justice, and maintaining sovereign immunity against suits.[254] Other rights of sovereignty, such as the right to execute treaties and conduct foreign relations, however, remain with the federal government.[255]

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[252] Under the various International Human Rights Declarations, self-determination is an international right for Native Hawaiians if proven they fall within the definition of "peoples." *Id.* at 97.

In the past, the Permanent Court of International Justice has classified "peoples" as

> a group of persons living in a given country or locality, having a race, religion, language and traditions of their own and united by this identity of race, religion, language and traditions, in a sentiment of solidarity, with a view to preserving their traditions, maintaining their form of worship, insuring the instruction and upbringing of their children in accordance with the spirit and traditions of their race and rendering mutual assistance to each other.

The Greco-Roman "Communities," Collection of Advisory Opinions (Greece v. Bulgaria), 1930 P.C.I.J. (ser. B) No. 17, at 21 (July 31). Although this court does not recognize the principle of *stare decisis*, the description the court accepts is a useful guideline for defining "peoples."

The International Commission of Jurists, a non-governmental organization with consultative status at the U.N., lists the elements of "people." A group falls into the definition if it shares: (1) a common history; (2) racial/ethnic ties; (3) cultural or linguistic ties; (4) religious or ideological ties; (5) a common territory or geographical location; (6) a common economic base; and (7) a sufficient number of individuals. (*The Events in East Pakistan*, 1970 International Commission of Jurists 70 (report by the U.N. Secretariat 1972).

Native Hawaiians satisfy all the elements except the requirement of a shared economic base. But Native Hawaiians did share a common economic base prior to the Western capitalism. MacKenzie, *Background, supra* note 21, at 3-5.

[253] The idea of shared or divided sovereignty is not an unique arrangement. Under U.S. federalism, the individual states relinquished their international sovereignty to the federal government, while retaining other internal or domestic sovereignty.

[254] MacKenzie, *Self-Determination, supra* note 208, at 84.

[255] *Id.*; Karen Blondin, *A Case for Reparations*, 16 HAW. B.J., at 13, 14-17 (1981). Furthermore, Congress has the power to specifically legislate criminal offenses out of the native governments' jurisdiction. *See, e.g.*, the Major Crimes Act, 18 U.S.C. §

The restoration of Native Hawaiian sovereignty is an appropriate remedy for Native Hawaiians. The form of this sovereignty, however, is uncertain. Hawaiians could be afforded complete sovereignty, as articulated by the international community. Hawaiians might also exercise partial sovereignty, similar to Native American tribes.

D. Compensation for land damaged under the control of the dominant power

1. Ecological damages

The Republic of Nauru filed an action against Australia on May 19, 1989 in the International Court of Justice, alleging exploitation and neglect for phosphate mining activities.[256] Between 1919 and 1967, Australia administered the former German colony under the Mandate System and the International Trusteeship System[257] until the central pacific island achieved nation-status in 1968.[258] Under the Mandate System and the International Trusteeship System, Australia owed Nauru a certain duty of care. Nauru lists two claims for the breach of duty: 1) that long term mining leases paid to Nauru were kept artificially low;[259] and, 2) that Australia has a duty to help repair lands damaged by phosphate mining on the Island.[260]

After 70 years of intensive phosphate mining, four-fifths of the island's approximately 13 square kilometers are covered with phosphate, rendering the land hostile to vegetation and habitation.[261] Nauru is

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1153 (1982) which extends federal jurisdictions for numerous crimes, including murder, manslaughter, and rape.

[256] Paul L. Montgomery, *Tiny Nauru, a Colony No Longer, Sues Australia for Neglect*, N.Y. TIMES, June 5, 1989, at A8.

[257] Kalinga Seneviratne, *Nauru: Locked in a 'David and Goliath' Struggle with Australia*, Inter Press Service, July 30, 1991, LEXIS, in Nexis library.

[258] Montgomery, *supra* note 256, at A8.

[259] W.I. Michael, *International Fiduciary Duty: Australia's Trusteeship Over Nauru*, 8 B.U. INT'L L.J., 381, 403 (1990).

[260] *Id.* at 397. Australia administered the former German colony between 1919 and 1967 through the League of Nation's Mandate System and then Under the International Trusteeship System. The goal of the Trusteeship Act was to serve long term political, social, and economic interests of the indigenous population and eventually to move the territory to full sovereignty. *Id.*

[261] Australia Asks Court to Throw Out Nauru Compensation Claim, Reuter Library Report, Nov. 11, 1991, LEXIS, in Nexis Library.

asking for $250 million to compensate for the ruined land and the artificially low price set for phosphate.[262]

Nauru's claims were supported by the United Nations Decolonization Committee. The Committee contends that Australia violated its trusteeship duty by profiting from the phosphate mining and by failing to care for the indigenous population.[263] Australia continued to challenge financial responsibility for rehabilitating the damaged land and alleged price fixing. In December 1991 Australia moved to dismiss the case, arguing: 1) outstanding claims were settled when it sold the phosphate works to the independent Nauru, and 2) Nauru was not a full-fledged nation when the harm was inflicted and consequently, Nauru could not sue in the International Court of Justice.[264]

This is the first situation where a formerly non-self-governing territory sued its trustee state in an international forum because of a breach of the trusteeship duties.[265] If Nauru succeeded, the implication is that any former trustee may be sued by a former ward.[266] And although Hawai'i was never under the Mandate or International Trusteeship Systems uncompensated, this case stands for the proposition that economic and environmental harm caused by a dominant "administering" country will not go uncompensated.[267]

Nevertheless, in August 1993, Australia and Nauru reached an out of court settlement whereby Nauru dismissed the case and Australia

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[262] Paul L. Montgomery, *Tiny Nauru, a Colony No Longer, Sues Australia for Neglect*, N.Y. TIMES, June 5, 1989, at A8.

[263] *Decolonization Committee Reviews situations in 18 Territories; Special Meeting on Declaration Asked; Includes Articles on World Court, Trusteeship Council, and the Committee on the Indian Ocean*, U.N. CHRONICLE, Dec. 1989, Vol. 26, No. 4, at 59.

Under the United Nations Charter Art. 73, the International Trusteeship Duty requires the administering country to act in a manner that will "ensure, with due respect for the culture of the peoples concerned, their political, economic, social, and educational advancement." The administrator must act to preserve the long term interest of the indigenous groups, irrespective of the trustee's own interests. Michael, *supra* note 259, at 408.

[264] *Nauru: World Court Hearing on Environmental Law*, American Political Network, Inc., Dec. 5, 1991, LEXIS, in Nexis library. Under the ICJ statute, only internationally recognized states may bring suit. I.C.J. CHARTER art. 34, ¶ 1.

[265] W.I. Michael, *International Fiduciary Duty: Australia's Trusteeship Over Nauru*, 8 B.U. INT'L L.J., 381, 402 (1990).

[266] *Id.* at 418.

[267] It may be possible to argue a *de facto* trusteeship relationship existed between the United States and the Territory of Hawai'i. Relevant factors might include: 1) The degree of control the United States exerted politically, socially, and economically; and 2) The level of political and civil rights given to Hawai'i residents.

agreed to pay $76 million.[268] Australian Prime Minister acknowledged Australia's responsibility for the environmental damage through the phosphate mining.[269] Great Britain and New Zealand, Australia's partners in administering Nauru during the colonial era and who jointly controlled the mining company, also agreed to contribute $17 million to the $76 million settlement, however, both countries never acknowledged responsibility.[270]

A related issue is whether a state may collect compensation for ecological damages caused by an occupying military. In June 1991, Russia and Hungary entered negotiations addressing environmental damages to the 460 square kilometers Soviet troops formerly occupied.[271] Pollution levels were highest at airports, where kerosene, petrol, and other hazardous wastes leaked into the soil and subsoil. The governments declined to disclose the damage figure but estimated that it fell in the range of thousands of millions of forints.[272]

Again, Native Hawaiians should observe negotiations and talks between the former Soviet Union and countries their troops once occupied. The eventual outcome or settlement could result in precedent for the United States paying compensation to Native Hawaiians for damage caused by the military's use of lands. In particular, the federal government might be liable for ecological damages to land it currently occupies.[273]

2. *Monetary compensation*

Monetary compensation for unjust land acquisition is another possible form of restitution. In 1946 the United States established the

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[268] Kalinga Seneviratne, *Environment-Nauru: Britain, New Zealand Pay for Past Plunder*, Inter Press Service, Mar. 31, 1994, LEXIS, in Nexis library.

[269] *Id.*

[270] *Id.*

[271] *Soviet Troops - Assessment of Ecological Damage*, MTI Hungarian News Agency, June 10, 1991, LEXIS, in Nexis Library.

[272] *Id.*

[273] This damaged land could include military bases, Pearl Harbor, and the Honolulu International Airport. The United States Congress has already recognized its responsibility to restore the environmental viability of land it uses. In May 1994, the U.S. Navy returned control of Kaho'olawe to the State. Joy Aschenbach, *Native Hawaiians Set Sights on Regaining Sovereignty*, L.A. TIMES, Feb. 12, 1995, at B1. Congress also set aside $400 million to clean and restore the island which the U.S. military used as a bombing target since its commandeering during World War II. *Id.*

Indian Claims Commission. It allowed identifiable native groups to bring "claims arising from the taking by the United States, whether as the result of a treaty or cession or otherwise, of lands owned or occupied by the claimant without . . . payment for such lands."[274]

Compensation, however, was limited to monetary awards. The Canadian government likewise awarded its Native Americans monetary compensation for their loss of land as part of a reparations package.[275] The United States also paid monetary reparations to Japanese-Americans interned during World War II and to Marshallese who suffered radiation poison from hydrogen bomb testing in the Pacific.[276]

IX. What Redress is Possible for Native Hawaiians?

The ideal reparations package would restore, to an extent, the pre-insurrection status quo of the Hawaiian Kingdom by returning the Ceded Lands and restoring Hawaiian self-determination and sovereignty. Monetary compensation is also appropriate for the use of ceded lands by the state and federal government, and for possible claims of ecological damage to those lands under United States' administration.

Native Hawaiian sovereignty groups have also suggested a basic reparations-restitution package. The Native Hawaiian Rights Confer-

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[274] MacKenzie, *Self-Determination*, *supra* note 151, at 81. Congress established a "judicial" commission to determine claims arising prior to August 13, 1946. *Id.*

[275] *See supra* text accompanying note 232 for a discussion of the land settlements signed between Canada and some of its indigenous people.

[276] The United States has redressed wrongs committed against the Japanese-Americans who were unconstitutionally interned during World War II. United States Representative Norman Y. Mineta states: "In the annals of civilization, there aren't many instances of a government apologizing this way . . . Here we have a government saying, we were wrong, we apologize." Ronald J. Ostrow, *World War II Internees to Hear 'We Apologize'; Civil Liberty: the First Round of Payments to Japanese-Americans Starts Tuesday. More Than $1/5 Billion will Go to 60,000 to Redress the Detainment*, L.A. Times, Oct. 7, 1990, at A4. The reparations bill, signed in August of 1988 included a formal apology and $20,000 for each living survivor. *Reparations Victory Called 'Bittersweet,'* L.A. Times, Nov. 23, 1989, at B2.

The United States is also settling claims with victims of nuclear fallout from sixty-six tests conducted in the Marshall Islands between 1945-1958. The United States has agreed to a $270 million compensation package. A treaty between the two states established the Nuclear Claims Tribunal. The panel will adjudicate claims and dispense monetary compensation to anyone on the islands during the testing, provided that they file a claim. Giff Johnson, *Pacific Islanders to Start Getting Nuclear Money in June*, Reuter Library Report, Feb. 16, 1990, LEXIS, in Nexis Library.

ence met in August 1988 and adopted a Five-Plank Resolution for self-governance which included an apology, return of land, recognition of sovereignty, and monetary compensation.[277] The Office of Hawaiian Affairs,[278] a Hawai'i state agency, also authored a blueprint for Native Hawaiian entitlements which incorporated the basic principles of the five-plank resolution.[279]

A. Form of the remedy

One possible reparations model is arbitration. The successful arbitration of the Egyptian-Israeli dispute over the area of Taba represents

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[277] Resolution adopted at Native Hawaiian Rights Conference, August 7-8, 1988, *quoted in* MacKenzie, *Self-Determination*, *supra* note 273, at 91. Specifically, the Resolutions provided the following:

> 1. An apology by the United States to Native Hawaiians and their government for its role in coup of 1893.
> 2. Substantial land and natural resource base comprised of a reformed Hawaiian Homes program, fair share of the ceded lands trust, the return of Kaho'olawe and other appropriate lands.
> 3. Recognition of the Native Hawaiian government with sovereign authority over the land base's territory.
> 4. Recognition and protection of subsistence and commercial hunting, fishing, gathering, cultural and religious rights of Native Hawaiians, and the exercise of sovereign power over these rights.
> 5. Appropriate cash payment.

Id.

[278] The Office of Hawaiian Affairs [hereinafter OHA] was established through amendments to the Hawai'i Constitution. HAW. CONST., art. XII, §§ 4-6.

> The committee intends that the Office of Hawaiian affairs will be independent from the executive branch and all other branches of government although it will assume the status of a state agency . . . The status of the Office of Hawaiian Affairs is to be unique and special. The establishment by the Constitution of [OHA] with power to govern itself through a board of trustees . . . results in the creation of a separate entity independent of the executive branch of the government . . . .

Hawaiian Affairs Comm. Rep. No. 59, *reprinted in* 1 *Proceedings of the Constitutional Convention of Hawai'i of 1978* at 645.

OHA's powers include acquiring, holding, and managing property, entering into contracts and leases, managing and investing funds, and formulating public policy relating to Hawaiians affairs. HAW. REV. STAT. §§ 10-4, 10-5,10-6 (1985).

[279] *Draft Blueprint for Native Hawaiian Entitlement* (Sept. 2, 1989). In hearings held on the draft blueprint in September and October of 1989, the concern arose that since OHA is a state agency which relies upon the Hawai'i Legislature for funding, its loyalties might be divided, thus making OHA an inappropriate leader for self-determination. MacKenzie, *Self-Determination*, *supra* note 151, at 92.

a "significant milestone," not only for resolving the border disputes but also because of the "spirit of cooperation and courtesy which permeated the proceedings" between the former enemies.[280]

Pursuant to a 1979 Treaty between Egypt and Israel, Article 4 created a Joint Commission to establish disputed boundaries between the two nations if negotiations failed.[281] In 1986, the former warring nations agreed to submit to arbitration over the demarcation line on the Sinai Peninsula.[282] Egypt prevailed and Israel transferred the Taba area, in its entirety, to Egypt.[283]

This model, voluntarily entered into by the two nations, is an amicable resolution to an international dispute. Furthermore, the parties tailored the mechanism by which their disputes would be settled and placed these terms into a treaty.[284] Arbitration, thus, is flexible to meet the needs of the parties and their problem. It may be conditioned upon a certain non-occurrence, or made mandatory. A fair tribunal may easily be convened, with each side choosing a set number of arbitrators, with a tie-breaking arbitrator being approved by both.

The more difficult route to reparations is through the International Court of Justice. Two hurdles must be overcome: (1) gaining jurisdiction over the United States,[285] and (2) successfully arguing that Native Hawaiians meet the qualification as a state.[286] Because the United States revoked its acceptance of the Court's compulsory jurisdiction, in order to satisfy jurisdiction requirements, the United States must explicitly agree to be bound by the court.[287] And since only states may be a party to a case before the court, Native Hawaiians must successfully argue that they qualify as a state because of the current sovereignty organizations,[288] or because the Hawaiian Kingdom was, and would

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[280] Haihua Ding & Eric S. Koenig, *Arbitral Decision: Treaties — Treaty of Peace Between Egypt and Israel — Demarcation of Internationally Recognized Boundaries — Arbitration of Disputes — Taba*, 83 AM. J. INT'L L. 550, 594 (1989).

[281] *Id.* at 590-91.

[282] Id.

[283] *Id.* at 594-95.

[284] Treaty of Peace between Egypt and Israel, Mar. 26, 1979, Egypt-Isr., *reprinted in* 18 I.L.M. 362 (1979).

[285] I.C.J. CHARTER art. 36.

[286] I.C.J. CHARTER art. 34, ¶ 1.

[287] I.C.J. CHARTER art. 36.

[288] One sovereignty group, the Ohana Counsel, declared its independence on January 16, 1994. *Hawaii's Search for Sovereignty*, CHRISTIAN SCI. MONITOR, Oct. 17, 1994, at 9. The Independent Nation State of Hawai'i claims 10,000 citizens and issues its own driver's licenses and automobile insurance. *Id.*

have continued to be, an internationally recognized state but for the illegality which they now are asking the court to remedy.

B. Conclusion

The United States violated international law by participating in the coup that robbed an independent nation of its sovereignty and its accompanying rights. On November 23, 1993, President Bill Clinton signed Senate Joint Resolution 19 in which Congress acknowledged the illegal overthrow of the Kingdom of Hawai'i and the United States' role.[289] And although the Congress "apologizes to Native Hawaiians on behalf of the people of the United States for the overthrow of the Kingdom of Hawai['i on January 17, 1893 with the participation of agents and citizens of the United States, and the deprivation of the rights of Native Hawaiians to self-determination[,]" the Congress added that "[n]othing in this Joint Resolution is intended to serve as a settlement of any claims against the United States."[290]

Nevertheless, under the analysis of this paper, the United States' is liable under international law for its illegal conduct over 100 years ago. Monetary restitution is appropriate. Reparations to Native Hawaiians would reaffirm that the rights and duties of the world community are equally applied against all states, from the most powerful, like Iraq and the United States, to the unimposing, like Kuwait and the Hawaiian Kingdom.

The following statement by a legal scholar was directed at the collective use of force against Iraq during the Gulf Crisis. It also serves to answer the question of why the world community should unite and support Native Hawaiian reparations for the illegal use of force against their once sovereign nation.

> It may well be utopian to expect that wars will be prevented by a common obligation to "protect each and all," but it is surely realistic for governments to press for the goal of security through preventive measures and the commitment to uphold — and, if necessary, to enforce — the basic law of the UN Charter.[291]

Jennifer M.L. Chock

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[289] S.J. Res. 19, 103d Cong., 1st Sess. (1993) (enacted).

[290] *Id.*

[291] Oscar Schacter, *United Nations Law in the Gulf Conflict*, 85 AM. J. INT'L L. 452, 473 (1991).

Discretionary Use of the Doctrine of Equivalents in Patent Law: Going Beyond the Triple Identity Test of *Graver Tank*

I. INTRODUCTION

The United States Constitution provides that "Congress shall have Power . . . To promote the Progress of Science and useful Arts, by securing for limited Times to . . . Inventors the exclusive Right to their . . . Discoveries."[1] Pursuant to this authority, Congress promulgated a series of Patent Acts[2] allowing inventors to obtain limited monopolies on their inventions in exchange for public disclosure.[3] The inventor receives an exclusive right to make, use, or sell the invention,[4] while the public receives the benefit of a useful invention.[5]

The inventor's patent application, and the subsequent patent, contain "one or more claims particularly pointing out and distinctly claiming the subject matter which the applicant regards as his invention."[6] The claims describe what is, and therefore, what is not, protected by the

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[1] U.S. CONST. art. I, § 8, cl. 8.

[2] The most recent is contained in 35 U.S.C. § 1-376 (1994).

[3] *See* 35 U.S.C. § 154. The inventor receives a limited monopoly for seventeen years. *Id.*

[4] *Id.*

[5] *See* Brenner v. Manson, 383 U.S. 519, 534 (1966) ("The basic quid pro quo contemplated by the Constitution and Congress for granting a patent monopoly is the benefit derived by the public from an invention with substantial utility").

This benefit can be viewed in two ways. First, the public has access to the patent's description of an invention or patented process. This allows other inventors to build on the patentee's work to develop useful items that may be related to, but do not infringe the patent. Second, when the patent term expires in seventeen years the invention falls into the public domain and can be practiced and used at will.

[6] 35 U.S.C. § 112.

patent.[7] Once a patent has been issued, the inventor or "patentee" can enforce the patent claims against an alleged infringer.[8] In doing so, the patentee often asserts that the alleged infringer's invention has literally infringed the claims of the patentee's patent.[9]

In addition to literal infringement, the patentee may attempt to prove infringement under the court-created doctrine of equivalents.[10] This equitable doctrine[11] prevents subsequent inventors from stealing the patented invention by making insignificant changes that avoid infringing the literal language of the claims yet result in essentially the same invention.[12] Infringement is found under the doctrine of equivalents if the "new" invention and the patented invention perform substantially the same function, in substantially the same way, to achieve substantially the same result.[13]

While initially designed to prevent fraud on a patent,[14] the doctrine of equivalents has become an often-used second method of proving infringement. More and more frequently, patent infringement cases have involved both infringement tests, with virtually any patentee being able to invoke the doctrine of equivalents.[15] In that the doctrine of equivalents does not rely on the literal language of the patent claims, use of the doctrine leads to some uncertainty in the marketplace.[16]

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[7] *See* Continental Paper Bag Co. v. Eastern Paper Bag Co., 210 U.S. 405, 419 (1908) ("[T]he claims measure the invention").

[8] *See* 35 U.S.C. § 271, 281.

[9] Palumbo v. Don-Joy Co., 762 F.2d 969, 974 (Fed. Cir. 1985) ("Literal infringement may be found if the accused device falls within the scope of the asserted claims as properly interpreted") (citing Envirotech Corp. v. Al George, Inc., 730 F.2d 753 (Fed. Cir. 1984).

[10] First created in Winans v. Denmead, 56 U.S. (15 How.) 330 (1853), the modern test for infringement under the doctrine of equivalents comes from Graver Tank & Mfg. Co., v. Linde Air Products Co., 339 U.S. 605 (1950) (infringement found where another's device performs substantially the same function, in substantially the same way, to achieve substantially the same result as the patented device). *See generally* D. CHISUM, PATENTS § 18.04 at 18-73 (1993); *see also infra* section III.

[11] *See* Hughes Aircraft Co. v. United States, 717 F.2d 1351, 1361 (Fed. Cir. 1983) ("The doctrine is judicially devised to do equity").

[12] Graver Tank & Mfg. Co. v. Linde Air Products Co., 339 U.S. 605, 607 (1950).

[13] *Id.* at 608.

[14] *Id.*

[15] *See* Atlanta Motoring Accessories, Inc. v. Saratoga Technologies, Inc., 33 F.3d 1362, 1366 (Fed. Cir. 1994) ("If literal infringement is not established, the second step is to apply the doctrine of equivalence [sic] to the accused device").

[16] See Pennwalt Corp. v. Durand-Wayland, Inc., 833 F.2d 931, 974 (Fed. Cir. 1987) (Newman, J., commentary) ("[U]ncertainty [is] inherent in the doctrine of equivalents"), *cert. denied*, 485 U.S. 961 (1988), and *cert. denied*, 485 U.S. 1009 (1988).

Subsequent inventors cannot rely solely on the patent claims as the limit of patented material.[17] Recently, several cases in the United States Court of Appeals for the Federal Circuit[18] have noted that the doctrine of equivalents should be used more sparingly.[19] This comment will discuss the general features and policies of the doctrine of equivalents, examine several cases which suggest a more restrictive use of the doctrine, and propose two possible approaches to limiting its use.

II. PATENT APPLICATIONS AND LITERAL INFRINGEMENT

To obtain a patent an inventor submits an application to the Patent and Trademark Office (PTO).[20] Within the application, the inventor will include a description of the invention[21] and a list of claims which distinctly describes the subject matter of the invention.[22] During the patent application process the patent examiner will scrutinize the inventor's claims to determine if the application satisfies the requirements for a patent.[23] The examiner may request that the applicant limit or narrow the claims before granting the patent.[24] Once the PTO

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[17] *See* International Visual Corp. v. Crown Mfg. Co., Inc., 991 F.2d 768, 774 (Fed. Cir. 1993) (Lourie, J., concurring) ("[T]he claims may no longer adequately inform the public of the scope of [patent] protection").

[18] Patent case appeals are within the exclusive jurisdiction of the United States Court of Appeals for the Federal Circuit. *See* 28 U.S.C. § 1295(a).

[19] *See, e.g.*, London v. Carson Pirie Scott & Co., 946 F.2d 1534, 1538 (Fed. Cir. 1991) ("Application of the doctrine of equivalents is the exception, however, not the rule").

[20] *See* 35 U.S.C. § 111.

[21] *See* 35 U.S.C. § 112, which provides:

> The specification shall contain a written description of the invention, and of the manner and process of making and using it, in such full, clear, concise, and exact terms as to enable any person skilled in the art to which it pertains, or with which it is most nearly connected, to make and use the same, and shall set forth the best mode contemplated by the inventor of carrying out his invention.

Id.

[22] *See* 35 U.S.C. § 112 "The specification shall conclude with one or more claims particularly pointing out and distinctly claiming the subject matter which the applicant regards as his invention." *Id.*

[23] *See* 35 U.S.C. § 101-103 (describing the requirements of utility, novelty, and non-obviousness).

[24] *See* 35 U.S.C. § 132, which provides:

> Whenever, on examination, any claim for a patent is rejected, or any objection or requirement made, the Commissioner shall notify the applicant thereof, stating

issues the patent, the patentee has a monopoly on the invention as described in the claims.[25] In describing precisely what is covered by the patent, the claims allow others to know what will or will not result in infringement.[26] The claims have been characterized as the "metes and bounds" of the invention.[27]

During a patent infringement suit, the court will usually proceed through a two-step process to determine whether literal infringement has occurred.[28] First, the court "assesses the meaning and scope of each claim."[29] This claim interpretation is a matter of law for the court to decide.[30] Second, the court "compares the accused device to the interpreted claims."[31] The patent has been literally infringed when "every limitation of a patent claim [can] be found in the alleged infringing product."[32] If the alleged infringer's device "falls clearly

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> the reasons for such rejection, or objection or requirement, together with such information and references as may be useful in judging of the propriety of continuing the prosecution of his application; and if after receiving such notice, the applicant persists in his claim for a patent, with or without amendment, the application shall be reexamined. No amendment shall introduce new matter into the disclosure of the invention.

Id.

[25] *See* 35 U.S.C. § 271 (describing what constitutes patent infringement).

[26] *See* United Carbon Co. v. Binney & Smith Co., 317 U.S. 228, 236 (1942) ("The statutory requirement of particularity and distinctness in claims is met only when they clearly distinguish what is claimed from what went before in the art and clearly circumscribe what is foreclosed from future enterprise").

[27] *See* London v. Carson Pirie Scott & Co., 946 F.2d 1534, 1538 (Fed. Cir. 1991); Corning Glass Works v. Sumitomo Elec. U.S.A., Inc., 868 F.2d 1251, 1257 (Fed. Cir. 1989).

[28] *See* Lemelson v. General Mills Inc., 968 F.2d 1202, 1206 (Fed. Cir. 1992); Maxwell v. K Mart Corp., 844 F. Supp. 1360, 1367 (D. Minn. 1994) ("A literal infringement analysis entails two steps"); Fairfax Dental (Ireland) Ltd. v. Sterling Optical Corp., 808 F. Supp. 326, 334 (S.D.N.Y. 1992), *aff'd*, 11 F.3d 1074 (1993) ("Patent infringement analysis is a two stage process").

[29] *Fairfax Dental (Ireland)*, 808 F. Supp. at 334. *See also* North American Vaccine Inc. v. American Cyanamid Co., 7 F.3d 1571, 1574 (Fed. Cir. 1993), *cert. denied*, 114 S.Ct. 1645 (1994).

[30] *See* Genentech, Inc. v. Wellcome Found. Ltd., 29 F.3d 1555, 1561 (Fed. Cir. 1994).

[31] *Maxwell*, 844 F. Supp. at 1367 (citing Becton Dickinson & Co. v. C.R. Bard, Inc., 922 F.2d 792, 796 (Fed. Cir. 1990)). *See also* Genentech, Inc. v. Wellcome Found. Ltd., 29 F.3d 1555, 1561 n.6 (Fed. Cir. 1994) (citations omitted).

[32] *Maxwell*, 844 F. Supp. at 1367 (citing Uniroyal, Inc. v. Rudkin Wiley Corp., 837 F.2d 1044, 1054 (Fed. Cir.), *cert. denied*, 488 U.S. 825 (1988)).

within the claim, infringement is made out and that is the end of it.''[33]

III. Patent Infringement Under the Doctrine of Equivalents

If a patentee fails to prove literal infringement, they may still be able to prove infringement using the doctrine of equivalents.[34] The doctrine is an equitable one, allowing the courts to find infringement in certain situations where literal infringement is absent.[35]

A. The Graver Tank *Triple Identity Test for Infringement*

The doctrine of equivalents draws its modern test from *Graver Tank & Mfg. Co., Inc. v. Linde Air Products Co.*[36] There the United States Supreme Court held that a patented invention has been infringed under the doctrine of equivalents if another's device performs substantially the same function, in substantially the same way, to obtain substantially the same result.[37] Since *Graver Tank*, courts have used this tripartite or ''triple identity'' test[38] in applying the doctrine of equivalents.[39]

The Court in *Graver Tank* noted the policy reasons for allowing a patentee to recover for infringement in cases lacking literal infringement. The Court stated that ''to permit imitation of a patented invention which does not copy every literal detail would be to convert the protection of the patent grant into a hollow and useless thing.''[40] In essence, an ''unscrupulous copyist''[41] should not be allowed to avoid

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[33] Graver Tank & Mfg. Co., v. Linde Air Products Co., 339 U.S. 605, 607 (1950).

[34] *See* Hughes Aircraft Co. v. United States, 717 F.2d 1351, 1361 (Fed. Cir. 1983) (''The doctrine of equivalents comes into play only when actual literal infringement is not present''); *Maxwell*, 844 F. Supp. at 1369 (''Even if there is no literal infringement, there may still be infringement under the doctrine of equivalents'').

[35] *See* Loctite Corp. v. Ultraseal Ltd., 781 F.2d 861, 870 (Fed. Cir. 1985) (''The doctrine has been 'judicially devised to do equity' in situations where there is no literal infringement but liability is nevertheless appropriate to prevent what is in essence a pirating of the patentee's invention'') (citing *Hughes Aircraft Co.*, 717 F.2d at 1361).

[36] 339 U.S. 605 (1950).

[37] *Id.* at 608.

[38] The test for substantial similarity of function, way, and result (or function, means, and result) is often referred to as the ''tripartite'' or ''triple identity'' test. These terms will be used interchangeably throughout this comment.

[39] *See generally* D. Chisum, Patents § 18.02[2] at 18-8 (1993).

[40] 339 U.S. at 607.

[41] *Id.*

infringement by making insignificant changes in the patent to avoid the literal meaning of the claims.[42]

When applying the doctrine of equivalents, a court compares the alleged infringing device with the claims of the patent, not with the patentee's embodiment of the patent claims.[43] The court compares the "claimed subject matter as a whole and the accused device."[44] In order to find that the patented material and alleged infringing device are substantially similar in function, way and result, the court must determine just how similar is "substantially similar." In effect, the court determines that the alleged infringing device must be outside some "range of equivalents" around the patented material before it is no longer "substantially similar" in function, way or result.[45] This range of equivalents given to a patentee may vary with the degree of invention.[46] For "pioneer patents,"[47] the range will be broader than for inventions in a "crowded art."[48]

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[42] *Id.* (recognizing the danger in allowing an infringer to make "unimportant and insubstantial changes and substitutions in the patent . . . to take the copied matter outside the claim and hence outside the reach of law."). *See also* Royal Typewriter Co. v. Remington Rand, Inc., 168 F.2d 691 (2nd Cir. 1948), *cert. denied*, 335 U.S. 825 (1948), wherein Judge Learned Hand stated that the doctrine of equivalents is intended to "temper unsparing logic and prevent an infringer from stealing the benefit of the invention." *Id.* at 692.

[43] *See* International Visual Corp. v. Crown Metal Mfg. Co., Inc., 991 F.2d 768, 772 (Fed. Cir. 1993) (citations omitted); Perkin-Elmer v. Computervision, 732 F.2d 888, 902 (Fed. Cir. 1984), *cert. denied*, 469 U.S. 857 (1984) ("Infringement is determined by comparison with the patentee's claimed invention, not with its marketed product").

[44] D. CHISUM, PATENTS § 18.04[1][b][i] at 18-90 (1993) (citations omitted).

[45] *See In re* Certain Doxorubicin and Preparations Containing Same, 20 U.S.P.Q.2d 1602, 1608 (U.S. Int'l Trade Comm'n 1991) ("The concept of a 'range of equivalents' is intended to convey a general idea of how far the trier of fact may depart from the literal language of the claims and still find infringement under the doctrine of equivalents"); *See also* D.M.I., Inc. v. Deere & Co., 755 F.2d 1570, 1575 (Fed. Cir. 1985).

[46] D. CHISUM, PATENTS § 18.04[2] at 18-100.14 (1993) (citations omitted). *See* Graver Tank & Mfg. Co. v. Linde Air Products Co., 339 U.S. 605, 608 (1950) ("[T]he area of equivalence may vary under the circumstances"); Innovative Scuba Concepts, Inc. v. Feder Industries, Inc., 819 F. Supp. 1487, 1498 (D. Colo. 1993) ("[T]he range of permissible equivalents depends upon the extent and nature of the invention").

[47] *See* Thurber Corp. v. Fairchild Motor Corp., 269 F.2d 841, 847 (5th Cir. 1959) (defining a pioneer patent as "one that is broadly new and in a new field").

[48] *See* Perkin-Elmer Corp. v. Westinghouse Elec. Corp., 822 F.2d 1528, 1532 (Fed. Cir. 1987) ("A pioneer invention is entitled to a broad range of equivalents"); Transco

Maxwell v. K Mart Corp.[49] presents an example of both the triple identity test and the doctrine of equivalents' policy to prevent patent fraud. There the Minnesota District Court granted the defendants' motion for summary judgment for lack of literal infringement, but denied the portion of defendants' motion pertaining to infringement under the doctrine of equivalents.[50] Maxwell had patented a method to connect pairs of shoes "to prevent separation and possible mismatching when offered for sale in self-service stores."[51] The patent described "a system that threads a filament through loops or fastening tabs secured between the inner and outer soles of each shoe of a mated pair."[52] Maxwell alleged the defendants, who had tried but failed to obtain a license to use Maxwell's system,[53] infringed her patent by making minor changes to the tab's location on the shoe.[54] The court held that the defendants' tabs performed the same function to achieve the same result as Maxwell's tabs, but that the similarity in the way the tabs worked was a disputed fact.[55]

The court denied the defendants' summary judgment motion on infringement under the doctrine of equivalents:

> It is undisputed that defendants knew of the [Maxwell] patent at the time they devised the accused systems. The evidence . . . shows that defendants attempted to avoid infringement by making only minimal changes while maintaining the same function. A reasonable jury could conclude that the minimal changes adopted by defendants fail to avoid infringement under the doctrine of equivalents.[56]

The court believed a jury could reasonably conclude that the defendants were "unscrupulous copyists," and allowed Maxwell to proceed under the doctrine of equivalents.

B. The Role of Prior Art and Prosecution History Estoppel

The patentee's use of the doctrine of equivalents will be restricted by the prior art. Essentially, prior art consists of matter protected by

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Prods., Inc. v. Performance Contracting, Inc., 792 F. Supp. 594, 602 (N.D.Ill. 1992) ("[T]he doctrine of equivalents must be narrowly applied in crowded fields of invention.") (citing Slimfold Mfg. Co. v. Kinkead Indus., Inc., 932 F.2d 1453, 1457 (Fed. Cir. 1991)).

[49] 844 F. Supp. 1360 (D. Minn. 1994).

[50] *Id.* at 1371.

[51] *Id.* at 1364.

[52] *Id.*

[53] *Id.*

[54] *Id.* at 1370.

[55] *Id.*

[56] *Id.* at 1370-71.

other patents in existence when the patentee files the application or matter already available for public use.[57]

In *Wilson Sporting Goods Co. v. David Geoffrey & Associates*,[58] the U.S. Court of Appeals for the Federal Circuit addressed the limitation by prior art:

> [A] patentee should not be able to obtain, under the doctrine of equivalents, coverage which he could not lawfully have obtained from the PTO [Patent and Trademark Office] by literal claims. The doctrine of equivalents exists to prevent a fraud on a patent, *not* to give a patentee something which he could not lawfully have obtained from the PTO had he tried. Thus, since prior art always limits what an inventor could have claimed, it limits the range of permissible equivalents of a claim.[59]

The court held that Wilson could not recover under the doctrine of equivalents. Wilson's patent claim for a golf ball dimple pattern could not "be given a range of equivalents broad enough to encompass the accused Dunlop balls[,]"[60] without also "ensnar[ing] the prior art Uniroyal ball."[61]

The patentee will also be restricted by prosecution history estoppel.[62] In *Hughes Aircraft Co. v. United States*,[63] the U.S. Court of Appeals for the Federal Circuit addressed the limitation by prosecution history:

> The doctrine of prosecution history estoppel precludes a patent owner from obtaining a claim construction that would resurrect subject matter

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[57] *See* Loctite Corp. v. Ultraseal Ltd., 781 F.2d 861, 870 (Fed. Cir. 1985) ("[T]he doctrine [of equivalents] will not extend to an infringing device within the public domain, i.e., found in the prior art at the time the patent issued"); Perkin-Elmer Corp. v. Computervision Corp., 732 F.2d 888, 900 (Fed. Cir. 1984), *cert. denied*, 469 U.S. 857 (1984) (Equivalence is not found where "the equivalent device is within the public domain, i.e., found in the prior art").

[58] 904 F.2d 677 (Fed. Cir. 1990).

[59] *Id.* at 684 (emphasis in original) (citations omitted).

[60] *Id.* at 685.

[61] *Id.*

[62] The prosecution history, also called "file wrapper estoppel," is the "record of proceedings in the Patent and Trademark Office on the application upon which a patent was issued." D. CHISUM, PATENTS § 18.05 at 18-151 (1993). *See, e.g.*, Loctite Corp. v. Ultraseal Ltd., 781 F.2d 861, 870 (Fed. Cir. 1985) ("Prosecution history estoppel precludes a patentee from obtaining a claim construction that would resurrect subject matter surrendered during prosecution of his patent application"). *See also* Charles Greiner & Co., Inc. v. Mari-Med Mfg., Inc., 962 F.2d 1031, 1036 (Fed. Cir. 1992).

[63] 717 F.2d 1351 (Fed. Cir. 1983).

> surrendered during prosecution of his patent application. The estoppel applies to claim amendments to overcome rejections based on prior art, and to arguments submitted to obtain the patent[.][64]

There, prosecution history estopped Hughes from "obtaining a claim interpretation so broad as to encompass the McLean structure,"[65] after Hughes had chosen claim language to distinguish its patent from the McLean prior art.[66]

In *Charles Greiner & Co., Inc. v. Mari-Med Mfg., Inc.*,[67] the U.S. Court of Appeals for the Federal Circuit used the prosecution history to estop Greiner from recovering under the doctrine of equivalents.[68] To avoid rejection of their patent application for a cervical neck brace, Greiner had "limited their claim to a collar with rigid supports only at the bight."[69] The court held that "Greiner cannot now capture exclusive rights to a collar with rigid support that extends substantially beyond the bight."[70]

C. Conflicting Policies Surrounding the Doctrine of Equivalents

The Patent Act encourages innovation by rewarding inventors with a monopoly.[71] The Patent Act grants an exclusive monopoly to the

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[64] *Id.* at 1362.

[65] *Id.*

[66] *Id.* at 1355-56. Despite the limiting effect of prosecution history estoppel, Hughes ultimately recovered under the doctrine of equivalents. The court determined that the defendant's satellite was much closer to Hughes' satellite then it was to the McLean prior art. The defendant's "store and execute" (S/E) satellites used an on-board computer to calculate and store the spacecraft's instantaneous spin angle (ISA) and to store control signals received from ground stations for later execution. *Id.* at 1360-61. Hughes' satellite transmitted sun sensor data to a ground station, where ISA calculations were performed, and immediately executed control signals received from earth. *Id.* Hughes "did *not* . . . surrender subject matter related to employment of an on-board computer to accomplish in a differently timed manner what is accomplished by his disclosed structure." *Id.* at 1362 (emphasis added).

[67] 962 F.2d 1031 (Fed. Cir. 1992).

[68] Even absent prosecution history estoppel, Greiner failed to satisfy the *Graver Tank* tripartite test. The defendant's collar "achieves a better result in a different way." *Id.* at 1036.

[69] *Id.* at 1036.

[70] *Id.*

[71] Sears, Roebuck & Co. v. Stiffel Co., 376 U.S. 225, 229 (1964) ("[Patents] are meant to encourage invention").

inventor[72] for a term of seventeen years.[73] During this time the patentee has the right to exclude others from "making, using, or selling the invention throughout the United States[.]"[74] While rewarding the inventor with a monopoly, the Patent Act also ensures that the public will benefit from the invention. To this end, the Patent Act requires that the patent specification describe the invention in "full, clear, concise, and exact terms . . . ."[75] This statutory requirement exists to ensure the public will have access to the patented material.[76] When the patent term expires, the once-patented material becomes available for public use.[77] Businesses and individuals may use the material without compensating the patentee and without the threat of an infringement suit.[78]

The public may also benefit from the patentee's disclosure during the patent term itself. Because the patent discloses the invention to the public, other inventors in the field have the opportunity to build on or design around the patentee's work. In fact, designing around an existing patent is not only allowed, but encouraged.[79] Subsequent work may itself be patentable if it satisfies the Patent Act requirements of novelty, utility and nonobviousness.[80]

To build on the patentee's work, other inventors in the field will want to know what will, and what will not, constitute infringement.[81] To avoid literal infringement, the other inventors can rely on the patent claims as the "metes and bounds of the claimed invention."[82] So long as these inventors do not infringe the literal language of the claims, they will not literally infringe the existing patent.[83]

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[72] *Id.* at 229 ("The grant of a patent is the grant of a statutory monopoly").

[73] *See* 35 U.S.C. § 154.

[74] *Id.*

[75] 35 U.S.C. § 112.

[76] *See* 35 U.S.C. § 112, which requires the patent description to "enable any person skilled in the art to which it pertains, or with which it is most nearly connected, to make and use the same." *Id.*

[77] Scott Paper Co. v. Marcalus Mfg. Co., 326 U.S. 249, 255 (1945).

[78] *Id.* at 256.

[79] *See* London v. Carson Pirie Scott & Co., 946 F.2d 1534, 1538 (Fed. Cir. 1991) ("[D]esigning around or inventing around patents to make new inventions is encouraged").

[80] *See* 35 U.S.C. § 101-103.

[81] *See London*, 946 F.2d at 1538 ("Notice permits other parties to avoid actions which infringe the patent and to design around the patent") (citing State Indus. v. A.O. Smith Corp., 751 F.2d 1226, 1236 (Fed. Cir. 1985)).

[82] *Id.* at 1538.

[83] *See supra* notes 28-33 and accompanying text.

The doctrine of equivalents, however, allows a patentee to recover for infringement even absent literal infringement.[84] If other inventors believe the patentee may be able to invoke the doctrine of equivalents, an element of uncertainty gets introduced into anticipating what constitutes infringement.[85] In fact, inventors working in a field occupied by an existing patent may not know whether their actions are infringing until the court analyzes them under the doctrine of equivalents.[86] The policy of allowing patentees to recover for infringement under the doctrine of equivalents is in direct conflict with the policy of requiring explicit claims to allow other inventors to design around the existing patent.

The courts traditionally have accepted this policy conflict because the doctrine of equivalents serves a noble purpose — to prevent fraud on a patent.[87] The district courts, however, have more and more frequently allowed the patentee to invoke the doctrine, even in cases absent any indication of patent "fraud" or "piracy". At times, the doctrine of equivalents becomes the second prong of an infringement case after literal infringement.[88] Allowing patentees such regular use of the doctrine means other inventors can no longer rely on the claims as a firm guidepost of what constitutes the patented material.[89] In an

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[84] *See supra* notes 34-35 and accompanying text.

[85] *See* Pennwalt Corp. v.Durand-Wayland, Inc., 833 F.2d 931, 974 (Fed. Cir. 1987) (Newman, J., commentary) ("[U]ncertainty [is] inherent in the doctrine of equivalents"), *cert. denied*, 485 U.S. 961 (1988) *and cert. denied*, 485 U.S. 1009 (1988).

[86] *See* Paper Converting Machine Co. v. Magna-Graphics Corp., 745 F.2d 11, 19 (Fed. Cir. 1984).

> [T]he doctrine of equivalents has been judicially created to ensure that a patentee can receive full protection for his or her patented ideas by making it difficult for a copier to maneuver around a patent's claims. In view of this doctrine, a copier rarely knows whether his product "infringes" a patent or not until a district court passes on the issue.

Id.

[87] *See Graver Tank*, 339 U.S. 605, 608 (1950) ("The essence of the doctrine is that one may not practice a fraud on a patent"). *See also* Wilson Sporting Goods Co. v. David Geoffrey & Assoc., 904 F.2d 677, 684 (Fed. Cir. 1990), *cert. denied*, 498 U.S. 992 (1990); Perkin-Elmer Corp. v. Westinghouse Elec. Corp., 822 F.2d 1528, 1542 (Fed. Cir 1987) (Newman, J., dissenting); Hughes Aircraft Co. v. United States, 717 F.2d 1351, 1361 (Fed. Cir. 1983).

[88] *See* Atlanta Motoring Accessories, Inc. v. Saratoga Technologies, Inc., 33 F.3d 1362, 1366 (Fed. Cir. 1994) ("If literal infringement is not established, the second step is to apply the doctrine of equivalence [sic] to the accused device"); ZMI Corp. v. Cardiac Resuscitator Corp., 844 F.2d 1576, 1581 (Fed. Cir. 1988) ("When literal infringement is not found, the equitable doctrine of equivalents comes into play").

[89] *See* International Visual Corp. v. Crown Mfg. Co., Inc., 991 F.2d 768, 774

attempt to instill greater reliability in the patent claims, the "Federal Circuit has increasingly interpreted and applied the doctrine more restrictively."[90]

In *London v. Carson Pirie Scott & Co*,[91] the U.S. Court of Appeals for the Federal Circuit identified the concern over liberal application of the doctrine of equivalents. There London brought suit alleging that Carson Pirie Scott and Samsonite infringed its patent for a clamp used to secure hangers in travel garment bags.[92] After the court granted Samsonite's motion for summary judgment, London appealed the portion of the judgment relating to infringement under the doctrine of equivalents.[93] The court affirmed the district court's finding that London's clamps and the defendants' clamps did not perform in substantially the same way.[94] The court emphasized the policies underlying the doctrine of equivalents,[95] but indicated that the doctrine should not be used automatically in every patent infringement case.[96]

(Fed. Cir. 1993) ("[T]he claims may no longer adequately inform the public of the scope of protection, and uncertainty and unjustified litigation can result"); London v. Carson Pirie Scott & Co., 946 F.2d 1534, 1538 (1991).

> [I]f the public comes to believe (or fear) that the language of patent claims can never be relied on, and that the doctrine of equivalents is simply the second prong of every infringement charge, regularly available to extend protection beyond the scope of the claims, then claims will cease to serve their intended purpose. Competitors will never know whether their actions infringe a granted patent.

Id.

[90] Fairfax Dental (Ireland) Ltd., v. Sterling Optical Corp., 808 F. Supp. 326, 335 (S.D.N.Y. 1992).

[91] 946 F.2d 1534 (Fed. Cir. 1991).

[92] *Id.* at 1535.

[93] *Id.* at 1537.

[94] *Id.* at 1539 ("[B]ecause the Samsonite trolley [clamp] does not grasp the hanger shanks [as the London clamp did], but grasps the hooks, it does not work in substantially the same way as the claimed device").

[95] *Id.* at 1538.

> Although designing or inventing around patents to make new inventions is encouraged, piracy is not. Thus, where an infringer, instead of inventing around a patent by making a substantial change, merely makes an insubstantial change, essentially misappropriating or even "stealing" the patented invention, infringement may lie under the doctrine of equivalents.

Id.

[96] *Id.* at 1538 ("Application of the doctrine of equivalents is the exception, however, not the rule").

The court in *Charles Greiner & Co., Inc. v. Mari-Med Mfg., Inc.*,[97] also addressed the policy conflicts, stating that "a court must, in applying the doctrine [of equivalents], avoid significant conflict with the fundamental principle that claims define the limits of patent protection."[98] In particular, "careful confinement of the doctrine of equivalents to its proper equitable role[] promotes certainty and clarity in determining the scope of patent rights."[99]

Restricting widespread use of the doctrine of equivalents could also help discourage careless claim drafting.[100] Arguably, patentees may be less careful in drafting claims if the doctrine of equivalents is readily available to redraft the claim during an infringement suit. This carelessness conflicts with the statutory requirement of explicit claims[101] and the policy that claims provide notice to others regarding the patent's limits. Allowing a patentee to invoke the doctrine of equivalents in equitable situations is markedly different than permitting use of the doctrine to redraft a carelessly drafted claim.[102]

The court in *Talk To Me Prods., Inc. v. Lanard Toys, Inc.*,[103] stated that the "[a]pplication of the doctrine [of equivalents] is limited to exceptional situations in order to discourage careless claim drafting."[104] Here, the court did not allow the plaintiff to recover under the doctrine of equivalents for alleged infringement of its patented toy water gun. The plaintiff argued that its invention used an axial alignment of the water tank, pump, and nozzle to avoid "sputtering" when firing the

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[97] 962 F.2d 1031 (Fed. Cir. 1992). There, the U.S. Court of Appeals for the Federal Circuit affirmed a judgment that the defendant's cervical neck brace did not infringe the patent of Charles Greiner & Co.'s Philadelphia Cervical Collar. Greiner had failed the *Graver Tank* test and was precluded from recovery by prosecution history estoppel. *Id.* at 1036.

[98] 962 F.2d at 1036. *See also* Continental Paper Bag Co. v. Eastern Paper Bag Co., 210 U.S. 405, 419 (1908) ("[T]he claims measure the invention").

The court in *Charles Greiner* also reiterated the holding in *London*, that the application of the doctrine of equivalents should not be the second prong of every infringement case. *Charles Greiner & Co.*, 962 F.2d at 1036.

[99] *Id.* at 1036.

[100] *See* Talk To Me Prods., Inc. v. Lanard Toys, Inc., 811 F. Supp. 93, 96 (E.D.N.Y. 1992).

[101] *See* 35 U.S.C. § 112.

[102] Perkin-Elmer Corp. v. Westinghouse Elec. Corp., 822 F.2d 1528, 1532 (Fed. Cir. 1987) ("[T]he doctrine of equivalents . . . is not designed to permit wholesale redrafting of a claim to cover non-equivalent devices").

[103] 811 F. Supp. 93 (E.D.N.Y. 1992).

[104] *Id.* at 95.

gun.[105] Claims thirteen and fourteen of the plaintiff's patent, however, indicated that the axial placement existed "to impart a glow to the water ejected . . . [to] simulate a lazer beam [sic][.]"[106] Additionally, the claim in question did not address the placement of the water exit nozzle nor did the patent mention sputtering. The court noted that the plaintiff was careless in its drafting, and should not be able to invoke the doctrine of equivalents.[107] The doctrine of equivalents does not allow the "wholesale redrafting of a claim to cover non-equivalent devices[.]"[108]

D. Potential Problems Applying Graver Tank

At times the *Graver Tank* triple identity test has been difficult to apply when assessing how a patented item works.[109] The concurring opinion in *Genentech, Inc. v. Wellcome Found. Ltd.*,[110] illustrates one possible difficulty. There the U.S. Court of Appeals for the Federal Circuit reversed the Delaware District Court's finding that the defendant had infringed Genentech's patent for a tissue plasminogen activator (t-PA)[111] under the doctrine of equivalents.[112] The court held that

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[105] *Id.* at 96.

[106] *Id.*

[107] *Id.*

[108] 811 F. Supp. at 96 (citing Perkin-Elmer Corp. v. Westinghouse Elec. Corp., 822 F.2d 1528, 1532 (Fed. Cir. 1987)).

[109] *See* International Visual Corp. v. Crown Metal Mfg. Co., Inc., 991 F.2d 768, 775 (Fed. Cir. 1993) (Lourie, J., concurring).

> The tripartite tests often examine only what a device does, rather than what it is. Claims to machines . . . generally define inventions by what they are, i.e., structurally. Thus, products may meet the tripartite tests in terms of what they do but be significantly different in terms of what they are. Processes are defined by their steps, so they may also be different in terms of what they are, even if they are the same in what they do.

Id.

[110] 29 F.3d 1555 (Fed. Cir. 1994).

[111] The court described a t-PA and explains its role in clot dissolution:

> The protein tissue plasminogen activator (t-PA) plays an important role in the dissolution of fibrin clots in the human body. The body forms such clots typically to breach a rupture in a blood vessel. When they are no longer needed, they are dissolved through the action of plasmin, an enzyme which bonds to the fibrin and severs the bonds between the fibrin molecules. Since plasmin circulates through the blood in an inactive form called plasminogen, a mechanism must be provided to activate the plasminogen and convert it to plasmin when a clot

the defendant's protein (FE1X) did not infringe plaintiff's '603 patent since it was "outside the permissible range of equivalents through the application of prosecution history estoppel."[113] In finding that FE1X did not infringe the plaintiff's '075 and '330 patents, the court felt the trial court used an overly broad definition of "function" in its analysis of FE1X under the triple identity test.[114] Using a narrower definition of function,[115] the court found that FE1X did not function in substantially the same way[116] nor achieve substantially the same results as the plaintiff's t-PA.[117]

The concurring opinion commented on the difficulty courts may have in applying the *Graver Tank* tripartite test. In particular, the concurring opinion noted the complexity of defining the function, way and result of a patented chemical.[118] The result in this case turned on

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is targeted for dissolution by the body. The protein t-PA serves as that mechanism.

Id. at 1557.

[112] The question of literal infringement had been decided in favor of the defendant on summary judgment. *Id.* at 1559.

[113] The evidence indicated the defendant's product (FE1X) had a specific activity of 253,800 IU/mg., plus or minus 18 percent (208,116 to 299,484). This activity range is much closer to that of the prior art (266,000) than to the plaintiff's value of "about 500,000" (for patent '603). *Id.* at 1566-67. During the patent application process, the plaintiff had defined its specific activity range as something "significantly above" that of the prior art. *Id.* at 1560. As such, the plaintiff was estopped from later claiming a range of equivalents that was specifically given up during the application process.

[114] *Id.* at 1567.

The issue of whether the "way" or "result" prongs are met is highly dependent upon how broadly one defines the "function" of human t-PA. If, as the trial court thought, a broad definition is appropriate — stimulating "the dissolution of fibrin clots through the cleavage of plasminogen to plasmin" — then it is difficult to imagine how FE1X, or any version of t-PA for that matter, would avoid infringement under the doctrine of equivalents because t-PA, or any operative variant, would by definition necessarily perform this function in the same general way with the same general results.

Id.

[115] Function was redefined as "catalyzing the conversion of plasminogen to plasmin, *and binding to fibrin.*" *Id.* at 1567 (emphasis added).

[116] The affinity for FE1X to bind to fibrin is less than half of that of plaintiff's patented human t-PA. *Id.* at 1568.

[117] FE1X has a half life approximately ten times longer than plaintiff's product and FE1X is less likely to bind to cells lining the patient's blood vessels. *Id.* at 1568.

[118] *Id.* at 1570.

Is the increased half-life part of the "way" analysis or is it a different "result"?

how the court defined the function of the defendant's chemical, and reaching such a definition proved difficult. The concurring opinion recommended looking to additional factors in the doctrine of equivalents analysis.[119]

IV. Going Beyond *Graver Tank*

Several recent Federal Circuit and district court decisions have noted that the doctrine of equivalents should not be the automatic second test in every infringement action.[120]

To some extent, these cases indicate a trend toward either requiring more than the *Graver Tank* triple identity test to prove infringement under the doctrine of equivalents, or limiting the availability of the doctrine altogether.

For example, the concurring opinion in *International Visual Corp. v. Crown Metal Mfg. Co., Inc.*,[121] suggested going beyond the *Graver Tank* triple identity test. In *International Visual*, the U.S. Court of Appeals for the Federal Circuit reversed a summary judgment ruling for the

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> Is the binding to fibrin "function," as stated by the majority, or is it part of the "way" t-PA dissolves clots? These questions illustrate the shortcomings of the function, way, result tests which relate to "how" a substance works, i.e., what it does, rather than what it is, which claims purport to define.

Id.

[119] Judge Lourie presented the defendant's $20 million, 130 man-years FE1X development program as evidence the defendant did not copy plaintiff's product. *Id.* at 1570. The majority included these statistics in a footnote, but avoided addressing anything beyond the *Graver Tank* tripartite test. *Id.* at 1569.

[120] *See, e.g.*, Charles Greiner & Co., Inc. v. Mari-Med Mfg., Inc., 962 F.2d 1031, 1036 (Fed. Cir. 1992); London v. Carson Pirie Scott & Co., 946 F.2d 1534, 1538 (Fed. Cir. 1991); American Home Prods. Corp. v. Johnson & Johnson, 1992 WL 280382 (Fed. Cir. 1992) (unpublished disposition) ("[T]he doctrine of equivalents is not an automatic second prong to every infringement charge. It is an equitable remedy available only upon a suitable showing"); Larmi Corp. v. Amron, 27 U.S.P.Q.2d 1280, 1284 (E.D.Pa. 1993) ("The doctrine is reserved for the exceptional case"); Buehler v. Ocrim S.p.A., 836 F. Supp. 1305, 1322 (N.D. Texas 1993), *aff'd*, 34 F.3d 1080 (Fed. Cir. 1994) ("Infringement by equivalents is the exception and not the rule") (citing Charles Greiner & Co., Inc. v. Mari-Med Mfg., Inc., 962 F.2d at 1036); Fairfax Dental (Ireland) Ltd., v. Sterling Optical Corp., 808 F. Supp. 326, 335 (S.D.N.Y. 1992), *aff'd*, 11 F.3d 1074 (Fed. Cir. 1993) ("[T]he Federal Circuit has increasingly interpreted and applied the doctrine [of equivalents] more restrictively"); Insituform of North America, Inc. v. Midwest Pipeliners, Inc., 780 F. Supp. 479, 484 (S.D. Ohio 1991).

[121] 991 F.2d 768 (Fed. Cir. 1993).

defendant and remanded for the district court to reconsider both literal infringement and infringement under the doctrine of equivalents of a "Magnetically Secured Display Apparatus."[122] The district court had made an erroneous claim interpretation which adversely affected the court's infringement analysis.[123] In his concurring opinion, Judge Lourie suggested that:

> [b]ecause the doctrine of equivalents runs counter to the role of claims as the sole measure of the invention, the claims may no longer adequately inform the public of the scope of protection, and uncertainty and unjustified litigation can result. *The solution may be to go beyond the tripartite tests.*[124]

In providing the district court further guidance, the concurring opinion suggested that going beyond the tripartite tests would involve examining several factors.

First, the concurrence suggested the court could look for indications of both copying and independent research. In fact, unless the alleged infringer provides evidence of independent research, the "trial court could properly infer that the accused [product] is the result of imitation rather than experimentation or invention."[125] Second, the court could analyze the "degree of similarity of an accused invention to what is literally claimed."[126] Other equitable considerations may also be included on a case by case basis.[127]

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[122] *Id.* at 770.

[123] *Id.* at 772. The district court interpreted claim one of the patent to require that the sign housing be "separate and apart" from the permanent magnet components. *Id.* at 771. Claim one did not contain this limitation. The district court also interpreted claim ten to require a housing when the claim did not so require. *Id.* Thirdly, the district court erroneously concluded that the claims required a plastic housing. *Id.* The patent specification mentions the plastic housing as a preferred embodiment of the invention and the plaintiff's housing was made of plastic, but the patent claims did not require a plastic housing. *Id.* at 771-72.

[124] *Id.* at 774 (emphasis added).

[125] *Id.* at 774 (citing Graver Tank & Mfg. Co. v. Linde Air Products Co., 339 U.S. 605, 612 (1950)).

[126] "[T]he closer the similarity, or the more 'insubstantial' the change from what is literally claimed, the greater the argument for equivalence, independent of the tripartite test." 991 F.2d at 775.

[127] For example, a pioneering invention "may be a factor favoring the application of the doctrine." *Id.* at 775. In addition, equitable considerations may deny use of the doctrine should a patentee "present a broad disclosure in the specification of his or her patent, file narrow claims, [and] seek to extend protection by the doctrine of equivalents to the disclosed, but unexamined, subject matter." *Id.*

The concurring opinion in *Genentech, Inc. v. Wellcome Found. Ltd.*[128] also recommended looking at additional factors during the infringement analysis. In particular, the degree of similarity between the compounds and any evidence of independent research would prove insightful.[129] In *Genentech*, the defendant had spent significant amounts of time and money developing its product. These expenditures were indicia the defendant did not copy the plaintiff's patented product.[130]

The court in *Lockwood v. American Airlines, Inc.*[131] cited the *International Visual* concurring opinion in discussing the doctrine of equivalents.[132] In *Lockwood*, the court denied Lockwood's motion for reconsideration of its earlier decision[133] granting defendant's motion for summary judgment. The court relied on prosecution history estoppel to prevent Lockwood from using the doctrine of equivalents.[134] However, the court commented that even if the plaintiff was not estopped by prosecution history, factors beyond the tripartite test should be considered and those factors do not support use of the doctrine of equivalents.[135] In particular:

> [i]f there is no prosecution history estoppel, if application of the doctrine would not encompass prior art, and if the tripartite tests are met, I

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[128] 29 F.3d 1555 (Fed. Cir. 1994).

[129] "The substantiality of the difference between the accused and claimed compounds, the fact of independent development, and the lack of copying, all lead to a conclusion of lack of infringement." *Id.* at 1550.

[130] *Id.* at 1570 (Lourie, J. concurring).

[131] 847 F. Supp. 777 (S.D. Cal. 1994).

[132] *Id.* at 779-80.

[133] Lockwood v. American Airlines, Inc., 834 F. Supp. 1246 (S.D. Cal. 1993).

[134] *Lockwood*, 847 F. Supp. 777, 780 (S.D. Cal. 1994) ("Because prosecution history estoppel will prevent the application of the doctrine of equivalents, and this court finds no convincing new reason that the court's July 30, 1993 finding of prosecution history estoppel was in error, plaintiff should not now be able to enjoy the benefits of an application of the doctrine of equivalents").

[135] *Id.* at 779-80. Lockwood had argued that several equitable reasons supported the use of the doctrine of equivalents. Lockwood used the spectrum analysis from *International Visual* to argue that the defendant's "SABREvision" reservation system and his interactive system were similar enough to evoke the doctrine of equivalents. *Id.* at 779. Lockwood also argued that his system was a pioneering invention which favored applying the doctrine. *Id.*

The court deferred to its earlier ruling that in this situation the equitable factors did not favor evoking the doctrine. This was particularly true "when balanced against the policy concerns of making the stated claims of patents something the public can rely upon as the bounds of the patented invention." *Id.* at 780.

> believe that a court should make a separate equitable determination . . . in order to find infringement under the doctrine of equivalents.[136]

While not dispositive here,[137] this dicta indicates the court's desire to go beyond the tripartite test when applying the doctrine of equivalents.

Whether these recent cases become the majority opinion should be decided in *Hilton Davis Chemical Co. v. Warner-Jenkinson Co., Inc.*[138] In a Federal Circuit *en banc* decision,[139] the court will answer several questions relating to the doctrine of equivalents. In particular, the court will address whether infringement under the doctrine of equivalents requires proof of more than the *Graver Tank* triple identity test, whether the infringement analysis is to be performed by the trier of fact, and whether use of the doctrine is at the court's discretion.[140]

A decision by the Federal Circuit to limit the use of the doctrine of equivalents would not be a complete rebuke of precedent. In fact, the Supreme Court in *Graver Tank* alluded to using proof of independent research to avoid a finding of infringement under the doctrine of equivalents.[141] The Court in *Graver Tank* also stated that "[e]quivalence, in the patent law, is not an absolute to be considered in a vacuum."[142] Judge Lourie's concurring opinion in *International Visual* noted that "nothing in Graver Tank states that mere satisfaction of the tripartite tests itself establishes infringement by equivalence."[143] In *Transco Prods. Inc., v. Performance Contracting, Inc.*,[144] the court remarked that the doctrine of equivalents infringement analysis varies from case to case and that a test other than the triple identity test may be appropriate.[145]

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[136] 847 F.Supp at 780, citing International Visual Corp. v. Crown Mfg. Co., Inc., 991 F.2d 768, 775 (Fed. Cir. 1993).

[137] Prosecution history estoppel foreclosed the plaintiff's attempt at invoking the doctrine of equivalents.

[138] 1993 WL 761179 (Fed. Cir. Dec. 3, 1993).

[139] Ordered *en banc* December 3, 1993 and argued *en banc* March 3, 1994.

[140] *See* 1993 WL 761179 (Fed. Cir. Dec. 3, 1993).

[141] "Without some explanation or indication that [the defendant's electric welding flux] was developed by independent research, the trial court could properly infer that the accused flux is the result of imitation rather than experimentation or invention." Graver Tank & Mfg. Co. v. Linde Air Products Co., 339 U.S. 605, 612 (1950).

[142] *Id.* at 609. The court also noted that "[w]hat constitutes equivalency must be determined against the context of the patent, the prior art, and the particular circumstances of the case." *Id.*

[143] 991 F.2d 768, 774 (Fed. Cir. 1993).

[144] 792 F. Supp. 594 (N.D. Ill. 1992).

[145] *Id.* at 600 (citing Malta v. Schulmerich Carillons, Inc., 952 F.2d 1320, 1326

Finally, *London v. Carson Pirie Scott & Co.*,[146] and numerous subsequent cases have noted that use of the doctrine of equivalents "is the exception and not the rule."[147] If so, then some reliable means should exist to predict in what situations the doctrine will apply.

V. Possible Approaches

The Federal Circuit in *Hilton Davis Chemical* could choose several ways to limit use of the doctrine of equivalents. First, the court may conclude that application of the doctrine of equivalents is entirely within the court's discretion and should not be the automatic second test for every infringement action.[148] This discretionary approach could require the patentee to make a preliminary showing that the defendant has copied the patentee's invention before the patentee could invoke the doctrine. Once this threshold test has been met, the trier of fact could analyze infringement using the triple identity test from *Graver Tank*,[149] or by using the triple identity test in conjunction with additional factors that favor application of the doctrine of equivalents. Second, the court may allow the doctrine of equivalents to be invoked by all patentees, but require the patentee satisfy more than the *Graver Tank* triple identity test to prove infringement. This test could require the patentee to prove additional factors that favor application of the doctrine of equivalents.

A. Threshold Test Approach

One possible alternative would require the patentee to make a preliminary showing that the defendant copied the patentee's patent

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(Fed. Cir. 1991), *cert. denied*, 112 S. Ct. 2942 (1992)).

> [W]hile comparison of function/way/result is an acceptable way of showing that structure in an accused device is the "substantial equivalent" of a claim limitation, it is not the only way to do so. . . . How equivalency to a required limitation is met necessarily varies from case to case due to many variables such as the form of the claim, the nature of the invention defined by it, the kind of limitation that is not literally met, etc.

Id. "Hence it seems that equivalency may be shown by a method of analysis other than the function/way/result approach." *Transco Prods.*, 792 F. Supp. at 600.

[146] 946 F.2d 1534 (Fed. Cir. 1991).

[147] *Id.* at 1538. *See supra* note 120.

[148] The test for literal infringement of the patent claims constitutes the first test.

[149] As discussed previously, this test involves proving infringement based on the similarity in function, way, and result of the alleged infringing device and the patent claims.

before the patentee could invoke the doctrine of equivalents. This approach emphasizes proving the defendant copied the patent. Such emphasis is consistent with the policies discussed in *Graver Tank*: that the "essence of the doctrine is that one may not practice a fraud on a patent."[150]

In practice, the patentee would provide evidence on the degree of similarity between an accused invention and the patent claims, and any substantial evidence of copying such as the defendant's lack of independent research. This test could be similar to copyright infringement tests which emphasize the substantial similarity between the two writings and a showing that the infringer had access to the copyrighted piece.[151] As in *Maxwell v. K Mart Corp.*,[152] evidence that the defendant failed to acquire a license to use the patent and subsequently developed an alternative device will require close scrutiny. Such actions should cut toward patent infringement if the defendant's product is substantially similar to the patentee's patent claims.

If the patentee makes a preliminary showing that the defendant may have copied the patent, and the defendant cannot produce evidence of independent experimentation or development, then the court would allow the patentee to invoke the doctrine of equivalents. Care must be taken, however, since patent policies encourage designing around patents, provided the invention is not copied.[153]

The policy underlying the doctrine of equivalents is to protect against fraud or the unscrupulous copyist.[154] Nevertheless, the doctrine's use must be balanced against the "need for reasonable certainty by the public as to the scope of the patent grant."[155] To this end, the court

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[150] Graver Tank & Mfg. Co. v. Linde Air Products Co., 339 U.S. 605, 608 (1950).

[151] *See, e.g.*, Waldman Publishing Corp. v. Landoll, Inc., 33 U.S.P.Q.2d 1266 (2d Cir. 1994) ("[C]opying is generally established by showing (a) that the defendant had access to the copyrighted work and (b) the substantial similarity of protectible material in the two works") (citing Kregos v. Associated Press, 3 F.3d 656, 662 (2d Cir. 1993), *cert. denied*, 114 S.Ct. 1056 (1994)); *See also* Reyher v. Children's Television Workshop, 533 F.2d 87, 90 (2d Cir. 1976), *cert. denied*, 429 U.S. 980 (1976) (citing Arnstein v. Porter, 154 F.2d 464 (2d Cir. 1946)).

[152] 844 F. Supp. 1360 (D. Minn. 1994).

[153] *See* London v. Carson Pirie Scott & Co., 946 F.2d 1534, 1538 (Fed. Cir. 1991) ("Although designing or inventing around patents to make new inventions is encouraged, piracy is not").

[154] *See Graver Tank*, 339 U.S. at 607-08.

[155] Maxwell v. K Mart Corp., 844 F. Supp. 1360, 1369 (D. Minn. 1994) (citing *Graver Tank*, 339 U.S. at 607-08).

could make a preliminary determination as to the applicability of the doctrine to the particular circumstances at hand, and balance these competing policies. Instead of allowing each and every patentee to use the doctrine, the court would require the patentee to make a preliminary showing that the defendant copied the patent. If it appeared the defendant made insubstantial changes to avoid the literal language of the patentee's claims, the patentee would then invoke the doctrine of equivalents. The court should deny use of the doctrine if the patentee failed to provide some indication the defendant copied the patent. Likewise, if the defendant had sufficient evidence it independently developed its product, the doctrine would not be available to the patentee. This threshold test would ensure that the doctrine is used to protect against patent fraud without causing undue uncertainty in the marketplace. Every patentee would not be able to invoke the doctrine.

B. Additional Factors Approach

Another possible alternative would allow all patentees to invoke the doctrine of equivalents, but restrict its use by requiring that something more than the *Graver Tank* triple identity test be met. Should the court in *Hilton Davis Chemical* adopt this approach, they will likely look to Judge Lourie's concurring opinion in *International Visual* to determine what other factors should be considered.[156]

In particular, the court would look to evidence the defendants copied, as opposed to independently developed their products. Such evidence would be similar to that used in the threshold test approach noted above. In addition to evidence of copying, the court would consider other factors. The court could perform a spectrum analysis as mentioned in *Lockwood v. American Airlines, Inc.*[157] The "closer a device comes to copying the patented device, the stronger the argument for applying the doctrine of equivalents."[158] The fact the patented device is a "pioneering invention" could also cut toward applying the doctrine of equivalents.

The court could look at whether the patentee is attempting to extend coverage to matter disclosed in the patent specification, but not included in the patent claims. This approach, mentioned in *International Visual*

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[156] *See supra* notes 125-127 and accompanying text.

[157] 847 F. Supp. 777 (S.D. Cal. 1994).

[158] *Id.* at 779.

Corp. v. Crown Mfg. Co., Inc.,[159] addresses not the "scrupulous copyist,"[160] but the "scrupulous patentee." The patentee has two years to "enlarg[e] the scope of the claims of the original patent"[161] by seeking a reissued patent. Material disclosed in the specification and absent from the claims, while known to the patentee, may have been placed in the specification to avoid scrutiny by the patent examiner. The court may want to deny use of the doctrine of equivalents when the patentee attempts to expand the breadth of his patent monopoly to cover material "hidden" in the patent specification.

The above mentioned extra factors could be used in conjunction with the triple identity test from *Graver Tank*. The court would first require the patentee prove a substantial similarity of function, way, and result between the patent claims and the alleged infringer's device. In order for the patentee to recover for infringement, however, additional factors must also favor recovery. This approach could leave to the court's discretion the degree to which these factors must favor the doctrine's use. Arguably, this approach could result in more complex and lengthy trials. In addition, too much discretion regarding the additional factors will result in continued uncertainty as to when the doctrine will be applied. If additional factors are to be considered, emphasis should be placed on proving copying by the defendant.

The decision in *Maxwell v. K Mart Corp.*,[162] represents an appropriate use of the doctrine of equivalents. There, the court denied the defendant's motion for summary judgment because evidence existed to indicate that the defendant may have copied Maxwell's invention. The defendant had access to Maxwell's invention, had failed at negotiating a license to use it, and subsequently developed a similar item to perform the same function. Despite noting that "the doctrine of equivalents is the exception, not the rule,"[163] the court held that a "reasonable jury could conclude that the minimal changes adopted by defendants fail to avoid infringement under the doctrine of equivalents."[164]

Whether the extra factors represent a threshold test prior to invoking the doctrine, or a supplement to the *Graver Tank* triple identity test

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[159] 991 F.2d 768, 775 (Fed. Cir. 1993).
[160] *Graver Tank*, 339 U.S. at 607.
[161] 35 U.S.C. § 251.
[162] 844 F. Supp. 1360 (D. Minn. 1994).
[163] *Id.* at 1369.
[164] *Id.* at 1371.

may ultimately depend on the appropriate role of judge and jury. The judge may be in the best position to apply this equitable doctrine consistently. The court will interpret the claims of the patent[165] and will resolve issues regarding prosecution history estoppel as a matter of law.[166] At this juncture, the court should apply the threshold test to determine if the circumstances indicate the defendant has copied the patent. A judicial threshold test for all patentees claiming infringement under the doctrine of equivalents would make the patent claims a more reliable indication of the patent limits. A defendant with evidence of independent development or experimentation could be assured that the court would deny use of the doctrine. Such an approach would increase reliance on the claims of the patent as the "metes and bounds" of the invention.

VI. Conclusion

The doctrine of equivalents has been traditionally used to prevent an "unscrupulous copyist [from] mak[ing] unimportant and insubstantial changes and substitutions in the patent which, though adding nothing, would be enough to take the copied matter outside the claim, and hence outside the reach of law."[167] The doctrine's use, however, is balanced against the policy that the claims define the limits of the patent to allow the public to know what material the patent protects. Because virtually every patentee has been able to invoke the doctrine of equivalents in an attempt to prove infringement, several recent cases have proposed a more restrictive use of the doctrine. A preferred approach would require the patentee to make a preliminary showing that the defendant has indeed copied, as opposed to separately invented the alleged infringing device. Once the court believed the defendant may have copied the invention, the patentee could invoke the doctrine. This approach should return the doctrine of equivalents to its initial role of protecting against fraud, while also allowing the public to rely on the claims as the limits of the patent. An alternative approach

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[165] *See* Genentech, Inc. v. Wellcome Found. Ltd., 29 F.3d 1555, 1560 (Fed. Cir. 1994).

[166] *See* Hoganas AB v. Dresser Indus., Inc., 9 F.3d 948, 952 (Fed. Cir. 1993) ("Because prosecution history estoppel is a question of law, [the court is] free to undertake a complete and independent analysis of the issue") (citing Loctite Corp. v. Ultraseal Ltd., 781 F.2d 861, 870 (Fed. Cir. 1985).

[167] *Graver Tank*, 339 U.S. at 607.

would allow the patentee to invoke the doctrine, but would require the presence of additional equitable factors in conjunction with the *Graver Tank* triple identity test before a finding of infringement. An additional factors approach should emphasize proving the defendant copied the patent to avoid continued uncertainty in the doctrine's use.

Roger Barrett

Non-Profit Peddling in Waikiki: To Permit or Not to Permit?

We have regularly rejected the assertion that people who wish to propagandize protests or views have a constitutional right to do so whenever and however and wherever they please.[1]

I. Introduction: Non-Profit Peddling in Waikiki

The Hawaiian Islands are extraordinarily isolated; located some twenty-five hundred miles from any continent, they are a true escape for the many who journey here each year.[2] Surprisingly, this isolation is an attribute rather than a detriment to Hawaii's economy. Because the island chain is approximately equidistant[3] from both the eastern and western shores of the Pacific, the islands are a prime destination for travelers from both Asia and America.[4] Additionally, Hawaii is a popular destination because its culture is rich, the scenery is unmatched, and the winds blow warm twelve months of the year. As a consequence, tourism has evolved as Hawaii's primary industry and Waikiki, the Islands' foremost mecca of tourism, generates more economic activity than any other single enterprise in the State.[5]

Beginning in 1976, in an effort to preserve and promote tourism in Waikiki, the City and County of Honolulu (hereinafter referred to as the "City") passed an ordinance designating Waikiki as a "Special District."[6] The ordinance includes provisions designed to combat over-

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[1] Grace v. United States, 461 U.S. 171, 177-178 (1983) (quoting Adderly v. Florida, 385 U.S. 39, 47-48 (1966)).

[2] Rand McNally, World Atlas (Special Edition, 1993).

[3] *Id.*

[4] Telephone interview with Robin Gongob, Project Coordinator, Research Library of the Hawaii Visitor's Bureau, in Honolulu, HI. (Oct. 21, 1994).

[5] *Id.*

[6] City and County of Honolulu, Haw., [Proposed] Bill No. 32 §1, Findings at 2 (1994).

crowding and to allow Waikiki to retain some of its earlier grandeur and spaciousness.[7] For example, it imposes restrictions on the heights and setbacks of buildings and requires landscaped open space.[8] Recently, the City spent more than twelve million dollars to renovate, widen and beautify Kalakaua Avenue, one of two main thoroughfares running through Waikiki.[9]

This special planning has been successful in creating a Waikiki designed for the pedestrian. Many sidewalks and plazas are expansive; restaurants, shops, hotels, attractions and the beach are all within walking distance of one another.[10] And, amid Waikiki's elegant shops and avenues exist several casual open markets—most tucked away between side streets or nestled in other out-of-the-way areas.[11]

Imagine, however, both the generous corridors of Kalakaua and Kuhio Avenues, as well as the narrower side streets of Waikiki, also clamoring with market-like vendors peddling discount, "message-bearing" T-shirts. Visualize sidewalk tables, one after another, piled high with T-shirts selling for as low as seven for twenty dollars.[12] Much to the consternation of Honolulu city officials and established Waikiki retailers, this is precisely the situation in Waikiki.[13] Beginning in 1992, several non-profit organizations set up tables on the busy sidewalks of Waikiki for the purpose of selling their message-bearing merchandise.[14]

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[7] *Id.* First used for growing taro, and later as a gathering place for Hawaii's Alii (royalty), Waikiki has a special history of grandeur and nobility. *Id.*

[8] *Id.*

[9] *Id.* The other main thoroughfare is Kuhio Avenue. Both streets are named after Hawaiian royalty: King David Kalakaua and Prince Jonah Kuhio.

[10] City and County of Honolulu, Haw., [Proposed] Bill No. 32 §1, Findings at 3 (1994).

[11] For example, the "International Marketplace" consists of small shops and open caravans that sell souvenirs and other trinkets.

[12] On any given day, one can purchase a T-shirt from a table-top vendor for not more than five dollars, and often the price is less.

[13] Recently, T-shirt vendors have also set up tables at Fisherman's Wharf in San Francisco. *See* Gaudiya Vaishnava Society v. City and County of San Francisco, 952 F.2d 1059 (1990), *cert. denied*, ___U.S. ___, 112 S.Ct. 1951 (1992); in the central historic district of Key West, *see* One World One Family Now v. City of Key West, 852 F. Supp. 1005 (1994); on the strip in Las Vegas, *see* One World One Family Now v. State of Nevada, ___F.Supp. ___(1994); and on the Mall in Washington DC., *see* Liz Spayd, *On DC. Streets, Vendors in Struggle*, WASHINGTON POST, Oct. 29, 1991, at A1, A6.

[14] Shannon Tangonan, *All-out Fight to Rid Streets of T-shirt Vendors*, HONOLULU ADVERTISER, Jan. 6, 1994 , at A3.

Although some may consider the presence of the vendors a festive and casual addition that tempers the effect of the many exclusive shops lining streets such as Kalakaua Avenue, others find the vendors to be an unwelcome juxtaposition that detracts from the District's carefully engineered sophistication.[15] Whatever your view may be, one thing is certain. The situation has outraged Waikiki retailers and city officials.[16]

This is partially because the non-profit vendors are exempt from paying taxes, whereas Waikiki merchants pay millions in taxes each year.[17] City officials and Waikiki proprietors are dismayed; they perceive the vendors as usurping business from legitimate tax-paying shop owners.[18] Rather than benefiting the local business economy, or adding to tax revenue for public benefit, each dollar spent on a vendor's T-shirt stops there.[19]

The City depends heavily upon tourism for its economic well-being, and the T-shirt vendors are perceived as an impediment to the Waikiki that the City wishes to create for visitors. In addition to complaints about the immediate impact on local retailers and city tax coffers, many also view the vendors' table-top business as a visual blight to Hawaii's visitors, destroying the ambiance of Waikiki's natural beauty and perhaps discouraging visitors from returning.[20]

Since their first appearance in 1992, and in spite of ongoing vigorous objection, the sidewalk vendors remain in Waikiki today. These non-profit groups have taken the position that the sale of their message-bearing merchandise on Waikiki sidewalks is an exercise of their fully protected First Amendment right to free speech.[21] Indeed, First Amendment protections have a special place in our nation's history and have been characterized as "the matrix, the indispensable condition of nearly every other form of freedom."[22] But, many wonder whether T-shirt

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[15] *Id.*

[16] Shannon Tangonan, *Tax Auditors Investigating T-shirt Vendors*, HONOLULU ADVERTISER, Jan. 6, 1994, at A3.

[17] *Id.*

[18] *Id.*

[19] *Id.*

[20] David White, *Waikiki Vendor Crackdown Starts*, HONOLULU ADVERTISER, Oct. 4, 1994, at A3.

[21] Shannon Tangonan, *All-Out Fight to Rid Streets of T-shirt Vendors*, HONOLULU ADVERTISER, Jan. 6, 1994, at A3.

[22] Palko v. Connecticut, 302 U.S. 319, 327 (1937) (holding that the first eight amendments may or may not be incorporated through the due process clause of the fourteenth amendment to the states—rather, only those rights which are fundamental to ordered liberty are incorporated, the First Amendment being the most important).

vending is a legitimate exercise of First Amendment freedoms, or simply crass commercialism hiding behind the guise of free speech.[23]

The vendors, as well as pointing to this fundamental right of expression, draw attention to the existing urban and commercial attributes of Waikiki.[24] They believe that they are entitled to use the sidewalks for commercial activities and expressive purposes and, above all, that they are acting within their constitutionally protected rights.[25] It is certainly true that Waikiki is urban in nature and that its streets are bustling with activity generated by the many businesses and attractions located throughout Waikiki. The T-shirt vendors have aligned themselves with those groups or individuals who take advantage of the concentration of people in Waikiki to distribute their messages to great numbers of people. These groups or individuals include those who use the busy sidewalks of Waikiki for distributing leaflets and handbills, and those who proselytize, chant or play music.[26] The T-shirt vendors believe that they too are legitimately exercising their expressive rights and that they have a right to reach their intended audience.[27]

In stark contrast to the vendors' belief that they are entitled to conduct their activity on any street they wish, subject only to reasonable regulation, the City believes that it may restrict sidewalk vending activity from Waikiki altogether.[28] After two years of fruitless negotiation, followed by litigation, the matter is now pending appeal before the Ninth Circuit Court of Appeals.[29]

The controversy has invited much speculation at to what the outcome will be upon judicial review. This article is an effort to answer that question. Part II outlines the legal history pertinent to this particular case. Part III provides a brief history of the First Amendment.

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[23] David White, *Waikiki Vendor Crackdown Starts*, HONOLULU ADVERTISER, Oct. 4, 1994, at A3.

[24] Appellant's Opening Brief at 19, One World One Family Now v. City and County of Honolulu, (9th Cir. 1994) (No. 94-16373).

[25] Plaintiff's Complaint for Declaratory and Injunctive Relief, One World One Family Now v. City and County of Honolulu, (D. Haw. 1994) (No. 94-00359).

[26] Appellant's Opening Brief at 33, One World One Family Now v. City and County of Honolulu, (9th Cir. 1994) (No. 94-16373).

[27] *Id.* at 14.

[28] Defendant-Appellees' Memorandum in Opposition to Plaintiff-Appellants' Emergency Motion For Order Granting Injunction During Pendency of Appeal, One World One Family Now v. City and County of Honolulu, (9th Cir. 1994) (No. 94-16373).

[29] *Id.*

Part IV discusses and analyzes the relevant, yet somewhat inconsistent, case law to determine what the law is. It then applies the law to the situation in Waikiki in an attempt to determine whether the non-profits have a right to sell their message-bearing wares on the streets of Waikiki, or if the City may ban the activity from Waikiki altogether. Finally, this article concludes that a Waikiki-wide prohibition is valid because the Waikiki vendors are not engaged in protected First Amendment activity, and that even if they are, a Waikiki-wide prohibition of sidewalk vending is a valid time, place, or manner restriction.

II. LEGAL HISTORY

Most of the groups selling T-shirts in Waikiki are registered as religious non-profits.[30] The groups are run primarily by former devotees of the International Society for Krishna Consciousness, or, as they are more commonly known, Hare Krishnas.[31] Many of their T-shirts bear the name of the religious group and/or an environmental message in letters ranging from an inch to less than a quarter of an inch high.[32]

In 1992, these groups first set up their tables on the sidewalks of Kalakaua Avenue directly in front of various tax-paying retail shops.[33] The merchants claimed that the vendors were hurting the local economy by conducting their commercial activity "under the guise of the First Amendment."[34] After various attempts on the part of the City to negotiate with the vendors, it became apparent that the T-shirt sellers had become a quasi-permanent fixture in Waikiki and had no intention of leaving or even setting up in lower traffic areas. On May 23, 1994, the City forced the issue by choosing to take action.[35]

At that time, Revised Ordinance of Honolulu ("ROH") section 29-6 was in effect and prohibited the sale of any merchandise within the

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[30] Shannon Tangonan, *Non-Profits May Have to Pay Sales Tax*, HONOLULU ADVERTISER, Nov. 28, 1994, at A2. All but one organization meet the requirements necessary to qualify as exempt from paying taxes. *Id.*

[31] *Id.*

[32] *Merchant: Sidewalk Not a Retailing Property*, HONOLULU ADVERTISER, Jan. 27, 1994, at A2.

[33] *Id.*

[34] *Id.*

[35] Gregg K. Kakesako and Melissa Vickers, *Fasi Crews Storm Waikiki to Battle T-shirt Vendors*, HONOLULU STAR-BULLETIN, May 23, 1994, at A1.

Waikiki Special Design District.[36] However, the City Prosecutor, believing the ordinance to be unconstitutional, refused to enforce it.[37] In response to the prosecutor's failure to enforce the ordinance, the mayor had one hundred concrete planters placed on those portions of the Kalakaua sidewalk that the vendors had been using.[38] On May 24, 1994, the Honolulu Police Department ordered the plaintiffs to cease their T-shirt vending activities or be cited for violating ROH § 29-6.2(b)(7).[39]

Outraged, two of the groups, One World One Family Now, "an inclusive type of religious philosophy emphasizing the principles of spiritual ecology,"[40] and Bhaktivedanta Mission, a group who's purpose is to "unite all religion and unite all living beings with their lost connection to [G]od and to propoga[t]e [G]od consciousness everywhere,"[41] responded by filing suit only three days later.[42] The non-profits sought an order temporarily enjoining the City from enforcing the ordinance, a preliminary injunction against the enforcement of the ordinance, a declaratory judgment that the ordinance was unconstitutional, and a permanent injunction restraining the City from interfering with the plaintiffs' activities.[43]

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[36] City and County of Honolulu, Haw., Ordinance § 29-6.2(b) (1954) states:

> Notwithstanding any ordinance to the contrary, it is unlawful for any person to sell or offer for sale, rent or offer for rent, goods, wares, merchandise, foodstuffs, refreshments or other kinds of property or services in the following areas: . . . (7) Waikiki Peninsula upon the public streets, alleys, sidewalks, malls, parks, beaches and other public places in Waikiki commencing at the entrance to the Ala Wai Canal, thence along the Ala Wai Canal to Kapahulu Avenue, thence along the diamond head property line of Kapahulu Avenue to the ocean, thence along the ocean back to the entrance of the Ala Wai Canal.

Id.

[37] Plaintiff's Complaint for Declaratory and Injunctive Relief, One World One Family Now v. City and County of Honolulu, (D. Haw. 1994) (No. 94-00359).

[38] Gregg K. Kakesako and Melissa Vickers, *Fasi crews storm Waikiki to battle T-shirt vendors*, HONOLULU STAR-BULLETIN, May 23, 1994, at A1.

[39] Plaintiff-Appellants' Emergency Motion for Order Granting Injunction During Pendency Of Appeal, Memorandum of Points and Authorities at 3, One World One Family Now v. City and County of Honolulu, (9th Cir. 1994) (No. 94-16373).

[40] *Id.* at 4.

[41] *Id.* at 5.

[42] Plaintiff's Complaint for Declaratory and Injunctive Relief, One World One Family Now v. City and County of Honolulu, (D. Haw. 1994) (No. 94-00359). Plaintiff's filed their complaint on May 27, 1994. *Id.*

[43] *Id.* at 12-13.

On June 2, 1994, the Federal District Court for the District of Hawaii granted Plaintiff's Motion for a Temporary Restraining Order.[44] On July 7, 1994, the court issued a compromise ruling on the plaintiffs' other prayers for relief: The City could prohibit the vendors from selling their wares on the main thoroughfares of Kalakaua and Kuhio Avenues, but was obligated to provide alternative locations within the Waikiki Special District.[45] The City was proscribed from enforcing the ordinance's complete Waikiki-wide ban on the activity.[46] The court determined that the vendors were engaged in fully protected speech which could be subject only to regulation, not Waikiki-wide prohibition.[47] Due to the City's significant interests in pedestrian safety, maintenance of the aesthetic character of Waikiki, and protection of local merchants, the court found that prohibiting the vendors from Kalakaua and Kuhio Avenues was justified, but that the same interests did not suffice to uphold the prohibition in other areas of Waikiki.[48]

Dissatisfied with the compromise, the vendors then appealed to the Ninth Circuit from that portion of the district court's order forbidding them to conduct vending activities on Kalakaua and Kuhio Avenues.[49] The City cross-appealed from that portion of the order allowing the vendors on the side streets of Waikiki. Neither of the appeals have yet been ruled on. As such, the compromise order is in effect today.[50]

III. Historical Evolution of the First Amendment

A. First Amendment Freedoms: A Brief History

First Amendment freedoms are "delicate and vulnerable, as well as supremely precious in our society."[51] Justice Cardozo has characterized

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[44] Order Granting Plaintiff's Motion for Temporary Restraining Order, One World One Family Now v. City and County of Honolulu, (D. Haw. 1994) (No. 94-00395).

[45] Order Granting In Part Plaintiff's Motion for Preliminary Injunction and Granting Plaintiff's Motion for Temporary Restraining Order, One World One Family Now v. City and County of Honolulu, (D. Haw. 1994) (No. 94-00395).

[46] *Id.*

[47] *Id.*

[48] *Id.*

[49] Appellant's Opening Brief at 2, One World One Family Now v. City and County of Honolulu, (9th Cir. 1994) (No. 94-16373).

[50] Order Granting In Part Plaintiff's Motion for Preliminary Injunction and Granting Plaintiff's Motion for Temporary Restraining Order, One World One Family Now v. City and County of Honolulu, (D. Haw. 1994) (No. 94-00395).

[51] State v. Bloss, 64 Haw. 148, 164, 637 P.2d 1117, 1129 (1981) (holding that handbilling on the streets of Waikiki is protected First Amendment activity).

the freedom of speech as the foundation upon which all other freedoms in this nation stand.[52] This reflects the view that implicit in the Constitution is the notion that it is not the government's place to suppress ideas because the government finds the message disagreeable.[53] Rather, free speech has been recognized as a fundamental part of a free society for several reasons.

As Justice Brandeis put it in his "safety valve" theory of free speech, an orderly society cannot thrive under the fear of enforced silence as "fear breeds repression [,] . . . repression breeds hate . . . [and] hate menaces stable government."[54] Justice Holmes viewed the freedom of speech as a tool for creating a "market place of ideas" wherein the best response to an idea is another idea.[55] Others have found significance in the institution of free speech as a road to truth and self-fulfillment and also as a method of checking abuse and tyranny by government.[56]

Such freedoms, however, have not always been a part of our Nation's history. For example, prior to the enactment of the First Amendment, the publication of statements that were disfavorable to government could lead to the speaker's prosecution for "seditious libel"[57]—and truth was no defense.[58]

Even so, the Framers of the Constitution, although recognizing the importance of free speech, did not originally include a provision that would expressly protect it.[59] Because of great public pressure to have

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[52] Palko v. Connecticut, 302 U.S. 319, 327 (1937).

[53] Abrams v. U.S., 250 U.S. 616 (1919).

[54] Whitney v. California, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring).

[55] *Abrams*, 250 U.S. at 630 (Holmes, J., dissenting).

[56] JOHN E. NOWAK, RONALD D. ROTUNDA, CONSTITUTIONAL LAW § 16.7 at 940 (4th ed. 1991).

[57] Originating in England, the publication of statements that were critical or disfavorable to the monarch and his or her agents were considered seditious libel. Truth was no defense, and in fact, "the greater the truth, the greater the libel against government." PROSSER AND KEETON, HANDBOOK OF THE LAW OF TORTS 771-73 (5th ed. 1984).

[58] JOHN E. NOWAK, RONALD D. ROTUNDA, CONSTITUTIONAL LAW § 16.7 at 936 (4th ed. 1991). In 1735 a New York printer, John Peter Zenger, was tried for seditious libel for the publication of articles critical of New York's Governor Crosby. The defense argued that truth should be an acceptable defense to the crime. Although the Court rejected the argument, the jury returned a general verdict of acquittal. Even so, the threat of prosecution lingered on for many years to come. *Id.*

[59] JOHN E. NOWAK, RONALD D. ROTUNDA, CONSTITUTIONAL LAW § 16.7 at 937 (4th ed. 1991).

the document include express guarantees of individual protection, the Bill of Rights was subsequently adopted in 1791.[60] The First Amendment states that:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.[61]

Despite the seemingly absolutist posture of the First Amendment, speech is not afforded absolute protection and, in certain circumstances, even the most expressive speech in the most public forum may be regulated by the government.[62] The United States Supreme Court has made this very clear: "We have regularly rejected the assertion that people who wish to propagandize protests or views have a constitutional right to do so whenever and however and wherever they please."[63]

IV. Discussion and Analysis

A. The Waikiki Vendors are Engaged in Unprotected Conduct

1. Categories of Speech and Fora

When balancing the government's interest in regulating the use of property—perhaps for safety or aesthetic reasons[64]—against the interests of those who wish to use the property for speech related activity, courts must identify what type of forum the property is because the proper First Amendment analysis may differ depending upon the classification.[65] Traditionally, speech has been given the greatest protection in a public forum, lesser protection in a limited public forum and the least protection in a non-public forum.[66] It is well settled that streets,

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[60] *Id.*

[61] U.S. Const. amend. I.

[62] *Bloss*, 64 Haw. at 157, 637 P.2d at 1125.

[63] Grace v. United States, 461 U.S. 171 (1983) (holding that a statute completely prohibiting the display of items such as flags and banners on the public sidewalks could not be justified as a reasonable place restriction on the exercise of free speech and was therefore unconstitutional).

[64] *Bloss*, 64 Haw. at 156, 637 P.2d at 1124.

[65] Board of Airport Commissioners v. Jews for Jesus, 482 U.S. 569, 572-73 (1987) (finding that an airport is not a traditional public forum).

[66] Perry Education Association v. Perry Local Educator's Association, 460 U.S. 37 (1983).

sidewalks and parks constitute quintessential public fora.[67] These are places where people have traditionally congregated to exchange ideas and therefore, regulation that is either unduly burdensome or aimed directly at speech in a public forum is strictly scrutinized.[68]

Undoubtedly, the streets of Waikiki constitute public fora. All streets, even those in quiet residential areas, have been used for public assembly and debate.[69] These are the hallmarks of the traditional public forum.[70] The first contentious question then is not whether the streets of Waikiki are public fora (for certainly they are), rather, it is whether the activity of the vendors constitutes speech at all, be it pure or commercial, or whether it is nothing more than conduct. Such a finding will determine the level of scrutiny applied and therefore, to what degree the activity can be regulated, or in some cases, completely prohibited.[71]

Also relevant is whether the City's attempt to restrict the activity of the vendors can be characterized as targeting the speech elements, if any, of the vendors' activity, or whether it is more accurately characterized as content-neutral general ban aimed at the secondary effects caused by the sales activity such as congestion, fraud and visual blight.[72] Finally, if the regulation is found to be a content neutral, time, place or manner regulation, the question remains whether the scope of the regulation is unduly burdensome—whether the statute unnecessarily encompasses an area that is broader than required for the City to effectuate its legitimate interests.

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[67] Ward v. Rock Against Racism, 491 U.S. 781, 796 (1989).

[68] *Jews for Jesus*, 482 U.S. at 571. Protection in a "quasi-public" forum such as an airport is less than that in traditional public fora such as parks, streets and sidewalks. *Id.* Protection for those who wish to speak in private fora, such as the residence of another, may be completely proscribed. For example, the Supreme Court upheld a prohibition against the picketing of an individual's residence even though the picketers confined themselves to the street immediately in front of the individual's home. *See* Frisby v. Schultz, 487 U.S. 474 (1988). In *Frisby*, an abortion clinic Doctor sought relief from pro-life picketing activities targeted at his residence. The United States Supreme Court held that there is no constitutionally protected right to "target picket" the home of a private individual from the public sidewalks adjoining his residential property. *Id.*

[69] *Jews for Jesus*, 482 U.S. at 571.

[70] *Frisby*, 487 U.S. 474 (1988).

[71] The Supreme Court has narrowly defined those categories of speech which will receive no protection at all: obscenity, fraudulent misrepresentation, advocacy of imminent lawless behavior, defamation and "fighting words." *See* R.A.V. v. City of St. Paul, Minnesota, 112 S.Ct. 2538, 2543 (1992). None of these categories have been implicated by the vendors' activities in Waikiki.

[72] City of Renton v. Playtime Theaters, 475 U.S. 41 (1986).

2. The Law as it Applies to Pure Speech, Commercial Speech, and Conduct

Speech is offered greater or lesser protection commensurate with its classification as "pure speech"[73] (greater protection), "commercial speech"[74] (lesser protection), or proscribable speech[75], which is offered no protection at all. The Supreme Court has narrowly defined the categories of speech which may be completely proscribed.[76] None of these categories, such as obscenity or "fighting words" have been implicated by the activity of the Waikiki vendors, and therefore, the issue of proscribable speech is inapplicable in this case.[77]

If, as the vendors claim, they are engaged in purely religious, ideological, philosophical, or political speech in a public forum, any content-based or unduly burdensome regulation will be strictly scrutinized. This means that unless the regulation is narrowly tailored to serve a compelling state interest, it will not survive strict scrutiny.[78]

As for commercial speech, only recently has the Court provided it with any protection at all.[79] In 1976, in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council*, the Court held that commercial speech (advertising) is entitled to a degree of First Amendment protection as long as it is legal and not misleading, because society has an interest in the "free flow of commercial information."[80] At issue in

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[73] Pure speech has been characterized as that which conveys ideological, religious, philosophical or political ideas. Village of Schaumburg v. Citizens For A Better Environment, 444 U.S. 620, 632 (1980).

[74] Board of Trustees of the State University of New York v. Fox, 492 U.S. 469, 473 (1989) (holding that the sale of Tupperware, even if accompanied by messages regarding the managing of a home, is nothing more than commercial speech). Commercial speech is that which primarily proposes a commercial transaction rather than having the conveyance of a political, philosophical, religious or ideological message as its fundamental purpose. The courts have recognized the importance of advertising because the consumer may then make informed decisions at to how to spend his scarce dollars. *Id.*

[75] Speech that lacks little value, such as obscenity or defamation, can be completely proscribed by government. R.A.V. v. City of St. Paul, Minnesota, 112 S.Ct. 2535, 2543 (1992)

[76] *Id.*

[77] *Id.*

[78] Widmar v. Vincent, 454 U.S. 263 (1981) (holding that government cannot exclude religious groups from using university classrooms for after-hours meetings, since other student groups were allowed to use the rooms).

[79] Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748 (1976).

[80] *Id.* at 764.

Virginia Pharmacy was whether pharmacists had a right to advertise their prices for prescription drugs.[81] In balancing the state's interest in maintaining the professionalism of pharmacists,[82] against consumers' interest in the free flow of information, the Court held that the First Amendment prohibits a state from paternalistically deciding that ignorance is preferable to knowledge.[83]

More recently, however, the Court has upheld regulations designed to protect consumers from commercial speech that the legislature perceives to be harmful to the interests of its citizens and residents. In 1986, in *Posadas De Puerto Rico Associates v. Tourism Company of Puerto Rico*,[84] the Court upheld Puerto Rico's regulation of the domestic advertisement of gambling casinos.[85] Puerto Rico allowed its casinos to advertise throughout the United States and abroad, but severely curtailed advertising by the casinos within Puerto Rico itself.[86] The Court held that the regulatory scheme satisfied the test applied to commercial speech: The regulation must directly advance a substantial governmental interest in promoting the health, safety, or welfare of its citizens and the means by which it does so must be no more extensive than necessary to serve the government's interests.[87] Essentially, the Court gave great deference to the legislature's determination that advertisements designed to promote gambling would be harmful to local citizens and residents. Hence, it is clear that the Court is willing, at least in some circumstances, to countenance paternalistic regulation of commercial speech. Commercial speech has thus been characterized as less deserving of First Amendment protection—it is a rather 'second class' variety of speech.[88]

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[81] *Id.*

[82] *Id.* Justice Rehnquist, in his dissenting opinion, feared that advertising would lead to increased drug use. He visualized advertisements stating: "Pain getting you down? Insist that your physician prescribe Demerol. You pay a little more than for aspirin, but you get a lot more relief." *Id.* at 788 (Rehnquist, J., dissenting).

[83] *Id.* at 770.

[84] 478 U.S. 328 (1986).

[85] *Id.* at 344.

[86] *Id.* at 332.

[87] *Id.* at 341 (applying the test delineated in Central Hudson Gas & Electric Corp. v. Public Service Commission, 447 U.S. 557 (1980) (striking down a ban on public utility ads promoting the use of electricity)). Although the *Central Hudson* test arguably required the regulation to achieve its ends via the least drastic alternative, *Posadas* significantly watered-down this prong of the test.

[88] JOHN E. NOWAK, RONALD D. ROTUNDA, CONSTITUTIONAL LAW § 16.7 at (4th ed. 1991).

And finally, apart from either pure or commercial speech, if an actor is found to be engaged in economic activity that conveys no message whatsoever, the activity is classified as non-expressive conduct and First Amendment protections are not triggered.[89] Hence, a regulation designed to restrict conduct will be subject only to rational basis review.[90] As long as the restriction is rationally related to a legitimate state interest, it will be upheld.[91]

3. Commercial speech "inextricably intertwined" with pure speech

Compartmentalizing speech as pure or commercial can be difficult and at some point, commercial speech can be transformed into pure speech if the commercial aspect is "inextricably intertwined" with a religious, political, philosophical or ideological message.[92] In such a case, the commercial and non-commercial components cannot be separated and the whole must be classified as pure speech.[93] In order to justify a regulation aimed at the content of a message, the government will no longer be able to advance only a substantial interest as required by the commercial speech test; it must advance a compelling state interest.

Thus, in such a case, pure speech used to garner a donation or turn a profit is protected; for example, just because newspapers are sold for a profit does not cause them to lose their status as pure speech.[94] Similarly, disseminating a persuasive message about one's religious cause in the hope that the listener will donate money to that cause is nonetheless pure speech.[95] But even if a form of expression is classified as "pure speech," it is not entitled to absolute protection.[96] The United States Supreme Court made this clear in *Village of Schaumburg v. Citizens*

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[89] Loper v. New York City Police Department, 999 F.2d 699 (2d Cir. 1993) (finding that begging involves expressions of poverty, hunger and the need for shelter and therefore is entitled to First Amendment protection).

[90] Railway Express Agency, Inc v. New York, 336 U.S. 106 (1949).

[91] *Id.*

[92] Board of Trustees of the State University of New York v. Todd Fox, 492 U.S. 469, 474 (1989).

[93] *Id.*

[94] City of Lakewood v. Plain Dealer Publishing, 486 U.S. 750, 756, n5 (1988).

[95] Village of Schaumburg v. Citizens for a Better Environment, 444 U.S. 620, 633 (1980).

[96] *Id.*

For a Better Environment.[97] *Schaumburg* involved an ordinance that regulated the activity of professional charitable fund-raisers.[98] The respondent was conducting its charitable appeals for funds on the streets and door-to-door.[99] The Supreme Court held that such activity was "undoubtedly subject to reasonable regulation,"[100] but that due regard must be given to the fact that solicitation is "characteristically intertwined" with fully protected ideological speech.[101] The Court defined the issue as not whether the groups had a right to solicit for funds in public fora—for undoubtedly they do[102]—but whether the city had exercised its power to regulate the solicitation in such a way as not to unduly intrude upon the rights of free speech.[103]

Similarly, in *Riley v. National Federation of the Blind of North Carolina Inc.*, the Court held that charitable solicitation was "inextricably intertwined" with its message—that it was unseverable and therefore, fully protected pure speech.[104] The Supreme Court struck down an ordinance that required professional fund-raisers to disclose the percentage of funds that were put toward administrative costs as compared to the percentage that actually went to the charity.[105] Pursuant to the ordinance, any fund-raiser that failed to make such a disclosure would be denied a charitable sales permit.[106] Further, if more than twenty-five percent of the funds raised went to administrative costs, the group would also be denied a permit.[107] The Court invoked strict scrutiny and struck the ordinance down, holding that the speakers could not be subject to a mechanism that had such a chilling effect on their right to speak freely.[108]

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[97] *Id.*

[98] *Id.* at 623. The ordinance provides, in pertinent part:

> Every charitable organization, which solicits or intends to solicit contributions from persons in the village by door-to-door solicitation or the use of public streets and public ways, shall prior to such solicitation apply for a permit. Solicitation of contributions for charitable organizations without a permit is prohibited and is punishable by a fine of up to $500 for each offense.

Id. nn. 1-2.

[99] *Id.* at 625.

[100] *Id.* at 632.

[101] *Id.*

[102] *Id.* at 633.

[103] *Id.*

[104] Riley v. National Federation of the Blind, 487 U.S. 781, 793 (1988).

[105] *Id.* at 784.

[106] *Id.* at 793.

[107] *Id.*

[108] 487 U.S. at 794.

Thus, it is clear that if the Waikiki T-shirt vendors are found to be involved in fund-raising activity that is inextricably intertwined with pure speech, the whole will have to be classified as pure speech.[109] Nevertheless, such a finding is not necessarily so. There exists precedent that would mandate a finding that the particular activity of the vendors is severable and constitutes neither pure nor commercial speech. Under these precedents, sidewalk T-shirt vending is more accurately characterized as commercial conduct, and therefore fails to trigger any First Amendment protection at all. Additionally, recent Supreme Court precedent indicates that the Court may be willing to extricate the solicitation aspect of charitable solicitation.

4. Severability and prohibition

The City argues that the situation in Waikiki is not analogous to *Shaumburg* or *Riley* and that the message of the vendors and their wares are not intertwined with one another. The City asserts that this is so because the level of dissemination of ideas accompanying the "mass merchandising" of T-shirts is insufficient.[110] I agree. However, rather than addressing whether the degree of message distribution accompanying the sale of T-shirts imbues the sales in this particular situation with First Amendment protection, this article will backup one step earlier in the analysis and address whether the legal construct of "inextricably intertwined" has been taken altogether too far in the context of selling merchandise on city sidewalks.

The City and the vendors have actively litigated whether the T-shirt sales have been conducted in conjunction with enough pure speech activity, such as the distribution of literature, to bring the sales activities within the protective cloak of the First Amendment. This issue is relevant to the case because of the Ninth Circuit's recent ruling in *Gaudiya Vaishnava Society v. City and County of San Francisco.*[111] In *Gaudiya*, the Ninth Circuit held that T-shirt sales conducted from side-walk tables, when done in conjunction with activities designed to disseminate

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[109] For a discussion of the possibility that those commercial elements "inextricably intertwined" with pure speech can indeed be extricated, *see* Part IV.

[110] Opening Brief of Defendants-Appellees and Cross-Appellants at 13, One World One Family Now v. City and County of Honolulu, (9th Cir. 1994) (No. 94-16373).

[111] Gaudiya Vaishnava Society v. City and County of San Francisco, 952 F.2d 1059 (1990).

a group's message,[112] constituted fully protected pure speech.[113] Thus, because the decision is binding upon the District of Hawaii, the parties are obligated to argue within the parameters set forth by the case.

This article, however, takes issue with both the decision itself and the subsequent interpretations of it by other courts. In so doing, this paper attempts to determine whether the United States Supreme Court would uphold *Gaudiya* in its entirety or perhaps interpret it differently than lower courts—including the District of Hawaii—have. The Supreme Court has never addressed the question of whether message dissemination done in conjunction with the sale of a T-shirt bearing a political, ideological, religious or philosophical message brings the sale of the T-shirt within the purview of the First Amendment. The Court has, however, discussed the concept of the sale of tangible items conducted in conjunction with dissemination of a group's message in contexts other than message-bearing T-shirt sales.[114] This construct has been misapplied by *Gaudiya* and other lower courts.

In *Board of Trustees of the State University of New York v. Todd Fox*, the Supreme Court had occasion to address whether the sale of Tupperware in university dormitories was entitled to status as fully protected pure speech by virtue of the fact that Tupperware transactions were accompanied by messages regarding financial responsibility and the running of an efficient home.[115]

Justice Scalia, writing for the majority, held that:

> No law of man or of nature makes it impossible to sell housewares without teaching home economics, or to teach home economics without selling housewares. Nothing . . . prevents the speaker from conveying, or the audience from hearing, these noncommercial messages, and nothing in the nature of things requires them to be combined with commercial messages. Including these home economics elements no more converted [Tupperware] presentations into educational speech, than opening sales presentations with a prayer or a Pledge of Allegiance would convert them into religious or political speech.[116]

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[112] The Ninth Circuit found that T-shirt sales accompanied by the groups' dissemination of information through, "distributing their literature, engaging in persuasive speech, and selling merchandise with messages affixed to the product" was fully protected pure speech. *Id.* at 1064.

[113] *Id.*

[114] Board of Trustees of the State University of New York v. Todd Fox, 492 U.S. 469, 473 (1989).

[115] *Id.*

[116] *Id.* at 474.

Similarly, there is no law of man or nature that makes it impossible to sell a T-shirt without a message, or to convey a message without a T-shirt. As logical a conclusion as this may seem, four lower courts that have specifically addressed this matter disagree.

These decisions include that of the Ninth Circuit Court of Appeals in *Gaudiya*, the United States District Court for the Southern District of Florida in *One World One Family Now v. City of Key West*,[117] the United States District Court for the District of Nevada in *One World One Family Now v. State of Nevada*,[118] and finally, the United States District Court for the District of Hawaii in *One World One Family Now v. City and County of Honolulu*.[119] Each of these courts have addressed the question of whether sidewalk sales of message bearing T-shirts are fully protected free speech.

The Ninth Circuit in Gaudiya was the first to do so. In that case, five non-profit organizations were denied permits to sell message bearing merchandise in the Fisherman's Wharf and Union Square areas of San Francisco. The groups were Gaudiya Vaishnava Society, a religious organization, Greenpeace Pacific-Southwest, an environmental group, San Francisco Nuclear Weapons Freeze, a group advocating the "freezing" of nuclear arms, the Committee in Solidarity with the People of El Salvador, a group opposed to the United States' foreign policy regarding El Salvador and finally, San Francisco Lesbian-Gay Freedom Day Parade and Celebration Committee, an organization that advocates civil rights for Gays and Lesbians.[120]

The *Gaudiya* plaintiffs filed suit to enjoin the enforcement of an ordinance that allowed the Chief of Police, at his discretion, to permit or deny a license to sell merchandise in the Fisherman's Wharf or Union Square areas of San Francisco.[121] The defendant city argued

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[117] 852 F. Supp. 1005 (D. Fla. 1994).

[118] ___ F.Supp ___(D. Nev. 1994).

[119] Plaintiff's Complaint for Declaratory and Injunctive Relief, One World One Family Now v. City and County of Honolulu, (D. Haw. 1994) (No. 94-00359).

[120] Gaudiya Vaishnava Society v. City and County of San Francisco, 952 F.2d 1059, 1060 (1990), *cert. denied*, ___U.S. ___, 112 S.Ct. 1951 (1992).

[121] *Id.* at 1061. § 660.2(j) of the San Francisco Municipal Code provided:

> No person may engage in sales solicitations for charitable purposes by means of selling clothing, jewelry, or any other goods, products, services or merchandise in any area of the City and County of San Francisco unless that person obtains the appropriate peddling permit pursuant to Articles 13, 17.3 or 24 of the San Francisco Police Code. This Section shall not apply to the sale of books,

that "an expressive item sold by a non-profit organization is protected only when it has no intrinsic value other than its message."[122] San Francisco cited *Muhammad Temple of Islam-Shreveport v. City of Shreveport* to support this proposition.[123]

In *Muhammad Temple*, the plaintiffs sold both religious literature and fish on public sidewalks.[124] The Fifth Circuit Court of Appeals affirmed the district court in holding that the sale of the religious newspapers was protected speech, but that the sale of fish was commercial and could therefore be prohibited from being sold on the sidewalks.[125]

The *Gaudiya* court, however, determined that such a "purely communicative value"[126] test had never been applied in any court and pointed out that *Muhammad Temple* "drew no such distinction between the intrinsic value of fish and newspapers, but instead relied on the fact that the newspaper conveyed the group's message, while the fish did not."[127] Instead, the *Gaudiya* court held that because the San Francisco plaintiffs were selling their merchandise in conjunction with pure speech, such as the distribution of literature, the T-shirt sales were inextricably intertwined with the groups' messages and therefore, the sales were entitled to classification as pure speech.[128]

This holding, as an interpretation of *Muhammed Temple*, is somewhat troublesome insofar as one could also argue that the fish in *Muhammad Temple* were indeed sold in conjunction with fully protected First Amendment activity—the sale and distribution of religious literature.[129] Consequently, in order to hold that this was not so, the *Gaudiya* court must have placed a great deal of emphasis on the fact that the goods offered for sale at Fisherman's Wharf and Union Square were emblazoned with religious, ideological, philosophical or political messages. Working backward from this logic, one could then conclude that if the

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pamphlets, buttons, bumper stickers, posters or any other type of item that has no intrinsic value or purpose other than to communicate a message.

Id. at 1061, n.4.

[122] *Id.* at 1063.

[123] Muhammad Temple of Islam-Shreveport v. City of Shreveport, 387 F. Supp. 1129 (W.D. La. 1979);

[124] *Id.* at 1131.

[125] *Id.*

[126] Gaudiya Vaishnava Society v. City and County of San Francisco, 952 F.2d 1059, 1062 (1990), *cert. Denied*, ____U.S. ____, 112 S.Ct. 1951 (1992).

[127] *Id.* at 1063.

[128] *Id.* at 1064.

[129] *Muhammad Temple*, 387 F.Supp. at 1131.

vendors in *Muhammad Temple* had in some way branded their fish with a message, the sale of the fish would also have been entitled to protection.

Despite the Ninth Circuit's rejection of Defendant's argument in *Gaudiya*, (that the court should look to *Muhammad* as to whether there is intrinsic value in the item beyond the message) the argument is well supported by the Supreme Court's decision in *Fox*. Other Supreme Court cases are also in accord with this construct, holding that sales and solicitation activities are inextricably intertwined with their messages only in contexts where there is no intrinsic value in any item sold beyond the value of the message it conveyed. Cases in which the Court held that the commercial aspect of the speech could not be separated from the pure speech component include *Thomas v. Collins*,[130] *Village of Schaumburg v. Citizens for a Better Environment*,[131] *Murdock v. Pennsylvania*,[132] and *City of Lakewood v. Plain Dealer Publishing*.[133]

In each of these cases, persuasive speech was either the item being sold or was used as a tool by the canvasser to solicit funds for a particular cause. The tool of the canvassers had no intrinsic value beyond the content of the message it conveyed. For example, as with a newspaper, there is little intrinsic value in the paper itself. It is merely the tool used to convey the printed message. If the print were to be removed from the paper, the paper itself would have relatively little value to the consumer. No one would buy it.

In contrast, when one sells a message-bearing T-shirt, the shirt itself has independent value beyond its message. The T-shirt has traditionally been used as more than a tool for conveying a message. It is an item of clothing that has value whether or not there is a message on it. The same can be said for items such as coffee mugs and stuffed animals. If the message were removed from its medium (the Tupperware container, the T-shirt, the coffee mug, or the fish), the medium itself

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[130] 326 U.S. 416 (1945) (soliciting for labor union membership is intertwined with persuasive speech.)

[131] 444 U.S. 620 (1980) (holding that charitable organizations soliciting door-to-door for benevolent, philanthropic, patriotic non-for-profit organizations is fully protected speech and canvassers could not be required to disclose what percentage of funds actually went to the charity).

[132] 319 U.S. 105 (1943) (holding that the sale of religious literature for profit is fully protected speech).

[133] 486 U.S. 750 (1988) (holding that the degree of First Amendment protection is not diminished merely because the newspaper or speech is sold rather than given away).

would still maintain significant independent value and is marketable in and of itself. In short, the item and the message are not inextricably intertwined.

Conversely, books, buttons, leaflets and pamphlets have but one ultimate purpose—the conveyance of an idea. And, without the message, the tool used is virtually worthless. Even if one takes issue with this distinction, the Court needs a place to draw the line. And the cases indicate that this is where the line has been drawn.

If and when this matter reaches the Supreme Court, it would appear that the Court will have to extend its former definition of inextricably intertwined (as did the Ninth Circuit) to include items which have commercial value in and of themselves. It seems unlikely, however, that the Court will endorse a legal construct that would allow First Amendment protection to inhere within the sale of commercial products simply because they are sold in conjunction with pure speech activity.

Presumably, under such a theory, a non-profit religious group could merely stamp any variety of items with its message and then conduct sales from sidewalk tables provided the group also distributed literature at the same time. None of the lower federal district courts cited above addressed this issue thoroughly and instead, simply followed *Gaudiya* in holding that T-shirts, coffee mugs and stuffed animals printed with messages and sold in conjunction with the dissemination of ideas,[134] were thus imbued with pure speech attributes and therefore, fully protected.[135]

Conversely, if the Court adheres to the reasoning set forth by Justice Scalia in *Fox*, T-shirt sales from sidewalk tables will likely be held to be non-essential to the dissemination of ideas. Therefore, the activity will be classified as commercial speech or as conduct and hence, can

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[134] In the case at hand, One World One Family Now v. City and County of Honolulu, (9th Cir. 1994) (No. 94-16373), the district court found that the vendor's T-shirt sales were conducted in conjunction with sufficient First Amendment activity to imbue the sales with protection. The evidence before the court was a single incident wherein a police officer asked if the vendor had any literature to distribute. The vendor then produced a brochure from beneath the table and had a "good conversation" with the officer. Appellant's Opening Brief at 5 n4, One World One Family Now v. City and County of Honolulu, (9th Cir. 1994) (No. 94-16373).

[135] *See* One World One Family Now v. City of Key West, 852 F.Supp 1005 (1994); One World One Family Now v. State of Nevada, ___F. Supp. ___(1994); One World One Family Now v. City and County of Honolulu, (9th Cir. 1994) (No. 94-16373).

be subject to being completely banned from Waikiki.[136] This seems to be the more sensible conclusion.

5. Imbuing tools of facilitation with First Amendment Protection

Gaudiya's progeny, however, appear to have taken the construct of "inextricably intertwined" yet one step further. Two cases have held that the table itself is protected as it too is "inextricably intertwined" with a group's merchandise and message. The Seventh Circuit has also had occasion to address the issue of private parties erecting structures on public property, but has upheld a city's right to prohibit such structures from areas the city deems appropriate.

In *Graff v. City of Chicago*,[137] a newsstand[138] vendor brought a facial challenge to a Chicago municipal ordinance that required newsstand operators to acquire a permit, or be evicted.[139] Mr. Graff (and his predecessors) had operated the newsstand for approximately seventy years without ever having required a permit.[140] Upon threat of eviction, rather than submitting a permit application, Mr. Graff filed suit in the federal district court.[141] His challenge failed and on appeal, the Seventh Circuit affirmed.[142] The Seventh Circuit began its analysis by quoting its opinion in *Lubavitch Chabad House, Inc. v. City of Chicago*:[143]

> There is no private constitutional right to erect a structure on public property. If there were, our traditional public forums, such as our public parks, would be cluttered with all manner of structures. Public parks are certainly quintessential public forums where free speech is protected, but the Constitution neither provides, nor has it ever been construed to mandate, that any person or group be allowed to erect structures at will.[144]

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[136] Board of Trustees of the State University of New York v. Todd Fox, 492 U.S. 469 (1989).

[137] 9 F.3d 1309 (7th Cir. 1993).

[138] A Newsstand is similar to a kiosk as opposed to a newsrack which is much smaller and designed to dispense only one newspaper at a time. *Id.*

[139] *Id.* at 1311.

[140] *Id.*

[141] *Id.*

[142] *Id.*

[143] *Id.* at 1314 (quoting Lubavitch Chabad House v. City of Chicago, 917 F.2d 341 (7th Cir. 1990)).

[144] *Graff*, 9 F.3d at 1314.

Graff argued that his newsstand was not a structure. Instead, he asserted that it was akin to a newsrack and therefore, under *Lakewood*, the City of Chicago could not evict him if he refused to get a permit.[145] The Court in *Lakewood* had determined that placing a newsrack on a public sidewalk was not like erecting a structure; rather, it was so closely tied to the circulation of the newspaper itself as to be essential for the dissemination of information.[146] In other words, the newsrack was inextricably intertwined with the newspaper and thus within the purview of the First Amendment. Consequently, the Court found that a complete ban on the placement of newsracks was far too burdensome on the paper's freedom of speech.[147]

But, the Seventh Circuit disagreed with Graff's attempt to analogize his newsstand to the newsracks discussed in *Lakewood*:

> Newsstands are large, permanent-type structures. They are constructed, and once in place they are not easily moved. Newsstands do not present one viewpoint; rather they supply many and varying editorial opinions. Newsstands shelter a business operator and his operation; they do not merely dispense or hand deliver newspapers. Newsstands also are more likely to obstruct the views of pedestrians and automobile drivers. In short, newsstands compared to newsracks are much larger, more permanent structures that occupy a significant portion of limited sidewalk space. *Thus, building and operating a newsstand is conduct, not speech.*[148]

The question then arises: Whether the setting up of portable tables on public streets, in connection with the sale of expressive materials, is considered protected conduct by virtue of being inextricably intertwined with pure speech?[149] Or, more simply, is the table a closer cousin to the newsstand or the newsrack? The Waikiki T-shirt vendors have attempted to align their activity with that of sidewalk musicians, proselytizers, leaflet distributors and newsracks. It is however, difficult to ignore the fact that they have 'set up shop' so to speak on the public sidewalks of Waikiki.

Even so, T-shirt vendors in other cities have successfully argued that their message is inextricably intertwined with the sale of the T-shirt,

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[145] *Id.*

[146] City of Lakewood v. Plain Dealer Publishing Co., 486 U.S. 750.

[147] *Id.*

[148] *Graff*, 9 F.3d at 1315 (emphasis added).

[149] One World One Family Now v. City of Key West, 852 F. Supp. 1005 (S.D. Fla. 1994).

and that the message-bearing T-shirt is inextricably intertwined with its medium of dissemination—the table.

In May, 1994, the United States District Court for the Southern District of Florida was faced with this contention.[150] The facts of the case, *One World One Family Now v. City of Key West*,[151] were substantially similar to the situation in Waikiki. Plaintiff, One World One Family Now, had set up portable tables at high traffic locations on the public sidewalks of Key West's primary historic and commercial areas.[152] Plaintiffs were using the tables to display and sell T-shirts that reflected the organization's mission via the words and symbols carried on the T-shirts.[153] In analyzing the case, the court concluded that *Lakewood* was "premised on a finding that a newsrack, as a source of news, is inextricably tied to the publication it contains and thus is commonly associated with expression."[154] The court then stated that the tables facilitated the sale of expressive T-shirts by:

> providing a space on which to place the items . . . . The fact that the tables [are] portable rather than permanent structures upon the city's sidewalk also suggests that the table is closely tied to the expressive activity rather than being purely commercial conduct.[155]

One may well wonder how portability is associated with a lack of commercialism. On Oahu, a visit to the Aloha Stadium Flea Market[156] reveals that purely commercial activity can be very portable indeed. Furthermore, the court in *Key West* originally drew its analogy from the newsrack analysis in *Lakewood*. Is a newsrack not a permanent fixture? If the City removed the newsracks nightly, would that suggest that they were somehow even more expressive and less commercial than if left in place over night? The court seems to have missed the significance of the table as a private structure obstructing a public sidewalk.

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[150] *Id.*

[151] *Id.*

[152] *Id.*

[153] *Id.*

[154] *Id.* at 1009.

[155] *Id.*

[156] Each Saturday, Sunday and Wednesday, the Aloha Stadium hosts multitudes of vendors, all of whom display and sell their wares on portable tables for the sole purpose of commercial profit. Hundreds of vendors are set up by 7:00 a.m.; by 3:00 p.m., one would never know the vendors had been there.

Unfortunately, the slippery slope created by *Key West* was made somewhat more acute in a subsequent case, *One World One Family Now v. State of Nevada*.[157] In *Nevada*, One World One Family Now and several other allegedly charitable non-profit organizations had set up "tables, chairs, umbrellas, boxes and signs on the public walkways adjacent to the Strip, from which they c[ould] engage in the sale of T-shirts containing political, religious, philosophical or ideological messages relating to, and in furtherance of, their respective missions."[158]

Pursuant to a Nevada ordinance of general application which prohibited encroachments of private structures onto public property, the Nevada Department of Transportation informed the vendors that they would have to remove their tables (and various appurtenances thereto) from the sidewalks.[159] In ruling for the plaintiffs, the Nevada District Court relied upon *Graff* and *Key West*, and held that "unlike the newsstands in *Graff*, the tables at issue here are relatively small and are portable rather than permanent."[160] Despite the smallness and portability of plaintiff's chairs, boxes and umbrellas, the court disapproved of their use for they did not "facilitate the exercise of expressive activities."[161]

In sum then, it appears that the Waikiki vendors are squarely within the lower courts' case law as long as they sell their T-shirts from a standing position, without the aid of an umbrella to shade them from the sun. The Nevada District Court closed with a very firm holding: "[T]he public's interest in safeguarding the fundamental rights of the First Amendment outweighs *any* competing public interest in the maintenance of the public walkways."[162]

In light of both common sense and the *Graff* opinion, *Nevada* and *Key West* have erroneously analogized the table with the newsrack rather than the newsstand. Setting up a table on a public sidewalk implicates the very concerns raised in *Graff*: Sidewalk obstruction, interference with the views of both pedestrians and drivers. And, tables don't merely dispense newspapers, they house a salesperson and require that person to engage in a face-to-face transaction on the sidewalk. *Graff* indicates that these are important factors to be considered.

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[157] 860 F. Supp. 1457 (D. Nev.1994).
[158] *Id.* at 1460.
[159] *Id.*
[160] *Id.* at 1462-63.
[161] *Id.*
[162] *Id.* at 1464 (emphasis added).

Thus, the analogy begun in *Gaudiya* and extrapolated by *Key West* and *Nevada* can be reduced to: A T-shirt is like a newspaper and a table is like a newsrack, and therefore, identical analysis should apply. This analogy fails for the two reasons discussed above. A T-shirt has intrinsic value as a marketable item whereas a newspaper has no value beyond the message it conveys and therefore does not carry with it the risks of sidewalk fraud and usurpation of business from legitimate tax-paying proprietors. Second, whereas a newsrack creates a limited obstruction and is necessary for the distribution of papers, a table is a large, cumbersome obstruction that is out of place on a city sidewalk, and it requires a salesperson to conduct commercial transactions on the public sidewalks.

By implication, the Seventh Circuit in *Graff* noted the significance of the presence of a salesperson when it pointed out that newsstands house an operator, whereas newsracks merely dispense newspapers. The importance of this difference was discussed thoroughly by the United States Supreme Court in *International Society For Krishna Consciousness, Inc. v. Lee*.[163]

6. *The particular invasiveness of solicitation*

Like *Schaumberg* and *Riley* discussed above, the *Lee* case also involved charitable solicitation. Recall that in both of those cases the Court held that the commercial component and the pure speech component of charitable solicitation were inextricably intertwined and therefore, the whole was transformed into pure speech. In *Lee* however, the Court extricated the heretofore inextricable.

The case involved the New York and New Jersey Port Authority's ban of both solicitation of contributions and dissemination of literature inside its Kennedy, La Guardia and Newark airport terminals.[164] The International Society For Krishna Consciousness, a not-for-profit religious organization, wished to perform "sankirtan" within the airport terminals.[165] Sankirtan is a ritual that consists of "going into public places, disseminating religious literature and soliciting funds to support the religion."[166] Due to the regulation, the practice was effectively

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[163] 112 S.Ct. 2701 (1992).
[164] *Id.* at 2709.
[165] *Id.* at 2703.
[166] *Id.*

prohibited within the airport terminals.[167] Upon challenge, the Court struck down the ban on dissemination of literature, but upheld the ban on solicitation.[168]

In so doing, the Court held that an airport terminal is a nonpublic forum and therefore the regulations need only pass a reasonableness standard.[169] The Court characterized solicitation as much more intrusive than merely handing out a leaflet because solicitation involves a face-to-face encounter.[170] "Solicitation requires action by those who would respond: The individual must decide whether or not to contribute, and then having decided to do so, reach for a wallet, search it for money, write a check, or produce a credit card."[171] This then creates the risk of duress and fraud in the form of shortchanging people who will soon be leaving and therefore less able and less likely to complain to the authorities.[172]

In the case of the Waikiki T-shirt vendors, the district court rejected the City's assertion that *Lee* was applicable to the situation in Waikiki. First, the district court found that the activity did not pose the risk of proliferating fraud and duress on the public.[173] Second, the court reasoned that, "[s]uch reliance is unwarranted because, in the instant case, the court is dealing with the quintessential public forum—the public sidewalks."[174] *Lee*, however, provides some hints that the classification of the forum is not necessarily dispositive.

Justice Kennedy concurred in the majority's decision to uphold the ban on solicitation, but in so doing, he did not rely on a forum-based analysis.[175] Rather, he argued that the ban should "be upheld as a reasonable time, place, and manner restriction, or as a regulation directed at the nonspeech element of expressive conduct."[176] He agreed with the majority that a face-to-face transaction created the risk of duress and fraud, but added that the regulation could be upheld as a

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[167] *Id.* at 2704.

[168] *Id.*

[169] *Id.*

[170] *Id.* at 2708.

[171] *Id.*

[172] *Id.*

[173] Order Granting In Part Plaintiff's Motion for Preliminary Injunction and Granting Plaintiff's Motion for Temporary Restraining Order, One World One Family Now v. City and County of Honolulu, 25 (D. Haw. 1994) (No. 94-00395).

[174] *Id.* at 28.

[175] 112 S.Ct. at 2715 (Kennedy, J., concurring).

[176] *Id.* at 2720.

content neutral restriction aimed at the evils inherent in the "exchange of money, which is an element of conduct interwoven with otherwise expressive solicitation."[177]

Hence, as one commentator has so astutely remarked, the value of *Lee*

> stems from the possibility that the Court may be ready to recognize some distinction between a solicitation's commercial and protected speech, whether it occurs in a public or a nonpublic forum. It does not matter whether the decision was based on Justice Kennedy's content neutral analysis, or the majority's forum-based approach. The Court treated similar face-to-face encounters differently: those involving immediate financial exchange were deemed subject to regulation; those involving only the dissemination of information were not. The element that distinguishes the two similar encounters is the commercial transaction. In [*Lee*], the Court has effectively shown that the commercial transaction is not inextricably intertwined with the protected speech of a charitable solicitation.[178]

The Hawaii District Court did in fact hold that the City had a substantial interest in controlling sidewalk congestion and in maintaining the economic and aesthetic qualities of Waikiki, particularly in light of the City's desire to preserve the economic welfare of a state that relies so heavily upon the tourism industry.[179] And, the City certainly may argue that it has similar interests in Waikiki to those asserted by the New York and New Jersey Port Authority.

Solicitation is more intrusive than merely handing someone a leaflet for it requires the parties to engage in a commercial transaction. As with those in an airport terminal, tourists in Waikiki are temporarily present in a place that is new and unknown, causing them to be more vulnerable to fraud and duress. Hence, tourists are enticing targets for

> the skillful and unprincipled solicitor . . . . The unsavory solicitor can . . . commit fraud through concealment of his affiliation or through deliberate efforts to shortchange those who agreed to purchase. Compounding this problem is the fact that . . . the targets of such activity

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[177] *Id.* at 2721.

[178] John Dziedzic, *Student Comment, Krishna v. Lee Extricates The Inextricable: An Argument For Regulating the Solicitation In Charitable Solicitations*, 17 U. PUGET SOUND L. REV. 665 (1994).

[179] Order Granting In Part Plaintiff's Motion for Preliminary Injunction and Granting Plaintiff's Motion for Temporary Restraining Order, One World One Family Now v. City and County of Honolulu, 29 (D. Haw. 1994) (No. 94-00395).

> frequently are on tight schedules. This in turn makes such visitors unlikely to stop and formally complain to . . . authorities.[180]

As Justice Kennedy argued, a regulation that prohibits charitable solicitation is most accurately characterized as one aimed not at content, but at conduct: the immediate physical exchange of money, regardless of the message that accompanies it, and regardless of the whether it occurs in a public or non-public forum.[181] Even if the majority does not fully support Kennedy's analysis, it is clear that a majority of the Court has indicated that the commercial transaction is not inextricably intertwined the pure speech component of charitable solicitation.

In light of the foregoing precedent, the T-shirt vendors' assertion that their activity is analogous to that of leaflet distributors, singers, chanters, proselytizers and the like is misplaced. Rather, their activity is fully distinguishable because of (1) the transactional nature of the T-shirt vendors' activity, (2) the inherent commercial attributes of their merchandise, and (3) the fact that such merchandise transactions are conducted from private structures erected on public property. Case law supports the conclusion that the T-shirt vendors are not engaged in pure speech and therefore, can be prohibited from Waikiki. Furthermore, even if table-top merchandising is found to qualify as pure speech, case law supports its prohibition from Waikiki.

B. The Regulation is a Valid Time, Place and Manner Restriction

1. Unbridled Discretion

Even assuming that the Waikiki T-shirt vendors are found to be engaged in pure speech under *Gaudiya*, it does not necessarily follow that the two cases mandate the same outcome. Although the Ninth Circuit held that message-bearing T-shirt sales were pure speech, that finding was not dispositive of the court's decision to strike down the ordinance. Rather, the ordinance was held unconstitutional because it vested unbridled discretion in the Chief of Police to grant or deny a permit, thereby creating the risk that he could do so based upon his dislike of the content or viewpoint of the speaker's message.[182]

The district courts in *Nevada* and *Key West* erroneously interpreted *Gaudiya* as standing for the proposition that cities must allow table-top

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[180] *Lee*, 112 S.Ct. at 2708.

[181] *Id.* at 2722.

[182] *Gaudiya*, 952 F.2d at 1065.

vending of message-bearing merchandise on their public sidewalks. However, even assuming that T-shirt sales constitute expressive activity, *Gaudiya* does not stand for the proposition that such activity cannot be subject to regulation. Rather, *Gaudiya* stands for the proposition that peddling cannot be subject to regulation at the unbridled discretion of government officials.[183] *Gaudiya's* progeny failed to realize the significance of a finding of discretion.

The doctrine of unbridled discretion was discussed at length by the Supreme Court in *Lakewood*.[184] The City of Lakewood, prior to 1983, completely prohibited the private placement of any structure on public property.[185] Based upon this prohibition, the Plain Dealer Publishing Company was unable to place its newsracks on the sidewalks.[186] The district court found the ordinance to be unconstitutional because it completely banned pure speech from public sidewalks.[187] The city attempted to cure the ordinance by allowing permits, but only upon the discretion of the mayor.[188] For this reason, the Supreme Court held that the ordinance did not pass constitutional muster.[189]

Clearly, a city may not vest discretion in its officials to grant or deny a permit. It can, however, regulate First Amendment activity as long as it does so in a content neutral manner. The United States Supreme Court has held that states may impose "content-neutral" time, place, or manner restrictions on speakers provided that the restrictions are (1) narrowly tailored (2) to serve a substantial governmental interest and (3) do not unreasonably limit alternative avenues of communication.[190] Thus, if the vendors are found to be engaged in pure speech, a Waikiki-wide prohibition on exercising this right of expression can be constitutional only if it is a valid time, place, and manner restriction.

2. Waikiki-wide Prohibition

The District Court for the District of Hawaii applied the time, place, and manner test to the Honolulu peddling ordinance and made no

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[183] *Id.*
[184] City of Lakewood v. Plain Dealer Publishing Co., 486 U.S. 750.
[185] *Id.*
[186] *Id.*
[187] *Id.*
[188] *Id.* at 751.
[189] *Id.* at 751-52.
[190] Ward v. Rock Against Racism, 491 U.S. 781, 803 (1989).

finding of unbridled discretionary powers vested in a city official via the provisions of ROH § 29-6.[191] Rather, the court found that the Waikiki T-shirt vendors were engaged in pure speech and that the ordinance, although content-neutral, was not narrowly tailored to serve the City's interests.[192] The court also found that the ordinance failed to leave open ample alternative channels of communication.[193] This issue has been vigorously litigated by the parties in the Waikiki dispute and will be a contentious issue on appeal. The issue is extremely close and, in a nutshell, will ultimately depend upon whether the Ninth Circuit finds a Waikiki-wide ban to be too broad. The district court found the ban too burdensome. However, such a ban finds support under the Court's recent precedents.

a. Analytical framework of the Supreme Court

i. Content neutrality and substantial governmental interests

In *Ward v. Rock Against Racism*,[194] the Court upheld an ordinance that regulated volume levels of concerts performed in an amphitheater in New York's Central Park.[195] After complaints about loud music and unruly audiences causing disruption to nearby residents and to those attempting to enjoy the quiet "Sheep Meadow," the city crafted an ordinance that required all musicians to use both New York's sound equipment and New York's sound technician.[196] The city's technicians were to defer to the performer's technicians in matters concerning sound quality, and to confer with them regarding volume problems.[197] As such, the Court found that the regulation was valid because it extended solely to the content-neutral goals of ensuring volume levels that were neither too loud nor too soft.[198]

Another Supreme Court case, *City of Renton v. Playtime Theaters*,[199] also provides instruction. The case involved a constitutional challenge

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[191] Order Granting In Part Plaintiff's Motion for Preliminary Injunction and Granting Plaintiff's Motion for Temporary Restraining Order, One World One Family Now v. City and County of Honolulu, 22 (D. Haw. 1994) (No. 94-00395).

[192] *Id.*

[193] *Id.* at 25.

[194] *Ward*, 491 U.S. at 791.

[195] *Id.* at 803.

[196] *Id.* at 787.

[197] *Id.* at 792.

[198] *Id.* at 793.

[199] City of Renton v. Playtime Theaters, 475 U.S. 41, 45 (1986)

to an ordinance that prohibited adult movie theaters from locating within one thousand feet of any residential zone, park, school or church.[200] The city enacted the ordinance in an attempt to control the deleterious secondary effects associated with the establishment of adult theaters.[201] Respondents, who had subsequently purchased two theaters in Renton for the purpose of showing adult films, challenged the ordinance on the ground that it was an impermissible regulation of their right to free speech.[202] The ordinance did not regulate the activity of any other type of theater or adult activity and thus, respondent argued, it was not content neutral.[203]

Indeed, government may not proscribe speech based upon its disapproval of the message or idea conveyed.[204] *In Playtime Theaters*, however, the Supreme Court held that because the ordinance was not aimed at the content of the films, but at the deleterious secondary effects[205] associated with theaters showing such films, it was a valid response to the problem.[206]

The doctrine of "secondary effects" was also argued in *Boos v. Barry*.[207] The District of Columbia had made it unlawful to display within five hundred feet of a foreign embassy, any sign tending to bring the foreign government into "public odium" or "public disrepute."[208] The Court found that the regulation was impermissibly aimed at the impact of speech on its listeners and thus, was subject to strict (and fatal) scrutiny.[209] "'Listeners' reactions to speech are not the type of "secondary effects" we referred to in *[Playtime Theaters]*."[210] In further distinguishing *Playtime Theaters*, the Court noted that the regulation in *Boos* failed to point to any legitimate secondary effects created by picket signs in front of embassies.[211] "They do not point to con-

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[200] *Playtime Theaters*, 475 U.S. at 45.

[201] *Id.* at 48.

[202] *Id.* at 43.

[203] *Id.* at 47.

[204] R.A.V. v. City of St. Paul, Minnesota, 112 S.Ct. 2535, 2542 (1992).

[205] *Playtime Theaters*, 475 U.S. at 48. Studies indicated that the establishment of adult theaters are associated with increased crime rates, decreased property values and an overall reduction in the quality of neighborhoods and commercial districts. *Id.* at 44.

[206] *Id.* at 47.

[207] 485 U.S. 312 (1988).

[208] *Id.* at 314.

[209] *Id.* at 319.

[210] *Id.* at 320.

[211] *Id.* at 321.

gestion, to interference with ingress or egress, to visual clutter, or the need to protect the security of embassies."[212] The corollary of this dicta is that if the regulation had pointed to these secondary effects, it would have been upheld. Justices Brennan and Marshall recognized the powerful implications of this dicta and thus, although concurring in the judgment, wrote separately to "object to Justice O'Connor's assumption that the [*Playtime Theater's*] analysis applies not only outside the context of businesses purveying sexually explicit materials but even to political speech."[213]

With Brennan and Marshall no longer on the bench, the Court may be even more amenable to the doctrine of secondary effects in a situation such as that created by the Waikiki T-shirt vendors. Several of the effects listed by the Court are precisely those asserted by the City as problems they wish to avoid by prohibited side-walk vending. They include the prevention of congestion and visual clutter and the need to protect an identified party.

Hence, as in *Ward*, *Playtime Theaters*, and *Boos*, the City of Honolulu has a powerful argument that its regulation is aimed not at the ideas conveyed by the non-profits, but at controlling the secondary effects associated with the vendors' chosen method of dissemination—commercial peddling from T-shirt laden tables that crowd and clutter the busy sidewalks of Waikiki. Indeed, the district court agreed that the City does have a valid and substantial interest in controlling sidewalk congestion and in maintaining the economic and aesthetic qualities of Waikiki.[214]

Although the district court did not accept the City's additional asserted interest in the prevention of fraud and duress, I believe the court rejected this interest too hastily. As the Supreme Court in *Lee* indicated, fraud and duress are risks that accompany public solicitation, especially where the solicitor targets a transient audience.[215] The Hawaii District Court reasoned that, "the City has not presented any credible evidence to support the claim that the T-shirt vendors are causing a

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[212] *Id.*

[213] *Id.* at 335 (Brennan, J., concurring in part and concurring in the judgment).

[214] Order Granting In Part Plaintiff's Motion for Preliminary Injunction and Granting Plaintiff's Motion for Temporary Restraining Order, One World One Family Now v. City and County of Honolulu, 25 (D. Haw. 1994) (No. 94-00395).

[215] International Society for Krishna Consciousness, Inc. v. Lee, 112 S.Ct. 2701, 2708 (1992).

proliferation of fraud and duress among tourists and residents."[216] This, however, is not the evidentiary burden that the City must bear. In *Playtime Theaters*, the Court held that Renton was entitled to rely upon studies done by the cities of Seattle and Detroit which found that the establishment of adult theaters are associated with increased crime rates, decreased property values and an overall reduction in the quality of neighborhoods and commercial districts.[217] Similarly, Honolulu can legitimately rely on the findings of the United States Supreme Court in the *Lee* case that monetary transactions of this nature do indeed present risks of fraud and duress.

Clearly, the City's ban on peddling in Waikiki is justified without reference to the content of the speaker's message.[218] A government's "purpose is the controlling consideration . . . . A regulation that serves purposes unrelated to the content of expression is deemed neutral, even if it has an incidental effect on some speakers or messages but not others."[219] Thus, as the Hawaii District Court correctly held, the regulation is content neutral. Even so, the district court found that the regulation failed the second and third prongs of the test—a complete Waikiki ban was not narrowly tailored and failed to provide ample alternative avenues of communication.[220] The final determination of this issue will depend upon which characterization of Waikiki is found to be more accurate: Is Waikiki a separate entity unto itself, or is it merely a small portion of the whole of Honolulu? The question within this question is whether this determination should be made by the court or left to the legislature.

ii. Narrow tailoring and ample alternative channels of communication

The Hawaii District Court found that a complete Waikiki-wide ban on non-profit peddling activity was too broad insofar as Waikiki is a large area which, "for all practical purposes . . . functions as a distinct

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[216] Order Granting In Part Plaintiff's Motion for Preliminary Injunction and Granting Plaintiff's Motion for Temporary Restraining Order, One World One Family Now v. City and County of Honolulu, 25 (D. Haw. 1994) (No. 94-00395).

[217] City of Renton v. Playtime Theaters, 475 U.S. 41, 48 (1986).

[218] *See* Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989).

[219] *Id.*

[220] Order Granting In Part Plaintiff's Motion for Preliminary Injunction and Granting Plaintiff's Motion for Temporary Restraining Order, One World One Family Now v. City and County of Honolulu, 25 (D. Haw. 1994) (No. 94-00395).

entity . . .''[221] The Court then held that the City's interests were sufficient to justify a ban on the main thoroughfares of Kalakaua and Kuhio Avenues, but not on the smaller side streets of Waikiki.[222]

The City argues that this portion of the Court's opinion was in error as it amounts to a zoning decision made by a body unqualified to do so.[223] In *Clark v. Community for Creative Non-Violence*,[224] the Court upheld Washington D.C's ban on overnight camping in Lafayette Park and the Mall.[225] Demonstrators wished to sleep in the parks in order to draw attention to the plight of the homeless.[226] In finding the ban narrowly tailored, the Court stated that,

> We do not believe . . . the time, place, or manner decisions assign to the judiciary the authority to replace the Park Service as the manager of the Nation's parks or endow the judiciary with the competence to judge how much protection of park lands is wise and how that level of conservation is to be attained.[227]

Additionally, the Court pointed out that the Park Service had not attempted to completely ban sleeping from the city and parks altogether.[228] Rather, it had permitted camping elsewhere in areas that it believed the activity was not inimical to the legitimate purposes of maintaining the parks in an attractive condition for those who wished to enjoy them.[229]

Similarly, the City of Honolulu has not attempted to ban sidewalk peddling from the entire City. Rather, in a county that covers 625 square miles, Waikiki's 507 acres constitute approximately one tenth of one percent of the total area of the City and County of Honolulu.[230] And, as in the *Clark* case, Honolulu's ban on peddling in Waikiki is designed to preserve Waikiki in a attractive condition for those who wish to visit there.

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[221] *Id.* at 28.

[222] *Id.* at 30.

[223] Opening Brief of Defendants-Appellees and Cross-Appellants at 28, One World One Family Now v. City and County of Honolulu, (9th Cir. 1994) (No. 94-16373).

[224] 468 U.S. 288 (1984).

[225] *Id.* at 299.

[226] *Id.* at 289.

[227] *Id.* at 299.

[228] *Id.* at 295.

[229] *Id.* at 296.

[230] Opening Brief of Defendants-Appellees and Cross-Appellants at 3, One World One Family Now v. City and County of Honolulu, (9th Cir. 1994) (No. 94-16373).

In applying the same test, the Court has also upheld a complete ban on the posting of political signs in certain public fora in order to prevent the resulting visual assault.[231] The vendors, however, have argued that the Court's decision in *City of Ladue v. Gilleo*,[232] controls the situation in Waikiki and mandates a finding in their favor. In *Ladue*, the Court struck down an ordinance that prohibited all residential signs except for those falling within one of ten exemptions. The Court so held because the regulation prohibited the use of an entire medium of expression.[233] Again, this argument only holds true if Waikiki is considered a separate entity for the purposes of applying the time, place, and manner test. However, it would seem more sensible to analogize Waikiki to the Parks within Washington D.C., rather than to separate Waikiki entirely from the City and County to which it belongs.

Furthermore, in *Playtime Theaters*, the Court held that cities may regulate speech related activities by dispersing them, or by effectively concentrating them.[234] And, under *Ward*, a city is under no duty to ensure that it uses the least intrusive means of furthering its legitimate interests.[235] "[The] requirement of narrow tailoring is satisfied 'so long as the . . . regulation promotes a substantial government interest that would be achieved less effectively absent the regulation.'"[236] As the Court stated, this does not mean that the regulation is invalid "'simply because there is some imaginable alternative that might be less burdensome on speech.'"[237]

A less than complete ban from Waikiki would certainly mean that its interests would be achieved less effectively than if forced to permit sidewalk peddling. Furthermore, the appropriate test to determine the suitability of an activity in a specified location is whether the manner of expression is basically incompatible with the normal activity of a particular place at a particular time.[238] As merchants have argued, the

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[231] Metromedia v. City of San Diego, 453 U.S. 490 (1981).

[232] 114 S.Ct. 2038 (1994).

[233] *Id.* at 2045.

[234] City of Renton v. Playtime Theaters, 475 U.S. 41, 51 (1986).

[235] *Ward*, 491 U.S. at 797 (1989).

[236] *Id.* at 799 (quoting United States v. Albertini, 472 U.S. 675, 689 (1985)).

[237] *Ward*, 491 U.S. at 797 (quoting United States v. Albertini, 472 U.S. 675, 689 (1985)).

[238] Grayned v. City of Rockford, 408 U.S. 104 (1972).

sidewalks of Waikiki are not designed to serve as space for an open market.[239]

As for the question of ample alternative channels of communication, the Court in *Playtime Theaters* held that the fact that respondents had to fend for themselves in the free market did not constitute a First Amendment violation.[240] The Court noted that it was sufficient that five percent of Renton's business district was available for establishing adult theaters.[241] Substantially more sidewalk space is available to the T-shirt vendors outside of Waikiki. Perhaps most importantly, the T-shirt vendors are indeed free to disseminate their message throughout Waikiki by handing out leaflets (or T-shirts), singing, chanting, proselytizing, or engaging passers-by in conversation. The plaintiffs are not prohibited from Waikiki, nor is their message. Only sidewalk peddling is restricted from Waikiki and the Court's precedents support such a restriction.

IV. Conclusion

The activity of the Waikiki T-shirt vendors is commercial conduct; Their activity does not even trigger First Amendment protections. Furthermore, even assuming that message-bearing T-shirt sales from sidewalk tables is protected speech, the City is still justified in prohibiting the activity from Waikiki as a valid time, place or manner restriction. In the meantime, however, "To permit or not to permit?" remains an unanswered question.

Jacqueline D. Fernandez[242]

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[239] *Merchant: Sidewalk Not a Retailing Property*, Honolulu Advertiser, Jan. 27, 1994 at A2.

[240] *Id.* at 53.

[241] *Id.*

[242] Class of 1996, William S. Richardson School of Law.

Empowering Battered Women: Changes in Domestic Violence Laws in Hawai'i

WITHOUT PEACE IN THE NATIONS
NO PEACE IN THE NATIONS
WITHOUT PEACE IN THE TOWNS
NO PEACE IN TOWNS
WITHOUT PEACE IN THE HOME
NO PEACE IN THE HOME
WITHOUT PEACE IN THE HEART

Anonymous

I. INTRODUCTION[1]

A. Background

Domestic Violence[2] is the leading cause of injury to women in the United States between the ages of 15 and 44.[3] Every fifteen seconds,

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[1] This note will discuss spousal abuse against women because according to the National Woman Abuse Prevention Project of the Department of Office of Victims Crime (1988), ninety-five percent of all domestic violence victims are women and ninety-seven percent of the perpetrators are men. Homosexual and lesbian relationships are also subject to violence but are outside the scope of this note.

[2] MARGARET EGBERT, OUR RIGHTS, OUR LIVES: A GUIDE TO WOMEN'S LEGAL RIGHTS IN HAWAII 163 (1991). Egbert outlines five main types of abuse as follows:

1) Physical abuse which includes hitting, punching, slapping, pushing, pinching, squeezing, holding you against your will, choking, kicking, hair pulling, burning or cutting.

2) Intimidation and harassment include threatening to kill you or beat you, threatening to take the children away, threatening to hurt you, your family or friends, threatening to hurt the children, threatening suicide, calling you at work, following you around, yelling at you, blocking your car, showing a weapon and threatening to use it.

3) Sexual abuse includes any sexual act which you are forced to participate in

somewhere in the United States, a woman is beaten by her husband, ex-husband or boyfriend.[4] Half of all married women will be beaten at least once by their spouses.[5] Women are in nine times more danger of a violent attack in their own home than on the streets.[6] Between 2,000 and 4,000 women die each year of abuse.[7] One in four suicide attempts by all women and half of all attempts by African American women follow an abusive relationship.[8] The March of Dimes reported that more babies are now born with birth defects as a result of the mother being battered during pregnancy than from the combination of all diseases and illnesses for which we now immunize pregnant women.[9] Fifty percent of all women have or will be involved in at least one incident suffering from abuse from a "loved one."[10] This statistic is not because fifty percent of all men are abusive but because society and the communities to which these women belong allow the abusers back into the homes or on the street to find a new "love."[11] Finally,

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when you don't want to. This includes being raped by your spouse/partner or forced to have sex with others.

4) Psychological abuse includes name-calling; overcriticizing; public and private humiliation; and affairs with other women. Many women have reported that of types of abuse, the worst is the psychological abuse.

5) Isolation is a series of actions which is designated to make you dependent upon him. This includes not being able to see your own friends alone, not being able to meet people or to have them visit you, not being able to drive or have a car, not having easy access to joint money and being locked in your own home.

Id.

[3] *Guns and Family Abusers*, WASH. POST, June 25, 1994 at A20 [hereinafter Guns & Abusers].

[4] OFFICE FOR WOMEN'S RESEARCH, DOMESTIC VIOLENCE FACT SHEET (1994) [hereinafter 1994 W.R.D.V. Fact Sheet].

[5] *See* Joan Zoara, *The Criminal Law of Misdemeanor Domestic Violence*, 83 J. Crim. L. & Criminology 46 (1992); *see also* RICHARD LANGLEY & RICHARD LEVY, WIFE BEATING: THE SILENT CRISIS 12 (1977).

[6] Sarah Buel, *Defending Our Lives*, Presentation at Domestic Violence Clearinghouse at Nov. 11, 1994 (videotape on file with author).

[7] ELIZABETH SCHNEIDER, VIOLENCE AGAINST WOMEN: ADDRESSING A GLOBAL PROBLEM 4 (1992).

[8] Georgia Department of Human Resources, Family Violence Teleconference Resource Manual (1992).

[9] Rhonda L. Kohler, *The Battered Women and Tort Law: A New Approach to Fighting Domestic Violence*, 25 LOY. L.A. L. REV. 1025, 1026 (1992) (citing Stan Grossfeld, *Safer and in Jail: Women Who Kill Their Batterers,* BOSTON GLOBE, Sept. 2, 1991, at 1, 3).

[10] Buel, *supra* note 6.

[11] 1994 W.R.D.V. FACT SHEET, *supra* note 4.

to put things in proper perspective of our nation's priorities on this crisis, there are 1200 shelters for battered women and children nationwide while there are 3800 hundred animal shelters.[12]

The statistics on domestic violence clearly show that it is a cancer growing in our nation's homes, even in our very own backyard. In Hawai'i,[13] approximately fourteen percent of all women admit being a victims of domestic violence.[14] Over 49,000 women, between the ages of 18 and 64, are victims of domestic violence.[15] In 1991, there were 16,349 calls to the police regarding domestic violence situations.[16] The Domestic Violence Legal Hotline receives an average of fifty calls a day for information regarding temporary restraining orders.[17] Furthermore, one study conservatively estimates that one woman a month is killed by her boyfriend, husband or ex-partner.[18]

On O'ahu, domestic violence related deaths have tripled from seven in 1990 to twenty-three in 1991.[19] O'ahu police receive approximately 1,000 calls a month related to domestic violence but only results an average of four arrests per day.[20]

B. Overcoming Apathy

Domestic violence is not just a "woman's issue." It has a significant impact on community resources. For example, it plays a major role in

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[12] *Id.*

[13] HAW. REV. STAT. § 586-1 (1989) is the civil statute which regulates domestic violence, it reads in pertinent part as follows:

> (1) Physical harm, bodily injury, assault, or the threat of imminent physical harm, bodily injury or assault, extreme psychological abuse or malicious property damage between family or household members; or
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> (2) Any act which would constitute an offense under section 709-906, or under part V or VI of chapter 707 committed against a minor family or household member by an adult family or household member.

Id.

[14] HAWAII STATE COMMISSION ON THE STATUS OF WOMEN, Domestic Violence Report, (1993) [hereinafter 1993 HI STATE DOMESTIC VIOLENCE REPORT].

[15] *Id.* The report states that the "typical" victim in Hawaii is "female, between the ages of 20 to 40; either formerly or currently intimate with their abuser, and Caucasian or Hawaiian/part-Hawaiian." *Id.*

[16] 1994 W.R.D.V. FACT SHEET, *supra* note 4.

[17] *Id.*

[18] HAWAII INSTITUTE FOR CONTINUING LEGAL EDUCATION, FAMILY LAW SECTION, FAMILY PRACTICE SEMINAR: FOCUS ON THE FAMILY, at 36 (1993).

[19] 1994 W.R.D.V. FACT SHEET, *supra* note 4.

[20] *Id.*

increased health costs[21] and loss of business productivity.[22] Also, law enforcement officers spend a hugely disproportionate amount of time on domestic violence calls than on murder, rape and all forms of aggravated assault combined.[23] Furthermore, over fifty percent of all homeless women are escaping from abusive homes.[24]

An understanding of the dynamics of domestic violence will replace myths that are perpetuated by stereotypes. For example, it is a myth that the typical battered woman is uneducated and living in poverty.[25] Women are victims in every culture and on all levels of society. Statistics show that fifty percent of all women are battered sometime in their lives.[26] Many of the victims are "successful professionals" such as attorneys, doctors, executives and professors. In fact, these professional women are far less likely to leave an abusive relationship than lower-income victims.[27]

C. *Overview*

Section II reviews the dynamics of domestic violence in order to dispel popular myths regarding battered women. A proper understanding of the battered woman will encourage the community to provide adequate remedies for the victim of domestic violence. Section III analyzes the Hawaii Legislature's recent amendments to battle domestic violence in Hawai'i and its impact on the community. Finally, Section IV of this note concludes that each act is a positive step in ending the cycle of violence in Hawai'i, but these acts are merely a first step in the difficult process.

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[21] DOMESTIC VIOLENCE COALITION, DOMESTIC VIOLENCE: A GUIDE FOR HEALTH CARE PROVIDERS, 3d. (1991). Medical expenses from domestic violence total at least $3 to $5 billion annually. Statistics show that violent families use hosptials more than other familes and that businesses forfeit at least another $100 billion in sick leave, lost wages, absenteeism and non-productivity. *Id.*

[22] *Id.*

[23] SCHNEIDER, *supra* note 7, at 4.

[24] *Id.*

[25] WALKER, TERRIFYING LOVE 106 (1989).

[26] *Id.*

[27] *Id.* at 107. Walker lists four reasons explaining why professional women are less likely to leave the batterer: 1) lower income women are more "in touch" with community services which include those for domestic violence victims; 2) fear of social stigma attached to the victim; 3) fear of hurting their husband's careers and 4) fear that others will not come to their aid because of social, financial, political ties to their husband. *Id.*

II. Dynamics of Domestic Violence

People often wonder why battered women stay with their abuser, assuming wrongfully that the victim would be safer if she left the abuser. [28] Most people believe that the woman is a mashochist or helplessly "dumb" for not seeing the abuser for the animal that he is.[29] The dominant theory explaining why a woman stays with the batterer is a "learned helplessness" theory developed by Dr. Lenore Walker. Walker's theory is the "dominant conception" of the battered woman syndrome and[30] has greatly influenced the law's image of the battered woman.[31]

Walker postulates a three-stage pattern in which the man manipulates his victim through various forms of abuse and the woman responds in fear and resentment.[32] This pattern of behavior is called the Cycle of Violence. The Cycle of Violence has three phases: a tension-building phase, an acute battering incident; and the "honeymoon" phase.[33]

Walker describes these three phases in *Terrifying Love*.[34] During the tension-building phase, the woman is victim to minor battering incidents such as slaps, pinches and controlled verbal abuse. The woman attempts to calm the batterer and prevent an escalation of violence.[35] Nevertheless, tension builds until the second phase, the acute battering incident. Battered women see this phase as unpredictable but at the

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[28] Walker, *supra* note 25, 47. In fact, it is more dangerous for women who attempt to leave the abusive relationship. Walker states that the abuse often escalates at the point of separation and that battered women are in greater danger of harm or death than during the relationship. *Id.*

[29] Angela Browne, When Battered Women Kill 46 (1987). Studies indicate that 73 to 85% of abuse victims do not experience the first incident of violence until after they have married the abuser. *Id.*

[30] Robert F. Schoop, et al., *Battered Woman Syndrome, Expert Testimony, and the Distinction between Justification and Excuse*, 1994 U. Ill. L. Rev. 45, 50 (1994).

[31] Naomia R. Cahn, *Civil Images of Battered Women: The Impact of Domestic Violence on Child Custody Decisions*, 44 Vand. L. Rev. 1041, 1050 (1991).

[32] Walker, supra note 25, at 42 .

[33] *Id.* at 42-43.

[34] Lenore Walker, Terrifying Love (1989).

[35] *Id.* Walker describes the woman's response in the tension-building phase as follows: "They go to great lengths to manipulate and control as many factors in their environment, and as many people, as they possibly can. They may also 'cover' for the batterer in an attempt to win his favor, making excuses for his bad behavior, and in general, isolating themselves from others who may help them." *Id.*

same time, inevitable.[36] After the acute battering, there is a tranquil period dubbed the "honeymoon" phase. During this phase, the batterer exhibits loving behavior toward his victim. For example, he may send flowers to the woman he has hospitalized.[37] The batterer may beg for her forgiveness and promise never to do it again. The victim then convinces herself that the batterer needs her to keep his "world" intact and if her love is strong enough, he will change. Unfortunately, the tension-building stage begins again and the cycle repeats itself. As the repetitions become more frequent, the "honeymoon" phase will become shorter and the acute battering less predictable.[38] As a result of this cycle, the woman believes she has relinquished control of her life and cannot escape.

Victims of Battered Woman Syndrome, like Post Traumatic Stress Disorder suffered by Vietnam War veterans, believe that they are virtually helpless and must endure the abuse.[39] The symptoms of this syndrome include "anxiety, fear, depression, shock, anger, compassion, guilt, humiliation, confused thinking, uncontrolled reexperiencing of traumatic events, intrusive memories, rigidity, lack of trust, suspiciousness, hypervigilence, and increased startle response to cues of possible violence."[40] This sense of helplessness is a response to repeated and unpredictable abuse suffered in the Cycle of Violence.[41] Some women may seek some form of protection by way of the law, shelters or divorce, but many women remain trapped in the abusive relationship.[42]

In addition to the psychological barriers which prevent a woman from leaving, women stay with an abusive partner for other reasons such as social or economic factors.[43] Couples usually have personal property or children in common and know one another's daily routines, families, place of employment and mutual friends.[44] It would be difficult

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[36] *Id.* at 43. Some women will provoke an acute battering incident in order to "get it over with" rather than endure the anxiety of the tension-building phase. *Id.*

[37] Cahn, *supra* note 31, at 1051.

[38] Walker, *supra* note 25, at 46.

[39] *Id.* at 48.

[40] Douglas Scherer, *Tort Remedies for Victims of Domestic Abuse*, 43 S.C. L. REV. 543, 555 (1992) (citing Daniel Sonkin et al., THE MALE BATTERER: A TREATMENT APPROACH 449 (1985)).

[41] WALKER, *supra* note 25, at 44.

[42] Kohler, *supra* note 9, at 1028.

[43] BROWNE, *supra* note 29, at 110. Browne states that there are 3 factors in a woman's decision to stay: "1) practical problems in effecting a separation, 2) the fear of retaliation if they do leave, and 3) the shock reactions of victims to abuse." *Id.*

[44] *Id.*

for a woman to hide from a man who is so familiar with her life. Women may also be concerned with the social stigma attached to the victim of abusive relationships.[45] Family and friends often turn the woman away rather than accept the existence of the violent relationship.[46]

It is important to remember that domestic violence is about power and control. It is deliberate and has a specific target. If assualt and battery is a crime between two strangers, then the definition should not change just because the perpetrator and victim are intimate.[47] Understanding the dynamics of domestic violence is a vital step toward a solution.

III. Legislative Remedies

During the last fifteen years, there has been a signficant increase in remedial legislation in all fifty states and the District of Columbia.[48] In 1993, the Seventeenth Session of the Hawaii Legislature enacted a number of bills which specifically address problems in the area of domestic violence law. [49]

A. Abolition of Interspousal Tort Immunity Rule: A New Avenue of Redress in Hawai'i

At one time, Hawai'i enacted interspousal immunity and barred all forms of actions between husband and wife.[50] The constitutionality of the interspousal immunity rule was upheld in *Peters v. Peters*.[51] This

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[45] Scherer, *supra* note 40, at 548 (citing Lenore Walker who explained that there is a myth that assualted women)("experience some pleasure, often akin to sexual pleasure, through being beaten by the man she loves"). *Id.*

[46] Cahn, *supra* note 31, at 1051.

[47] Penelope D. Clute, *How Prosecutors Can Make a Difference Pro-Actively Handling Domestic Violence Cases*, N.Y. Bar J., Aug. 1994, at 44.

[48] Scherer, *supra* note 40, at 551.

[49] *See* Haw. Rev. Stat. § 586-1, *supra* note 13 and accompanying text.

[50] Haw. Rev. Stat. § 572-28 (1987) reads in pertinent part: "A married person may sue and be sued in the same manner as if the person were sole; but this section shall not be construed to authorize suits between spouses." (repealed 1993).

[51] 63 Haw. 653, 634 P.2d 586 (1981). *Peters* involved a married couple, residents of New York, who were in a motor vehicle accident in Hawaii involving a "U-Drive" vehicle driven by the husband while his wife was a passenger. The wife brought a negligence claim against her husband. The Hawaii Supreme Court upheld Haw. Rev. Stat. § 572-28 saying that the "long standing state policy prohibiting interspousal suits is not bereft of rationality." *Id.*, 634 P.2d at 589.

section will address the history and justification of the interspousal tort immunity rule in Hawai'i, criticism of this "legal anachronism" and the impact of its abolition.[52]

1. History of the rule: anachronitic concept of husband and wife as one legal unit

The concept of a marriage merging husband and wife into one legal unit was adopted in Hawai'i through Act 2, 1 Statute Laws of His Majesty Kamehameha III in 1846.[53] This concept remained intact in Hawai'i until the enactment of the Married Woman's Act in 1888, in which the Legislature recognized the right of a married, "woman to hold real and personal property in her own name, to make contracts as if she were sole, and to sue and be sued in the same manner as if she were sole."[54] Even though the Hawaii Legislative Assembly granted a woman's right to sue and be sued, there remained a thorny clause which read: "[B]ut this section shall not be construed to authorize suits between husband and wife."[55] The language of § 5, commonly referred to as the interspousal immunity rule, was codified in Hawaii

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[52] S.B. No. 1216, 17th Leg., Reg. Sess. (1993). The Senate bill states that HAW. REV. STAT. § 572 - 28 will read in pertinent part as follows: "§ 572-28 Suits by and against. A married person may sue and be sued in the same manner as if the person were sole. This section shall be construed to authorize tort suits between spouses." *Id.*

[53] *Peters v. Peters*, 634 P.2d at 589 . *Peters* citing Ch. IV, Art.I, § IV of said Act which reads in pertinent part:

> The wife, whether married in pursuance of this article or heretofore, or whether validly married in this kingdom or in some other country, and residing in this, shall be deemed for all civil purposes, to be merged in her husband, and civilly dead. She shall not, without his consent , unless otherwise stipulated by anterior contract, have legal power to make contracts, or to alienate and dispose of property—she shall not be civilly responsible in any court of justice, without joining her husband in the suit, and she shall in no case be liable to imprisonment in civil action. The husband shall be personally responsible in damages, for all the tortuous [sic] acts of his wife; for assaults, for slanders, for libels and for consequential injuries done by her to any person or persons in this kingdom.

Id.

[54] *Id.* at 589 citing Ch. XI, Laws of His Majesty Kalakaua I, passed by the Legislative Assembly of 1888.

[55] Ch. XI, Laws of His Majesty Kalakaua I, passed by the Legislative Assembly of 1888, which reads in pertinent part as follows: SECTION 5. A married woman may sue and be sued in the same manner as if she were sole; but this section shall not be construed to authorize suits between husband and wife. *Id.*

Revised Statutes § 573-5 and last was upheld in *Peters v. Peters*[56] in 1981. In *Peters*, the Hawaii Supreme Court stated that it was unconvinced that the rule was "bereft of rationality"[57] and that deference to the Legislature was the "proper judicial stance."[58] Following *Peters*, it was clear that any change to the rule would have to come from the Legislature.

2. The rule is no longer viable to today's society

American jurisprudence created the interspousal immunity rule on the belief that upon marriage the woman was enveloped by the husband's identity to become one legal unit.[59] Without the consent of her husband, a married woman could not own property, contract or sue.[60] Although the historical basis for the rule seems outdated, interspousal immunity survived for mainly two reasons: 1) the belief that allowing tort actions between married couples would incite marital disharmony,[61] and; 2) the fear of collusive lawsuits and its effect on insurance companies should the immunity be lifted.[62]

While the state may have had a viable interest in the preservation of marital harmony, to bar the proper forum for a legitimate claim did not further the compatibility of a married couple.[63] If the marriage is marred

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[56] *Peters*, 634 P.2d at 590. The Hawaii Supreme Court held that the interspousal immunity rule has "statutory provenance" and that the "rule is not for judicial discard without compelling reasons." *Id.*

[57] *Id.* at 591. The Court admitted that this was,"[D]espite the unanimous or near-unanimous belief of legal writers that the 'metaphysical and practical reasons which prevented such actions . . . are no longer applicable." *Id.*

[58] *Id.* at 590.

[59] McCurdy, *Torts Between Persons in Domestic Relations*, 43 HARV. L. REV.1030, 1030-33 (1930). *See also* S.B. No. 1216, 17th Leg., Reg. Sess. (1993) Ironically, despite the lack of substantive right to sue, women have been held liable for contracts of necessaries.

[60] S.B. No. 1216, 17th Leg., Reg. Sess. (1993).

[61] Peters v. Peters, 63 Haw. 653, 634 P.2d 586 (1981). The court held that based on legislative intent to prevent marital disharmony and collusive suits, interspousal tort actions should not be countenanced. *Id. See generally* Amy Emiko Ejercito, *Peters v. Peters: Is There Really a Choice of Law Under Hawaii's Interest Analysis?*, 5 U. HAW. L. REV. 113 (1985).

[62] *Id.*; *see also* Shook v. Crabb, 281 N.W.2d 616, 618 (Iowa 1979).

[63] *Shook*, 281 N.W.2d at 617. The Iowa Supreme Court went on to say that, "While the state has an interest in encouraging marital harmony, to deny a forum for the redress of a wrong would do little to advance the compatibility of a married couple. It is difficult to see how denying access to the legal process should be said with any certainty to encourage domestic tranquility". *Id.*

by violence, the preservation of marital harmony is moot. The interspousal immunity rule merely served as a bar to legitimate tort claims for damages where injuries were suffered due to spousal battery.[64]

As to the potential for collusive lawsuits, there is no distinction between the potential for interspousal actions and other personal injury claims.[65] Interspousal cases will be screened with the same stringency as other types of personal injury cases, a meritless interspousal suit will be dismissed as easily as any other meritless case.[66]

There is also concern for the potential fraud that could impact insurance companies if interspousal suits are allowed.[67] But this concern is not, in itself, a legitimate reason to retain interspousal immunity in Hawai'i as the insurance companies are capable of limiting their exposure to potential fraud by either limiting the coverage or by making adjustments in their premiums.[68]

Aside from minor concerns, the Hawaii Legislature found that the interspousal immunity rule is "bereft of rationality" and should no longer be the law of the state.[69] The Legislature added that the abolition of the interspousal tort immunity rule removes from marriage the "discriminatory burden" which is absent in other intrafamily lawsuits such as children versus parents and siblings versus siblings.[70]

3. *Abolition is the first of many obstacles*

Women may now bring tort claims against their husbands including claims for injuries sustained during the abusive relationship under Hawaii Revised Statutes § 663-1.[71] Most tort suits that arise from

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[64] *Id.*

[65] *Id.* at 618.

[66] *Id.* The court held that, "We do an injustice not only to the intelligence of jurors, but to the efficacy of the adversary system, when we express undue concern over the quantum of collusive or meritless law suits. There is, to be sure, a difference between the ability to file a suit and to achieve a successful result. It is upon the anvil of litigation that the merit of a case is finally determined . . . ." *Id.*

[67] *Id.* at 617.

[68] *Id.*

[69] *See* Peters v. Peters, 63 Haw. 653, 634 P.2d 586 (1981). The *Peters* court defered to the Legislature since, "[I]t would be presumptuous to believe an unamended aspect has been left for judicial alteration." *Id.* at 591.

[70] S. Stand. Com. Rep. No. 1167, 17th Leg., 1993 Reg. Sess.

[71] Haw. Rev. Stat. § 663-1 (1984) reads as follows:

Torts, who may sue and for what. Except as otherwise provided, all persons

domestic violence will allege assault and battery, but some may involve intentional infliction of emotional distress.[72]

Although a spouse may now sue her husband in tort, there are still many barriers. The abolition of the interspousal immunity is only the first of many barriers that a battered woman faces before she can actually see the inside of a courtroom. First of all, the women must overcome procedural barriers.[73] For example, if divorce proceedings have not yet begun or are not yet finalized, the court may decide to join the battery action with the divorce proceedings.[74] If the divorce proceedings are final and the battered victim did not join the tort action, she may be barred from the tort action based on the doctrine of res judicata.[75] And there may be other bars to the tort action such as the statute of limitations which may run before the women had been emotionally prepared to take action.[76]

Even if a woman is able to overcome the procedural barriers, she will face barriers in the courtroom in the form of stigmas and prejudices that are associated with the "battered woman."[77] For example, the use of the Battered Women's Syndrome to explain the dyanamics of domestic violence may be a "catch-22" since even the word "syndrome" has a negative connotation which taints the minds of people, including judges and jurors.[78]

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residing or being in the State shall be personally responsible in damages, for trespass or injury, whether direct or consequential, to the person or property of others, or to their spouses, children under majority, or wards, by such offending party, or the offending party's child under majority, or by the offending party's command, or by the offending party's animals, domestic or wild; and the party aggrieved may prosecute therefor in the proper courts.

Haw. Rev. Stat. § 663-1 (1984).

[72] RESTATEMENT (SECOND) OF TORTS § 46 cmt. k (1979). The Restatement defines intentional infliction of emotional distress as "so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency and conduct so regarded as atrocious, and utterly intolerable in a civilized community." *Id.*

[73] Kohler, *supra* note 9, at 1025.

[74] *Id.* at 1030.

[75] *Id.*

[76] *Id. See* Haw. Rev. Stat. § 662-4 (1989) which reads as follows: "Statute of Limitation. A tort claim against the State shall be forever barred unless action is begun within two years after the claim accrues . . . ." *Id.*

[77] Kohler, *supra* note 9, at 1030.

[78] Browne, *supra* note 29, atl 77. *See also* State v. Cababag, 9 Haw. App. 496, 850 P.2d 716, 722 (1993). In *Cababag*, the Intermediate Court of Appeals analogized the use of expert testimony in battered woman syndrome cases to sexually abused child

Even in jurisdictions where the interspousal immunity rule has been abolished, judges have sometimes found "exceptions" to its abrogation when a wife sues her husband.[79] Other courts denied full recovery for injuries suffered in a long-term abusive relationship because the battered victims did not leave after the first act of violence.[80] For example, in *Blair v. Blair*,[81] a Vermont court explained its minimization of the woman's testimony regarding abuse by her husband:

> The marital misdeeds that have been attributed to [the husband], most of them, we don't believe. We do recognize that there was a certain amount of misbehavior; that there may be these temper tantrums and items of misbehavior, but the strangling with the hands and violence and threats that were described by [the wife] have been blown way out of proportion as evidenced by the fact that she stayed throughout the four years of marriage.[82]

The *Blair* court trivialized the wife's abuse allegations as fraudulent accusations by a scorned woman.[83] This is reflective of the ignorance of the effects that long systematic abuse has on a woman.[84]

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cases. The court strongly favored the use of expert testimony in both types of cases. The court's decision was consistent with the Hawaii Supreme Court's statement,"[T]he routine indicia of witness credibility—consistency, willingness to aid the prosecution, straight froward rendition of the facts—may, for good reason be lacking. As a result jurors may impose standards of normalcy on child victim/witnesses who consistently respond in distinctly abnormal fashion." *Id.*, 850 P.2d at 722. (quoting State v. Batangan 71 Haw. 552, 799 P.2d 48 (1990) (where an expert was allowed to testify to explain sexually abused child syndrome because it was outside the jury's scope of everyday experiences)).

[79] Kohler, *supra* note 9, at 1029. Kohler cites *Chiles v. Chiles*, 779 S.W.2d 127, 131 (Tex. 1989), a case in which the Texas Court Appeals held that the tort of intentional infliction of emotional distress was not recognized as a separate cause of action in a divorce proceeding. Athough the jury found that the wife was subjected to "extreme and outrageous" conduct in the form of "physical and verbal abuse, harassments, threats and generally provocative conduct" which was the proximate cause of her "severe emotional distress." *Id.* The court held that despite a jury finding of physical abuse, the plaintiff's failure to plead or show evidence of physical injury barred her claims of both intentional and negligent infliction of emotional distress.

[80] Kohler, *supra* note 9, at 1030 *See also*, *Man Gets 18 Months for Killing Unfaithful Wife*, The Japan Times, Oct. 20, 1994, at 7. A man who fatally shot his wife when he caught her in bed with her lover was sentenced to 18 months. Her lover was left unharmed. *Id.*

[81] 575 A.2d 191, 193 (1990).

[82] *Id.* at 193.

[83] *Id.* The trial judge said,"I think that they're blown up by her own hurt with what happened to the marriage."

[84] Kohler, *supra* note 9, at 1030. Kohler cites Christine A. Littleton, *Women's*

The abolition of the interspousal immunity rule provides a battered woman with the means to adjudicate the wrongdoings of her husband as well as the potential for monetary damages which may relieve some of their financial dependency on her husband.[85] However, court backlog can delay tort suits and collectibility is also an issue for these kind of cases.[86]

B. Exemption from mediation in divorce proceedings

According to the Hawaii Divorce Manual, divorce mediation is,"an adjunct to the adversarial, legal approach to settling disputes" and the family court presumes that attorneys will refer their contested cases to mediation.[87] This section will address the addition of Hawaii Revised Statutes § 580, which exempts parties from mediation if there is an allegation of family violence, and its justification and its impact on the community.[88]

1. In cases of violence, mediation endangers the woman's well-being

The nature of a mediation program works against the very grain of the dynamics of violent relationship.[89] The seriousness of spousal abuse makes it a crime rather than a resolvable dispute and therefore, refutes the efforts of mediation.[90] There is a prominent belief that domestic

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[84] Kohler, *supra* note 9, at 1030. Kohler cites Christine A. Littleton, *Women's Experience and the Problem of Transition: Perspective on Male Battering of Women*, 1989 U. CHI. LEGAL F. 23, 36 & n.55. Littleton analogizes battered victims to rape victims: "[I]t is often said that rape victims are raped twice—once by the rapist and once by the legal system. If that is so, then battered women are battered three times—once by the batterer, a second time by society and finally by the legal system." *Id.*

[85] HARV LAW REV. ASSOC., NEW STATE AND FEDERAL RESPONSES TO DOMESTIC VIOLENCE 1532 (1993).

[86] *Id.*

[87] First circuit Memo No. 35 (Oct. 17, 1986) *reprinted in* HAWAII DIVORCE MANUAL ch. 3-1 (3d. 1988).

[88] H.B. No. 569, 17th Leg., Reg. Sess. (1993). The house bill states that HAW. REV. STAT. § 580 - ____will read in pertinent part as follows: "§ 580-____ Battered spouses; exemption from mediation in divorce proceedings. In contested divorce proceedings involving allegations of spousal abuse, the court may excuse a party from participating in any component of any mediation program, if the court determines that it is in the best interest of the party." *Id.*

[89] Dispute Resolution in Education: The NJCA Mediation Model at 8 (1982).

[90] Kelly Rowe, *The Limits of the Neighborhood Justice Center: Why Domestic Violence Cases Should not be Mediated*, 34 EMORY L.J. 855, 864 (1985).

violence consists merely of "family squabbles" or "lovers' spats".[91] But descriptions by battered women, hospital statistics and police records combine to dispute this belief.[92]

Also, mediation avoids attaching blame to either party[93] which allows the batterer to avoid taking responsibility for his criminally violent behavior.[94] Mediation assumes that both parties are partially at fault and are willing, in good faith, to alter negative behaviors in order to save the marriage.[95] In cases with spousal abuse, the mediation mistakenly places some fault on the wife and ignores the underlying cause of the husband's violence.[96] Until the batterer accepts and understands the underlying causes for his violent behavior, change in his wife's behavior will have little effect on his own behavior.[97]

Mediation puts the decision-making and the responsibility of the ultimate dispute resolution on the shoulders of the disputants.[98] The parties reach this resolution through guided communications by the mediator, addessing each other's needs and drafting specific agreements as they emerge through a process of communication and negotiations.[99]

Prior to the last legislative session, parties seeking a judgment in a contested divorce were required to participate in a mediation program.[100] Family court procedures allowed an exemption in cases where recent and severe spouse abuse was involved.[101] This procedure has

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[91] *See* R. Langley & R. Levy., *supra* note 5, at 164. ("Even language used by police officers indicates their low regard for wife beating investigations. The possibly felony is muted by euphemisms such as 'domestic disturbance,' 'family squabble,' 'family trouble,' 'lovers quarrel' and 'family spat.'"). Also, according to Anotonia Novell, U.S. Surgeon General, in 1992, 95% of the battered women in hospitals were never identified as abuse victims. *Id.*

[92] The following statistics are reflective of the depth and seriousness of spousal abuse: U.S. SURGEON GENERAL'S REPORT (1984)(battering is the single most common cause of injury to women resulting in more injuries than automobile accidents, rapes and muggings combined); 1994 W.R.D.V. Report, *supra* note 4 (16,349 calls were received by Honolulu police for assistance in domestic violence cases in 1991 and domestic violence related deaths on O'ahu have more than tripled from seven in 1990 to twenty-three in 1991).

[93] DISPUTE RESOLUTION IN EDUCATION, supra note 89, at 52.

[94] Rowe , *supra* note 90, at 866.

[95] *Id.*

[96] *Id.*

[97] *Id.* at 865.

[98] HAWAII DIVORCE MANUAL CH. 3-1 (3d. 1988).

[99] *Id.*

[100] *Id.*

[101] *Id.*

been amended to make it easier to exempt battered spouses from the required participation in the mediation.[102] The exemption will be left to the court's discretion in contested divorce proceedings where: 1) spousal abuse is alleged and 2) the court determines that it is in the best interest of the excused party.[103] Following the testimony of the Hawaii State Judiciary and the Hawaii State Commission on the Status of Women[104], this measure attempts to protect both the physical and emotional wellness of the victim.[105]

In a study conducted by the Hawaii State Commission on the Status of Women, none of the family courts that responded would recommend mediation in their courts where domestic violence was an issue.[106] This is simply because "mediation is not used in criminal cases or if lethality is an issue."[107]

Mediation is often used to "screen" or ease the overload in the courts but mediation can be detrimental to the spousal abuse victim. By recognizing the special circumstances of battered victims, the Legislature sent out a message to the community that domestic violence is a serious crime and courts will protect the victim's physical and psychological well being.

C. Restraining order prohibiting posession of firearms[108]

A temporary restraining order (TRO) is a court order that requires distance between the batterer and the victim for a specific time period and is used to grant immediate relief from further abuse against the

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[102] HAW. REV. STAT. ch. 580 is amended by adding a new section, which will read as follows: "Battered spouses; exemption from mediation in divorce proceedings. In contested divorce proceedings involving allegations of spousal abuse, the court may excuse a party from participating in any component of any mediation program, if the court determines that it is in the best interest of the party." *Id.*

[103] STAND. COM. REP. No. 510, 17th Leg., Reg. Sess. (1993).

[104] *Id.*

[105] *Id.*

[106] 1993 HI Domestic Violence Report, *supra* note 14. On Maui, mediation is sometimes used for custody or visitation issues. On Oahu, mediation sessions are used to negotiate civil restraining order terms or to "screen" divorce proceedings (This study was conducted before the end of the 17th Legislative session which enacted H.R.S. § 580 exempting battered spouses from mediation). *Id.*

[107] *Id.*

[108] S.B. No. 525, 17th Leg., Reg. Sess. (1993).

vicitm.[109] A recent amendment prohibits the possession of a firearm while the TRO is in effect.[110] This amendment recognizes the danger of allowing a person allegedly prone to violence to have possession of a weapon. Section 1 will address the background and the justification for the amendment and section 2 will address its impact and shortcomings.

1. Background

This section will discuss the prohibition of the possession of a firearm by a person restrained by a court order and the need for the prohibition. This section will also analyze of the new statutory material in light of the 1994 Crime Bill and the conflicting views between the prohibition of mere possession or ownership by restrained persons and the constitutionality of a forfeiture of a firearm.

Hawaii Revised Statute § 134-7 which prohibits the possession of firearm or ammunition for certain specified persons has been amended to include those persons who have been restrained pursuant to court order.[111] The new statutory material also provides for notification of the protective order to the chief of police in each county.[112]

This measure is consistent with a gun safety proposal included in the anti-crime bill recently passed by Congress.[113] Both the Senate and

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[109] PETER FINN, Civil Protection Orders: A Flawed Opportunity for Intervention 155 (1991).

[110] *See* S.B. No. 525, 17th Leg., Reg. Sess. (1993).

[111] S.B. Bill No. 525, 17th Leg., Reg. Sess. (1993) stated HAW. REV. STAT. § 134-7 is amended to prohibit a restrained person from possessing or controlling any firearm or ammunition for the period that the restraining order is in effect. The restrained person must relinquish possession of any firearm or ammunition owned to the police department. Anytime that a registered weapon is not relinquished, the court shall grant a search warrant for the limited purpose of seizing the firearm and ammunition. *Id.*

[112] HAW. REV. STAT. § 586-6 is amended to read as follows, in pertinent part: "§ 586-6 Service of order. Any order issued under this chapter shall either be personally served upon the respondent, or served by certified mail, unless the respondent was present at the hearing in which case the respondent may be served by handing the respondent a filed copy of the order after the hearing. A filed copy of each order issued under this chapter shall be served by regular mail upon the chief of police of each county. *Id.*

[113] *Guns and Abusers, supra* note 3. The editorial stated that Sen. Wellstone and Rep. Torricelli introduced a proposal which would prohibit ownership of firearms by persons "deemed to be domestic abusers." *Id.*

the House have approved the bill, but the Senate version is more stringent and effective.[114] The Senate version would ban ownership of firearms by aconvicted spouse and child abusers or those who have restraining orders entered against them for domestic violence.[115] The House, on the other hand, endorsed a more constrictive version which prohibits the mere possession of a firearm by an individual being restrained by court order.[116]

2. *Will It Be Enough?*

Hawai'i followed the House version in limiting the prohibition to the possession, as opposed to ownership, of a firearm by persons who are restrained by court order.[117] In a statewide domestic violence survey, forty-seven of the three-hundred and eleven victims of abused who responded stated that the abuser used a gun in some method of abuse.[118] This statistic is consistent with the nationwide statistic, which shows weapons are used in thirty percent of domestic violence incidents.[119]

These amendments strengthen the court's commitment to safeguard the spousal abuse victim who may not be in arm's reach but in range for a bullet.[120] But in light of the depth and scope of the problem of domestic violence[121], this may not be enough.

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[114] *Id.*

[115] *Id.*

[116] *Id.*

[117] S. STAND. COM. REP. No. 1170, 17th Leg., 1993 Reg. Sess. The report stated that the committee recognized that ownership should not necessarily be equated with control or possession of a firearm or involved in the use of the firearm. Therefore, the word "own" was omitted from the bill to "allow persons to own firearms although subject to restraining order." *Id.*

[118] 1993 HI State Domestic Violence Report, *supra* note 14, at Table 5: Reported Objects and Methods Used to Perpetuate Domestic Violence.

[119] NEWSLETTER FROM THE HAWAII STATE COMM.OF THE STATUS OF WOMEN (HI State Comm. of the Status of Women, Honolulu, HI), Sept. 1993 at A1.

[120] S. STAND. COMM. REP. No. 498, 17th Leg., 1993 Reg. Sess. The report states: "Your committee finds that prohibiting a person under a restraining order from possessing or controlling a firearm merely furthers the intent of the restraining order by protecting the individual protected by the order from being injured from afar." *Id.*

[121] *Guns and Family Abusers*, *supra* note 2. The article states that firearms are used in seven percent of all domestic violence cases (in the United States) which comes to nearly 150,000 cases a year. *Id.*

D. *Illegal to enter or remain on premises of abuse shelter*

This section will discuss the statutory measure attempting to preserve the sanctity of the shelter and the importance of the availability of shelters to abused women.

Hawaii Revised Statute §§ 708-816.5 makes it unlawful to knowingly enter or remain on the premises of a spouse abuse shelter after reasonable warning or request.[122] A violation of this statute is a misdemeanor and equivalent to a criminal trespass in the first degree.[123]

The shelter is a refuge for a battered women and is essential to both immediate survival and future recovery.[124] These safe havens provide food and shelter for women and their children in situations where immediacy is critical.[125] The time bought will give the women an opportunity to network into community resources as well as look for permanent housing.[126] But the most crucial resource offered to these women is the break from the abuse so desperately needed to start the

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[122] H.B. No. 62, 17th Leg., Reg. Sess., 1993. This act provides for the addition of this new section as follows: "§ 708- ____Entry upon the premises of a facility utilized as a sex, child, or spouse abuse shelter; penalty. No person shall knowingly enter or remain unlawfully upon the premises of a facility utilized as a sex abuse, child abuse, or spouse abuse shelter after reasonable warning or request to leave by a member of the facility's staff. *Id.*

[123] HAW. REV. STAT. §§ 708-813 (1989), relating to criminal trespass, reads in pertinent part as follows:

(1) A person commits the offense of criminal trespass in the first degree if:
(a) That person knowingly enters or remains unlawfully:
(i) In or dwelling; or
(ii) In or upon the premises of a hotel or apartment building; or
(b) That person:
(i) Knowingly enters or remains unlawfully in or upon premises which are fenced or enclosed in a manner designed to exclude intruders; and
(ii) Is in possession of a firearm, as defined in section 134-1 of such intrusion; or
(c) That person enters or remains unlawfully in or upon the premises of any school, as defined in section 297-1, after reasonable warning or request to leave by school authorities or a police officer.
(2) Criminal trespass in the first degree is a misdemeanor.

Id.

[124] ANTHONY BOUZA, RESPONDING TO DOMESTIC VIOLENCE, WOMAN BATTERING: POLICY RESPONSES 195 (1991).

[125] *Id.*

[126] *Id.*

healing process. Shelters save women's lives by providing various services and referrals to many community resources.[127]

The signifigance of the preservation of sanctity of shelters and treatment centers is obvious. In the shelter, the women learn to deal with the feelings of shame, helplessness and isolation within a community-built environment and without the ever-present fear of retaliation.[128] Approximately 50 percent of all women who stay in a shelter or safe house for more than one week never return to the batterer.[129] In Hawai'i, all shelters have a "no-turn-away" policy for abused women.[130]

E. Education of the Players

It must be emphasized that the education of law enforcement officers and the judiciary employees is vital to breaking the cycle of violence in Hawai'i.

1. Educating law enforcement

Police officers encounter domestic violence more than all other forms of violence combined.[131] So, those who work on the front lines of domestic violence, like police officers, must be better trained to handle the crime that accounts for a substantial portion of their calls.[132] Police

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[127] 1993 HI STATE DOMESTIC VIOLENCE REPORT. Shelters provide services that may be grouped into four categories: "1) providing direct services for safety and welfare; 2) providing advocacy efforts to improve specific systems and institutions which deal directly with victims of domestic violence; 3) offering community education and prevention programs; and 4) training personnel in specific systems and institutions which deal directly with victims of domestic violence." *Id.*

[128] *Id.*

[129] Walker, *supra* note 25, at 14.

[130] 1993 HI STATE DOMESTIC VIOLENCE REPORT, *supra* note 14. If the shelter is filled to capacity, the women are faced with two choices: 1) a woman in residence must leave before she is ready to provide room for the incoming victim with the possible risk of returning to the batterer or 2) the shelter will provide a motel room dipping into" already inadequate" funds. The shelter realizes that these options are insufficient to properly aid the abused woman and her children, but lack of funds and staff force these "alternatives." There are presently no shelters on Lanai, the Hana district on Maui, the west side of Kauai or the North Shore of Oahu. *Id.*

[131] *See* LAWRENCE W. SHERMAN, POLICING DOMESTIC VIOLENCE: EXPERIMENTS AND DILEMMAS 1 (1992).

[132] HARVARD LAW REVIEW ASSOC., *supra* note 85, at 1501.

officers frequently subscribe to the popular view that women who stay in the battering relationship must like it or are very tolerant.[133] But the woman's decision becomes very rational in light of the police department's lack of intervention, her lack of finances and the far greater risk of being severely beaten or killed if she tried to leave her abuser.[134]

Police officers often rationalize their lack of intervention on the belief that domestic violence calls are highly dangerous. But in reality, domestic violence calls account for approximately six percent of police deaths making it one of the least dangerous of all crimes to which police respond, relative to other calls to which they respond.[135]

In Hawai'i, twenty-one percent of women surveyed responded that they had called the police in the past with no result[136] and sixty-one percent of those who responded felt the most difficult problem in dealing with the police were attitudinal.[137]

The police are integral in the systemic response to stop the "cycle of violence."[138] Departments must state clearly and in writing that battering is a crime and that their officers must refer the victims to community resources including shelters, hotlines and counseling agencies.[139] Since the police officers are on the "frontlines", they offer the strongest opportunity for these women to be introduced to advocates such as a shelter or hotlines.[140]

2. Education of the judiciary

In the past, the justice system obeyed the abused victim's wishes regarding the prosecution or dismissal of charges against the batterer. This ignores the dynamics of the domestic violence. In other crimes, the justice system does not leave the decisions regarding prosecution

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[133] *Id.*

[134] Zoara, *supra* note 5, at 50.

[135] *Id.* at 51.

[136] 1993 HI STATE DOMESTIC VIOLENCE REPORT, *supra* note 14, at 26.

[137] *Id.* Sixty-one percent of the women who responded to the Statewide Domestic Violence survey complained about the police attitudes ("acting as if the abuse was unimportant, making the victim feel wrong for calling police and talking story and not doing anything"). Forty-one percent also said that ineffectual police response "potentially affected her safety." *Id.*

[138] MICHAEL STEINMAN, WOMAN BATTERING 194 (1991).

[139] *Id.*

[140] Bouza, *supra* note 124, at 195.

to the victims, but realizes the duty to protect the entire community.[141]

The continuous and up-to-date education of the judiciary will play a major role in the effectiveness of the new statutes, the future of tort remedies as a remedial action for battered women and the legal conceptualization of battered women. On O'ahu, all judges and probation officers participate in continuous training on domestic violence issues such as availability of community resources, social and psychological causes of abuse, perpetrator profile and impact on the community.[142] This continuous training is not true for the other circuits in Hawai'i.[143]

F. Evidence of family violence will be a factor in custody.

In making child custody decisions, courts attempt to create an arrangement that would be in the best interest of the child. The best interest of a child is determined by factors that have a direct impact on the child or his relationships.[144] In the past, neither parent has a "preferred status" in a custody dispute,[145] but the court may consider evidence that a parent is the primary aggressor in a violent home without having to find the parent unfit.[146] Today, due to increased public awareness of domestic violence, the Legislature mandates that the court evaluate evidence of violence when determining custody decisions.

Hawaii Revised Statutes §571-46[147] has been amended to explicitly require that the court consider evidence of family violence, including

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[141] Clute, *supra* note 47, at 44.

[142] 1993 HI STATE DOMESTIC VIOLENCE REPORT, *supra* note 14, Appendix 5.

[143] *Id.* The HI State Comm. on the Status of Women conducted a study in which family cour judges provided information on the extent of their training. The Kauai Family court did not participate. On Maui, only family court judges participate in training and these sessions are occasional and "not guaranteed." Many judges may take initiative and seek out training on their own. On Hawai'i, all judges receive some types of out-of-court training but may not be on the specific issue of domestic violence. One family court judge responded that all family court judges receive training in all issues. *Id.*

[144] Cahn, *supra* note 31, at 1042.

[145] Fujikane v. Fujikane, 61 Haw. 352, 604 P.2d 43 (1979).

[146] Dep't of Social Servs. & Hous. v. Doe, 819 P.2d 1130 (1991).

[147] HAW. REV. STAT. § 571-46(9), prior to 1993 amendments, read in pertinent part as follows:

(1) Custody should be awarded to either parent or to both parents according to

the frequency and degree of violence, when determining the best interests of the child in custody and visitation proceedings.[148] If the court awards custody to a parent against whom evidence has been presented, the court must include a written explanation for its decision within its order.[149]

Under this statute, the court determines the weight to confer the evidence on domestic violence. Family violence need not be proven; evidence of family violence is merely presented for the court's consideration and the court shall arrange custody and visitation in the best interests of not only the child, but also the abused spouse.[150] The court is allowed to incorporate an award of child custody as part of the protection of the abuse victim.

Courts are usually reluctant to evaluate a domestic violence problem because of an evidentiary problem: the lack of any corroborating evidence.[151] Evidence of domestic violence is hard to come by when sheilded by the privacy of a home. Nevertheless, the family court is not always constrained by rules of evidence. The family court as well as each party may provide a "wide range of out-of court-information" to aid the judge in his or her decision as the child's welfare is the paramount consideration of the court.[152] In fact, the court has "con-

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the best interests of the child . . .

(9) The court shall consider evidence of family violence, including but not limited to spouse abuse, as one of the factors in determining the best interest of the child in establishing custody and visitation rights.

Id.

[148] HAW. REV. STAT. § 571-46 (9) (1989) currently reads in pertinent part:

. . . (9) The court shall consider evidence of family violence, including but not limited to spouse abuse, the determination regarding who was the primary aggressor and the frequency and degree of family violence as factors in determining the best interests of the child in establishing custody and visitation rights. If custody is given to a person against whom there is evidence of family violence, the court shall include, in its written order, the reasons for the decision. If there is evidence of family violence, an award of joint custody or any grant of visitation shall be arranged so as to best protect the child and the abused parent.

Id.

[149] *Id.*

[150] S. STAND. COMM. REP. No. 974, 17th Leg., 1993 Reg. Sess.

[151] Cahn, *supra* note 31, at 1082 .

[152] Sabol v. Sabol, 2 Haw. App. 24, 624 P.2d 1378, 1382 (1981). *Sabol* considered the use of a social study report and its respective exhibits which contained hearsay evidence. The question was whether the ordinary rules of evidence prohibiting hearsay apply to a court-ordered social study in a custody dispute. The court held that custody

siderable'' discretion in requiring investigations and reports to help it reach a decision that will be in the best interest of the child.[153]

1. Violence is a relevant factor whether or not directed at child

Children are greatly affected by domestic violence and are often present in violent homes.[154] Despite the belief that children are unaware of the violence in the home, it has been shown that approximately ninety percent of the children are indeed aware that acts of violence have been committed against their mother.[155]

It is important to remove children from a spousal abuse situation for two reasons: prevention of both present and future harm. With respect to present harm, between fifty-three and seventy percent of men who abuse women also abuse their children.[156] Batterers are extremely dependent men who constantly demand their wife's or girlfriend's attention and this attention must be shared when there is a child in the home.[157] This may explain why violent incidents increase when the woman becomes pregnant or when the children are very young.[158]

Furthermore, sixty-two percent of teenage sons in a violent home are injured when trying to protect their mother from a batterer.[159] Also, children from violent homes are physically abused or neglected at a rate fifteen times greater than other children.[160]

Even if the children themselves are not abused, they can suffer psychological harm which will manifest itself in other ways. On its

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proceedings were "not the typical legal inquiry" and ". . .otherwise inadmissible evidence admitted for use in deciding custody issues shall be used only in deciding the custody issues and not for deciding any other issues." *Id.*

[153] Turoff v. Turoff, 56 Haw. 51, 527 P.2d 1275 (1974). *See also* Fujikane v. Fujikane, 61 Haw. 352, 604 P.2d 43 (1979) ("[T]he critical question be to resolved in any custody proceedings is what action will be in the interests of the child"). *Id.*

[154] NATIONAL WOMAN ABUSE PREVENTION PROJECT, DOMESTIC VIOLENCE FACT SHEETS, OFFICE OF VICTIMS OF CRIMES (1988) (The Fact Sheet states that children are present in 41-55% of homes where police respond to domestic violence calls). [hereinafter 1988 N.W.D.V. Fact Sheet].

[155] *Id.*

[156] Zoara, *supra* note 5, at 48.

[157] Walker, *supra* note 34, at 136 .

[158] *Id. See also* Cahn, *supra* note 31, at 1047.

[159] *Id.*

[160] 1993 HI STATE DOMESTIC VIOLENCE REPORT, *supra* note 14, Appendix 5.

face, the psyhological injuries may seem unrelated.[161] For example, the children have higher risks of alcohol or other drug abuse,[162] learning problems,[163] hearing/speech problems,[164] and physiological problems.[165]

With regard to the prevention of future harm, boys who have watched their mother be battered are more likely, as adults, to batter their own wives and girlfriends.[166] If the children are removed from a violent home, the judicial system has hopefully "broken" the cycle of violence.

In the future, Hawai'i may incorporate innovative reforms in child custody decisions such as those suggested in Cahn's *Civil Image of Battered Women*.[167] Cahn suggests: 1) the court should question the fitness of a severely abusive parent; and 2) modification of awards if the father continues to abuse the mother. Even if the abuse is not directed at the child, at the very least, the abuse indicates apathy toward the child and the child's relationships.

Another proposed reform is in regard to the court's view of abandonment[168] when the mother leaves her children with the abusive husband. Some judges view the mother's flight as neglectful of her children and penalize her during the custody case.[169] But an understanding of the battered woman may aid the judge to view the woman's flight as a rational response to the abuser's unbridled violence.[170] Otherwise, the woman will between the perverbial rock and a hard place: remain with the children and suffer the abuse or flee without the children to get help. The judiciary will hopefully strive to perpetuate further reforms in the system and the legal conceptualization of battered women.

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[161] Zoara, *supra* note 5, 46.

[162] *Id.*

[163] *Id.*

[164] *Id.*

[165] 1988 N.W.D.V. FACT SHEET, *supra* note 154, at A1. The fact sheet described headaches and ulcers as physical ailments common in children of violent homes. *Id.*

[166] 1993 HI STATE DOMESTIC VIOLENCE REPORT, *supra* note 14, at App. 5.

[167] Cahn, *supra* note 31, at 1089.

[168] HAW. REV. STAT. § 709-902 (1989) defines the abandonment of a child. §709-902 states that: (1) A person commits the offense of abandonment of a child if, being a parent, guardian, or other person legally charged with the care or custody of a child less than fourteen years old, he deserts the child in any place with intent to abandon it." *Id.*

[169] Cahn, *supra* note 31, at 1092.

[170] *Id.*

G. Confidentiality privilege expanded to victim-counselor

This section will discuss the addition of this statute which will expand the privilege of domestic violence counselors for the purpose of ensuring the confidentiality of communications between counselor and victim.

Hawaii Rules of Evidence, Rule 505.5 has been amended to include a victim counselor privilege to protect confidential information divulged during the counseling process.[171] This provision recognizes that confidentiality of communications between a victim and counselor is "vital" to the victim's recovery from the trauma of sexual assault, domestic violence, or child abuse.[172] It is analogous to victim-counselor provisions

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[171] HAW. R. EVID. 505.5, HAW. REV. STAT. § 626.1 (1989) has been amended by amending subsection (a) "Definitions" and reads in pertinent part as follows:

"(a) Definitions. As used in this rule:

(1) A communication is "confidential" if not intended to be disclosed to third persons other than those to whom disclosure would be in furtherance of the provision of counseling or treatment services to the victim or those reasonably necessary for the transmission of the communication

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(7) A "victim counselor" is either a sexual assault counselor or a domestic violence victims' counselor. A sexual assault counselor is a person who is employed by or is a volunteer in a sexual assault crisis center, has undergone a minimum of thirty-five hours of training and who is, or who reports to and is under the direct control and supervision of, a social worker, nurse, psychiatrist, psychologist, or psychotherapist, and whose primary function is the rendering of advice, counseling or assistance to victims of sexual assault. A domestic violence victims' counselor is a person who is employed by or is a volunteer in a domestic violence victims' program, has undergone a minimum of twenty-five hours of training and who is, or who reports to and is under the direct control and supervision of, a direct service supervisor of a domestic violence victims' program, and whose primary function is the rendering of advice, counseling, or assistance to victims of abuse."

Id.

[172] S. STAND. COMM. REP. No. 501, 17th Leg., 1993 Reg. Sess. The report states: "The bill has been amended by: 1) consolidating the definitions of "Domestic violence victims' program" and "Sexual assault crisis center" into the "Victim counselor program" definition. Your Committee believes that the proposed unitary definition covers all contemplated activities and functions and thus achieves the same result in a less convoluted manner; 2) Eliminating the definition of "social worker" in the bill and simplifying the definition of "victim counselor" to conform to other HRE privileges for attorney-client and physician-patient. Your Committee finds that a communication spoken confidentially from the victim to a person reasonably believed to be an authorized counselor is sufficient to invoke the privilege. The privilege rules are intended to benefit privilege holders, e.g., clients, patients, victims. A description of

currently in use in some twenty states.[173] Furthermore, the 1994 Crime Bill also outlines Congress's desire to study and develop model legislation on a federal level that will maximize protection of confidential communications between victim and counselor, within constitutional limits.

1. Absolute confientiality balanced with constitutional rights of defendant

The assurance of confidentiality of any victim-counselor relationship is crucial to achieve the goal of helping victims cope with traumatic incidents like sexual assault and domestic violence.[174] It appears that the Hawaii victim-counselor privilege is absolute or near-absolute.[175] This privilege may be claimed by the victim herself, her guardian or her counselor, but only on behalf of the victim.[176] Since there is no

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a person's credentials for a qualified counselor would limit the scope of the rule and negate the privilege if a victim received counseling from an unqualified counselor . . ." *Id.*

[173] *See* CAL. EVID. CODE §§ 1035 to 1037.7 (1992) (sexual assault victim-counselor and domestic violence victim-counselor privileges), "encourages and protects the counseling of emotionally distressed victims of violent crimes by according privilege status to confidential communications made in the course of the counseling process.", *construed in* Rule 505.5 Commentary N.J. STAT. ANN. § 2A:84A-22.13 and 22.15 (1991) explained that,"counseling of victims is most successful when the victims have assumed [that] their thoughts and feelings will remain confidential and will not be disclosed without their permission". *Id.*

[174] H.R. 3355, PL 103-322 (1994).

[175] HAW. R. OF EVID. § 505.5 (b) regarding the general victim-counselor privilege reads in pertinent part as follows:

> (b) General rule of privilege. A victim has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made to a victim counselor for the purpose of counseling or treatment of the victim for the emotional or psychological effects of sexual assault, domestic violence, or child abuse or neglect, and to refuse to provide evidence that would identify the name, location, or telephone number of a safe house, abuse shelter, or other facility that provided temporary emergency shelter to the victim.

Id.

[176] HAW. R. OF EVID. § 505.5(c) (1993) reads:

> (c) Who may claim the privilege. The privilege may be claimed by the victim, the victim's guardian or conservator, or the personal representative of a deceased victim. The person who was the victim counselor at the time of the communication is presumed to have authority to claim the privilege but only on behalf of the victim.

Id.

express provision for the defendant batterer to defeat this privilege, it must be analyzed in light of the potentiality of violating the defendant's right to obtain exculpatory evidence and present it at trial , guaranteed by the Sixth Amendment of the Federal Constitution[177] and the Article I, section 14 of the Hawaii State Constitution.[178]

There are exceptions to the victim-counselor privilege for persons other than the defendant.[179] None of the exceptions expressly allow for

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[177] U.S. CONST. amend. VI reads:

Rights of accused. In all criminal prosecutions, the accused shall enjoy the right to a speedy trial and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been . . . ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

Id.

[178] HI. CONST. art. I, § 14 is modeled after the U.S. CONST., amend. VI and was "intended to give the state the benefit of federal decisions construing the same language" *Id.* State v. Wong, 47 Haw. 361, 389 P.2d 439 (1964).

[179] HAW. R. OF EVID. § 505(d) (1989) reads as follows:

d) Exceptions. There is no privilege under this rule:

(1) Perjured testimony by victim. If the victim counselor reasonably believes that the victim has given perjured testimony and a party to the proceeding has made an offer of proof that perjury may have been committed.

(2) Physical appearance and condition of victim. In matters of proof concerning the physical appearance and condition of the victim at the time of the alleged crime.

(3) Breach of duty by victim counselor or victim counseling program. As to a communication relevant to an issue of breach of duty by the victim counselor or victim counseling program to the victim.

(4) Mandatory reporting. To relieve victim counselors of any duty to refuse to report child abuse or neglect under chapter 350, domestic abuse under chapter 586, or abuse of a dependent adult under part X of chapter 346, and to refuse to provide evidence in child abuse proceedings under chapter 587.

(5) Proceedings for hospitalizations. For communications relevant to an issue in proceedings to hospitalize the victim for mental illness or substance abuse, or in proceedings for the discharge or release of a victim previously hospitalized for mental illness or substance abuse.

(6) Examination by order of court. If the court orders an examination of the physical, mental , or emotional condition of a victim, whether a party or a witness, communications made in the course thereof are not privileged under this rule with respect to the particular purpose of which the examination is ordered unless the court orders otherwise.

(7) Condition an element of claim or defense. As to a communication relevant

the disclosure of the confidential communications even for the preservation of the defendant's constitutional right.[180]

It is apparent from the commentary following Hawaii Rules of Evidence § 505.5 that the legislature patterned § 505.5 after California's counterpart of the domestic violence victim-counselor privilege and may look to California for its interpretation.[181] The California privilege is very similar to Hawaii's newest version of the privilege.[182] However, there are two differences in the rules that may affect the scope and interpretation of the Hawaii victim-counselor privilege.

First of all, the definition of "counselor" may limit or expand the scope of the privilege. Hawai'i has a rather broad definition of a domestic violence counselor which would allow for a liberal scope of privilege.[183] On the other hand, California's definition is broken up

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to the physical, mental or emotional condition of the victim in any proceeding in which the victim relies upon the condition as an element of the victim's claim or defense or, after the victim's death, in any proceeding in which any party relies upon the condition as an element of the party's claim or defense.

(8) Proceedings against the victim counselor. In any administrative or judicial proceedings in which the competency or practice of the victim counselor or of the victim counseling program is at issue, provided that the identifying data of the victims whose records are admitted into evidence shall be kept confidential unless waived by the victim. The administrative agency, board or commission shall close to the public any portion of a proceedings, as necessary to protect the confidentiality of the victim.

Id.

[180] HAW. R. OF EVID. § 505.5 (1993) in its entirety does not specifically allow for disclosure of confidential communications.

[181] HAW. R. OF EVID. § 505.5 (1993) commentary.

[182] CA Evid. Code § 1037.2 (1982) provides in pertinent part:

As used in this article, "confidential communication" means information transmitted between the victim and the counselor in the course of their relationship and in confidence by a means which, so far as the victim is award, discloses the information to no third persons other than those who are present to further the interests of the victim in the consultation or those to whom disclosures are reasonably necessary for the transmission of the information or an accomplishment of the purposes for which the domestic violence counselor is consulted. it includes all information regarding the facts and circumstances involving all incidences of domestic violence, as well as all information about the children of the victim or abuser and the relationship of the victim with the abuser.

Id.

[183] HAW. R.OF EVID. 505.5 (7) (1993) defines "domestic violence victims' counselor as:

a person who is employed by or is a volunteer in a domestic violence victims'

into four sections, at least one of which a "counselor" must fulfill in order to hold the privilege.[184] The California version requires that the supervisor be qualified in certain areas of domestic violence as well as have a minimum number of hours counseling victims while the Hawaii rule has no such requirement.[185]

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program, has undergone a minimum of twenty-five hours of training and who, is or who reports to and is under the direct control and supervision of, a direct service supervisor of a domestic violence victims' program, and whose primary function is the rendering of advice, counseling, or assistance to victims of abuse.

Id.

[184] CA CODE OF EVID. § 1037.1(b) (1982)which provides in pertinent part:

As used in this article "domestic violence counselor" means any of the following:

(a) A person who is employed by any organization providing the programs specified in Section 18294 of the Welfare and Institutions Code, whether financially compensated or not, for the purpose of rendering advice or assistance to victims of domestic violence, who has received specialized training in the counseling of domestic violence victims, and who meets one of the following requirements:

(1) Has a master's degree in counseling or a related field; or has one year of counseling experience, at least six months of which is in the counseling of domestic violence victims.

(2) Has least 40 hours of training as specified in this paragraph and is supervised by an individual who qualifies as a counselor under . . . paragraph (1); or is a psychotherapist . . . The training, supervised by a person qualified under paragraph (1) shall include, but need not be limited to the following areas: domestic violence, civil and criminal law as it related to domestic violence, societal attitudes towards domestic violence, peer counseling techniques, housing, public assistance and other financial resources available to meet the financial needs of domestic violence victims and referral services available to . . . victims.

(b) A person who is employed by any organization providing the programs specified . . . , whether financially compensated or not, for the purpose of counseling and assisting victims of domestic violence, and who meets one of the following requirements:

(1) Is a psychotherapist as defined in Section 1010; has a master's degree in counseling or a related field; or has one year of counseling experience, at least six months of which is in counseling victims of domestic violence.

(2) Has the minimum training for counseling victims of domestic violence required by guidelines established by the employing agency . . . and is supervised by an individual who qualifies as a counselor under paragraph (1). The training, supervised by a person qualified under paragraph (1), shall include, but not be limited to,the following areas: law, victimology, counseling techniques, client and system advocacy, and referral services.

Id.

[185] *Id.*

Secondly, the California version expressly allows compulsory disclosure by the court order through many exceptions, including a balancing test: if the court determines that the probative value of the information outweighs the effect of disclosure of the information, then the court may compel disclosure.[186] This express provision of compulsion through a balancing test is unavailable in the Hawaii rule and, therefore, may face constitutional challenge if case law does not expand the rule's interpretation to include a balancing test similar to that of California.

IV. Conclusion

You cannot solve a problem with the same belief system that created it.

Albert Einstein

Historically, family privacy has been held in such high regard by our society that it has acted as a shield to domestic violence.[187] New statutes show a growing concern for domestic violence issues by our community as a whole. In order to maximize the effectiveness and quality of the new statutes, there must be a rigorous training program initiated to incorporate every player of the prosecution of the batterer and the protection of the victim, from law enforcement to judiciary to community services. Only a well-educated, synchronized system can break the Cycle of Violence in Hawai'i.

Renee M. Yoshimura[188]

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[186] CA. R. of Evid. § 1037.2 (1982) also provides in pertinent part:

> The court may compel disclosure of information received by a domestic violence counselor which constitutes relevant evidence of the facts and circumstances involving a crime allegedly perpetrated against the victim . . . and which is the subject of a criminal proceeding, if the court determines that the probative value of the information outweighs the effect of disclosure of the information on the victim, the counseling relationship and the counseling services. The court may compel disclosure if the victim is either dead or not the complaining witness in a criminal action against the perpetrator. The court may also compel disclosure in proceedings related to child abuse if the court determines that the probative value of the evidence outweighs the effect of the disclosure on the victim, the counseling relationship and the counseling services.

Id.

[187] Scherer, *supra* note 40, at 552.

[188] William S. Richardson School of Law, Class of 1996.

American Democracy In Hawai'i: Finding a Place for Local Culture

I. Introduction

In Volume II of the *Price of Paradise*, Peter Adler and Noralynne Pinao address the feared loss of the "*aloha* spirit."[1] It is a question on the minds of many who were raised in Hawai'i. According to Adler and Pinao, the things that make up *aloha* —love, affection, compassion, mercy, pity, and kindness —transcend and cut across cultures.[2]

The following essay asserts that the "*aloha* spirit," is a unique outcropping of only one culture in the world — the multi-ethnic culture (commonly called "local culture") of Hawai'i. The fate of the "*aloha* spirit," therefore, depends on the preservation of Hawai'i's local culture. The local culture of Hawai'i, however, is threatened by various modern forces.

Part II of this essay will examine the formation of local culture in Hawai'i, its unique characteristics, and the threat to its future existence. Part III will attempt to answer the question whether there is a place for local culture in the modern State of Hawai'i, and if so, how local culture could be more integrated into a democratic society.

Uncertainty over the fate of the "*aloha* spirit" is related to a larger question of assimilation into America. If Hawai'i is to maintain its uniqueness, and if it is to achieve a greater concept of community and citizenship, the culture of Hawai'i's local people (hereafter "local people" or "locals") must persist. Hawai'i's leaders must seriously ponder Hawai'i's identity and incorporate it into policy decisions despite the trend toward conformity with non-local principles. The purpose of this essay is to spark discussion about creative ways to

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[1] Peter Adler and Noralynne Pinao, *Aloha Spirit*, The Price of Paradise: Volume II 7 (Randall Roth ed., 1993).

[2] *Id.* at 11.

protect and nurture the special and fragile society that is Hawai'i.

II. Cultural and Historical Roots

When de Tocqueville recorded his observations of democracy in America, he noted the "accidental circumstances" which created peculiarly American practices.[3] It was this unusual history that made it impossible to understand American society using the European model. Likewise, history elucidates the reasons why Anglo-American norms will not fall neatly on society in Hawai'i.

Of principal concern is the development and subsequent demise of the unique local culture developed by the non-white population of Hawai'i. Since its evolution, this culture has encompassed the means of communication, interpersonal relationships, business dealings, and recreational patterns of a majority of Hawai'i's population. The existence of local culture is acknowledged by all, but often noted with a casualness that summarizes local culture as a conglomeration of certain foods, pidgin English, common practices, and the vaguely defined "*aloha* spirit." In the following pages, local culture will be examined primarily for its emphasis on certain fundamental values that differ from Anglo-American culture.

Before going forward, a qualification is necessary to dispel the errant assumption that local culture is a monolithic body of values and customs. This assumption leads to two problems. First, it is tempting for some to describe Hawai'i's situation as a battle between white and non-white forces. This characterization oversimplifies by assuming that all adherents to local culture are non-white. Simple observation can readily dismiss this assertion. Second, talking about local culture as a single identifiable body leads to the belief that all locals have basically the same values. On the contrary, one can find a multitude of differences within local culture. Different shades of local culture exist between ethnicities, age groups, rural and urban areas, islands, and economic class.[4]

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[3] Alexis de Tocqueville, Democracy in America 49 (Richard D. Heffner ed., 1984).

[4] Perhaps one of the greatest tensions in recent history was the drive for statehood. Public sentiment in favor of statehood was led by Japanese Americans, and much opposition came from Native Hawaiians. For Congressional testimony from a Native Hawaiian that expresses this sentiment, *see Statement of Mrs. Alice Kamokila Campbell*, Kodomo no tame ni: For the Sake of the Children: The Japanese American Experience in Hawaii 397-401 (Dennis M. Ogawa ed., 1978).

The theories that follow require some amount of grouping and assumption for coherent approaches to a large society. Focus will be on commonalities among the myriad of attitudes in Hawai'i. Similarities among Native Hawaiians and immigrants will be elucidated despite some obvious differences in historical situations.[5] Furthermore, many of the less appealing aspects of cultural traditions will receive less attention or may be ignored.[6] What is more important here is defining the boundaries of a local identity, and recognizing it as an evolving body of principles worth preserving because of both its number of practitioners in Hawai'i and its aspirational value as a tool for a truly multi-cultural society.

A. Factors That Led to the Creation of Local Culture

Understanding the formation of local culture is important for constructing a workable description of local culture and for explaining some of the modern phenomena that threaten its existence. Generally, local culture can be attributed to similarity of circumstance and similarities among the distinct national cultures in Hawai'i. The former provided the setting, need and desire to create a common culture, while the latter provided the foundation upon which local culture was built.

1. Common Circumstances

Most immigrants who came to Hawai'i arrived as contract laborers. They were lured to the plantations by the promise of a better life and intended to return home after their time was served. The arduous boatride to Hawai'i was the first of many common torments experienced by the various ethnic groups.[7] In the years of Western colonization, Native Hawaiians and immigrants were often considered nameless statistics, heathens, barbarians, and cargo. White attitudes toward

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[5] For example, the internal sentiments of the Native Hawaiian may have been more focused on keeping alien influences at bay, whereas the immigrant may have been escaping poverty or oppression, or searching for a "better life."

[6] Three characteristics of note are the historical subordination of women in Asian cultures, the practice of human sacrifice of the *kauwa* (untouchable class) in ancient Hawai'i, and the subtle prejudice toward African Americans by some locals.

[7] *See* HANAHANA: AN ORAL HISTORY ANTHOLOGY OF HAWAII'S WORKING PEOPLE 109-110, 153-154 (Michi Kodama-Nishimoto et al. eds., 1984).

immigrant laborers were evident in a statement by Hawai'i Sugar Planters Association president Richard A. Cooke: "I can see no difference between the importation of foreign laborers and the importation of jute bags from India."[8] Less-than-human status was backed with actual economic and political disparity between whites and non-whites. This de facto bifurcated society linked many Native Hawaiians and immigrants.

Economically, these non-white groups shared similar occupations. While most immigrants worked on the plantations to displace a shrinking native population, those remaining natives also maintained rural lifestyles. Any business ventures by non-whites were primarily of the small business or trade variety. The lack of social mobility was at least partially due to schemes designed to keep the lowest classes in check. The classic example is the plantation store where plantation wages were funneled back into the plantation by forcing laborers to shop there.[9]

The *Mahele* successfully disenfranchised the *maka'ainana* (the typical Hawaiian who was a ward of the chieftain) and concentrated land, now privately owned, in the hands of government and foreign (European and American) interests.[10] The *Mahele* gave entrepreneurs the land that created the need for immigrant labor. Arriving too late for the land division, the immigrant had no ownership and very little opportunity ever to become landed, considering the meager wages that they earned. The difficulties of lower class living required children of non-whites to work to support the family.

Most foreigners from the United States and Europe (except for Portuguese immigrants imported as laborers) either were landed in Hawai'i after the *Mahele*, or had sources of wealth in their homelands. On the other hand, laborers were unlikely to have sources of wealth in their home lands since the purpose of coming to Hawai'i was to eke out a better existence. Other than the few *kuleana* (small property) holders, civil servants, and those with ties to the *ali'i* (nobility), many

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[8] ALEXANDER MACDONALD, REVOLT IN PARADISE: THE SOCIAL REVOLUTION IN HAWAII AFTER PEARL HARBOR 126 (1944).

[9] MABEL C. CRAFT, HAWAII NEI 65 (1898).

[10] The *Mahele* of 1848 was a royal proclamation that parceled Hawaiian land as private property. Under its terms, 1 million acres of the best land was kept for the king's private domain with 1.5 million acres kept under his name for the government's use. 1.6 million acres was given to 245 high chiefs, which, "with unmatched insouciance, they proceeded to sell, lease or give away to foreigners." FRANCINE DU PLESSIX GRAY, HAWAII: THE SUGAR COATED FORTRESS 48 (1972).

Native Hawaiians had no other source of wealth except the land itself, and therefore were similarly economically poor.

In addition to having a minimal amount of economic power, non-white people of plantation-era Hawai'i lacked political power. Citizenship requirements prevented most immigrants from voting in the constitutional monarchy of the Kingdom of Hawai'i. Language requirements eliminated others, and property requirements managed to exclude many potential Native Hawaiian voters.

"*Haole*," the Native Hawaiian word for "foreigner," became the universal local word for a Caucasian person. The most important similarity that led to the formation of a local culture among non-whites was the existence of a common polar extreme in the *haole*. *Haoles* represented sophistication, power and money. *Haoles* remained an island among themselves with separate schools, social circles, modes of entertainment, and activities. The second class, comprised of all other ethnicities, intermingled in their own world.

Perhaps indicative of a historical identification with other non-white cultures were the events that surrounded King Kalakaua's relationship with Japan. Although Hawai'i's royalty often felt overt and subtle signs of derision and condescension in Europe and America, Kalakaua was treated as a bona fide king in Japan.[11] Although often foiled by competing Western influences, attempts were made at cooperation in a setting of mutual respect.

From these circumstances, local culture was born. As diverse as the cultures from Hawai'i, Japan, China, the Philippines, Korea, Puerto Rico, and Portugal are, they contained enough similarities to form a basis upon which to relate. Like permutations of natural evolution, traditional beliefs were altered and adapted as inspired by necessity. Other original characteristics spontaneously emerged from this cultural soup.

2. *Similar Cultures: Local Culture Defined*[12]

a. *The Family*

Perhaps the most important aspect of local culture is the primacy of the extended family. Among Asian cultures, the central role of the

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[11] For a full account of the Hawaiian and Japanese relationship, *see* DENNIS M. OGAWA, JAN KEN PO 82-108 (1973).

[12] For comparative sketches of the cultures of Hawai'i, *see* PEOPLE AND CULTURES OF HAWAII (John F. McDermott, Jr. et al. eds., 1980).

family is directly linked to the Confucian ethic of filial piety. As such, first generation immigrants are often patrons and matrons of large families that continue to celebrate traditional occasions together. Native Hawaiian culture is also rooted in the extended family which is called *ohana*. The *ohana* contains the core values of the Hawaiian way; neither expected nor demanded, the *ohana* was simply there. Similarly, the Filipino concept of extended family is a salient feature of the culture "that has endured with pervasive strength throughout all the years of rule by outsiders and efforts to impose alien values."[13] Cross-cultural amalgamation of family values was further catalyzed when many local groups intermarried. Most notably, because plantation bosses would not bear the costs of importing Chinese women, Chinese men married Native Hawaiian women and new Chinese/Hawaiian surnames like Ah Sam and Ah Loo were created.

The family was the primary governing and decision-making unit in non-*haole* areas of Hawai'i. In all these cultures, the similarity was not simply the existence of an extended family concept, but that the family was the *absolute pinnacle* of importance in their lives. This shared belief was transferred relatively easily and with acceptance toward other groups. Hence, it is likely that a local person will be linked to numerous "calabash" relatives who are blood relatives by all accounts except in fact. When families integrated through intermarriage, it was a relatively easy transition into traditional roles and events whether one attended a *lu'au* (Native Hawaiian feast), *yakudoshi* (Japanese special birthday), or Chinese New Year celebration because the underlying values were the same. Even today, local people are likely to skip engagements and, likewise, accept excuses of "family obligations" over numerous other priorities.

These traits stand in contrast with the traditional nuclear family of the Continental United States (hereafter "mainland"). Factors such as economic prosperity, geographic mobility, and technological improvements in communication, transportation and public services have allowed the typical American family unit to be relatively independent.[14]

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[13] *Id.* at 157.

[14] Many European cultures that immigrated to the United States placed a high value on extended families, but time has changed many of these practices as well. The U.S. Supreme Court stated: "Ours is by no means a tradition limited to respect for the bonds uniting the members of the nuclear family. The tradition of uncles, aunts, cousins, and especially grandparents sharing a household along with parents and children has roots equally venerable and equally deserving of constitutional

Of course, all of these developments have come to Hawai'i since it emerged from the plantation era. More people are able to relocate to the mainland with their spouses and children in search of greater opportunities. More public services means that less labor is required by family members. Nevertheless, local residents continue to feel obligations and affinities toward their families, most often manifested in large gatherings.

b. Gifting

Gifting was freely exercised by Native Hawaiians, and is perhaps part of the reason for their subsequent demise at the arrival of capitalism. The Native Hawaiian people lived in a land of plenty with an abundance of resources in relation to their needs.[15] Furthermore, there was no private ownership; no one in Hawai'i could take another's fish catch because no one really owned the fish.[16] When a stranger or a friend came to another's household, food and comfort would be abundantly provided in all circumstances. In fact, the height of embarrassment was to run out of food or drink at a *lu'au*.[17]

More than a simple gesture, the gift was a source of power to the Native Hawaiian, as David Malo explained:

> If a man's wife was abducted from him he would go to the king with a dog as a gift, appealing to him to cause the return of his wife — or the woman for the return of her husband — but the return of the wife, or the husband, if brought about, was caused by the gift of the dog, not in pursuance of any law.[18]

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recognition." *Moore v. City of East Cleveland*, 431 U.S. 494, 504 (1977). Justice Powell, writing for the majority, went on to say that modern society has brought about a decline in extended family households. In a concurring opinion Justice Brennan, joined by Justice Marshall, added that intolerance of extended family living reflected "cultural myopia" that tried to impose "white suburbia's preference in patterns of family living" on non-whites. *Id.* at 507-508.

[15] THOMAS K. HITCH, ISLANDS IN TRANSITION 17 (1992) ("[T]here is little doubt that even the commoners of the alii time were better off economically than the vast majority of their contemporaries around the world.").

[16] The property regime in ancient Hawai'i was one of communal ownership. Each *ahupua'a* (self sustaining division of the island upon which an *ohana* or group of *ohana* dwelled) controlled its own fish and fishponds as well as other communal properties. Between individuals within the *ahupua'a* there was no claim to ownership vis a vis each other.

[17] McDermott, *supra* note 12, at 14.

[18] DAVID MALO, HAWAIIAN ANTIQUITIES 58 (Nathaniel B. Emerson trans., 2d ed. 1951).

For the Japanese, gifts were a matter of *giri* (obligation) and the primary means of forming ties of loyalty and friendship. "Critical to the Issei's concept of *giri* was not the immediate rewards of a big bank account or an abundant dinner table, but fulfilling a *moral* obligation to repay kindness with kindness."[19] Perhaps the most prevalent modern manifestation of this responsibility is returning from a trip with *omiyage* (gifts from abroad) for family, friends, and supporters.

Related to the value of gifting is a unique attitude toward material goods. This approach may be linked in part to the meager lifestyle lived by the ancestors of local people. Making the most of what was available and living within one's means were the prevailing standards. Relationships took a much higher priority than material possessions since people relied so heavily on each other for support, comfort, entertainment, and survival. Given this background, local people freely exchange material goods for other non-material benefits. Thus, many local people, regardless of their means, do not quibble over small amounts of money among acquaintances and especially among friends and family since it is assumed that it will come back either in money, favors, kindness, or other acts.[20] Besides trading goods, services, and money, the fungible nature of actions is a critical feature of local culture that often makes relationships incomprehensible to outsiders. Indeed, to some extent, local people do not even keep track of "debts" and "credits" among friends, and free gifting is the norm even if it is known that the other person cannot materially reciprocate. In this spirit, many local businesses of the past risked solubility by extending credit to those who could not pay.[21]

The local practice of gifting goes beyond modern concepts of charity. In local culture, gifting is less a matter of individual choice and more a combination of habit and duty. Charitable organizations in the United

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[19] OGAWA, *supra* note 11, at 69.

[20] From personal experience, while on the mainland I have seen a friend literally pull a pizza into three pieces since three of us split the price equally. I do not assert that this is a standard mainland practice, however, this would clearly be rude behavior among local people. Local people, conscious of their own fair share, are more likely to allow others to eat what they can whether it is more or less than the bought share. Debts of gratitude owed to others (or debts collectable from others) are stored in memory for a later date.

[21] Despite the stereotypes of the Chinese in Hawai'i — that they are stingy penny-pinchers—they were often the ones extending credit. *See* Violet Hew Zane, *Born in the Store*, *in* HANAHANA: AN ORAL HISTORY ANTHOLOGY OF HAWAII'S WORKING PEOPLE, *supra* note 7, at 140.

States are characterized by tax incentives for potential contributors and tax exemptions for their operation. These legal mechanisms are necessary to accommodate the presumption of self-interested actors, necessary to sustain a predictable and viable market economy.

c. Conflict Avoidance and Consensus Resolution

Wars waged between *ali'i* were fought by their subjects, but among the common people there was little to cause or sustain a fight in an environment with plentiful resources. Conflict avoidance became the governing principle among Native Hawaiians.[22] In ancient Hawai'i, those who had bad manners were considered the worst kind of scoundrels and were notoriously talked about with horror for years.[23]

The Japanese dualistic persona of *omote* (outer appearance) and *ura* (inside emotions) has a similar effect — calling for an obedience and decor in public situations that avoids conflict, and quickly resolves or internalizes disputes.

Related to the desire to avoid conflict altogether is the desire for consensus resolution of those conflicts that do occur. Any conflicts among Native Hawaiians were solved with *ho'oponopono* (to make right), a conflict resolution method where all parties gathered in the spirit of forgiveness and harmony. Related to conflict-free resolution is the spirit of tolerance. As stated before, the Hawaiian culture greeted foreigners with open arms and often as extensions of the *ohana*. In Filipino culture, the first life goal has been described as neighborliness or *panagkakadua* in Ilocano.

Thus, desiring peaceful resolution of problems, local people in Hawai'i often use the phrases, "ain't no big ting," "no make waves," and "let 'um go." To illustrate this point, one need only look to the

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[22] This is in contrast to areas throughout the ancient and midieval world, including Western Europe, where the bloodfeud was the primary means of individual conflict resolution. The worshipping of the war god, *Ku*, and the strict *kapu* (ancient laws) seem to counter this point. In these cases, conflict between people was more the law of consequence than exercises of individual independence against one another. It is believed that Tahitian colonists arriving circa 1200 A.D., instituted the class system and the *kapu*. Under this theory, prior to their arrival there was no war among the first Hawaiian people. The common people, or *maka'ainana*, were holdovers from the original Hawaiian society. *See* HITCH, *supra* note 16, at 3-20.

[23] E.S. HANDY & MARY KAWENA PUKUI, THE POLYNESIAN FAMILY SYSTEM IN KA'U, HAWAI'I 191 (1972).

opinion letters to the major newspapers in Hawai'i and see the prevalence of *haole* last names.[24]

When a local group of friends must decide where to go, it is usually an unsatisfactory situation if four would like to go to the movies, and one wants to eat dinner. Unlike typically American majoritarian rules, outings are either abandoned or modified to accommodate all people involved. Contrary to the rule of "the squeaky wheel gets the grease," local culture in Hawai'i maintains a primarily risk-free, behind-the-scenes, private sphere for dealing with problems.[25]

d. Self-Restraint, Discipline and Shame

Discipline and self-restraint are often viewed as stereotypically Asian characteristics. To be sure, Asian cultures that came to Hawai'i employed these characteristics quite often to cope with the hardships of the times. The Native Hawaiians also had to exercise an extreme amount of restraint to live under the strict *kapu* (the pervasive system of Native Hawaiian law). Their subservience to the *ali'i* was complete. As David Malo put it, "the life of the people was one of patient endurance, of yielding to the chiefs to purchase their favor. The plain man (*kanaka*) must not complain."[26] These traits are necessary parts of a conflict avoidance society, as well as one where roles are strictly defined and sacrifice may be an important part of one's duty as a servant, parent or leader.

The mechanism that maintained the local society of self-restraint was shame. Professor Dennis Ogawa contrasts guilt to shame:

> [The] American middle class famil[y's] primary source of social control is guilt. How you act according to your own conscience regardless of what other's think, is the American way of maintaining good conduct

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[24] This finding may be misleading because it presupposes that people with *haole* last names *are haole*, and that being *haole* has everything to do with being non-local. Still, it provides a poignant substitute for the more unknowable statistic of how many locals think a problem exists, but do not make their opinions known in the "standard" ways.

[25] The labor movement in Hawai'i stands in stark contrast to this premise. With no intention of minimizing the importance of union accomplishments, one should note that the severe working conditions on the plantations may have left the immigrant laborers with no alternative except to unionize and strike. Today, unions stand out as one of few public organizations in which locals actively participate. See discussion *infra*.

[26] MALO, *supra* note 19, at 60-61.

> . . . Feeling shame isn't so much a feeling of doing what one feels is good for his conscience but what will reflect well on the family.[27]

Deriving from cultures that historically hold the family above the individual, shame is a control mechanism that permeates all of local culture. Thus, many local people, including those of younger generations, are reluctant to exercise complete freedom of action; they still abide by the standards of "no make 'A'," and "have some class." In this light, many continue to see struggle as a virtue and unbridled behavior as a sign of weakness or a source of shame.

e. Loyalty, Obedience and Following

Anglo-American values focus on leadership skills as the sign of success. Local culture concurs, but also places emphasis on one's ability to be led, especially when it creates a difficult inner conflict. Trust in government and leadership has always been a trait of local culture, perhaps stemming from the governmental systems of their home countries. This trust has not always been warranted. When Liliuokalani waited for President Cleveland to act in accordance with his proclamation and when Japanese American soldiers fought while family members were rounded up into internment camps, they displayed an intense faith in the leaders of America and American democracy. Although frustrated on many occasions, the local population continues to exhibit faith in government, centralizing much power in the hands of their leaders and showing a willingness to pay higher taxes for various causes. Similarly the lack of interest in governmental matters is a recognition of separate spheres of duty.

f. Openness and Integration

Plantation owners employed segregation and race-based policies as a divide and conquer technique against the possibility of concerted action of the underclass. Furthermore, some ethnicities, particularly the Chinese and Japanese, exercised an amount of self-segregation in an effort to insulate their customs. Nevertheless, necessity and common circumstances provided an atmosphere of openness. Local culture ascribed to an active practice of acceptance and integration that went beyond passive tolerance. Today, the most noticeable manifestations of this

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[27] OGAWA, *supra* note 11, at 45.

phenomena are the common dialect (pidgin English) and the variety of foods enjoyed. Both contain elements of many cultures in an amalgam unlike anything in the rest of the world. Local culture continually crosses ethnic boundaries in a spirit of inclusion.

Unfortunately, it is the superficial manifestations of this trait — pidgin and ethnic foods — that draw the most attention in descriptions of local culture. The core values are more likely to fall on the wayside.

To summarize, a common thread can be found in all of these characteristics of local culture. Family-centeredness, gifting, conflict avoidance, consensus resolution, self-restraint, and openness were predictable commonalities among ethnic cultures that centered life around groups rather than individuals. It is this focus on group behavior that marks the fundamental difference between Hawai'i's local values and their Anglo-American counterparts.

B. The Demise of Local Culture

By most accounts, the rise to political and economic power of non-white members of Hawai'i's population since the 1950's has been an era of reckoning. However, instead of a pluralistic society that incorporates all cultures of Hawai'i, the current state of affairs is best described as equal opportunities for different ethnicities to participate in a predominantly Anglo-American society. To say that locals have taken over Hawai'i is inaccurate because many have been forced or have chosen to abandon the characteristics mentioned above. The processes of overt, active eradication and subtle suffocation have marked a continuing era of cultural imperialism that began with the arrival of Captain Cook. Today, Western cultural dominance is not far away from achieving complete fruition.

1. Overt Dominance and Discrimination

Particularly during the period of imperialism and "Manifest Destiny," Americans and Europeans imposed cultural dominance over foreign populations. The first wave of this effort in Hawai'i was the spirited and probably well-intentioned actions of American missionaries in attempting to "civilize" Native Hawaiians. Most important was the fall of the *kapu*, which was at the heart of Hawaiian society. With the help of converted *ali'i*, the missionaries ended the practice of traditional religion, ceremonies, dance, and other customs. Similarly, fears of an impending "Yellow Peril" before and during World War II led to the

shutting down of foreign language schools, and the internment of suspect Japanese American citizens.

Whether by converting the *ali'i* to Christianity, practicing discrimination, or holding out the fruits of capitalism, Anglo-American dominance closed the primary realms where individual cultures thrived. It became increasingly difficult for a Chinese in Hawai'i to be Chinese, or a Native Hawaiian to be Hawaiian, and so with other ethnic groups. To become like the *haole* Americans was to approach equality.

The overt effort to Westernize Hawai'i's non-white population reached another high point during the drive for statehood in the 1940's and 1950's. Perhaps because of the profundity of the bombing of Pearl Harbor, patriotism rose to an all-time high in Hawai'i during and after World War II. People answered the call to "Speak American." The performance of Hawai'i's citizens became a central issue in Hawai'i's quest for statehood and the privileges that came with it. Part of the battle in Congress revolved around the question of whether a predominantly non-white population could be Americanized. Even after being reminded of the 442nd's valiant rescue of the "lost battalion" of his home state, Texas Senator Connally, in the midst of Senate debate, left these remarks in the 1952 Congressional Record:

> The Senator from California says the people of Hawaii are already citizens . . . They are not voting citizens. Fifteen percent of them are not citizens. He says that every one of them is a good American; that the people of Hawaii are as good citizens as are [me] and [him]. If he wants to classify himself in that category, he may do so, but I do not want to classify myself in that category. I think I am a better American than a great many people who live in Hawaii. I have been to Hawaii. The majority of the people there are not of American ancestry or descent.[28]

By this time, public schools were deemed either non-standard English or standard English schools, with most college bound students attending the latter. Especially in families from East Asian cultures that put a high premium on education, the push for children to stop speaking pidgin was enormous.[29]

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[28] 98 CONG. REC. 1719 (1952).

[29] The debate over whether or not pidgin is acceptable continues today. Some advance the opinion that pidgin is a disgrace and a detriment, while others feel it has major cultural significance. See Thelma Chang, *Revisiting Pidgin: If It's Garbage, So Is Shakespeare*, HONOLULU ADVERTISER, Oct. 30, 1994, at B-1, B-4.

Along with the loss of a primary realm for distinct ethnic cultures, the local subculture was relegated to second class status. Thus, too strong an affinity toward an ethnic culture or local culture worked against one's social status.

The Americanization of Hawai'i was apparently assured by 1959. On Admissions Day, a Hawaiian man was overheard in a bar: "Now we are all *haoles*."[30]

2. Subtle Deterioration of Local Culture

A much more subtle phenomena is occurring now that Western legal, political, and social institutions have been firmly set in place to surround all elements of Hawai'i's society. The following illustrates this effect:

In a hypothetical situation, suppose a local person from Hawai'i, A, moves to the mainland and will be conducting activity that could be a nuisance to neighboring mainlanders, X and Y, who are also conducting similar activities. The operative values in this example is A's views of cooperation, self-restraint, and conflict avoidance. With this in mind, A is unlikely to commit a nuisance to X and Y, and instead finds a way to abate the problem, or conducts the activity when they are not present. X and Y, while not necessarily boors, are nevertheless of the opinion that if something is bothersome, one should say something about it, leading frequently to a confrontation and, usually, to a resolution. X and Y conduct their activities to promote their self-interest and without self-conscious concern for the impact on their neighbors. There are two consequent possibilities. Of the three, A is most likely to bear the brunt of the nuisance because A's value system says "no make waves" and internalize hardships. In all situations, adhering to traditional values will make A the loser in this society, as X and Y remain either oblivious or unsympathetic to A's hardship. The other, perhaps more likely scenario is that A will conform to X and Y's way of life and venture into unfamiliar grounds of conflict where A is likely to be at a disadvantage.

Some might explain the above example as a case of majority rule. As a corollary, suppose X is a mainlander in Hawai'i among A, B, and C. For admirers of local culture, the results seem no more comforting. A, B and C are unlikely to be a nuisance to X because

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[30] GAVAN DAWS, SHOAL OF TIME: A HISTORY OF THE HAWAIIAN ISLANDS 391 (1968).

of the above mentioned values. On the other hand, by merely following his or her set pattern, X is oblivious to the fact that the others are unlikely to complain of a nuisance—not because it does not disadvantage them, but because it is contrary to their values. The results are similar. A, B and C can bear the harm created by X to their disadvantage and presumably to X's advantage, or A, B and C can conform to X's system of conflict driven justice. A third possibility is A, B and C can unite and oust or at least outcast X with their superior numbers although this action itself goes against the very principles by which they operate. Still a fourth possibility is that X may make a self determination to conform to A, B and C, although this is an unlikely and economically irrational action.[31]

The result of these culture clashes is an uncontrolled and unnoticed cultural race to the bottom that occurs in practically all human relationships and situations in Hawai'i.[32] Once high-held virtues such as trust, internalization of suffering, conflict prevention and avoidance, generosity and tolerance become hindrances among a Western influence in a Westernized society. The unflattering label of "naiveté" is attached to traditional practices and people rush to the conquering culture. Those few local culture holdouts risk becoming the perennial economic

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[31] *But cf.* THE RESEARCH COMMITTEE ON THE STUDY OF HONOLULU RESIDENTS, THE THIRD ATTITUDINAL SURVEY OF HONOLULU RESIDENTS, 1983 51 (1986). (A statistical study found these changes in Honolulu residents between 1978 and 1983. "Non-locals as a whole are accepting more of the traditional Eastern value of filial piety and rejecting the traditional Western value of individual freedom. It is interesting to note that Caucasians are becoming more like locals in their attitudes toward their parents and in their evaluation of individual freedom.").

[32] Some examples: 1) A non-local business drastically cuts the cost of its product by not providing certain local amenities. The local businesses lose customers and are inclined to go the more economically efficient route by cutting corners. 2) A local workforce has the value of working until the assigned tasks are complete regardless of overtime. A non-local worker makes the same amount of pay but works only during set hours regardless of how productive he/she is. The local workforce is inclined to abide by the non-local rules. 3) In exercising their freedom of speech, non-local speakers may crowd local voices out of the most effective times or places. The main recourse for local people is to adopt the non-local method of assertive speaking. 4) A local pick-up basketball game involves the honor system. The game is controlled by an unspoken rule whereby each person calls out whenever, in his judgment, he fouls someone else. The non-local rule is to call out when someone else fouls you. The non-local player, playing by his own rules, can play the entire game without a foul because no one will call it on him and he never calls it on himself. The likely outcome is that the local players will acquiesce to the non-local's unfettered play or conform to the non-local rule at least in dealing with the non-local.

and legal losers. The pressure and tendency to conform or assimilate is augmented by the forces of the non-local controlled mass media that projects a relatively narrow set of values by which one should live. The phenomenon has been understood for centuries as summed up in the maxim, "when in Rome, do as the Romans."

Some may view these changes as the result of "natural forces" in social evolution. However, given the history of dominance and discrimination, a sometimes-well-intentioned, but odious cultural imperialism is a better interpretation of the cause of Hawai'i's current status. A Darwinistic evolution implies the creation or emergence of the most able culture, but imperialism imposes the culture of the powerful on others without regard to whether the dominating culture is better in any true sense.

C. The Future of Local Culture

As indicated above, it is the nature of Western culture *and* the current imposition of Western legal, political, and social institutions that erode local culture. It is the latter that should be challenged. The institutional edge and access bias given to Western culture has led Hawai'i toward complete cultural assimilation and an unsatisfactory fate for many in the silent majority. The result flouts the American ideals of equality, diversity, integration, and democratic government of the people. In Hawai'i, the essence of island life and the "*aloha* spirit" will be lost forever as those who hold on to it find themselves at a disadvantage. Perhaps most significant is the impending loss of a local identity and the subsequent loss of civic pride and accountability.

One current practice that promotes Western cultural domination is the adoption of mainland philosophies into Hawai'i's legal regime. Historic preservation laws, environmental protection policies, insurance regulation and the bulk of Hawai'i's common law are just a few of the multitudinous examples of laws with mainland derivatives. Rarely is more than lip-service given to Hawai'i's "unique cultural heritage." With careful attention, Hawai'i can begin to propose policy schemes that reflect or aspire to the best elements of its local culture. True cultural preservation will begin with the evaluation and reformation of all of Hawai'i's laws to stimulate creative policy-making that incorporates the incentives, motives, and traditions characteristic of local culture.[33] Despite the revolutionary tone, it might be found that many

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[33] One area where this incorporation has already been attempted is the common law regarding traditional Hawaiian rights. *See* discussion of the Richardson Court *infra*.

laws are satisfactory and many others require only minor alterations. In other cases, local culture may need to bend and make way for progress. Knowing precisely what changes are needed is not possible until this inquiry is begun. If local culture is to be a part of Hawai'i's future, a more amicable legal and political environment is needed to protect its place in society. If left to the forces of inertia, local culture will undoubtedly lose the fight for cultural survival.

Obviously, other factors are contributing to the demise of local culture. Population growth has removed much of the small town flavor of Hawai'i, particularly on O'ahu. The emergence of a middle class has dissolved much of the common circumstances that once linked immigrants and natives.

Also, superior technology has changed Hawai'i forever. People are able to be more self-reliant and less dependent on family and neighbors for everyday support. Greater communication and mobility allows people to be less bound by geographic limits for group support. Increased knowledge lessens the need for and credibility of shared or similar superstitions which often linked cultures.[34]

Finally, there has been a dramatic increase in tourism. Visitors from the mainland demand certain amenities of the mainland. Increased numbers of visitors from Asia may either recreate a primary realm where local cultures may rediscover themselves or, given the homogeneity and Westernization of Asia, only exacerbate the problem of sustaining local culture.

All these factors have a major impact on the future of local culture and are either impossible or undesirable to eliminate. Thus, focus is placed on factors with practical significance, in particular, the selection and creation of policies.

The state of modern society is also a reminder to be wary of a potential pitfall — losing oneself in romanticism and nostalgia. The problem is twofold. First, the past may not be as great as some make it out to be. Thus, reliance on the past for a model of the future is a

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[34] For example, the prevailing principle among "locals" when it comes to sacred areas, artifacts, and especially gravesites is *kapu*! (Don't touch!). This could be a remnant of Native Hawaiian and Japanese Shinto notions of spirit in the world around us. Most traditional cultures of Hawai'i have an idea of harmony with nature, the past, and the future. Ancestor worship and respect for history make it all the more loathsome to disturb objects which contain these spirits. As illogical as it may sound, this alone has probably served best to protect artifacts and graves from private collectors and construction on private property.

misleading exercise. Second, what good things that did exist in the past are often unrecoverable because of irreversibly changed circumstances. Longing for pleasant walks on dusty roads, movies and shave ice for a nickel, and friendly neighbors that offer the shirts off their backs may only hinder aspirational, forward-looking visions. Nevertheless, local culture exists in a modern form, often intertwined and hidden among the prevalent Anglo-American culture. Local values are viable, accepted and often preferable building blocks for Hawai'i's society. Finding a place for local culture in modern society requires a serious and educated investigation that learns from the past for guidance, rather than looking to the past with longing.

Before going further, it is imperative to point out the fact that distinguishing local and non-local people has become an extremely difficult if not impossible task. Overbroad uses of ethnicity as a proxy for making the distinction are no longer appropriate as one will find many *haole kama'aina* (long-time Caucasian residents of Hawai'i) that are much more "local" than social climbers of other races. Hawai'i has entered a state of complexity where appearance alone says nothing about one's values. A cursory interpretation of the following part on local paradigms might expect and find an anti-*haole* tone. In reality, however, the enemies of local culture span the spectrum of race and economic class. Furthermore, the proposed approach borrows many elements from American ideals which are critical to a vision of Hawai'i's preferred future. To be sure, a vision of Hawai'i's future would not be entirely multi-cultural without incorporating Anglo-American values.

The heart of Hawai'i's inner conflict can be represented in a series of television commercials depicting the prosperity of a Japanese-American small-business owner. The series began with the fateful, "meritorious" decision to dump old friend, "Banker George," for the self-serving convenience of a local giant in banking. The erosion of local values is everywhere.

III. A Place for Local Culture in Hawai'i's Democracy

If one uses Abraham Lincoln's description of American democracy as government of, by and for the people, it would seem appropriate to assume that democracy in Hawai'i's version of America would be markedly different from the mainland United States given its unique historical and cultural roots. Although similar institutions of representative democracy would exist, the specifics might differ depending on a number of considerations. However, these differences are not found

in Hawai'i. Continued efforts are made to incorporate "culturally correct" language in various statutes and other government pronouncements, but the basic paradigms of Anglo-American society are embraced by the State of Hawai'i. Again, the result is an uncontrolled flow toward assimilation and away from local culture.

In a report about the transition to democracy among Asian nations, Muthiah Alagappa states:

> The democracy that emerges [when an Asian variant of democracy originates in the Asian people] . . . will be peculiarly Asian — placing the community and the common good above the individual with the public displaying greater respect for authority. While opposition will not be precluded, the system will be characterized by a dominant party, a centralized bureaucracy, and a strong interventionist government. This Asian variant, it is asserted, is a final form, not a transitional phase on the path to liberal democracy.[35]

Similarly, the people of Hawai'i must forge a democracy that is representative of its local culture. Even though it may not look like typical American democracy, a multi-cultural society in Hawai'i can be a democracy nonetheless.

The exercise of democratic rights are the heart and soul of Hawai'i's future. If a truly pluralistic and evolving society is to be achieved, the first area of concentration must be on reforming those political bodies and processes through which the people govern themselves and define their democracy.

Recall the hypothetical situation where a minority *haole* influence encounters local culture adherents. Suppose the local rule for getting service at a store is waiting until it is offered. The *haole* who recently moves to Hawai'i from the mainland has a rule of his own: If he needs service, he asks for it. Again, there are four possibilities: 1) Local shoppers can wait around while the ones who ask for service get it first. (*disadvantageous acquiescence*). 2) Local shoppers can start asking for service as well, such that it becomes the new norm. (*assimilation*). 3) Local merchants can refuse to serve non-locals first, or give them substandard service compared to local shoppers. (*rebellion*). 4) Non-local shoppers can conform to the local custom of patience either by free choice or as a result of the act of *rebellion*. (*counter-assimilation*).

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[35] Muthiah Alagappa, *Democratic Transition in Asia: The Role of the International Community*, EAST-WEST CENTER SPECIAL REPORTS 10-11 (October, 1994).

In taking a fresh look at the democratic institutions of Hawai'i with an eye toward preserving local culture, one must set up new paradigms that avoid situations where people are forced to choose only between options 1 and 2. Instead, Hawai'i must broaden the horizons of our citizenry, redefining local culture with a sensible distribution of some *assimilation*, some *rebellion*, and some *counter-assimilation*.

Some may argue that this is unfair to non-local culture. Options 1 and 3 are both disadvantageous to the non-conforming group, whereas 2 and 4 advantage the conforming group. Why should we shun option 1 — which disadvantages locals for not conforming to American ways — and allow or even encourage option 3 — which disadvantages non-locals for not conforming to local ways? The answer has two parts. First, the exercise of option 3 is to counterbalance the overwhelming number of mainland created policies that are and will continue to be applied to Hawai'i whether adopted by the state government, or imposed by the federal government. The second and more important reason relates back to the nature of local culture itself. Recall that although option 3 is disadvantageous to non-locals, it is also counter to the non-conflictual nature of local culture. In essence, exercising option 3 is also an act of *assimilation* by local culture that has the silver lining of preserving a local practice. It is a pill that must be swallowed in situations where *counter-assimilation* is desired, but unlikely to come about on its own. Thus, by encouraging acts of *assimilation*, *rebellion*, and *counter-assimilation*, a process of give-and-take will begin. The result should be a viable combination of preserved local culture and integrated Anglo-American culture with the least amount of unconscious Westernization.

The three sections that follow are starting blocks for preserving and in some cases revising local culture in modern American society. The first two attempt to clarify currently ill-defined parameters. In so doing, a path might be cleared for local values to take hold in modern Hawai'i. The third section describes a tradeoff paradigm between *rebellion* or *counter-assimilation* and local *assimilation*. This new paradigm will then be applied to various institutions that affect democracy in Hawai'i.

A. Original Ideas: Suppressing the Urge to Link

When dealing with a personal problem, one of the first objectives is to acknowledge that one has a problem. This first paradigm simply reminds Hawai'i not to blindly accept policy that works on the main-

land. Of course, just because Hawai'i is unique does not mean it should reject everything from the mainland. By the same token, Hawai'i should not accept everything from the mainland. Part of putting local culture into Hawai'i's democracy is making *conscious* decisions about which policies best apply to Hawai'i's local population rather than using labels as proxies for our views.

In his account of the 1970 gubernatorial election in Hawai'i, Tom Coffman elucidates some of the key differences between Governor John Burns and Democratic primary opponent Tom Gill.[36] Gill was the consummate liberal reformer, and Burns personified the Democratic Revolution of 1954:

> While Burns inclined to behind-the-scenes workings, Gill was at home behind the podium or, better yet, in public hearings, where he could bring to bear his power for give and take. Gill was widely recognized as an intellect and an idea man. Burns made a virtue of not having all the answers. Foremost, Gill dealt in ideas and issues, Burns in balancing conflicting power drives; Gill in advocacy, Burns in conciliation.[37]

Gill's primary support base consisted of university students inspired by the Civil Rights Movement, newly arrived *haoles* likewise inclined, and the anti-Burns Teamsters Union.[38] Burns was victorious with the support of the coalition built by the "Revolutionaries of '54," which detractors have often called the "old boy network."

Senator Daniel Inouye once remarked, "The difference between [the two parties] is that the Republicans' chief concern is property, things, what we own; the Democrats worry about people — what we are."[39] But as the Democratic primary of 1970 demonstrated, even though Hawai'i appeared to have liberal tendencies when it came to law and policy, Hawai'i would not elect a liberal politician who seemed more able and energetic, but less local, than Burns. Like Southern Democrats, Hawai'i's Democrats were and still are quite different from their mainland comrades.

This is not to say that the party label and Inouye's statements ring hollow. Hawai'i's affinity to American liberalism and the Democratic party was in response to the Republican led plantation oligarchy. Equal opportunities for non-white racial groups in Hawai'i occurred roughly

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[36] TOM COFFMAN, CATCH A WAVE: HAWAII'S NEW POLITICS 41 (1973).

[37] *Id.* at 40.

[38] *Id.* at chapter 12.

[39] DANIEL K. INOUYE, JOURNEY TO WASHINGTON 209 (1967).

coterminously with the Civil Rights movement, and local customs of openness and acceptance matched an idea of tolerance for civil liberties.

Although American liberalism is a good match for Hawai'i's people, it is not a perfect match. The inherent problem of linking local attitudes to mainland attitudes is that the latter tend to dominate. Eventually, people in Hawai'i will be led by ideologues from outside of Hawai'i's unique setting. Political values will not be generated in Hawai'i because national movements are better funded, more visible, more reachable, and more organized.

Coffman said that Governor Burns defied labeling.[40] Appropriately, the man who stands as an icon of modern Hawai'i[41] helped create a political atmosphere that also defied labeling. However, out of necessity or custom, a label — usually the liberal wing of the Democratic party — is attached to Hawai'i's people and politics.

When students on Moloka'i selected a graduation song that referred to "The Lord," school officials forbade them under the Establishment clause theory. Nevertheless, many people in Hawai'i sided with the students who eventually defied the ruling and sung the song as planned.[42] Perhaps overriding the liberal banner of a strong First Amendment were the values of active openness as opposed to simple tolerance and the fact that these were children after all.

One of the most important issues in Hawai'i today is the question of sovereignty. Once again, a policy in Hawai'i may be greatly influenced by an outside movement that is being linked to the situation of Native Hawaiians.

It is not surprising that in formulating a theory, justification, and movement for sovereignty, Native Hawaiians look toward the mainland model of Native American nations.[43] In that policy lies all precedent of the United States dealing with indigenous peoples. Again, this can potentially be a problem resulting in mainland solutions for local problems.

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[40] COFFMAN, *supra* note 38, at 40.

[41] In the 1994 gubernatorial race, even Republican candidate Pat Saiki ran a television commercial that attempted to associate herself with Governor Burns.

[42] *Molokai High School Seniors to Defy Ban on Song? Choral Leader Say They Will Sing "Friends"*, HONOLULU STAR BULLETIN, June 1, 1994, at A-3.

[43] This is not the only model. Sovereignty advocates also look at the plight of indigenous peoples in different countries. Nevertheless, the starting point for dealing with the U.S. government is Native American policy.

Sovereignty advocates do recognize differences between the situation in Hawai'i and on the mainland. Many believe these differences work to the advantage of Native Hawaiian sovereignty and call for greater sovereign rights.[44] On the other hand, the thrust of the sovereignty movement is based on what Native Americans already have. Going by this path, Native Hawaiians might not get anything more than Native Americans. This possible outcome is disturbing to those knowledgeable of the ignominious history of federal policy toward Native Americans. For example, laws that truncate Native American sovereignty, such as the Major Crimes Act[45] and the Indian Civil Rights Act[46], may also apply to a federally recognized Hawaiian "nation within a nation." Another important question is whether a mainland United States policy regarding Hawaiian sovereignty can adequately account for the amount of interrelation and cultural identity among Hawaiians and non-Hawaiians. Native American policy today reflects a cautious policy of physical and social separation of cultures — an attitude that would be unwanted in Hawai'i where cultures are already well blended.

Again, a better paradigm is to avoid this linking and search for a policy made for the circumstances locally. Many local people believe in some sort of sovereignty for Hawaiians. This is a reflection of the local values that allow different lifestyles, and demand fairness and reparation. A local approach, unlike a mainland one, may not see any inherent impossibility of traditional Native Hawaiian culture, local culture, and Anglo-American culture in the same place simultaneously. Local people might invite the return of native-claimed lands in areas that are integrated with the rest of society. A solution which is in stark contrast to the mainland method of carving out enclaves with borders that divide wholly separate jurisdictions. If Native Americans had made their own policy with the United States, it would not look like the

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[44] *See* MICHAEL KIONI DUDLEY & KEONI KEALOHA AGARD, A CALL FOR HAWAIIAN SOVEREIGNTY 120-123 (1990), explaining why Native Hawaiians have a stronger case than many Native American groups, in particular citing Hawai'i's past status as an independent internationally recognized sovereign. Some differences that may lessen the Native Hawaiian claim vis a vis Native Americans, are given less attention. Some examples are the fact that many non-Hawaiians were part of the Hawaiian nation at the time of overthrow, and that unlike the Hawaiians, many Native Americans were literally removed from their land to unfamiliar reservations or killed in brutal warfare.

[45] 18 U.S.C. § 1153 (1988) (Ousts tribes of jurisdiction for a list of so-called "major crimes" even when both the accused and the victim are tribal members).

[46] 25 U.S.C. § 1301 et seq. (1988) (Imposes U.S. civil rights standards on tribal governments).

Native American policy of today. Rather, it is the often cruel and bungled result of Anglo-American domination. It is a situation that Native Americans must now attempt to salvage, hopefully with the assistance of future lawmakers.[47]

B. The Public - Private Distinction

George Cooper and Gavan Daws opened people's eyes to the land *hui* (informal associations) among Hawai'i's power elite.[48] This phenomenon was the result of more than just greed and corruption, owing somewhat to the local concepts of loyalty, gifting, and payback. On the other hand, there was more to it than just the local Hawaiian way, since corruptibility of politicians occurs in many settings throughout the United States. Thus, a necessary resolution is to find a place for these positive local values in democratic government, such that it is neither blamed for political corruption, nor used as a pretext for justifying unacceptable behavior.

A good starting point is to make a distinction between the private and public spheres of local living. In short, there is almost no place in public life for the local payback process. When someone does a favor for another using public goods, such as a government job or public contract, this "gift" is a violation of local values and cannot be justified by any claim to be the local way. The local custom of reciprocation is a gift from the self in return for a gift from another. When someone has control of a public good and that person gives it away, the gift is not from her because it was never hers to give away in the first place. An example of this situation would be returning the favor of a gifted book by giving the original gift giver a library book. It would be folly to say that gifting obligations have been fulfilled, and dubious to say that this is the local way.

Unfortunately, cronyism and corruption are often ascribed to the local way of doing business despite the fact of government corruption

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[47] Historically, the federal courts were the only protection for Native Americans against the anti-sovereignty policies of the President and Congress. The more recent trend has reversed roles, with a more conservative court truncating native rights while Congress works for greater tribal independence. DAVID H. GETCHES ET AL., FEDERAL INDIAN LAW 285 (3d ed. 1993). It will be interesting to see what happens now that Republicans control Congress, and the Supreme Court has changed slightly.

[48] GEORGE COOPER & GAVAN DAWS, LAND AND POWER IN HAWAI'I: THE DEMOCRATIC YEARS (1985).

in many mainland settings where government is highly centralized and there exists an insulated power elite. Chicago and Boston politics are two noteworthy examples. Associating the practice of gifting and obligation with corruption is troublesome because it may incline local people, who have so relied on these values, to shy away from relationship building through gifting as being un-American. By making a distinction between public and private spheres, and with encouragement from leadership, local people should have ample non-public realms to continue these practices.

A proper understanding of local culture would dispel misconceptions that corruption is an inherent part of it. The public-private distinction will dissolve the shield behind which some local politicians hide, and break the sword with which many non-locals attack local culture.

C. Local Culture's Give and Take

Local culture is under attack. Accepting the status quo allows the process of subtle deterioration to continue. The fight against this attack will be futile if local culture does not slightly assimilate to American ways. By forfeiting a little, local culture may be able to maintain its most important ideal in modern Hawai'i.

This important ideal is a group-oriented society that puts great emphasis on relationships. By maintaining a social order based on groups, the people of Hawai'i can sustain important values of family, conflict resolution, gifting, and openness. Using the technique of *rebellion* to bring about *counter-assimilation*, a local policy must stem the tide of non-local forces toward unfettered individualism.

The trade-off is that local culture must abandon certain tendencies toward conflict avoidance and self-restraint that approach apathy. People with local values must grab the reins of power by stepping out of the role of watching others make decisions about society and passively or reluctantly accepting the resulting situation. One needs a very fine pen to draw this tradeoff. Not assimilating enough — that is, not asserting enough power — will result in local culture never having the clout or means to reestablish itself. Assimilating too much surrenders the very values that need to be preserved.

1. Local Give: Ending Apathy With a New Extroversion

One of the major difficulties in Hawai'i's participatory democracy is getting people to participate.

One can offer a number of reasons why this is so. First, this may be a reflection of local people's relatively recent immersion in American democracy and its means of exerting power, such as interest groups, media, and citizen action. Second, it may simply be one aspect of a tide of apathy sweeping across the United States.

Another, and perhaps the key reason, is that citizen participation often goes against the local values of avoiding conflict, keeping opinions to oneself, and not dealing with problems of such a large scale. Despite these valid cultural reasons for being introverted, the practice must end. Local people need actively to think about, discuss, and participate in government activities.

If local culture fails to assert itself and sound its multitudinous voices of contrary opinion, local cultural values will be lost in political discussion. Non-local voices, used to getting themselves heard, flood the airways of opinion.

A practical approach requires a Machiavellian outlook. Local people, used to phrases like "ain't no big ting" and "Whatevas," need to break out of this passive mode, not because it is un-American if they do not, but because it is the only way to protect their lifestyle.

2. Local Take: Rebellion and Counter-Assimilation

Local people must involve themselves in Hawai'i's democracy, and in so doing, assimilate to Western ways. *How* and *why* people participate is another matter. Acts of *rebellion* and *counter-assimilation* should take place in these two areas.

a. How?

The government institutions that have been implanted into Hawai'i are designed to hear opinions voiced in a non-local way. New systems of participation must be designed for local styles to counter an access bias that favors practitioners of non-local culture. Traits of initiative, caring, risk, and perseverance may be necessary for anyone who wishes to participate in public affairs. On the other hand, traits of verbosity, wealth, boldness, and nerve need not be required for participation to be effective. All people should have equal access to government activities, at which time, if local people choose not to participate (not to do the "give" part of the paradigm), there is nothing more that can be done.

b. Why?

The reasons people participate in government should move away from exerting individual rights to prevail over societal responsibilities. Instead, government should have a more utilitarian role — looking out for societal interests first, and weighing claims to individual rights accordingly. This would better reflect the group centered nature of local culture.

All Americans are immersed in the belief that individuals possess certain inalienable rights. These are most notably enumerated in the Bill of Rights. Of lesser note is the existence of any responsibilities of citizenship. A few are mentioned at times, although usually to demonstrate leverage for asserting a right: the duty to pay taxes, the duty to serve in the military during war, the duty to serve on juries, and the duty to vote.

In contrast, local culture is grounded in values of self restraint and responsibility to groups. Perhaps because individual freedoms and equality were denied until relatively recently, many people still have a difficult time taking them for granted. Thus, a local cultural paradigm should recognize various unwritten (and perhaps written if subsequently codified) responsibilities which correspond to the various rights and privileges of citizenship. The general concept of freedom would be tempered by discipline and self-restraint. The freedom of speech would come along with the importance of listening. Equality and pluralism can exist only where citizens practice tolerance and openness.

3. Application of the Give and Take

a. Role of Courts

The great moderator of this new paradigm, particularly in the area of strengthening local values, is the local court. An aggressive court can draw a uniquely Hawaiian balance between societal welfare and individual rights.

This approach has already been used in Hawai'i during the service of Chief Justice William S. Richardson. The Richardson Court has been ridiculed by mainland courts and non-local dissenters in Hawai'i because of its apparent lack of ability in analyzing legal precedent.[49]

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[49] *See generally* Williamson B.C. Chang, *Reversals of Fortune: The Hawaii Supreme Court, the Memorandum Opinion, and the Realignment of Political Power in Post-statehood Hawai'i*, 14 U. HAW. L. REV. 17 (1992).

Contrary to this criticism, Justice Richardson had a clear agenda as mandated by Governor Burns.[50] The court was entrusted with undoing past wrongs and compensating for the known access biases against the local people of Hawai'i, who would rarely go to court to assert their individual rights. This judicial philosophy goes to the first part of the act of *rebellion*—how one participates.

As to the second part — the goals of society — the court also took an active role. Applying a common law created in Anglo-American culture seemed counter-intuitive to Justice Richardson. Instead, this court had an opportunity to create law for Hawai'i's special history and population.[51] A notable example of this mode of adjudication was in the area of land rights.[52]

Obviously, some problems will arise if a Hawai'i court takes it upon itself to protect a societal-centered culture. The most glaring difficulty is that defiantly ignoring precedent, even if it has been derived from other cultural systems, runs afoul of American modes of jurisprudence. Arguments of unpredictability and unconstitutionality will be made and some cases may be appealed to the U.S. Supreme Court.

One possible response is the *Midkiff* decision.[53] In it, the U.S. Supreme Court spent a considerable amount of time discussing the unique history of Hawai'i and in particular, the circumstances surrounding the appropriation of land and the *Mahele*. Although historical circumstance has never been employed with such significance since then, the Court did open a window of hope for those who believe Hawai'i may require a unique status in order to preserve its democracy.

The court, with its inherent powers, is the perfect bastion for this act of *rebellion*, and perhaps the ultimate motivator for an act of *counter-assimilation*.

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[50] "The Governor, as he appointed [the justices of the Supreme Court], reportedly told some of them not to feel bound by Territorial precedents if, in their judgment, those precedents were wrong. Territorial judges and governors named by U.S. presidents usually had no roots in Hawaii, and Burns and his party perceived them as largely unfamiliar with and unsympathetic to special island conditions." Statements by James S. Burns, the Governor's son, in personal interviews, *cited in* CAROL S. DODD, THE RICHARDSON YEARS: 1966-1982 54 (1985).

[51] *Id.*

[52] *See* the shoreline boundary cases where principles of traditional Hawaiian practice are applied to limit private property rights. In re Ashford, 50 Hawaii 314, 440 P.2d 76 (1968); County of Hawaii v. Sotomura, 55 Hawaii 176, 517 P.2d (1973); In re Sanborn, 57 Hawaii 585, 562 P.2d 771 (1977); *cited in* CAROL S. DODD, THE RICHARDSON YEARS: 1966-1982 (1985).

[53] Hawaii Housing Authority v. Midkiff, 467 U.S. 229 (1984).

b. Cronyism

In an essay on cronyism, Honolulu Advertiser's Jerry Burris cites four examples: non-bid contracts given out by the head of the Office of Environmental Quality Control, the deputy comptroller parceling government purchases to friends, the budget director ordering computers from a golfing buddy, and the Governor's nomination of the wife of a close political associate to the Hawai'i Supreme Court.[54] More recently, controversy has arisen over the forced resignation of the Dean of the University of Hawai'i Law School amid allegations that the resignation was due to his refusal to acquiesce to admitting prospective students linked to legislators.

Under American standards, cronyism is unacceptable to democracy. Under the public-private distinction in a local cultural paradigm, cronyism is likewise unacceptable. Two methods that are used to combat this problem are multiple checks and ethics commissions.

Multiple checks are procedural devices designed to ensure fairness and merit-based selection of people and parties who will have responsibilities for the public and receive benefits from the public. In the case of government contracts, the process requires bidding. In putting a new Justice on the Supreme Court, different branches of government are checks upon each other. The problem with procedural safeguards is that they are only indirectly related to the problem of cronyism. They are often sidestepped or silently ignored without notice.

Ethics standards are more directly aimed at behavior. One must ask, however, where these standards come from. In Hawai'i, local people are relationship-centered. Rigid rules can have a chilling effect on the "*aloha* spirit." It is critical to make a clear distinction between acting in a public and private capacity. In the public sphere, the American ideal of merit-based advancement should prevail and local culture should assimilate accordingly, although it may not be contrary to local culture principles in the first place considering the values of discipline and openness. On the other hand, merit-based evaluation of performance does not mean that a local way of working that disadvantages the non-local cannot exist.

Here is a prime example of the fine line between *assimilation* and *counter-assimilation*. Merit is the preferable means of selecting people for

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[54] Jerry Burris, *Cronyism*, THE PRICE OF PARADISE: VOLUME II, *supra* note 1, at 289.

public duties or benefits. Furthermore, when working for the government, loyalties must be to the people and mission of society first, and working acquaintances second. These are ideals to which some local people need to adapt. On the other hand, working relationships, worker's attitude, openness, a family feeling, and the "*aloha* spirit" are all part of assessing merit in Hawai'i since all are vital to the survival of local culture. These are concepts to which many non-locals need to adapt.

c. Government Centralization

"Hawai'i's formal government is the most centralized and its administration the most integrated of all fifty states in the union."[55] Many attribute this to historical consequence, with government institutions passing relatively unchanged from monarchy to territory to state.[56]

In a positive light, centralization may be an indicator of local culture's trust in government and its tendency toward mass culture. On the other hand, it may be a result of local people's non-confrontational tendency to accept passively, adapt to whatever happens, and be ruled by others.

Whichever the case, centralization must end even if it seems counter to local norms. Decentralizing government means more influence and input from citizens, a greater feeling of ownership and identity, and more effective and responsive government services. Furthermore, government will better reflect the views of local people because of their greater input. It will require some local people to break a code of silence and inaction.

Although many non-locals have been calling for decentralization — mostly to wrest some controls that inhibit private actions — the decentralization that should take place may not be what non-locals expect. A local format may rely heavily on informal relationships, unstructured local activities, family decision making bodies, and consensus decision making. The goals of small community groups may not be the exercise of independence, but rather the achievement of the

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[55] Norman Meller, *Policy Control: Institutionalized Centralization in the Fiftieth State, in* POLITICS AND PUBLIC POLICY IN HAWAI'I 13 (Zachary A. Smith & Richard C. Pratt eds., 1992).

[56] *Id.*

community's piece of the larger society's goals. The model town meeting need not be the New England model. Instead, local dynamics would rule the process. Once again, if local people do not participate, non-local rules will dominate.

d. Interest Groups

In speaking of interest groups in Hawai'i, one must speak in two breaths. The local unions are rife with local memberships, very powerful, highly visible, and have leadership that is often considered as part of the political insiders. Non-governmental interest groups formed around causes such as environmentalism, lower taxes, or not-in-my-back-yard movements are often characterized by proportionately high participation by *haoles*, mainland leadership or parent organizations, less political clout, and pursuit of change through the courts rather than through the political process.

Locally dominated unions, such as the United Public Workers, Hawai'i Government Employees Association, International Longshoremen's and Warehousemen's Union, and Teamsters are powerful because of their established position in Hawai'i's society. Strong ties of loyalty and obligation make union participation akin to the other group ties so important in local living. One of the problems with the unions is that no groups with these kinds of local ties yet exist to pose counter arguments to the unions.

What is needed is more activism by local people and involvement in other interest groups. Local influence can form the kinds of ties and loyalties that make unions powerful, and at the same time, provide a greater variety of views and a less lopsided framing of issues. Once again, local culture adherents must do the unexpected and take public action.

The many non-local interest groups would benefit from more local input if they begin to conform methods of recruitment and retention with underlying principles and practices of local culture. Membership and political clout would increase. In many cases the lack of active support is not because locals do not care about the issues. Instead it is a combination of the local introversion ("I don't want to make waves") and the apparent exclusion of locals in the movements ("I would feel intimidated at a meeting of mostly *haoles*"). Avoiding the question of what must happen first, it is at least clear that in the give-and-take paradigm, both sides must cede some ground.

As groups become powerful, one should remember the public-private distinction mentioned above. As long as these organizations are pro-

ponents for societal agendas, their function is much needed. When they gain too much power and pursue private interests to the detriment of the public, there is a violation of the public trust. Like cronyism, crossing this threshold should not be tolerated.

e. . Campaigns

According to Senator Inouye, during the plantation years one of the most notorious and common exercises of control by the elites was tying the voting pencil to a string attached to the ceiling. Inouye remarked, "a field hand voting for a Democrat might just as well shout it from the top of a palm tree."[57] Today, the exorbitant costs of elections may not be as heinous as overseeing how people vote, but it does still represent how campaigns and their results are greatly in the hands of the wealthy. If political campaigns and elections in Hawai'i are to be reformed in such a way that local values are preserved, once again there must be a give and take.

The give is more local participation. In order to stimulate positive change, local people must at least show some demand for it. Although this demand is apparent in the non-local led media (discussed later), it is not evident in the actions of local people. For example, a large number of candidates in the last election ran unopposed. As much as this may have bothered many people in the local community, few would dare to step out of the local mode and run or encourage someone else to run. Also, despite some clamoring for campaign reform, local people have not stood up to demand it.

On the other hand, campaign reform in Hawai'i may mean the abridging of First Amendment rights of candidates. Once again, this is an area where the needs of society may outweigh the individual candidates rights. Spending limits, designated forums of communication, fact checking, anti-mudslinging measures, and advertisement requirements might all be challenged as violations of the First Amendment.[58] In Hawai'i, however, these rights may have to give way. Ironically, even without specific laws, certain "anti-*aloha*" campaigns can severely disadvantage a candidate, perhaps because of the

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[57] INOUYE, *supra* note 41, at 209.

[58] *See* Buckley v. Valeo, 424 U.S. 1 (1976)(invalidating the part of a campaign reform law that would restrict the amount a candidate could spend on a campaign because of First Amendment considerations).

local disdain for these tactics.[59] Nevertheless, a policy that formally rejects unfettered campaigning will help to institutionalize the local values of societal responsibility, openness, and *ohana*.

f. Media

The two major newspapers and the major television stations of Hawai'i are dominated by non-local influences. The media is another powerful institution that requires a certain amount of extroversion to be a participant.

Once again, there ought to be more local participation in running this very influential institution. Some success can be seen insofar as the entertainment industry has a media-like impact on people. Local personalities have become influential leaders in society.[60] It is important that these people continue to hold fast to local values and to encourage similar participation in news writing and broadcast journalism.

One way in which the news media could adjust to fit the local climate would be to end the use of straw polls and data. When newspapers or television stations disseminate opinions forwarded to them and present them as the "voice of Hawai'i," they tend to skew opinion in favor of non-local interests that are more likely to express opinions or take part in voluntary polls. Once again, one should note the apparent prevalence of non-local views in the voluntarily offered letters printed in editorial pages. The result is a faulty picture for those relying on this information, and a pressure for local people to conform.

IV. Conclusion

By some accounts, Hawai'i's local culture and the "*aloha* spirit" have been swept away by a raging tide of individualism. On closer inspection, however, the situation appears not to be that dire. Local

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[59] Frank Fasi's "morphing" commercials in the 1994 campaign, Rick Reed's sex-scandal allegations against Senator Inouye in 1992, and Mufi Hanneman's attack on Neil Abercrombie for alleged marajuana use in 1990 are three examples of tactics that may have hurt campaigns. These represent a few instances where acts of rebellion occured without any government created stimulus.

[60] Some examples: Comedian Frank DeLima visits schools and talks about self esteem and drug education; musician Haunani Apoliona does extensive work with Alu Like and the Native Hawaiian community. Musician Henry Kapono, among other ventures, does public service announcements about recycling.

people are still group oriented, however, the groups people relate to are no longer large sections of society, communities, and interest groups. Instead, perhaps intimidated by the rate of growth and the urbanization of much of Hawai'i, local people support and rely on smaller groups — families, friends, social acquaintances, work and school mates. Within these small spheres, local culture lives.

These cramped homes of local culture are not safe from the crowding forces of true individualism. If local values of family, openness, gifting, and obligation are to survive, the people of Hawai'i must create a more habitable environment. This means looking at the large scale once again. Instead of retreating into comfortable enclaves, local people need to venture out and recapture an identity with mass society in Hawai'i. This requires elements of initiative and risk, which local people have been capable of in the past.

By seizing the reins of Hawai'i's democratic institutions, laws and policies can be written for the benefit of the silent local majority. In the process, non-locals can integrate rather than dominate. The result will be a truly multi-cultural, truly representative democracy. Achievement of this society would be Hawai'i's ultimate gift to the world. Apathy will cause a slow disintegration.

In this sense, Hawai'i was doing quite well about the time of statehood. There seemed to be widespread interest and participation in politics, children were educated in civics, a revolutionary spirit filled newly empowered reformers, the Judiciary took bold steps to invent a body of law for Hawai'i, and many felt "lucky to live, Hawai'i;" if only they were not detracted by external barriers, internal value shifts, less able successors, or whatever other forces led to their demise.

Armed with a clear notion that Hawai'i is unique and worth preserving, and a guiding principle that distinguishes between public and private spheres of life, the people that call Hawai'i home can meet the challenge of this most recent quiet crisis. Perhaps we can do it better this time.

Ku i ka nu'u.

Andrew Hiroshi Aoki[61]

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[61] Visiting Student, William S. Richardson School of Law; Class of 1995, University of Michigan School of Law.