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The Aboriginal Land Title of the Native People of Guam

I. INTRODUCTION

The Ninth Circuit Court of Appeals assumed without deciding in a recent case that the native peoples of Guam (the Chamorro) hold a property right, "aboriginal title," in lands they historically used or occupied. The case was *Government of Guam ex rel. Guam Economic Development Authority v. United States*.[1] But the court refused to decree that the Chamorro have those rights, ruling that the Government of Guam, which brought the suit as trustee for the native Guamanians, lacked standing.[2] The Supreme Court, which of late hears fewer than two percent of the cases it is asked to review, declined to issue a writ of certiorari.[3] It did so notwithstanding that, throughout our history, final resolution of cases involving the rights of native Americans has been a duty traditionally undertaken by the Supreme Court.[4] Native

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[1] 179 F.3d 630 (9th Cir. 1999).

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

[3] Guam Econ. Dev. Auth. V. United States, 529 U.S. 1017 (2000) (mem.). While once the number was closer to four percent, more recently the court has been granting certiorari in approximately 100 cases out of the 5,000 or more cases it is asked to review each year. ROBERT L. STERN ET AL., SUPREME COURT PRACTICE 164 (1993).

[4] An abbreviated sampling includes: Johnson v. M'Intosh, 21 U.S. (8 Wheat.) 543 (1823) (mem.); Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1 (1831); Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832) (mem.); Mitchel v. United States, 34 U.S. (9 Pet.) 711 (1835); Chouteau v. Molony, 57 U.S. (16 How.) 203 (1853); In re Kansas Indians, 72 U.S. (5 Wall.) 737 (1866); United States v. Forty-Three Gallons of Whiskey, 93 U.S. 188 (1876) (mem.); United States v. McBratney, 104 U.S. 621 (1881) (mem.); Ex Parte Crow Dog, 109 U.S. 556 (1883); Elk v. Wilkins, 112 U.S. 94 (1884); United States v. Kagama, 118 U.S. 375 (1886); Talton v. Mayes, 163 U.S. 376 (1896); Ward v. Race Horse, 163 U.S. 504 (1896); Jones v. Meehan, 175 U.S. 1 (1899); United States v. Rickert, 188 U.S. 432 (1903); Morris v. Hitchcock, 194 U.S. 384 (1904); United States v. Winans, 198 U.S. 371 (1905); Winters v. United States, 207 U.S. 564 (1908); Cariño v. Insular Gov't of Philippine Islands, 212 U.S. 449 (1909); Heckman v. United States, 224 U.S. 413 (1912); Choate v. Trapp, 224 U.S. 665 (1912); United States v. Sandoval, 231 U.S. 28 (1913); United States v. Pelican, 232 U.S. 442 (1914); United States v. Nice, 241 U.S. 591 (1916); Williams v. City of Chicago, 242 U.S. 434 (1917); Turner v. United States, 248 U.S. 354 (1919); Lane v. Pueblo of Santa Rosa, 249 U.S. 110 (1919); Cramer v. United States, 261 U.S. 219 (1923); United States v. Candelaria, 271 U.S. 432 (1926); United States v. Creek Nation, 295 U.S. 103 (1935); United States v. McGowan, 302 U.S. 535 (1938); United States v. United States Fid. & Guar. Co., 309 U.S. 506 (1940); United States v. Santa Fe Pac. R.R. Co., 314 U.S. 339 (1941); Board of Comm'rs v. Seber, 318 U.S. 705 (1943); Williams v. Lee, 358 U.S. 217 (1959); Fed. Power Comm'n v. Tuscarora Indian Nation, 362 U.S. 99 (1960); Seymour v. Superintendent of Washington State Penitentiary, 368 U.S. 351 (1962); Arizona v. California, 373 U.S. 546 (1963); Arizona v. California, 460 U.S. 605 (1983); McClanahan v. State Tax Comm'n, 411 U.S. 164 (1973); Keeble v. United States, 412 U.S. 205 (1973); Oneida

Guamanians are native Americans.

The question whether the Chamorro hold aboriginal title to lands on Guam thus remains open. Also remaining open is the same question with respect to the native peoples of Hawai'i, and of America's other territories — American Samoa, the Commonwealth of the Northern Marianas Islands, the Commonwealth of Puerto Rico, and the U.S. Virgin Islands.[5] It has long been settled that the native peoples of the contiguous 48 states enjoy aboriginal title. So did, until Congress acted, the native peoples of Alaska — the Athabaskan Indians, the Aleuts, and the Inuits of the Arctic region.[6] This article examines the question of whether the native peoples of Guam have status, like the native Americans of the "lower 48" and of Alaska, to assert aboriginal rights in their historical lands. And, assuming they have such a status, it examines the evidence of occupancy in support of their claim to lands in the Ritidian area in the north of Guam. The article concludes, unsurprisingly enough,[7] that no less than "native Americans" and "native Alaskans," the native Guamanians may claim aboriginal title. That is to say, no principle of law differentiates Chamorros from other native Americans, such that the native Guamanians are somehow disqualified from claiming an aboriginal title in lands they historically occupied. The article then concludes that the evidence of the Chamorros' historical occupancy, so far unruled on by any court, satisfies the elements of aboriginal title.

Indian Nation v. County of Oneida, N.Y., 414 U.S. 661 (1974); Oneida County, N.Y. v. Oneida Indian Nation, 470 U.S. 226 (1985); Morton v. Ruiz, 415 U.S. 199 (1974); Morton v. Mancari, 417 U.S. 535 (1974); United States v. Mazurie, 419 U.S. 544 (1975); Fisher v. Dist. Court, 424 U.S. 382 (1976); Bryan v. Itasca County, Minn., 426 U.S. 373 (1976); United States v. Antelope, 430 U.S. 641 (1977); Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978); Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978); Wilson v. Omaha Indian Tribe, 442 U.S. 653 (1979); Washington v. Wash. State Commercial Passenger Fishing Vessel Ass'n, 443 U.S. 658 (1979); White Mountain Apache Tribe v. Bracker, 448 U.S. 136 (1980); United States v. Sioux Nation of Indians, 448 U.S. 371 (1980); Montana v. United States, 450 U.S. 544 (1981); Merrion v. Jicarilla Apache Tribe, 455 U.S. 130 (1982); New Mexico v. Mescalero Apache Tribe, 462 U.S. 324 (1983); United States v. Mitchell, 463 U.S. 206 (1983); Kerr-McGee Corp. v. Navajo Tribe of Indians, 471 U.S. 195 (1985); Seminole Tribe v. Florida, 517 U.S. 44 (1996); South Dakota v. Yankton Sioux Tribe, 522 U.S. 329 (1998).

[5] Stanley K. Laughlin, Jr., THE LAW OF THE UNITED STATES TERRITORIES AND AFFILIATED JURISDICTIONS 296, 431, 346, 377, 431 (1995).

[6] Alaska Native Claims Settlement Act, 43 U.S.C.A. §§ 1601-1642 (West 1971).

[7] The author was counsel for the Government of Guam throughout the case—in the District Court of Guam, the Ninth Circuit, and on the failed Petition for Writ of Certiorari to the United States Supreme Court. His co-counsel in the case was his long-time partner, Louis F. Claiborne, who died October 6, 1999, just after faxing to the author his last "bits" for the Petition for Writ of Certiorari. Irv Molotsky, *Louis Claiborne, 72, Deputy Solicitor General*, NEW YORK TIMES, October 12, 1999, p. C25. Following his death, Claiborne was eulogized by Georgetown law professor and Supreme Court watcher Richard Lazarus as the "best" Supreme Court advocate of his time. R. Lazarus, *A Farewell to the "Claiborne Style,"* THE ENVTL. F., Nov. 1999 at 8.

As a parenthesis, this article at its end examines the question of the standing of the Government of Guam or, by extension, the State of Hawai'i, for example to assert the aboriginal land rights of its native people. The Ninth Circuit was wrong in *Guam Economic Development Authority* in holding that the Government of Guam lacked standing to bring the claim of the Chamorros.[8] Still, future litigants should be mindful of the standing traps set by the decision, and assure that they have a "proper" plaintiff.[9] We will not examine the myriad other procedural obstacles that an adverse claimant can be expected to assert such as ripeness and laches. In cases of the United States as the defendant, the twelve-year statute of limitations of the federal Quiet Title Act may also apply.[10]

II. THE DOCTRINE OF ABORIGINAL TITLE AND THE NOTION OF RECOGNIZED TITLE

Aboriginal or Indian title is a permissive right of occupancy, granted by the federal government, to the aboriginal possessors of the land and their descendants.[11] In the United State Supreme Court case, *Johnson v. M'Intosh*,[12] Chief Justice Marshall explained the theory of aboriginal title:

> In the establishment of these relations [between the discoverer and natives], the rights of the original inhabitants were, in no instance, entirely disregarded; but were necessarily, to a considerable extent, impaired. They were admitted to be the rightful occupants of the soil, with a legal as well as just claim to retain possession of it, and to use it according to their own discretion; but their rights to complete sovereignty, as independent nations, were necessarily diminished, and their power to dispose of the soil at their own will, to whomsoever they pleased, was denied by the original fundamental principle, that discovery gave exclusive title to those who made it.

While the different nations of Europe respected the right of the natives, as occupants, they asserted the ultimate dominion to be in themselves; and claimed and exercised, as a consequence of this ultimate dominion, a power to grant the soil, while yet in possession of the natives. These grants have been understood by all, to convey a title to the grantees, subject only to the

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[8] *See Guam Econ. Dev. Auth.*, 179 F.3d at 640.

[9] *See generally id.*

[10] *See* Quiet Title Act, 28 U.S.C. § 2409a(g) (1994).

[11] United States v. Gemmill, 535 F.2d 1145, 1147 (1976) (*citing* Johnson v. M'Intosh, 21 U.S. 543, 573-74 (1823)). *See, e.g.*, Tlingit & Haida Indians of Alaska v. United States, 389 F.2d 778, 782 (Ct. Cl. 1968); Choctaw Nation v. Oklahoma, 397 U.S. 620, 623 (1970); Inupiat Cmty. v. United States, 680 F.2d 122, 129 (Ct. Cl.), *cert. denied*, 459 U.S. 969 (1982).

[12] 21 U.S. 543 (1823).

Indian right of occupancy. Conquest gives a title which the courts of the conqueror cannot deny.[13]

As later described by the Court, Indian or "aboriginal title" means:

> mere possession not specifically recognized as ownership by Congress. ... This is not a property right but amounts to a right of occupancy which the sovereign grants and protects against intrusion by third parties but which right of occupancy may be terminated and such lands fully disposed of by the sovereign itself without any legally enforceable obligation to compensate the Indians.[14]

By contrast, "recognized" title exists where Congress, through statute or treaty, has granted a right of permanent occupancy within a specifically defined territory.[15] Recognized title requires demonstration of an affirmative intention by Congress to set aside the particular lands for permanent occupancy by Indians.[16]

The power to deal with Indians in all capacities resides exclusively with Congress. Article I, Section 8 of the Constitution sets forth:

> The Congress shall have power to lay and collect taxes, duties, imposts and excises, to pay the debts and provide for the common defense and general welfare of the United States; but all duties, imposts and excises shall be uniform throughout the United States; [t]o borrow money on the credit of the United States; [t]o regulate commerce with foreign nations, and among the several states, and with the Indian tribes.[17]

Whether an assertion of Indian rights to land is based on Indian title or recognized title is critical in two respects. The first pertains to the factual proof of ownership of the lands. When a claim is made that land is owned by virtue of recognized title, the crucial element of proof is a demonstration of the affirmative government intent to recognize title.[18] That intent will be readily found in an act of Congress, a treaty, or an executive order recognizing title.[19] In contrast, affirmative government recognition, such as approval by statute or other formal governmental action, is not a prerequisite to a claim under aboriginal title.[20] Instead, the proof of an aboriginal file claim requires

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[13] *Id.* at 574, 588.

[14] Tee-Hit-Ton Indians v. United States, 348 U.S. 272, 279 (1955).

[15] *Id.* at 277; Miami Tribe v. United States, 175 F. Supp. 926, 936 (Ct. Cl. 1959); Sac & Fox Tribe of Indians v. United States, 315 F.2d 896, 897 (Ct. Cl. 1963), *cert. denied*, 375 U.S. 921 (1963); Strong v. United States, 518 F.2d 556, 563 (Ct. Cl. 1975), *cert. denied*, 423 U.S. 1015 (1975).

[16] *Sac & Fox Tribe*, 315 F.2d at 897; *Strong*, 518 F.2d at 563.

[17] U.S. CONST. art. I, § 8, cls. 1, 2, 3.

[18] U.S. CONST. art. I, § 8, cl. 1.

[19] *Id.*

[20] *See* United States v. Santa Fe Pac. R.R. Co., 314 U.S. 339, 347 (1941); Lipan Apache Tribe v. United States, 180 Ct. Cl. 487, 492 (1967); Oneida Indian Nation v. County of Oneida,

the difficult, lengthy and costly showing of immemorial possession of the land to which the claim is made.[21] The claimant must show actual, exclusive and continuous possession of the land claimed.[22]

The second critical distinction between recognized and aboriginal title arises when it is alleged there has been an expropriation, or "taking."[23] Land owned by virtue of recognized title which is appropriated by the government is held to have been taken under the Fifth Amendment, and hence compensation must be paid to Indians holding recognized title.[24] Crucially, because many years may have passed since the taking, payment for a taking made under the Fifth Amendment includes an award for interest.[25] By contrast, the United States may terminate aboriginal title held by Indians, without any legally enforceable obligation to compensate the Indians for the "taking."[26] Any compensation awarded for the appropriation of Indian occupancy rights is, in a sense, "gratuitous" and allowed only pursuant to a clear statutory directive.[27]

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414 U.S. 661, 669 (1974); County of Oneida v. Oneida Indian Nation, 470 U.S. 226, 235-36 (1985); United States v. Pueblo of San Ildefonso, 513 F.2d 1383, 1394 (Ct. Cl. 1975); Narragansett Tribe of Indians v. S.R.I. Land Dev. Corp., 418 F. Supp. 798, 807 (D.R.I. 1976).

[21] For example, the Indian Claims Commission, created to determine pre-1946 Indian claims against the United States, Indian Claims Commission Act, 25 U.S.C.A. § 70 (West 2003), was scheduled to complete its work in five years but processed claims until disestablished in 1978. Act of Oct. 8, 1976, Pub. L. No. 94-465, 1976 U.S.C.C.A.N. (90 Stat.) 1990, amended by Act of July 20, 1977, Pub. L. No. 95-69, 1977 U.S.C.C.A.N. (91 Stat.) 273. An example of how an aboriginal claim is proven, see Thompson v. United States, 8 Ind. Cls. Comm'n. 1, 31-39 (1959) (claim of the Indians of California); *see also Tee-Hit-Ton*, 348 U.S. at 285-88.

[22] *See* Snake or Piute Indians v. United States, 112 F. Supp. 543, 552 (Ct. Cl. 1953); *Sac & Fox Tribe*, 315 F.2d at 903; *Strong*, 518 F.2d at 560.

[23] U.S. CONST. art. I, § 8, cl. 3.

[24] *See* Sioux Tribe of Indians v. United States, 316 U.S. 317, 326 (1942); Chippewa Indians of Minnesota v. United States, 301 U.S. 358, 375 (1937); Shoshone Tribe of Indians v. United States, 299 U.S. 476, 497 (1937); United States v. Creek Nation, 295 U.S. 103, 109-10 (1935); *Tee-Hit-Ton*, 348 U.S. at 285; Fort Berthold Reservation v. United States, 390 F.2d 686, 690 (Ct. Cl. 1968); *Sioux Nation*, 448 U.S. at 415 n.29.

[25] *See Shoshone Tribe*, 299 U.S. at 497; Indians of California by Webb v. United States, 98 Ct. Cl. 583, 600 (1942), *cert. denied*, 319 U.S. 764 (1943); *Fort Berthold Reservation*, 390 F.2d at 690; *Sioux Nation*, 448 U.S. at 424.

[26] *See Tee-Hit-Ton*, 348 U.S. at 279; *Sioux Nation*, 448 U.S. at 415 n.29.

[27] *See Tee-Hit-Ton*, 348 U.S. at 284; Tlingit & Haida Indians of Alaska v. United States, 389 F.2d 778, 787 (Ct. Cl. 1968). The distinction that compensation for the "taking" of aboriginal title is required only where authorized by Congress was clarified by the Supreme Court in *Tee-Hit-Ton*. In United States v. Alcea Band of Tillamooks, 329 U.S. 40 (1946), the Court had held that eleven Indian tribes suing under a jurisdictional act were entitled to compensation for loss of their aboriginal title lands. Denying a distinction existed between original Indian title and recognized Indian title, the Court noted that "[a]dmitting the undoubted power of Congress to extinguish original Indian title compels no conclusion that compensation

As *Johnson* and its progeny demonstrate, once the United States asserts dominion over Indian lands, the Indian's occupancy is subject to the absolute control of the federal government. This control comprises two components that are mirror images of one another, and has been described as follows:

> It is obvious that Congress cannot simultaneously (1) act as trustee for the benefit of the Indians, exercising its plenary powers over the Indians and their property, as it thinks is in their best interests, and (2) exercise its sovereign power of eminent domain, taking the Indians' property within the meaning of the Fifth Amendment to the Constitution. In any given situation in which Congress has acted with regard to Indian people, it must have acted either in one capacity or the other. Congress can own two hats, but it cannot wear them both at the same time.[28]

Thus, the United States first has the obligation to protect the Indian right of occupancy against intrusion from third persons. Second, the United States has the absolute and unfettered right to extinguish aboriginal title without compensation.

The Indian Nonintercourse Act has been part of the law of the United States since the law was first enacted in 1790.[29] The Act gives statutory recognition to both elements of the power of the federal government over Indian title. It also prohibits the unfair, improvident, or improper disposition of Indian-owned or possessed lands by Indians to parties other than the United States without the consent of Congress, and authorizes the federal government to vacate any such disposition made without consent.[30] The Act does not,

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need not be paid." *Alcea*, 329 U.S. at 47. The Tillamooks case was distinguished in *Tee-Hit-Ton* because it arose under a jurisdictional act specifically authorizing payment and therefore the quoted language was treated as dicta. *Tee-Hit-Ton*, 348 U.S. at 282.

[28] *Fort Berthold Reservation*, 390 F.2d at 691.

[29] Indian Nonintercourse Act, July 22, 1790, 1 Stat. 137, ch. 33. For a history of the Act, *see* Joint Tribal Council of Passamaquoddy Tribe v. Morton, 388 F. Supp. 649, 652 n.1 (N.D. Me. 1975) ("Passamaquoddy I"). Now set forth in the United States Code, the Act provides:

> No purchase, grant, lease, or other conveyance of lands, or of any title or claim thereto, from any Indian nation or tribe of Indians, shall be of any validity in law or equity, unless the same be made by treaty or convention entered into pursuant to the Constitution. Every person who, not being employed under the authority of the United States, attempts to negotiate such treaty or convention, directly or indirectly, or to treat with any such nation or tribe of Indians for the title or purchase of any lands by them held or claimed, is liable to a penalty of $1,000. The agent of any State who may be present at any treaty held with Indians under the authority of the United States, in the presence and with the approbation of the commissioner of the United States appointed to hold the same, may, however, propose to, and adjust with, the Indians the compensation to be made for their claim to lands within such State, which shall be extinguished by treaty.

25 U.S.C.A. § 177 (West 2001).

[30] Federal Power Comm'n v. Tuscarora Indian Nation, 362 U.S. 99, 119 (1960); County of Oneida v. Oneida Indian Nation of New York, 470 U.S. 226, 232-33 (1985); Oneida Indian

however, apply to transactions in which the United States itself is dealing with Indian land.[31] This is an acknowledgement of the absolute and complete control of the United States over aboriginal title.[32]

Litigation in Maine almost thirty years ago provides a striking example of the effect of the Nonintercourse Act. The plaintiff tribes in that litigation sought to recover 12.5 million acres of aboriginal land given in exchange for some 23,000 acres under the terms of a 1794 treaty executed with Massachusetts, the predecessor state of Maine, some four years after the passage of the Nonintercourse Act.[33] The simple but powerful argument made by the tribes in that case was that state's purchase of the land was invalid because it did not occur by treaty or convention entered into pursuant to the Constitution.[34] The central issue in the Maine cases, however, was whether the United States had any obligation to the Indians by virtue of the Nonintercourse Act. Both the District Court and First Circuit held that the United States had a trust responsibility with respect to the protection of aboriginal title.[35] Thus, the United States was obliged to do whatever was necessary to protect Indian land whenever the government became aware Indian rights had been violated.[36] Moreover, the United States was in a fiduciary capacity with respect to protection of aboriginal title and this capacity included a duty to investigate and take such action as may be warranted.[37] The First Circuit did not reach the question of whether the trust relationship required the United States to sue on behalf of the tribes,[38] nor did the court reach the substantive issue of whether Congress had acquired or ratified the land acquisitions of the state from the Indians.[39] The action that the United States subsequently filed on behalf of the Indians was eventually settled[40] with some $81,500,000 appropriated to implement this settlement.[41]

Nation v. County of Oneida, 414 U.S. 661, 667 (1974); Joint Tribal Council of Passamaquoddy Tribe v. Morton, 528 F.2d 370, 377 (1st Cir. 1975) ("Passamaquoddy II"); Narragansett Tribe v. S. Rhode Island Dev. Corp., 418 F. Supp. 798, 803 (D. R.I. 1976).

[31] *See Tuscarora Indian Nation*, 362 U.S. at 120.

[32] *Id.*

[33] *See* Robert McLaughlin, *Giving It Back To the Indians*, 239 ATLANTIC MONTHLY, Feb. 1977 at 70.

[34] *See Passamaquoddy I*, 388 F. Supp. at 652.

[35] *Id.* at 662-63; *Passamaquoddy II*, 528 F.2d at 379.

[36] *See Passamaquoddy I*, 388 F. Supp. at 662-63.

[37] *See Passamaquoddy II*, 528 F.2d at 380.

[38] *Id.* at 370.

[39] *Id.* at 380-81.

[40] *See* Maine Indian Claims Settlement Act of 1980, Pub. L. No. 96-420, 1980 U.S.C.C.A.N. (94 Stat.) 1785 (codified at 25 U.S.C.A. § 1721, et seq. (West 2001)).

[41] *See* 25 U.S.C.A. § 1724 (West 2001).

The typical legal and equitable defenses such as statute of limitations, laches, adverse possession, estoppel by sale, operation of state law and public policy are not available[42] in actions brought to redress violations of the Nonintercourse Act.[43] The Act simply restrains acquisition of Indian land by third parties other than in the manner prescribed in the Act.[44] Furthermore, the argument that aboriginal title alone does not mean a "title" having the protection of the Nonintercourse Act is "without merit."[45] Therefore, the most likely defenses available in Nonintercourse Act litigation will be attempts to show either that the Indian tribe or Congress acquiesced in the alienation of aboriginal lands, that the Nonintercourse Act was not intended to cover the particular land in dispute, or that the United States itself terminated Indian title.[46]

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[42] *See* County of Oneida v. Oneida Indian Nation, 470 U.S. 226, 235-36 (1985); Schaghticoke Tribe of Indians v. Kent Sch. Corp., 423 F. Supp. 780, 784-85 (D. Conn. 1976); Narragansett Tribe of Indians v. S. Rhode Island Dev. Corp., 418 F. Supp. at 803-06; Oneida Indian Nation v. County of Oneida, 719 F.2d 525, 537 (2d Cir. 1983), *aff'd, County of Oneida*, 470 U.S. 226. In the Oneida County case the also unsuccessful contention was made that no private right of action was available to enforce the provisions of the Nonintercourse Act. *Oneida Indian Nation*, 719 F.2d at 532-37. Although it did not reach that issue, the Supreme Court narrowly (5-4) held that the Indians had a federal common-law right to sue to protect their aboriginal land rights. *County of Oneida*, 470 U.S. at 235-36.

[43] To establish a prima facie violation of the Nonintercourse Act, it must be shown that the plaintiff is or represents an Indian "tribe" within the meaning of Act; the parcels of land at issue are covered by the Act as tribal land; the United States has never consented to the alienation of the tribal land; and the trust relationship between the United States and the tribe, as established by coverage of the Act, has never been terminated or abandoned. *See generally Passamaquoddy II*, 528 F.2d at 375-80; *Narragansett Tribe*, 418 F. Supp. at 803; *see* Mashpee Tribe v. New Seabury Corp., 427 F. Supp. 899, 902 (D. Mass. 1977); James v. Watt, 716 F.2d 71, 72 (1st Cir. 1983).

[44] *See* United States v. Ahtanum Irrigation Dist., 236 F.2d 321, 334 (9th Cir. 1956); United States v. 7,405.3 Acres of Land, 97 F.2d 417, 422 (4th Cir. 1938).

[45] *Narragansett Tribe*, 418 F. Supp. at 807.

[46] For example, Maine's defenses to the claims by the Indian tribes were, first, that the Act was never intended to apply to Maine; second, whether the Act is applicable or not, the aboriginal possession of the Maine Tribes was extinguished before 1790; third, in any event, Congress, in admitting Maine to the Union in 1820 with knowledge of treaties between Maine's parent state, Massachusetts, and the tribes, approved those treaties as a matter of law. *See Oneida Indian Nation*, 719 F.2d at 539 (claim of subsequent federal ratification). Given the narrowness of recent rulings in this area, (*County of Oneida*, 470 U.S. 226), a time bar may be successfully asserted in an appropriate case. *County of Oneida*, 470 U.S. at 261-63 (Stevens, J., dissenting). The Supreme Court recently agreed to hear a case in which the Fourth Circuit upheld a Nonintercourse Act claim despite the claim that Congress, by later action, had ratified the action of the State. Catawba Indian Tribe v. South Carolina, 718 F.2d 1291 (4th Cir. 1983), *rev'd en banc*, 740 F.2d 305 (1984), *cert. granted*, 471 U.S. 1134 (1985).

The doctrine of aboriginal title derives from international law principles that were first adopted, in America, in the American Indian context,[47] but has also been applied as far afield as the Philippines.[48] Indeed, today, aboriginal title is recognized throughout the world, especially in former British and Spanish colonies. This is not surprising, since the fundamental notion is simple and universal. Absent cession or sale by the native landholders, the possessory right of the aborigines should be respected by the colonial power. This was as much, if not more, the law of Spain, as it was that of the United States.[49] It was suggested by the United States in the *Guam Economic Dev. Authority* that any aboriginal title in the lands in Guam was extinguished by Spain long before the Treaty of Paris. However, that cannot be presumed. Indeed, the Supreme Court has concluded that the principles of "Indian title" apply in territories ceded by Spain as a "rule of property," without need of proof.[50] Nor is it necessary to prove express governmental endorsement of aboriginal title. As the Court stated in *Lipan*: "Indian title based on aboriginal possession does not depend upon sovereign recognition or affirmative acceptance for its survival."[51]

III. A BRIEF HISTORY OF LAND OCCUPATION ON GUAM

It is useful to review the history of land occupation in Guam. Long before the "discovery" of Guam by Magellan in 1521, a substantial indigenous population lived on the island in permanent settlements, notably those located at the northern end of Guam.[52] The native Chamorro were organized into autonomous family clans, each asserting exclusive possessory rights over land,

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[47] *See* Felix S. Cohen, *Original Indian Title*, 32 MINN. L. REV. 28, 43-48 (1947).

[48] Cariño v. The Insular Gov't of the Philippine Islands, 212 U.S. 449 (1909); *see also* Mabo v. Queensland, [No. 2] (1992); Te Weehi v. Reg'l Fisheries Officer, (1986) 1 N.Z.L.R. 680; Hamlet of Baker Lake v. Minister of Indian Affairs, (1979) 107 D.L.R. 3d 513; Calder v. Attorney-Gen. of British Columbia, (1973) 34 D.L.R. 3d 145; Adeyinka Oyekan v. Musindiku Adele, 1 W.L.R. 876, 880 (U.K. P.C., per Lord Denning, appeal from Nigeria 1957) ("The court will assume that the British Crown intends that the rights of property of the [native] inhabitants are to be fully respected").

[49] *See* Lipan Apache Tribe v. United States, 180 Ct. Cl. 487, 491-498 (1967).

[50] United States v. Santa Fe Pac. R.R. Co., 314 U.S. 339, 346 (1941).

[51] *Lipan*, 180 Ct. Cl. at 492.

[52] *See* Decl. of Robert M. Rogers at 4-6, Government of Guam v. United States, (D. Guam App, Civ. No. 95-00111); PAUL CARANO & PEDRO C. SANCHEZ, A COMPLETE HISTORY OF GUAM 20-22 (Charles E. Tuttle Co. 1965); Fray Juan Pobre de Zamora, *The Account of the Loss of the Galleon San Felipe* (1598-1603), 18 J. PAC. HIST. 198, 213 (Marjorie J. Driver trans., 1983); F. OLIVE Y GARCIA, THE MARIANA ISLANDS, 1884-1887 21-22 (Driver trans., MARC 1984) (1887).

including offshore lagoons and reefs.[53] Beachfronts were occupied by the highest caste families, the chamorri, for greatest access to fishing and reef gleaning. Inland plateaus were inhabited and farmed by the lowest caste, the manachang. However, all clan property, both coastal and inland, was owned by the chamorri of the clan, and each village governed by clan chamorri headmen.[54] Although they had earlier claimed Guam for the Crown, the Spanish originally did not attempt to colonize the island or interfere with the natives.[55] By the last third of the Seventeenth Century, however, this attitude changed, and despite indigenous rebellions during which much of the male population was slaughtered, the remaining Chamorro were subdued and forcibly "reduced" to a few settlements.[56]

Without benefit of cession or purchase, most of the Chamorro properties were henceforth deemed "Crown Lands," although under prevailing Spanish law, the title of the natives remained unimpaired.[57] The lands in *Guam ex rel. Guam Economic Development Authority*, at the northern end of the island, were never appropriated to any specific governmental use during the Spanish regime, and, at least in the Nineteenth Century, the natives were not excluded from using them.[58]

By the Treaty of Paris in 1898, at the close of the Spanish American War, Spain ceded Guam to the United States. Because of its special importance as a forward naval base, the President assigned the island to the Secretary of the Navy with full discretion "to take such steps as may be necessary to establish the authority of the United States and give it the necessary protection and

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[53] *See* Rogers Decl., *supra* note 52, at 7-8; LAURA S. THOMPSON, GUAM AND ITS PEOPLE 100, 102-03 (Princeton Univ. Press 1947); CARANO & SANCHEZ, *supra* note 52, 21-22; LAWRENCE J. CUNNINGHAM, ANCIENT CHAMORRO SOCIETY 162, 170-72 (The Bess Press 1992); Richard H.J. Wyttenbach-Santos, Ph.D., Captain, U.S. Navy (Retired), "An Historical Overview of the Military's Objectives on Guam and in Micronesia" (1994) at 1, 3; STANLEY K. LAUGHLIN, JR., THE LAW OF THE UNITED STATES TERRITORIES AND AFFILIATED JURISDICTIONS 400 (Lawyers Coop. 1995); ROBERT M. ROGERS, DESTINY'S LANDFALL 74-75 (1995).

[54] *See* Rogers Declaration, *supra* note 52, at 4.

[55] LAURA THOMPSON, GUAM AND ITS PEOPLE, 58 (American Council Institute of Relations, 1941) [hereinafter THOMPSON].

[56] Rogers Declaration, *supra* note 52, at 5-7; DEP'T OF THE NAVY, REPORT ON GUAM, 1899-1950, at 1-2; THOMPSON, *supra* note 55.

[57] *See* Res. to Req. for Admis. Nos. 2 & 3, Government of Guam v. United States; Rogers Decl., *supra* note 52 at 7-9; CARANO & SANCHEZ, *supra* note 52, at 53, 58; Paul B. Souder, *Guam: Land Tenure in a Fortress*, in LAND TENURE IN THE PACIFIC (Univ. of South Pacific, Suva Fiji, 3d ed. 1987) 212; THOMPSON, *supra* note 55, 102-03; SPANISH LAWS CONCERNING DISCOVERIES, PACIFICATIONS, AND THE SETTLEMENTS AMONG THE INDIANS (Univ. of Utah 1980) 159, 160, 165-66 and Book II, Tit. 31, Law 13; Book VI, Tit. 1, Law 23 (in American West Center (Tyler, ed.), Occasional Paper No. 16, *The Indian Cause in the Spanish Laws of the Indies* (Univ. of Utah 1980) 108, 114, 116-17).

[58] Rogers Declaration, *supra* note 52, at 9-10.

Government."[59] For the ensuing half-century, Guam was administered as a military post, under the paternalistic, but absolute, control of a Naval Governor.[60] Until World War II, however, the United States took no special interest in the northern end of the island, and while viewing all Spanish Crown lands as owned by the United States, did not interfere with native use of the lands in suit.[61]

Guam was taken by Japanese forces on December 8, 1941 (December 7, west of the Date Line) and occupied until mid-July 1944. Upon the recapture of the island, the United States "increased its military presence . . . [and] [t]hat increased presence required more land, which the United States continued to acquire until 1950."[62] Accordingly, the American Armed Forces appropriated, initially without payment, much of the land on Guam.[63] In due course, formal condemnation proceedings were instituted to establish military reservations. Although the parcels claimed in *Guam ex rel. Guam Economic Development Authority* as aboriginal lands were included in these reservations, no payment was made for them, the Federal Government's view being that these areas were already owned by the United States as Crown Lands ceded to it by Spain.[64]

In 1945, the Navy sought, and obtained from Congress, authority to transfer lands not needed for military purposes to Guamanians.[65] The next year though, Congress granted the Navy's request for formal authority to acquire additional land on Guam for naval purposes and, as something of an afterthought, for the resettlement program, too.[66] Finally, in mid-1950, the Organic Act of Guam was passed.[67] For Guamanians, the significance of this Act lay in the fact they enjoyed the first tantalizing fruits of self-governance. From 1898 until the Japanese invasion and occupation, the Naval Commandant had exercised the functions of the executive, legislative and judicial branches of the typical modern democratic system of government. With the Organic Act of 1950, a modicum of self-government was doled out to the Guamanians. Even today, while Guam's Congressional representative may vote on bills, his or her vote counts only unless it is a deciding vote, in which

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[59] Exec. Order No. 108-A (Dec. 23, 1898).

[60] THOMPSON, *supra* note 55, at 64-67, 297-98.

[61] Rogers Declaration, *supra* note 52, at 10.

[62] Guam Econ. Dev. Auth. v. United States, 179 F.3d 630, 632 (9th Cir. 1999).

[63] *See* Robert K. Coote, U.S. BUREAU OF LAND MGMT., Land-Use Conditions and Land Problems on Guam (August 1950) at 2-3; Hearings on H.R. 6547, before the House Committee on Naval Affairs, 79th Cong., 2d Sess. (May 29 and June 5, 1946) at 3448, 3460, 3469.

[64] Def.'s Res. To Pl.'s First Set of Reqs. For Admis., 6, 8, 9-13; *Guam Econ. Dev. Auth.*, 179 F.3d 630 (9th Cir. 1999).

[65] Guam Land Transfer Act, Pub. L. No. 225, 59 Stat. 584 (1945).

[66] Guam Land Acquisition Act, Pub. L. No. 594, 60 Stat. 803 (1946).

[67] Organic Act of Guam, Pub. L. No. 630, 64 Stat. 384 (1950).

case it is disallowed. Still, the Organic Act created a new local legislature. By 1950, according to the Court of Appeals, "the military was no longer using much of that land; by 1950, more than 50 percent of the actual acreage in Guam was occupied by inactive military installations."[68] Noting that "Congress previously had enacted the Guam Land Transfer Act to allow for the release of some of this land," the court went on to quote two further 1950 Reports indicating that "Congress expressed a similar purpose when drafting the Organic Act."[69]

The Organic Act required in Section 28(b) the transfer to the new Guam Government established by the legislation of all land not reserved by the President within ninety days.[70] On the last day permitted, President Truman signed an Executive Order which, among other things, reserved for military use all the land that had recently been condemned for that purpose.[71] In 1958, the Air Force transferred to the Navy the northernmost slice of Andersen Northwest Field at the northern end of Guam, comprising some 184 acres.[72] In 1962, the United States condemned for the Navy an adjoining strip of beach and tidelands of similar acreage.[73]

In 1992, the Navy determined to close its Ritidian Facility (composed of the two strips of land described above), and formally declared these 371 acres, together with some 15,500 acres of adjacent submerged lands, excess to its needs.[74] Although Guam sought to acquire this acreage, the General Services Administration transferred the uplands and tidelands to the United States Fish and Wildlife Service the following year.[75] They then became the "Ritidian Unit" of the Guam National Wildlife Refuge, which was established primarily to protect endangered species of native birds.[76] Unfortunately, the predation of the alien Brown Tree Snake, so far evading the best efforts of the Refuge guardians, has effectively eliminated these species.[77]

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[68] *Guam Econ. Dev. Auth.*, 179 F.3d at 639 (citing *Civil Government of Guam: Hearing on S. 185, S. 1892 and H.R. 7273 Before a Senate Subcommittee of the Committee on Interior and Insular Affairs*, 81st Cong. 62, 2d Sess. (April 19, 1950)).

[69] *Id.*

[70] Organic Act of Guam, Pub. L. No. 630, § 28(b), 64 Stat. 384.

[71] Exec. Order No. 10,178, 15 Fed. Reg. 7313 (Oct. 30, 1950).

[72] Guam ex rel. Econ. Dev. Auth. v. United States, 179 F.3d 630 (9th Cir. 1999), Stipulated Facts at 10, Government of Guam v. United States (D. Guam App. Div. Civil No. 45-00111).

[73] *Id.*

[74] *Id.* at 12.

[75] *Id.* at 12-13.

[76] *Id.* at 21-23.

[77] Dep. of Michael W. Ritter, 21:21-23:21, 25:11-19, 36:23-25, 51:17-25, 71:11-14; Government of Guam v. United States (D. Guam App. Div. Civil No. 95-00111); Stipulated Facts at 17-18.

In April 1995, after two years of intensive study and wide-ranging consultations at every level of the concerned military services, the Department of Defense published the 1994 Guam Land Use Plan ("GLUP 94"). That report unequivocally concluded that substantial additional acreage in Navy and Air Force reservations was no longer needed for military purposes, and was accordingly "releasable."

IV. THE NATIVE GUAMANIANS HAVE STATUS TO CLAIM ABORIGINAL LAND RIGHTS EQUALLY WITH "INDIANS" OF THE AMERICAN CONTINENT

There is no basis for denying the benefit of the aboriginal-title doctrine to the natives of Guam on the ground that they are ethnically different from the "Indians" of the American continent. As we have noted, Spain deemed the Chamorro "Indians" subject to the same paternalism and entitled to the same rights as the aborigines of Spanish America.[78] Nor was the American attitude toward the Guamanians in sharp contrast. On the contrary, for many years the United States treated the native inhabitants of Guam in much the same way as Native Americans were treated in the continental United States.[79]

Thus, at the very beginning, the American Commissioners at the Paris Peace Conference of December 1898, conceded the right of "natives of Spain" living in the ceded islands to remain and to retain Spanish citizenship.[80] But they refused to accept a clause in the treaty proposed by Spain that would have afforded the native inhabitants of the ceded territories, including Guam, the right to opt for Spanish citizenship.[81] They argued against "an anomalous condition of affairs" that "would permit all the uncivilized tribes which have not come under the jurisdiction of Spain . . . to elect to create for themselves

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[78] Even before the *Laws of the Indies* were published, the Captain-General of the Philippines, on September 7, 1680, instructed the Governor of the Mariana Islands, *inter alia*, as follows:

> Protection shall be given to the peaceable indios, already subjected to the King's authority, defending them against their enemies, and treating them with charity and benevolence, so that, with gentleness, they may be led to become rooted in the Holy Faith, and the others be induced to follow their example, never losing them from sight, and registering them, so that a prompt report can be made to His Majesty, and remedial measures shall be applied to those who have fallen away, the number of which should also be reported every year by said Governor.

LUIS DE IBANEZ Y GARCIA, THE HISTORY OF THE MARIANAS, WITH NAVIGATIONAL DATA, AND THE CAROLINE, AND PALAU ISLANDS: FROM THE TIME OF THEIR DISCOVERY BY MAGELLAN IN 1521 TO THE PRESENT 149 (Marjorie G. Driver trans., MARC 1992) (1886) [herinafter IBANEZ].

[79] Treaty of Peace, Dec. 8, 1898, Annex 1 to Protocol No. 22, 261-62.

[80] *Id.*

[81] *Id.*

a nationality other than the one in control of the territory, while enjoying the benefits and protection of the laws of the local sovereignty."[82]

The first American governor was instructed "to protect the natives," promising all those who cooperate "by honest submission" that they would "receive the reward of its support and protection."[83] The natives were subjected to "the absolute domain of naval authority,"[84] in practice, the "plenary" power of the appointed governor who "held the supreme legislative, executive, and judicial authority of the island."[85]

In sum, the native inhabitants, without any civil or political rights save as the governor might concede them, were subjected to the absolute dominion of an alien executive. The first governor, Captain Leary immediately exercised his power of guardianship by promulgating orders very reminiscent of those issued for the governance of continental Indians in the same period. One need notice only several of Captain Leary's initial decrees: forbidding religious possessions in the streets and the public celebration of 'village saints' days' outside the walls of a church or a private residence;[86] suppressing "the existing system of concubinage" and requiring all couples "living together out of the bond of wedlock" to be married;[87] requiring every inhabitant "without a trade or habitual occupation" to cultivate a garden patch sufficient for himself and his dependents and to keep a sow, twelve hens and one cock;[88] establishing prohibition on the island;[89] outlawing all but government schools and making education compulsory and nonsectarian;[90] and forbidding cockfighting on Sunday.[91]

However benevolently intended, this is obviously a regime in which the "Great White Father" takes "wards" under his wing with protective paternalism. Nor was the matter of land exempted. Having been instructed upon his appointment to "particularly assume control of all Crown lands,"[92] Governor Leary issued a Proclamation in the following terms:

> That, all public lands and property and all rights and privileges, on shore or in the contiguous waters of the Island, that belonged to Spain at the time of the

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[82] *Id.*

[83] Instructions for the Military Commander of the Island of Guam, Navy Dep't, Jan. 12, 1899.

[84] 25 Op. Att'y Gen. 59, 60 (1903).

[85] 25 Op. Att'y Gen. at 60.

[86] Gen. Order No. 4, GUAM ADMIN. R. & REGS. (Aug. 21, 1899).

[87] Gen. Order No. 5, GUAM ADMIN. R. & REGS. (Sept. 15, 1899).

[88] Gen. Order No. 7, GUAM ADMIN. R. & REGS. (Oct 4, 1899).

[89] Gen. Order No. 8, GUAM ADMIN. R. & REGS. (Nov. 1, 1899).

[90] Gen. Order No. 12, GUAM ADMIN. R. & REGS. (Jan. 22, 1900).

[91] Gen. Order No. 21, GUAM ADMIN. R. & REGS. (June 11, 1900).

[92] Letter of Appointment From John D. Long, Secretary (Jan. 12, 1899).

> surrender, now belong to the United States and all persons are warned against attempting to purchase, appropriate or dispose of any of the aforesaid properties, rights or privileges without the consent of the United States Government. [93]

For good measure, Leary immediately issued an order forbidding all transfers of even individually held land without the Governor's consent.[94] This restriction remained in force until 1950.[95] Here we have a revealing parallel with the Nonintercourse Act governing land transactions by the Native Americans of the American continent of the United States.[96]

V. THE NATIVE GUAMANIANS, STANDING ON A FOOTING EQUAL WITH OTHER NATIVE AMERICANS, CAN SHOW HISTORICAL USE AND OCCUPATION OF LANDS IN THE RITIDIAN AREA OF NORTHERN GUAM, AND THUS ESTABLISH ABORIGINAL TITLE; CONGRESS HAS NOT EXTINGUISHED THAT TITLE

The native Guamanians, therefore, stand on an equal footing with the native Americans of the lower forty-eight states, and Alaska. The evidence of the Chamorros' use and occupation of the lands of northern Guam remains to be examined. At the outset, we should note that it does not matter that the areas in question were not fenced or farmed or otherwise "cleared." As the Supreme Court ruled long ago in a comparable context:

> Indian possession or occupation was considered with reference to their habits and modes of life; their hunting-grounds were as much in their actual possession as the cleared fields of the whites; and their rights to its conclusive enjoyment in their own way and for their own purposes were as much respected, until they abandoned them, made a cession to the government, or an authorized sale to individuals.[97]

The relatively "vacant" status of some of the lands in suit prior to their acquisition by the United States—notably the former Crown lands within the Ritidian Unit of the Refuge and in the northern portion of the Northwest field—is no indication that they were not "owned" by Chamorros before 1700, when Spain appropriated these acres to the Crown. The whole of Guam was described as "populated" in aboriginal times, with as many as 300 residents

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[93] Proclamation to the Inhabitants of Guam (Aug. 10, 1899).

[94] Gen. Order No. 3, GUAM ADMIN. R. & REGS. (Aug 21, 1899).

[95] *See* S. REP. NO. 596, at 2 (1945).

[96] 25 U.S.C.A. § 177 (West 2003); *see* Oneida Indian Nation v. County of Oneida, 414 U.S. 616, 667-68 (1974); *see also* County of Oneida v. Oneida Indian Nation, 470 U.S. 226, 233-36 (1985).

[97] Mitchel v. United States, 34 U.S. 711, 746 (1835).

in each village.[98] What is more, Ritidian and Tarague, in particular, were significant villages, entitled each to a church in the eyes of the missionaries and, a year later, to a visit from the Governor.[99] Their chiefs were prominent in the several rebellions at the close of the Seventeenth Century, with the most to lose as the highest caste with proprietal rights to all clan property.[100] As we have noted, these villages had ceased to exist by 1710. They had only ceased to exist, however, because they were destroyed in retaliation for their "disloyalty"[101] or because their populations were forcibly moved elsewhere.[102]

The accepted view is that at the time of the appropriation in 1700, the Chamorros still treated land, in practice, as a communal asset of the clan, even if an individual noble held title in theory. At least the non-residential lands claimed as aboriginal, in the interior or offshore, presumably would have been deemed "commons," available to the entire community. But this is not critical. Native land rights are no less entitled to protection when they are held individually rather than tribally.[103]

We assume that Congress, by explicit act, constitutionally could abrogate aboriginal title without making just compensation.[104] Neither the United States nor the Naval Government, however, ever extinguished aboriginal title to the lands in question by purchase (conventional or forced).[105] Nor did the aboriginal owners voluntarily cede or give their lands to either government.[106] As a matter of American federal law, then, the consequence is that any aboriginal title to such lands remains unextinguished.[107] Absent purchase or cession, the act of the sovereign in appropriating the lands to a public use, or even the transfer to a private grantee, does not end native title.[108] In the circumstances, the government must be viewed as having temporarily "borrowed" the use of the lands, subject to a duty to return possession when the need which justified the borrowing ceases.

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[98] Zamora, *supra* note 52, at 213.

[99] GARCIA, *supra* note 52, at 195, 200; *see also id.* at 204, 211.

[100] *See* GARCIA, *supra* note 52, at 265, 275, 281; IBANEZ, *supra* note 78, at 51, 122, 123, 125; L. M. COX, CIVIL ENGINEER, U.S. NAVY, ET AL., THE ISLAND OF GUAM 27 (revised and enlarged edition) (1926); Rogers Decl., *supra* note 52, at 4-5; CARANO & SANCHEZ, *supra* note 52, at 75, 81.

[101] *See* COX, *supra* note 100, at 28; Rogers Decl., *supra* note 52, at 5; CARANO & SANCHEZ, *supra* note 52, at 75.

[102] *See, e.g.*, IBANEZ, *supra* note 78, at 85.

[103] Cramer v. United States, 261 U.S. 219 (1923); *see* United States v. Dann, 470 U.S. 39, 50 (1985).

[104] *Cramer*, 261 U.S. 219.

[105] *Id.*

[106] *Id.*

[107] *Id.*

[108] *See e.g., Cramer*, 261 U.S. 219; United States v. Santa Fe Pac. R.R., 314 U.S. 339 (1941); United States v. Alcea Band of Tillamooks, 329 U.S. 40 (1946).

VI. A PARENTHESIS: THE NINTH CIRCUIT WAS WRONG IN RULING THAT THE GOVERNMENT OF GUAM LACKED STANDING. THE ABORIGINAL-TITLE CLAIM AWAITS ONLY A "PROPER" PLAINTIFF

In dismissing the aboriginal title claim on the sole ground that the Government of Guam was not the proper plaintiff,[109] the court of appeals overlooked or misread relevant precedents.

The fact that the Government of Guam is neither a "tribe" nor an individual landowner is not a proper basis for disqualifying it from asserting aboriginal title on behalf of the natives of the Island. In the first place, the doctrine of aboriginal title is not dependent on any particular kind of ownership. That tribes have been the usual plaintiffs in cases of this sort is simply a reflection of the historical circumstance that, in the continental United States, the land rights of the aboriginal inhabitants were usually communally held by tribes. But the principle on which native land interests are respected in American law is much broader, derived as it is from international law, basically of Spanish origin.[110] The governing Spanish Laws of the Indies, which applied indiscriminately in all the Spanish possessions, made no distinction between lands held communally and those held individually, nor between those held by a "tribe," defined by ethnicity, those held by a "pueblo" or "rancheria," defined geographically, and those held by a society, defined politically. Decisions of the Supreme Court sufficiently illustrate the point.[111]

In any event, there is no inflexible rule that the plaintiff initiating the litigation must be the owner. Suits under particular statutes sometimes restrict the character of the eligible litigant. But when, as in the case of Guam, no such condition is prescribed, the courts have taken a very relaxed view as to who properly may be the plaintiff. Native claims have been represented in court by tribal chiefs,[112] by an Indian superintendent,[113] by a group acting for all the Indians within a State;[114] by the United States;[115] or by a State through

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[109] Guam Econ. Dev. Auth. v. United States, 179 F.3d 630, 640 (9th Cir. 1999).

[110] *See* Felix S. Cohen, *The Spanish Origin of Indian Rights in the Law of the United States*, 31 GEO. L.J. 1, 15-21 (1942); Cohen, *supra* note 47, at 43-47.

[111] *E.g.*, Jones v, Meehan, 175 U.S. 1 (1899); Cariño v. Insular Gov. of the Philippine Islands, 212 U.S. 449 (1909); *Cramer*, 261 U.S. 219; United States v. Candelaria, 271 U.S. 432 (1926); United States v. Dann, 470 U.S. 39, 50 (1985).

[112] *E.g.*, The Kansas Indians, 72 U.S. 737 (1866); Lone Wolf v. Hitchcock, 187 U.S. 553 (1903).

[113] *E.g.*, Superintendent of Five Civilized Tribes v. Comm'r of Internal Revenue, 295 U.S. 418 (1935).

[114] *E.g.*, Thompson ex rel. Indians of Cal. v. United States, 122 Ct. Cl. 348, 356-61 (1952).

[115] *E.g.*, Heckman v. United States, 224 U.S. 413 (1912).

its Attorney General.[116] In the absence of any presently identified descendants of the aboriginal owners in this case,[117] there ought to be no objection to their representation by the Government of Guam. The Government of Guam, it should be stressed, was not claiming for itself, but only as a specie of "parens patriae," prepared, in due course, to make appropriate disposition or dedication of the lands affected in accordance with a later determination of the true owners. This is especially appropriate given the refusal of the United States to pursue the claims, and the unique fact that the present population in Guam is substantially descended from the original natives.

This point is in no way inconsistent with the proposition, advanced by the Ninth Circuit, that "tribal rights to Indian lands [are] the exclusive province of the federal law," nor with the principle that "[only] Congress can delegate its authority over aboriginal land rights."[118] Neither of these axioms casts any doubt upon the standing of the Government of Guam to assert aboriginal rights on behalf of the native titleholders. On the contrary, the first case quoted by the Ninth Circuit Court of Appeals, *Oneida Indian Nation v. County of Oneida, N.Y.*[119] together with its sequel, *County of Oneida, N.Y. v. Oneida Indian Nation*[120] establishes that the failure of the federal executive to assert aboriginal claims does not extinguish them or bar their assertion by others.[121] And the second case invoked, *Turtle Mountain Band of Chippewa Indians v. United States*[122] confirms that no one, unless clearly authorized by Congress, can abrogate those rights.

These precedents reflect the tradition that native title is jealously protected by federal law *against impairment or destruction* at the hands of the State, third persons, or unauthorized federal officers. But nothing in these cases or others prevents the *vindication* of aboriginal rights by appropriate representa-

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[116] *E.g.*, Indians of Cal. by Webb, 98 Ct. Cl. 583 (1942), *cert. denied*, 319 U.S. 764 (1943); Indians of Cal. v. United States, 102 Ct. Cl. 837 (1944). To be sure, in this instance, a special jurisdictional Act provided that the California Attorney General could present the claims to the Court of Claims. Act of May 18, 1928, ch. 624, 45 Stat. 602 (1928) (codified at 25 U.S.C.A. § 654 (West 2003)). But this appears to be no more than acquiescence in the decision, previously taken at the State level, that California would attempt to vindicate the aboriginal claim of all Indians within the State. *See* 1927 Cal. Stat., ch. 643, at 1092.

[117] It is not essential, at this point, to determine how the aboriginal land should be allocated among the successors of the aboriginal owners, or otherwise dealt with. *See* Washington v. Wash. State Commercial Passenger Fishing Vessel Ass'n, 443 U.S. 658, 671 (1979).

[118] Guam ex rel. Econ. Dev. Auth. v. United States, 179 F.3d 630, 640 (9th Cir. 1999).

[119] 414 U.S. 661 (1974).

[120] 470 U.S. 226, 241-44 (1985).

[121] *See also* 28 U.S.C.A. § 1362 (West 2003).

[122] 490 F.2d 935, 952-53 (Ct. Cl. 1974).

tives when the United States, as it did in *Guam ex rel. Guam Economic Development Authority v. United States*,[123] denies the claims.

VII. CONCLUSION

This article draws three conclusions. First, native Americans of the "lower Forty-Eight" and of Alaska have long been held to enjoy "aboriginal rights" in the lands they historically occupied. Nothing should distinguish those native Americans from the native Americans of Guam nor, for that matter, the native Americans of Hawai'i, and the native Americans of America's other island territories. The historical land rights of these native American are likewise entitled to protection.

Second, the evidence of the Chamorros' historical use and occupancy of Northern Guam establishes their aboriginal rights to the Ritidian area there. No court sitting in fair judgment on the merits of such a claim could require more evidence than has been garnered, particularly given the Supreme Court's presumptions in this regard.

Third, the Ninth Circuit was wrongly and unusually niggardly in denying the Government of Guam's status as an appropriate party plaintiff. The Court's decision worked a particularly perverse result, since the entity that should have been suing to vindicate those land rights, the federal government, was instead denying them by means of procedural roadblocks such as limitations, laches, and (ultimately successfully) standing. This was all for the purpose of diverting the lands to a more modernly popular federal purpose, a wildlife refuge. (Though in this case, again perversely, it was a refuge to protect six species already extinct.) In the circumstances, the territorial Government of Guam is perhaps the most appropriate party plaintiff. But the lesson is clear that, in the Ninth Circuit, if you are to vindicate an aboriginal land right, you must find a leader of the aboriginal community who has survived the genocidal policies of the present and prior sovereigns, cloak him or her in appropriate standing garb, and file suit in that person's name.

John Briscoe[124]

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[123] 179 F.3d 630 (9th Cir. 1999).

[124] Mr. Briscoe was a name partner for twenty years with San Francisco's Washburn, Briscoe & McCarthy, now combined with Stoel Rives LLP. He is a former adviser to the United Nations Compensation Commission in Geneva, Switzerland, and is a visiting scholar at the University of California at Berkeley.

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Hawai'i's Sunshine Law Compliance Criteria

Jon M. Van Dyke*

I. INTRODUCTION

Hawai'i's Sunshine Law is found in Chapter 92, Part I of the Hawai'i Revised Statutes (H.R.S.), and it applies to all state and county boards, commissions, and legislative bodies.[1] This summary has been prepared as part of a process designed to respond to the complaint filed in the Circuit Court of the Second Circuit in the case of *Smith v. Apana*,[2] which challenged practices utilized by Maui boards and commissions. It is designed to acquaint members of these bodies, and the staff who serve them, with the main features of the Sunshine Law and its specific requirements.

II. DISCUSSION

A. All "Meetings" Must Be Open to the Public.

Having the business of government be open to the scrutiny of all is the central theme of the Sunshine Law, and the details are designed to ensure this outcome. This Law is designed "to protect the people's right to know," and also to allow citizens to have input into decision-making. "[T]he 'Sunshine Law[]' is intended to foster transparency in the formation and conduct of public policy by '[o]pening up the governmental processes to public scrutiny and participation[.]'"[3] Courts have said repeatedly that the Sunshine Law is to be "liberally construed," and that doubts are to be resolved in favor of greater openness.

The Sunshine Law guarantees the public's right to know when government bodies meet, to be informed in advance of what business these bodies intend to conduct, to attend these meetings, and to obtain their minutes in a timely manner. All "interested persons" must be permitted to present written and oral testimony on all agenda items. Each body can adopt rules to "provide for

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* Jon M. Van Dyke is a professor of law at the William S. Richardson School of Law, University of Hawai'i.

[1] Hawai'i's Sunshine Law does not apply to the State Legislature.

[2] *See* Brief for Defendants at 3, Smith v. Apana (No. 97-0536(2)) (Nov. 6, 2001).

[3] Bremner v. City and County of Honolulu, 96 Hawai'i 134, 146, 28 P.2d 350, 362 (App. 2001) (quoting HAW. REV. STAT. § 92-1 (1993)) (internal alteration in original); *see* HAW. REV. STAT. ANN. § 92-1 (Michie 2003).

reasonable administration or oral testimony,"[4] and many bodies (including the Maui County Council) limit public testimony to three minutes per agenda item, with the opportunity to return for further testimony after everyone else has testified. Boards cannot delegate to a committee the responsibility of hearing public testimony, but must be available to hear such testimony directly itself, with a quorum of members present.[5]

B. What Bodies Are Governed by the Sunshine Law?

H.R.S. section 92-2(1) defines a *board* as "any agency, board, commission, authority, or committee of the State or its political subdivisions which is created by constitution, statute, rule, or executive order, to have supervision, control, jurisdiction or advisory power over specific matters and which is required to conduct meetings and to take official actions." In 1985, the Attorney General gave the opinion that the three Trustees of the Travel Agency Recovery Fund, who were private travel agents appointed by the Director of the Department of Commerce and Consumer Affairs to manage the fund, were bound by the provisions of the Sunshine Law because they were appointed according to a statute and charged by a statute with managing the fund.[6] The Hawai'i Supreme Court ruled in a 1996 unpublished opinion that the Space Development Authority and the Space Advisory Committees established by the State's Department of Business, Economic Development and Tourism were covered by the Sunshine Law because they had "advisory power."[7]

In 1991, the lawyer for the board of the Office of Hawaiian Affairs gave the opinion that the Sovereignty Advisory Council had to comply with the Sunshine Law for two reasons. First, it had been established by the Legislature, which designated the organizations whose representatives would serve as members. Second, it had the responsibility to "develop a plan to discuss and study the sovereignty issue." It was thus a "board" that was covered by the Sunshine Law, because it met the requirement found in H.R.S. section 92-2(1) of having "advisory power over specific matters."[8] In contrast, in 1997,

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[4] HAW. REV. STAT. § 92-3.

[5] Applicability of the State Sunshine Law to the County Councils and the Presentation of Oral or Written Testimony on Agenda Items, Op. Att'y Gen. No. 86-5 (Feb. 10, 1986) (noting that "an opportunity to present oral or written testimony must be afforded on any agenda item at every meeting of all boards," and that "an opportunity to testify must be provided at every council meeting on agenda items, even if a public hearing on the item has been held").

[6] Trustees of the Travel Agency Recovery Fund, Op. Att'y Gen. No. 85-14 (July 26, 1985).

[7] Green Sand Comty. Ass'n v. Hayward, No. 93-3259 (Hawai'i 1996).

[8] Letter from Sherry P. Broder, attorney, to Clayton Hee, Chair, Office of Hawaiian Affairs (Nov. 5, 1991) (on file with author).

the Attorney General gave the opinion that the Governor's Economic Revitalization Task Force was not subject to the requirements of the Sunshine Law because it had not been "created by constitution, statute, rule, or executive order," but rather was assembled pursuant to the Governor's initiative.[9] This view has been criticized, because of its departure from the spirit of the Sunshine Law, as well as its language, quoted above, which refers to bodies created by "executive order."[10]

County councils, and the boards and commissions created by a county charter or county ordinance, are also governed by the Sunshine Law because the counties are political subdivisions of the state and the Sunshine Law is a general law enacted to govern all.[11] In 2001, the Office of Information Practices rendered the opinion that the "Vision Teams" established by the City and County of Honolulu should be considered to be "boards" under the Sunshine Law, even though they did not have any set membership and were open to all who wish to participate.[12]

Non-governmental bodies receiving public funds or benefits are not covered, unless they have been created under some authority of the state or county government. The Attorney General concluded, for instance, that the student government organization at the University of Hawai'i was not governed by the Sunshine Law.[13]

C. What Is a "Meeting"?

H.R.S. section 92-2 defines "meeting" as "the convening of a board for which a quorum is required in order to make a decision or to deliberate toward a decision upon a matter over which the board has supervision, control, jurisdiction, or advisory power." The only major exception to this definition

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[9] Letters from Margery S. Bronster, Att'y Gen.,Hawai'i, to Desmond Byrne, Chair, Common Cause, Hawai'i (Sept. 2 and 29, 1997) (on file with author).

[10] Neither of the informal opinions mentioned have binding authority in other contexts. Formal opinions issued by the Attorney General have persuasive value, but are also not binding on courts. *See, e.g.*, State ex rel. Bronster v. Yoshina, 84 Hawai'i 179, 932 P.2d 316 (1999), where the Attorney General argued that many years of previous Attorney General opinions were incorrect.

[11] Applicability of the State Sunshine Law to the County Councils and the Presentation of Oral or Written Testimony on Agenda Items, Op. Att'y Gen. No. 86-5 (Feb. 10, 1986).

[12] Office of Information Practices [hereinafter OIP], Sunshine Law Application to Vision Teams and Neighborhood Board Members Attendance at Vision Teams Meetings, OIP Op. Ltr. No. 01-01 (Apr. 9, 2001). In 1998, the Legislature gave the Director of the Office of Information Practices the responsibility to administer the Sunshine Law. HAW. REV. STAT. ANN. § 92-1.5 (Michie 2003).

[13] Applicability of State Sunshine Law to the ASUH Senate, Op. Att'y Gen. No. 85-18 (Sept. 6, 1985).

is when a board is exercising "adjudicatory functions," such as deciding a formal contested-case hearing, when its activity is governed by H.R.S. Chapter 91.[14]

The meetings held by committees and subcommittees of public boards are certainly included as "meetings" covered by this definition, even though they may not have the "quorum" necessary to make a binding final decision.[15] The Attorney General has given the opinion that a "retreat" planned by the Trustees of the Office of Hawaiian Affairs to take place after its formal Board Meeting in order to "resolve personality conflicts" and discuss OHA's goals would have been a "meeting" that would have had to comply with the Sunshine Law.[16]

1. Does this definition mean that board members cannot talk to each other except in an official "meeting"?

Board members are prohibited from engaging in any *deliberations* with each other outside formal meetings and are specifically prohibited from discussing how they will vote except in properly-noticed meetings.[17] The term "deliberation" thus refers to any discussion or communication between or among board members related to reaching a decision on any item that is before the board or commission for action. Board members are not permitted to use "chance meetings" at social or informal gatherings, or electronic communication, to circumvent the spirit or requirements of the Sunshine Law. Nonetheless, board members are permitted to talk to each other in limited and carefully defined circumstances.

First, *two members* may communicate with each other to "gather information from each other about official board matters to enable them to perform their duties faithfully, as long as no commitment to vote is made or sought."[18] A board member who missed a meeting would be permitted, for instance, to contact another board member by phone to learn what had happened at the missed meeting. But an inquiry such as, "How do you feel about that matter?," would be improper, as would any attempt by either member to try to influence the opinion of the other. Direct transmission of information is

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[14] HAW. REV. STAT. § 92-6(a)(2).

[15] Applicability of the Hawai'i Sunshine Law to the Committees of the Board of Regents, Op. Att'y Gen. No. 85-27 (Nov. 27, 1985) (The Sunshine Law applies to the University of Hawai'i Board of Regents.).

[16] Applicability of Part I, Chapter 92, Hawaii Revised Statutes, to a Private "Retreat" of OHA Trustees, Op. Att'y Gen. No. 86-19 (Sept. 2, 1986).

[17] HAW. REV. STAT. § 92-2.5(a).

[18] *See id.*

appropriate, but any discussion of the implications of such information, outside a formal meeting, would not be.

In addition, *a group consisting of two or more members but fewer than the number of members which would constitute a quorum of the board* may be selected by the full board to meet together to:

- *Investigate* a matter, but only if (A) the scope of the investigation is approved by a vote taken at a board meeting; (B) the group reports its findings and recommendations on this matter to the full board at a formal board meeting; and (C) deliberation and decision-making is conducted only at a duly-noticed subsequent board meeting conducted in conformance with the Sunshine Law;[19]
- *Present, discuss, or negotiate* on behalf of the board if the board approves by vote and specifies each member's authority; or
- *Discuss the selection of the board's officers.*[20]

Finally, *any number of members* may either meet with the *Governor* to discuss any matter (except a matter submitted to the board for adjudication), or meet with *the head of the board's department* in order to discuss those administrative and financial matters specified in H.R.S. section 26-35.[21]

These exceptions must be interpreted narrowly, so that the rule prohibiting *deliberations* outside a formal meeting is maintained. An investigating subcommittee can make recommendations regarding a specific matter if it is assigned by the full board to investigate. The members of the subcommittee, however, should not engage in discussions with each other outside a formal meeting about the implications of their recommendation on formal decisions that must be reached. Similarly, a subgroup of a board can be assigned to negotiate with another person or body about a position that the full board has adopted, but its members should not negotiate with each other about this matter except in a formal meeting of the board.

Board members have discretionary authority to reach decisions on matters within the statutory or constitutional responsibilities assigned to the board. Such authority, however, is confined by the statutory and constitutional provisions creating the board and assigning responsibility to it. The foremost obligation of boards and commissions is to ascertain and give effect to the intention of the legislative body that created it to the fullest degree. The term "discretionary authority" thus means the power conferred by statutes, regulations, or constitutional provisions on public officials to act in their official capacity consistent with the governing legal principles, according to their own judgment, based on experience and intelligence, and in a reasonable manner to achieve the goals identified by the provisions that gave them their

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[19] *See id.* § 92-2.5(b)(1).

[20] *See id.* § 92-2.5(b) & (c).

[21] *See id.* § 92-2.5(d) & (e).

authority. Thus, the exercise of such guided discretion is the opposite of acting in an arbitrary or capricious manner. Government attorneys advising boards and commissions have the responsibility to ensure that the requirements of the Sunshine Law are understood and respected, and that board members understand the statutory provisions that govern the board and operate consistently with these provisions.

2. Are meetings by videoconferencing permitted?

Meetings by videoconferencing are permissible if the public has the required notice of all locations where board members will be physically present and has access to attend and participate at any of the locations.[22] Both video and audio interaction are required.

D. How Much "Notice" Must Be Given to the Public and How Detailed Does the "Agenda" Have to Be?

Six calendar days' notice must be given to the public in advance of each meeting. Further, the *agenda* for the meeting must be *posted* at the site of the meeting, *filed* with the county clerk, and *mailed* to persons who request such notices.[23] If a public hearing is being held, the Maui County Charter, section 13-2(11) requires that notice be provided "by publication in a newspaper of general circulation in the county." When formal rulemaking is involved, H.R.S. section 91-3(a)(1) requires 30-days notice.

The posted *agenda* must list the "*items* to be considered" with particularity, in order to give the public sufficient notice to make an informed decision regarding attendance and participation. The "agenda" is thus the written list of each and every item proposed to be considered for deliberation and action at a meeting of the board, listed in the order in which the items will be considered. The agenda should refer to any documents and exhibits that the board will consider. These documents and exhibits should be available for examination by the public. The Attorney General has concluded that a published agenda containing only general references, such as "Unfinished Business" and "New Business," is insufficient to comply with the law, and that a board must list "all of the specific 'items' or 'matters' that will be discussed" at its meeting.[24] If a board anticipates that it will conduct part of its meeting in executive session (pursuant to procedures discussed below), it

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[22] *See id.* § 92-3.5(a).

[23] *Id.* § 92-7(b) & (e).

[24] Agenda and Minutes of Hawai'i State Commission on the Status of Women, Op. Att'y Gen. No. 85-2 (Feb. 4, 1985).

should list the executive session on its agenda, with a reference to the purpose of the session.[25]

The agenda thus must list as an *item* every separate matter that will be discussed for purposes of action, decision-making, deliberation, information, or advice. An "item" is a specific topic to be discussed or decided, listed in clear and understandable terms. The goal in determining whether a matter should be listed as a separate "item" is to ensure that the public has proper notice of the issues the board will be discussing or deciding, and to allow citizens to present testimony on these issues. It may be acceptable to group related matters together as a single item, if the board will be examining them together, so long as it is clear what the board will be discussing.

Matters can be *added* to the agenda only if *two-thirds* of the members eligible to attend the meeting agree by recorded vote. *But even with a two-thirds vote*, a board cannot add an item to the agenda if it is *of reasonably major importance* and if action concerning this matter *will affect a significant number of persons*.[26] This language is designed to limit the ability of a board to add items to the agenda. The proper approach is to refrain from adding any matters to an agenda unless the additional matters would raise no controversy whatsoever, such as announcements of future events, the adoption of congratulatory resolutions, or the correction of clerical or typographical errors. A matter is *of reasonably major importance* if it is of interest to any sector of the community, and an agenda item would affect a *significant* number of persons if it would concern more than a handful of individuals. Any new agenda item that would impact more than a couple of people would thus constitute a *substantive* or *significant* change.

The documents and reports that are related to the agenda item and are made available in advance of, or during, the meeting to the board members should normally be accessible to the public for inspection and copying. The recommended copying fee is set at five cents per page by H.R.S. section 92-21, but a board can set a higher rate by rule. The only exception to this requirement would be for documents that are still in draft form and thus would be considered to be internal working documents. H.R.S. section 92F-13(3) and -13(5) do not require disclosure of government documents that "must be confidential in order for the government to avoid the frustration of a legitimate government function," or of documents that that are "[i]nchoate and draft working papers of legislative committees."[27] The Office of Information Practices has also recognized that inter-agency and intra-agency memoranda

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[25] HAW. REV. STAT. § 92-7(a).

[26] *See id.* § 92-7(d).

[27] HAW. REV. STAT. ANN. §§ 92F-13(3), -13(5) (Michie 2003).

may frequently be protected by the common law "deliberative process privilege."[28]

Staff documents that are "predecisional" and "deliberative" and which reflect the "give and take" of the process of reaching a decision do not, therefore, need to be made available to the public prior to a meeting, even though they are presented to the board members before the meeting. Once the board members start talking in detail about a document at a board meeting, however, this document will lose its privileged status as part of the deliberative process. At this point, the document should be made available for the public to examine.

E. When Can "Emergency Meetings" Be Held?

Emergency meetings can be held if an *unanticipated event* or a matter creating a fear of *imminent peril* to public health, safety, or welfare occurs, but only if two-thirds of the members eligible to attend concur that such an emergency has occurred, and state their reasons in writing, and if, in the case of an unanticipated event, the Attorney General also concurs. Unanticipated events are those that board members could not have known about from generally-available sources. Also included are deadlines established by courts, legislative bodies, or other governmental agencies that are beyond the control of the board.[29] Notice must be provided of such meetings by the filing of an emergency agenda and the finding of an emergency at the office of the Lieutenant Governor, or the appropriate county clerk's office. Persons requesting notification on a regular basis must be "contacted by mail or telephone as soon as practicable."[30] Action taken at emergency meetings must be limited to matters that are truly necessary.

F. Can Meetings be "Continued" or "Recessed" Until Another Day?

Boards, commissions, and legislative bodies should be practical in setting their agenda and should list only the number of items that they think they can realistically complete during their scheduled meeting. Nonetheless, sometimes a body fails to complete action on all the listed agenda items for a

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[28] *See* OIP Op. Ltr. No. 90-8 (Feb. 12, 1990) (drafts of correspondence and staff notes regarding an alleged zoning violation); OIP Op. Ltr. No. 90-21 (June 20, 1990) (private consultant report regarding financial and compliance audit); OIP Op. Ltr. No. 91-16 (Sept. 19, 1991) (draft mater plan); OIP Op. Ltr. No. 91-24 (Nov. 26, 1991) (interview panelists' notes); OIP Op. Ltr. No. 92-27 (Dec. 30, 1992) (preliminary draft minutes). Final draft minutes, however, are not privileged and should be accessible by the public. *Id.*

[29] HAW. REV. STAT. § 92-8(c).

[30] *See id.* § 92-8(a)(4).

meeting by the end of the day. Can the body "recess" the meeting until the next day, or a subsequent day, without posting a new agenda? The Attorney General has explained that recesses until a subsequent day are permitted "if a board or commission cannot complete its business on the date that the meeting was publicly noticed . . . provided that it announces at the publicly noticed meeting the date, place, and time of the continued meeting."[31]

This issue presents a practical problem that requires a practical solution. Sometimes issues are so controversial that public testimony lasts for many hours, and the board is not permitted to engage in deliberations until the testimony is completed. If the meeting must begin anew the next day, the public testimony could also begin again, and the board may again be blocked from having the time to complete its deliberations. Sometimes a board loses its quorum because of illness or other factors beyond the control of its members. It is thus logical to allow these difficult meetings to be recessed until the following day or until a day in the very near future. If the continuation is put off more than five days, however, the full notice requirements of the Sunshine Law, as explained above, should be complied with, a new agenda should be posted, and additional public testimony must be allowed.

Every effort, of course, must be made to keep the public informed about the board's activities. If a recess until a subsequent day is to be taken, the board must take a formal vote to reconvene at a particular time and a particular location, and it should post a notice at its meeting place that describes its vote to recess and reconvene.

G. When Can "Executive Sessions" Be Held?

A meeting or part of a meeting can be held in *executive session* (i.e., closed to the public) only if two-thirds of the members present at an open and properly-noticed meeting approve, *and* only if the number of those approving constitute a majority of the members eligible to attend the meeting.[32] If the session was anticipated in advance, the purpose of the executive session should be listed in the posted agenda. If it was not anticipated in advance, the purposes should be announced to the public at the time the two-thirds vote is taken. No new topics should be added during the executive session.[33] In other words, a properly-noticed open meeting must first take place, and, at this open meeting, the board members must vote on the record to move into an executive session. Such executive sessions are proper *only* to discuss the

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[31] DEPARTMENT OF THE ATTORNEY GENERAL, THE SUNSHINE LAW AND OTHER LEGAL REQUIREMENTS FOR CONDUCTING PUBLIC MEETINGS, CH. 92, HAWAII REVISED STATUTES 9 (Oct. 1992).

[32] HAW. REV. STAT. § 92-4.

[33] *See id.* § 92-7(a).

following matters: *Personnel matters*, including hiring, dismissing, and disciplining employees and officers (unless the individual concerned requests an open meeting); *labor negotiations*; *the acquisition of public property*; *legal issues with the board's attorney* "pertaining to the board's powers, duties, privileges, immunities, and liabilities;" *investigative material concerning criminal misconduct*; or *sensitive matters related to public safety or security*.[34]

The language in H.R.S. section 92-5 indicates that a board can take a vote and thus make a formal decision during executive session, but the better (and by far the more common) practice is for the formal decision to be made after the board terminates its executive session and reconvenes into a public open session. A publicly-cast vote informs the public of a government official's position on a particular issue and ensures accountability. Discussions related to pending litigation, for instance, can ordinarily be conducted in executive session, in accordance with the attorney-client privilege. If votes are to be taken on settlement or on other significant steps, however, they should be taken in open session. Further, the conclusion of an executive session should be made public even though the deliberations were private.

Minutes of such executive sessions must be prepared and can be kept private only as long as "their publication would defeat the lawful purpose of the executive meeting."[35] A board can have a *limited meeting* that is closed to the public if two-thirds of the board members agree that the location of the meeting is dangerous to health or safety. Nonetheless, such meetings must be videotaped, and no decisions may be made.[36]

H. How Detailed Must "the Minutes" Be, and How Rapidly Must They Be Produced?

Minutes must be kept and copies must be made available to the public at a "reasonable cost of reproducing such copy."[37] The price for reproduction will normally be five cents per page, but some boards may establish a higher fee by rule.[38]

The required minutes need not constitute "a full transcript," nor must a recording be made, but the minutes must give a "true reflection of the matters discussed at the meeting and the views of the participants."[39] Summary minutes are acceptable. The minutes must contain "[t]he substance of all matters proposed, discussed, or decided; and a record, by individual member,

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[34] *See id.* § 92-5.
[35] *See id.* § 92-9(b).
[36] *See id.* § 92-3.1.
[37] *See id.* §§ 92-9 & 92-21.
[38] *See id.* § 92-21.
[39] *See id.* § 92-9(a).

of any votes taken."[40] Any person in attendance is permitted to record the meeting if the "recording does not actively interfere with the conduct of the meeting."[41]

The minutes must be produced *within thirty days* after the meeting unless all or part of the meeting was closed to the public. In those situations, the minutes of the closed portions must be produced as soon as the need for the closure disappears.[42] Preliminary draft minutes that are still in the process of being edited can be withheld from the public. The Office of Information Practices has said, however, that final draft minutes presented to board members for approval must be made available to the public, because they are government records governed by the Uniform Information Practices Act, which is found in H.R.S. Chapter 92F.[43]

The law does not authorize any exceptions to the thirty-day rule (except for confidential matters), but if a board for some reason has not approved its minutes within the thirty days, then whatever draft minutes have been prepared must be made available to the public.[44] In 1998, the Circuit Court of the First Circuit ruled that the Board of Land and Natural Resources had violated H.R.S. section 92-9 "by failing to keep minutes for BLNR briefings...[and] for some BLNR executive meetings" and "by failing to timely complete minutes of some regular BLNR meetings."[45]

I. How Is the Sunshine Law Enforced?

Persons who willfully violate any aspect of the Sunshine Law can be charged with a misdemeanor and, if convicted, can be summarily removed from the board or commission they sit on.[46] The Sunshine Law can be enforced by *the Attorney General* or by *any person* acting as a "private attorney general," even if the person has not participated in the prior proceedings or suffered any direct injury.[47] Any final action taken in violation of Sections 92-3 (open meetings) and 92-7 (notice) is voidable upon proof of

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[40] *See id.* § 92-9(a)(3).

[41] *See id.* § 92-9(c).

[42] *See id.* § 92-9(b).

[43] Minutes of Employees' Retirement System Meetings, OIP Op. Ltr. No. 92-27 (Dec. 30, 1992); Withholding of Minutes of a Public Meeting, OIP Op. Ltr. No. 02-06 (Aug. 23, 2002) (explaining that the process of approving the minutes must take place in public and that the public must have access to the draft minutes being approved).

[44] Withholding of Minutes of a Public Meeting, OIP Op. Ltr. No. 02-06, at 7 (Aug. 23, 2002) (noting that "[t]here is no requirement in the Sunshine Law that minutes be approved").

[45] Environment Hawai'i, Inc. v. Wilson, No. 97-2402-06 (Hawai'i Jan. 23, 1998).

[46] HAW. REV. STAT. § 92-13.

[47] Kaapu v. Aloha Tower Development Corp., 74 Haw. 365, 380, 846 P.2d 882, 888 (1993) (citing HAW. REV. STAT. § 92-12(a) & (c)).

a "wilful violation."[48] Nonetheless, a challenge must be commenced within ninety days of the board action, and such intent is always difficult to prove.[49] Decisions made at emergency meetings, however, are not voidable, even if the Sunshine Law has not been fully complied with. Further, "[t]he Court may order payment of *reasonable attorney fees and costs to the prevailing party* in a suit brought under this section."[50] To avoid discouraging citizens from filing such suits, parties defending against claims brought under the Sunshine Law will not be awarded attorneys' fees if they are the prevailing party unless the complaint was frivolous.[51]

III. SUMMARY AND CONCLUSION

The Sunshine Law is written clearly in most respects, and the opinions and cases cited above help clarify most of the ambiguities. To summarize the main points:

1. Each board and commission must post its agenda six days in advance, listing each item to be discussed in enough detail to give the public notice of what is to be discussed and decided. This approach allows members of the public the opportunity to submit and deliver testimony regarding each item at the meeting during which discussions and decisions are to take place.

2. Changes to the agenda cannot be made without a two-thirds vote of the board members. Even with such a vote, such changes should not be made if the matter will affect any sector of the community.

3. Notice of anticipated executive sessions should be given. The purposes for such executive sessions should also be provided to the public. Prior to any executive session, the board must meet in a public session and two-thirds of the members of the board must vote to move into executive session. Only the specific matters listed in the Sunshine Law may be discussed in such session. Although a vote can take place during executive session, the better, and much more common practice, is to make decisions in open session. The minutes of executive sessions must be kept and made available to the public when the need for confidentiality ends.

4. Recessed meetings should be avoided to the extent possible. If the recess extends more than six days, a new agenda must be posted.

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[48] HAW. REV. STAT. § 92-11.

[49] *See, e.g.*, Outdoor Circle v. Harold K.L. Castle Trust, 4 Haw. App. 633, 642, 675 P.2d 784, 791 (1985)(finding that no "wilful violation" occurred when the Land Use Commission failed to hold a meeting to adopt its conclusions of law, in light of the prior sequence of Commission meetings that had been held in compliance with the Sunshine Law).

[50] HAW. REV. STAT. § 92-12(c).

[51] Kahana Sunset Owners Assoc. v. Maui County Council, 86 Hawai'i 132, 948 P.2d 122 (1997).

5. The minutes must be prepared and made available to the public within thirty days. The draft minutes that are to be reviewed for approval by board members must also be made available to the public before or during the meeting at which they will be discussed.

Military Medical Malpractice: Adopt the Discretionary Function Exception as an Alternative to the *Feres* Doctrine

On October 6, 1997, the United States Supreme Court passed up another opportunity to correct one of the Court's worst mistakes.[1] By refusing to grant certiorari in *Jones v. United States*,[2] the Court allowed the *Feres* doctrine[3] to persist in an area never originally contemplated by Congress: medical malpractice.[4] Sergeant Donzell Jones was not only an active duty service member in the Army, but also a highly accomplished track and field athlete.[5] Jones was a member of the 1992 United States Military Olympics team and assigned to the San Francisco area for training.[6] During his assignment in California, Jones underwent an operation at the Oakland Naval Hospital to relieve chronic abdominal pain. The procedure failed to correct his stomach problem, severely injured both his legs, and ended his military and running careers.[7] By improperly applying pressurized leg stockings during Jones's surgery, the doctors cut off the blood supply to his legs.[8] The lack of blood caused Jones to lose all feeling in his legs and he underwent another operation to remedy the problem.[9] Unfortunately, the doctors were unable to correct their mistake and Jones will never run again.[10]

In any civilian hospital, this "error" would constitute patent medical malpractice, but because Jones was treated at a Naval hospital, his claim against the United States had to first survive the Federal Tort Claims Act ("FTCA"), which places restrictions on lawsuits against the United States and limits subject matter jurisdiction in a federal court.[11] One of the earliest

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[1] *See* Jones v. United States, 112 F.3d 299 (7th Cir. 1997), *cert. denied*, 522 U.S. 865 (1997).

[2] *Id.*

[3] The *Feres* doctrine prevents service members from suing the federal government. *See infra* Part II.B.

[4] *Jones*, 112 F.3d at 300.

[5] *Id.*

[6] *Id.*

[7] *Id.*

[8] Tech. Sgt. Tracio Adams, et al., *Image Repair of Military Healthcare*, app. 3, *at* http://www.ou.edu/deptcomm/dodjcc/groups/98A1/Appendix3.htm (last modified Dec. 11, 1997).

[9] *Id.*

[10] *Jones*, 112 F.3d at 300.

[11] 28 U.S.C. § 2680 (2000). Under the Medical Malpractice Immunity Act (commonly known as the Gonzalez Act), FTCA claims against the government are the exclusive remedy for torts committed by military medical personnel acting within the scope of their employment. 10 U.S.C. § 1089 (1988). *See infra* Part II.A. *See also* 28 U.S.C. § 2679 (2000).

interpretations of the FTCA's exceptions occurred in 1950. In *Feres v. United States*,[12] the Supreme Court established the *Feres* doctrine, which states that service members who sustain any injuries "incident to [military] service" cannot sue the government.[13] The doctrine has been radically expanded to include medical malpractice actions and even recreational activities as incident-to-service.[14] The FTCA also includes an express discretionary function exception ("DFE"), which immunizes the government from suit when its employees make discretionary decisions. The DFE has been applied to bar some medical malpractice claims brought by dependents of service members.[15]

This article argues that *Feres* should be overruled.[16] The legislative intent behind the FTCA, to generally waive the federal government's claim of sovereign immunity, cannot be achieved through an outmoded doctrine that has expanded far beyond its original purpose. Service members are not allowed to sue the government for medical malpractice, even when a civilian, who received the same negligent medical care, could sue and recover against the federal government.[17] *Feres* unfairly bars service member suits even when no rationale behind the doctrine supports its application.[18] Veteran's benefits do not always adequately cover the harm caused by negligent treatment and in circumstances where those payments would be adequate, any judicial remedy could be offset by the amount of a veteran's benefit payment. The medical malpractice context is more similar to its civilian counterpart than any other aspect of the military and cannot be called "distinctively federal in character."[19] Further, military discipline is not adversely affected when service members are allowed to question their doctor's medical decisions. The discretionary function exception should be the only argument available to the government to raise immunity in medical malpractice cases because the exception has been narrowly interpreted and selectively applied to immunize the government from suit.[20] The application of the discretionary function exception provides a remedy to those injured by government employees, while preserving immunity in cases where a legitimate concern for protecting discretionary or policy decisions exists. The government's use of the *Feres* doctrine in medical malpractice cases circumvents both the legislative intent

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[12] 340 U.S. 135 (1950).

[13] *Id.* at 144.

[14] *See, e.g.*, Costo v. United States, 248 F.3d 863 (9th Cir. 2001); Del Rio v. United States, 833 F.2d 282 (11th Cir. 1987).

[15] *See* Denny v. United States, 171 F.2d 365 (5th Cir. 1948).

[16] *See infra* Part III.A.

[17] *See* Jones v. United States, 112 F.3d 299, 300 (7th Cir. 1997).

[18] *See Costo*, 248 F.3d 863.

[19] *See* Feres v. United States, 340 U.S. 135, 143 (1950).

[20] *See infra* Part III.B.

and judicial purposes behind the doctrine.[21] The discretionary function exception, however, when applied in lieu of the *Feres* doctrine, can provide a fair balance between tort victim recovery and governmental immunity in medical malpractice cases.[22]

Part II outlines the scope of the *Feres* doctrine problem, provides the history of the FTCA and its 1988 amendment, the Federal Employees Liability Reform and Tort Compensation Act, and highlights the confusion that lower courts have experienced when applying the *Feres* doctrine to medical malpractice cases. Part III outlines the reasons that support overruling *Feres*, explains how the doctrine has routinely failed to achieve any of the goals for which it was developed, and demonstrates how the outmoded *Feres* doctrine has created an inequity between civilians and service members who receive medical treatment from government sources. Part III also addresses why overruling *Feres* will neither open the floodgates to litigation, nor cause the vast military discipline problems as urged by pro-*Feres* constituents.[23] It proposes that the discretionary function exception to the FTCA is an appropriate remedy for the *Feres* doctrine problem, by achieving the goals of the legislature and preserving immunity for the federal government in certain critical contexts. Part IV concludes that the discretionary function exception is a viable solution to correcting a doctrine long overdue for reconsideration and emphasizes that the judiciary is the proper forum for that change.

II. THE *FERES* DOCTRINE AND DISCRETIONARY FUNCTION EXCEPTIONS: IRRECONCILABLE DIFFERENCES

In 1946, Congress enacted the FTCA, eliminating the complete freedom from litigation the federal government had long enjoyed under the common law doctrine of sovereign immunity.[24] Before the FTCA, persons injured by employees of the federal government had no remedy unless the victim sought a private bill of relief from Congress and the government consented to be sued.[25] As enacted, the FTCA broadly waived the federal government's

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[21] *See infra* Part III.A.

[22] *See generally infra* Part III.

[23] *Privacy Lawsuits by Members of the Military: Hearing Before the S. Judiciary Comm.*, 109th Cong. 1-2 (2002) (statement of Major General Nolan Sklute, Retired, Judge Advocate General, U.S. Air Force).

[24] For general background on the common law doctrine of sovereign immunity see John Postl, *Wrongful Death Action Against the United States Barred by the Sovereign Immunity Doctrine*, Koohi v. United States, 976 F.2d 1328 (9th Cir. 1992), 17 SUFFOLK TRANSNAT'L L. REV. 620 (1994).

[25] *See* Dalehite v. United States, 346 U.S. 15, 24-25 n.9 (1953); *see also* Note, *Government Tort Liability*, 111 HARV. L. REV. 2009 (1998) (addressing different reasons for governmental immunity).

immunity from tort suits,[26] but reserved thirteen significant governmental activities where immunity was preserved.[27] The FTCA generally provides for the payment of money damages for persons or property injured as a result of the negligent actions of government employees acting within the scope of their

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[26] 28 U.S.C. § 1346(b) (2000). Section (b)(1) provides:

Subject to the provisions of chapter 171 of this title, the district courts . . . shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

Id.

[27] 28 U.S.C. § 2680 (2000). The exceptions include:

(a) Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.

(b) Any claim arising out of the loss, miscarriage, or negligent transmission of letters or postal matter.

(c) Any claim arising in respect of the assessment or collection of any tax or customs duty, or the detention of any goods, merchandise, or other property by any officer of customs of excise or any other law enforcement officer, except that the provisions of this chapter and section 1346(b) of this title apply to any claim based on injury or loss of goods, merchandise, or other property, while in the possession of any officer of customs or excise or any other law enforcement officer . . . .

. . . .

(d) Any claim for which a remedy is provided by sections 741-752, 781-790 of Title 46, relating to claims or suits in admiralty against the United States.

(e) Any claim arising out of an act or omission of any employee of the Government in administering the provisions of sections 1-31 of Title 50, Appendix.

(f) Any claim for damages caused by the imposition or establishment of a quarantine by the United States.

. . . .

(h) Any claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights: . . . .

(i) Any claim for damages caused by the fiscal operations of the Treasury or by the regulation of the monetary system.

(j) Any claim arising out of the combatant activities of the military or naval forces, or the Coast Guard, during time of war.

(k) Any claim arising in a foreign country.

(l) Any claim arising from the activities of the Tennessee Valley Authority.

(m) Any claim arising from the activities of the Panama Canal Company.

(n) Any claim arising from the activities of a Federal land bank, a Federal intermediate credit bank, or a bank for cooperatives.

Id.

employment.[28] The United States is liable "in the same manner and to the same extent as a private individual under like circumstances,"[29] meaning that, if the same negligent act would subject a private person to liability, the United States also would be liable.[30] Before an FTCA claim is filed in federal district court, however, the agency accused of causing the injury must be given a chance to settle the suit through administrative processes.[31] If the agency denies or fails to settle the claim within six months, the victim may then file the suit in federal court.[32] The victim must also establish subject matter jurisdiction by overcoming the numerous defenses routinely raised by the defendant United States based on various exceptions to immunity that the FTCA provides.[33]

In 1988, Congress amended the FTCA by enacting the Federal Employees Liability Reform and Tort Compensation Act ("FELRTCA").[34] FELRTCA was enacted in response to the 1988 Supreme Court decision in *Westfall v. Erwin*,[35] where the Court held that a discretionary function exception to the FTCA applied *only if* the negligent decision in question was a discretionary decision *and* made in the scope of employment, potentially allowing individual employee liability.[36] Congress reacted to the potential for these suits by passing FELRTCA, which made recovery against the government under the FTCA the sole remedy for plaintiffs.[37] FELRTCA states that "[t]he remedy against the United States . . . resulting from the negligent or wrongful

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[28] 28 U.S.C. § 1346(b). *See also* Robb v. United States, 80 F.3d 884 (4th Cir. 1996) (holding that the United States was not liable for the failure of two doctors to diagnose lung cancer because the doctors were independent contractors, not employees, of the Air Force). *See generally* Thomas K. Kruppstadt, Note, *Determining Whether a Physician is a United States Employee or an Independent Contractor in a Medical Malpractice Action under the Federal Tort Claims Act*, 47 BAYLOR L. REV. 223 (1995) (discussing criteria for determining employee status in FTCA claims).

[29] 28 U.S.C. § 2674 (2000).

[30] 28 U.S.C. § 1346(b).

[31] 28 U.S.C. § 2675(a) (2000). *See* Rise v. United States, 630 F.2d 1068, 1071 (5th Cir. 1980). For more information on the administrative claim procedure, see THE JUDGE ADVOCATE GENERAL'S SCHOOL, U.S. ARMY, JA 241, THE FEDERAL TORT CLAIMS ACT, Ch. 2, (May 2000).

[32] THE JUDGE ADVOCATE GENERAL'S SCHOOL, *supra* note 31 at I-2 n.7.

[33] Latchum v. United States, 183 F. Supp. 2d 1220, 1220-22 (D. Haw. 2001).

[34] 28 U.S.C. §§ 2674, 2679, 2680.

[35] 484 U.S. 292 (1988).

[36] *Id.* at 297-98. In *Westfall*, the Court interpreted the FTCA to permit some suits against government employees even if the government could not be sued due to an exception. FELRTCA reasserted the policy of several previous immunity statutes that conferred absolute immunity on government employees in certain jobs. *Id. See, e.g.*, Medical Malpractice Immunity Act, 10 U.S.C. § 1089 (1988). *See also infra* Part II.B.2.

[37] *See Hearing Before the House Subcomm. on Admin. Law of the House Comm. on the Judiciary*, 100th Cong. 30-32 (1988) (addressing the *Westfall* case specifically).

act . . . of any employee of the Government while acting within the scope of his office or employment is exclusive."[38] The amended Act now requires that the United States be substituted as the defendant for any of its employees, which eliminates all civil actions against the individual government employees arising from negligent acts committed in the scope of their employment.[39] Normally, suing the government is beneficial for tort victims because the government is much more likely to pay its debts than an individual tortfeasor. Unfortunately, the special defenses afforded to the government under the FTCA are not available to individual tortfeasors and, when applicable, can eliminate a victim's only possible recovery.

A. Scope of the Feres Doctrine Problem

Before 1991, the Department of Defense ("DoD") did not have a system for compiling data on medical malpractice cases.[40] In 1991, the Department of Legal Medicine at the Armed Forces Institute of Pathology in Washington, D.C. began to collect data on all medical malpractice claims brought against DoD, in order to establish risk management programs and target potential problem areas in the military medical arena.[41] The newly created system, called the "Abstracts of Closed Malpractice Claims Database," contained 1,544 closed malpractice claims brought against the DoD from mid-1988 through November 1991.[42] Before the 1991 implementation of the new reporting procedures, records were not always accurately maintained, but the data compiled by DoD during the 1988-1991 period and the resulting initial report, in all categories, reflect the general characteristics of military medical malpractice cases reported to DoD during the representative time period.[43]

According to DoD, since 1982 the number of annual claims brought for medical malpractice has remained relatively constant, at approximately 900 per year.[44] Based on the number of physicians in the military, the total number of claims brought against the government represents approximately

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[38] 28 U.S.C. § 2679(b)(1).

[39] *Id.*

[40] RICHARD L. GRANVILLE, MD, JD ET AL., OFFICE OF THE ASSISTANT SEC. OF DEF. (HEALTH AFFAIRS), SOME CHARACTERISTICS OF DEPARTMENT OF DEFENSE MEDICAL MALPRACTICE CLAIMS: AN INITIAL REPORT 1 (1992).

[41] *Id.*

[42] *Id.* The database tracks all claims from the time a report is filed, on Standard Form 95, with the offending agency through the local Judge Advocate General's office. *Id.* at 2. Closed claims are those with a final outcome at the time of the report. No pending cases were included. *Id.*

[43] *Id.* The report itself recognized that the numbers reflect the general characteristics of military medical malpractice claims. *Id.*

[44] *Id.* at 1-2.

7 complaints for every 100 doctors.[45] In the civilian sector over the same time period, a large insurance company consistently reported nearly 13 claims per 100 civilian doctors, almost double the rate as the military.[46] Over 50% of the patients who brought the military suits were dependents of active duty service members,[47] and the claims were overwhelmingly brought against active duty doctors (85%) rather than other medical services personnel.[48] Twelve percent of the claims against DoD were brought by children younger than one year old, and were attributed to the high number of prenatal, labor, and delivery claims made.[49] Forty percent of the claims were settled either by the offending agency, or the Department of Justice ("DoJ").[50] Of the eighty-seven cases that actually went to trial, 47% resulted in a decision for the plaintiff, a percentage comparable to the private medical industry.[51] A mere five percent of claims were filed by active duty service members for their own injuries.[52] Furthermore, nearly 85% of all the injuries sustained were of at least moderate severity, including one quarter of all claims arising from death.[53] Out of 1,381 cases with outcome data available, 9% were barred by the *Feres* doctrine. This figure may seem low; however, when considering that service member suits comprise only 5% of the total claims, the numbers not only reflect a complete bar on service member claims, but also a bar on almost as many civilian claims brought by dependents.[54]

DoD's initial report also documents total payments of $122,630,896.00 made to victims of medical malpractice from 1988-1991, which may appear to be a large sum. However, what DoD does not emphasize is that only 9% of those victims received compensation in an amount that exceeded the established settlement limits authorized either by the agency or the DoJ.[55] Consequently, very few of these cases actually cost the government more money than already budgeted into the settlement limits. The authors of the report recognized the fact that the discrepancy between the total number of claims against DoD, when compared to the civilian sector, is caused in part by the *Feres* doctrine and conceded that "it is obvious the DoD claims experience

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[45] *Id.* at 2.

[46] *Id.*

[47] *Id.* at 2 tbl.2.

[48] *Id.* at 7 tbl.6. Other medical personnel may include registered nurses, medics, or other soldiers assigned to administrative hospital duties.

[49] *Id.* at 3 fig.3, 9 tbl.9.

[50] *Id.* at 4 tbl.4A. Each agency has the authority to settle claims up to $100,000.00 and the Department of Justice ("DoJ") has a settlement limit of $500,000.00. *Id.* at 3.

[51] *Id.* at 4.

[52] *Id.* at 3 tbl.2.

[53] *Id.* at 4 fig.5.

[54] *Id.* at 3 tbl.2.

[55] *Id.* at 10.

parallels that of the civilian sector in specialties and procedures involved in malpractice allegations."[56] DoD may claim that the difference between the number of military versus civilian claims is attributable to a higher standard of medical care.[57] An equally reasonable inference, however, is to interpret the statistics to mean that service members, who comprise about half the patients treated in military hospitals, are not bringing suits for their own injuries because of the *Feres* doctrine bar, and if allowed to sue, would account for the other 7% of claims.

B. The Supreme Court's Treatment of Two FTCA Exceptions

The Supreme Court's treatment of FTCA exceptions varies greatly. The *Feres* doctrine bar, which the judiciary created, is broadly interpreted to prevent nearly all claims arising from service member injuries.[58] On the other hand, the discretionary function exception cases reflect the Court's reluctance to infer any meaning outside the express language of the exception.[59] Although the exceptions were drafted with a similar legislative purpose, the Court's application methods have caused the two exceptions to diverge, resulting in nearly absolute immunity in *Feres* cases and limited immunity in discretionary function exception cases.[60]

1. The Feres doctrine crisis

The *Feres* doctrine states that no service member can sue the federal government for negligence when the injuries resulted from activity that arose or occurred "incident-to-service."[61] The Supreme Court created the *Feres* doctrine in 1950 in response to the enactment of the FTCA in 1946.[62] In *Feres*, the Court interpreted part of the FTCA's language in 28 U.S.C. § 2680(j), which provided immunity for injuries that arose out of "combatant activities" during a "time of war."[63] Strictly construed, this provision would *allow* recovery for injuries arising from non-combatant, peacetime military activities, such as medical malpractice.[64] But in the *Feres* case, a unanimous

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[56] *Id.* at 2, 8.

[57] *See id.* at 2.

[58] *See, e.g.*, Latchum v. United States, 183 F. Supp. 2d 1220 (D. Haw. 2001); Jones v. United States, 112 F.3d 299 (7th Cir. 1997).

[59] *See, e.g.*, Indian Towing, Co. v. United States, 350 U.S. 61 (1955).

[60] *See* Feres v. United States, 340 U.S. 135, 137, 146 (1950). *See infra* Part III.

[61] *Feres*, 340 U.S. at 146.

[62] *See id.* at 138.

[63] 28 U.S.C. § 2680(j) (2000).

[64] *Id.*

Supreme Court interpreted the language in a way that severely limited the potential benefits that the FTCA originally conferred upon service members.[65]

According to the Supreme Court, when a trial court determines that a service member's injuries occurred in the course of activity "incident-to-service,"[66] the court must dismiss the case for lack of subject matter jurisdiction.[67] The *Feres* decision, now over fifty-three years old, effectively replaced the FTCA's express language of "combatant" and "time of war" with an "incident-to-service" test, expanding what should have been a narrow exception to the FTCA's general waiver of immunity.[68] Since *Feres*, all FTCA claims made by service members *or their families* for an injury to the service member must overcome the *Feres* hurdle before a federal court can hear the case.[69]

The *Feres* case consolidated three claims involving active-duty service members who were injured as a result of government negligence.[70] The first case, *Feres v. United States*,[71] involved a soldier who burned to death in his barracks bed when a faulty heating plant caused the building to catch fire.[72] The other two cases involved medical malpractice.[73] In *Jefferson v. United States*, a service member underwent an abdominal operation performed by Army surgeons while on active duty.[74] During a later operation, which occurred after the service member had left the Army, civilian surgeons removed a "U.S. Army" towel, eighteen inches wide by thirty inches long, from his stomach.[75] Similarly, in the third case consolidated under *Feres*, *Griggs v. United States*, an Army soldier died on the operating table at the

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[65] *Feres*, 340 U.S. at 139.

[66] *Id.* at 146.

[67] *See* Latchum v. United States, 183 F. Supp. 2d 1220, 1234 (D. Haw. 2001).

[68] *Feres*, 340 U.S. at 146.

[69] *See* 28 U.S.C § 1346 (2000).

[70] *Feres*, 340 U.S. at 136-37.

[71] Feres v. United States, 177 F.2d 535 (2d Cir. 1949).

[72] *Id.* The executrix of the estate alleged that the government negligently quartered Feres in barracks that were known to be unsafe and for negligent failure to maintain an adequate fire watch. *Id.* at 536. The Second Circuit affirmed the lower court's dismissal of the action and concluded that the FTCA did not assign liability to the United States in these types of cases. *Id.* at 538.

[73] Jefferson v. United States, 178 F.2d 518 (4th Cir. 1949); Griggs v. United States, 178 F.2d 1 (10th Cir. 1949).

[74] *Jefferson*, 178 F.2d at 519. The second surgery occurred eight months later, after Jefferson had been discharged from active duty. *Id.* at 519. Jefferson alleged negligent failure to remove the towel and negligent medical treatment by the Army. *Id.* After finding negligence as a fact, the court reexamined the FTCA and determined that the United States had no liability under the Act. *Id.* The Fourth Circuit affirmed. *Id.* at 520.

[75] Feres v. United States, 340 U.S. 135, 137 (1950).

hands of Army surgeons.[76] In the consolidated appeal,[77] the Supreme Court ruled against recovery for all three plaintiffs because, in each case, the injuries occurred "incident to [military] service" and were therefore barred.[78]

In *Feres*, Justice Jackson provided three reasons to justify barring service member claims against the government.[79] The first reason relates to the "distinctly federal" character of the relationship between service members and the federal government.[80] According to the Court, the relationship between the Armed Forces and the government is derived from federal sources, referring to Article I, Section 8, of the Constitution, which authorizes the federal government to, among other things, raise an army.[81] The Court reasoned that because the federal government has a unique power to conduct these activities and no private individual can, the relationship must be governed by federal authority.[82] The statutory language of the FTCA holds the United States liable only "in the same manner and to the same extent as a private individual under like circumstances,"[83] and because no parallel private liability exists, the Court concluded that no recovery could be recognized under the facts of the *Feres* cases.[84]

The second rationale concerned a dual recovery problem: the Veteran's Benefits Act (1958) ("VBA")[85] already provides a remedy for the death and disability of service members.[86] The Court deferred to Congress when interpreting the language of the FTCA, assuming that Congress did not intend service members to recover twice under both the FTCA and the VBA.[87] The Court pointed to the lack of an adjustment scheme or offset provision in the FTCA and concluded that Congress could not have also contemplated a service member's recovery under the FTCA.[88]

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[76] Griggs v. United States, 178 F.2d 1 (10th Cir. 1949). The executrix of Griggs's estate alleged that unskilled and negligent surgeons caused her husband's death. *Id.* at 2. The Tenth Circuit allowed the suit, concluding that the FTCA applied to claims of active duty military personnel. *Id.* at 6.

[77] *Feres*, 340 U.S. at 143-46.

[78] *Id.*

[79] *Id.* at 143-44.

[80] *Id.* at 143.

[81] U.S. CONST. art. I, § 8.

[82] *Feres*, 340 U.S. at 144.

[83] 28 U.S.C. § 2674 (2000).

[84] *Feres*, 340 U.S. at 144.

[85] The Veteran's Benefits Act of 1958 codified many benefits under Chapter 38 of the U.S. Code that already provided for the death or disability of service members under the U.S. Statutes at Large, enacted in 1933. *See, e.g.*, 38 U.S.C. §§ 1311, 1122, 1967 (2002).

[86] *Id. See also Feres*, 340 U.S. at 144.

[87] *Feres*, 340 U.S. at 144.

[88] *Id.*

The *Feres* case alluded to a final reason to bar a service member's suit against the government: the military discipline rationale.[89] Although not discussed in detail by the *Feres* court, four years later, the Supreme Court expounded on this rationale in *United States v. Brown*,[90] where the Court stated that a suit must be barred by the *Feres* doctrine when the decisions of the military are called into question.[91] The *Brown* Court reasoned that the FTCA excluded these types of claims because of the "special relationship of the soldier to his superiors, the effects of . . . suits on discipline, and the extreme results that might [occur] if suits . . . were allowed for negligent orders . . . or negligent acts committed in the course of military duty."[92]

In 1977, in *Stencel Aero Engineering Corp. v. United States*,[93] the Court again relied on the military discipline rationale to conclude that service member suits against the government adversely affect the special relationship between soldiers and their superiors.[94] The military discipline rationale can be used to explain why all claims based on activities considered "incident-to-service" must be barred.[95] If judicial inquiry into the suit could jeopardize military discipline or, in other words, "duty and loyalty to one's service and to one's country," *Feres* bars the claim.[96]

This rationale for applying the *Feres* doctrine had become the focus of Supreme Court decisions until 1987,[97] when the Supreme Court reaffirmed all three reasons for the *Feres* doctrine in *United States v. Johnson*.[98] In *Johnson*, a Coast Guard helicopter pilot, who was stationed in Hawai'i, received radar assistance from the Federal Aviation Administration ("FAA") because of inclement weather.[99] After the FAA had radar control over the helicopter, it crashed into the side of a mountain on Moloka'i, killing everyone on board.[100] In holding that the *Feres* bar applied, the Court relied heavily on the fact that the accident occurred on-the-job and that Johnson's wife had received some compensation for the loss of her husband through VBA.[101] Although the

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[89] *See id.* at 141-43.

[90] 348 U.S. 110 (1954).

[91] *Id.* at 112.

[92] *Id.*

[93] 431 U.S. 666 (1977).

[94] *Id.* at 672.

[95] *Id.* at 673; United States v. Shearer, 473 U.S. 52, 57 (1985); United States v. Muniz, 374 U.S. 150, 162 (1963).

[96] United States v. Johnson, 481 U.S. 681, 691 (1987).

[97] *See Shearer*, 473 U.S. at 58 n.4 (stating that the other two factors are no longer controlling).

[98] 481 U.S. 681.

[99] *Id.* at 682-83.

[100] *Id.* at 683.

[101] *Id.* at 683, 689.

Johnson Court breathed new life into the original *Feres* reasons, the decision was split 5-4.[102] Justice Scalia authored a powerful dissent, joined by Justices Brennan, Marshall and Stevens, which indicated that they were willing to consider overruling *Feres*.[103] One possible alternative to the *Feres* doctrine that could provide both compensation and protection for military decision-making, is the discretionary function exception.[104]

2. The discretionary function exception jurisprudence

Unlike the *Feres* doctrine, the discretionary function exception is explicitly stated in the language of the FTCA.[105] The legislative exception applies to "[a]ny claim based upon an act or omission of an employee of the Government . . . [during] the exercise or performance or the failure to exercise or perform a discretionary function or duty . . . whether or not the discretion involved be abused."[106] The exception was designed to establish a boundary between "Congress' willingness to impose tort liability upon the United States and its desire to protect certain governmental activities from exposure to suit by private individuals."[107]

The first case directly dealing with the discretionary function exception was brought to the Supreme Court in 1953. *Dalehite v. United States*[108] was a test case for 300 separate wrongful death and property damage suits totaling over two hundred million dollars in value.[109] The plaintiffs alleged that the Army's Bureau of Ordinance negligently implemented the government's plan to manufacture and transport large quantities of fertilizer grade ammonium nitrate.[110] When the large stores of fertilizer caught fire and exploded, it caused massive injuries and property damage in Texas City, Texas.[111] Although government employees entered into contracts with private companies to execute the storage, transportation, and shipment of the fertilizer, the Court categorized the Army's decision-making process as a discretionary function, which precluded recovery against the government.[112] The Court held that the discretionary function includes more than initiation of programs and determinations by

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[102] *Id.* at 681.

[103] *See id.* at 692, 703 (Scalia, J., dissenting). *See also infra* Part III.A.

[104] *See* 28 U.S.C. § 2680(a) (2000).

[105] 28 U.S.C. § 2680(a); *see supra* text accompanying note 27.

[106] 28 U.S.C. § 2680(a).

[107] United States v. S. A. Empresa de Viacao Aerea Rio Grandense (Varig Airlines), 467 U.S. 797, 808 (1984).

[108] 346 U.S. 15 (1953).

[109] *Id.* at 17.

[110] *Id.* at 18-19.

[111] *Id.* at 17, 18, 23.

[112] *Id.* at 35-36.

administrators; employees who implement plans and administrative decisions in accordance with official directions are exempt from suit as well.[113]

Later decisions categorized a discretionary function as a "planning rather than operational" decision.[114] The planning/operational distinction was strengthened in 1955, in *Indian Towing Co. v. United States*,[115] in which the U.S. Supreme Court held the federal government liable for property damage resulting from the Coast Guard's failure to operate a lighthouse properly.[116] The Court concluded that the decision whether or not to operate the lighthouse was a discretionary function, but once the Coast Guard made that choice, performing the day-to-day business of the lighthouse was operational and therefore immunity was not available to the government.[117]

In 1984, the U.S. Supreme Court expanded the application of the discretionary function exception in *United States v. S. A. Empresa de Viacao Aerea Rio Grandense* ("*Varig Airlines*").[118] The Supreme Court avoided the planning/operational distinction previously used, instead relying on "the nature of the conduct, rather than the status of the actor, [to] govern[] whether the discretionary function exception applies in a given case."[119] The Court recognized that not all discretionary decisions are made in the planning phase and recharacterized the test to focus on the type, rather than the time, of the decision.[120] In *Varig Airlines*, the FAA had implemented a spot-check program to ensure that private airline companies were complying with federal aviation regulations.[121] A fire broke out on a Varig aircraft, causing the asphyxiation of 124 out of 135 people aboard.[122] Both Varig Airlines and the families of deceased passengers attempted to sue the government, alleging that the fire could have been prevented if the FAA had done a proper check and certification of the aircraft.[123] Relying on *Dalehite*, a unanimous Court determined that the nature and quality of the federal employee's actions, namely, the spot-check procedure, were of the type that Congress intended to shield from tort liability.[124] Because the FAA could not possibly inspect every aircraft before every flight, the discretion involved in determining how to

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[113] *Id.*

[114] *Id.* at 42. *See also* Indian Towing Co. v. United States, 350 U.S. 61 (1955) (applying operational distinction to hold government liable).

[115] 350 U.S. 61.

[116] *Id.* at 69.

[117] *Id.*

[118] 467 U.S. 797 (1984).

[119] *Id.* at 813.

[120] *See id.* at 815-18.

[121] *Id.* at 817.

[122] *Id.* at 800.

[123] *Id.* at 800-01.

[124] *Id.* at 815-16.

allocate resources to ensure maximum compliance with federal regulations was a discretionary function immune from tort suit.[125]

In 1988, the Supreme Court again tried to define the limits of the discretionary function in *Berkovitz v. United States*.[126] The Court held that the discretionary function exception did not immunize the government from liability for the Division of Biological Standards' ("DBS") negligent licensing procedure for manufacturers of the polio vaccine.[127] The Food and Drug Administration's ("FDA") procedure to license a vaccine manufacturer was not discretionary, and therefore was distinguishable from the spot-check procedure used in *Varig Airlines*, because "the [DBS had] no discretion to issue a license without first receiving the required test data; to do so would violate a specific statutory and regulatory directive."[128] The Court qualified the *Berkovitz* holding by suggesting that, if the petitioners' claim had alleged that DBS incorrectly determined that the vaccine complied with the established regulations, when, in fact, it did not, the decision may not have been discretionary.[129]

Three years later in 1991, the Supreme Court faced another discretionary function question in *United States v. Gaubert*.[130] The case involved a complicated regulatory scheme designed to help failing savings and loan and thrift institutions from going bankrupt.[131] As part of the Home Owner's Loan Act of 1933,[132] the Federal Home Loan Bank Board ("FHLBB")[133] became involved in the day-to-day management of a particular institution, owned by petitioner Gaubert.[134] When the business failed, Gaubert alleged that the FHLBB employees negligently supervised and managed his institution.[135] The Court outlined a step-by-step process to determine when the discretionary function exception applied.[136] The first question is whether an "element of judgment or choice" is involved.[137] Reaffirming *Berkovitz*, the Court stated that the requirement of judgment or choice is not satisfied if "a federal statute,

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[125] *Id.* at 818-20.

[126] 486 U.S. 531 (1988).

[127] *Id.* at 548. DBS is a part of the National Institutes of Health. *Id.* at 533. The complaint also alleged that the FDA negligently released the vaccine to the public. *Id.*

[128] *Id.* at 542-43.

[129] *Id.* at 544-45.

[130] 499 U.S. 315 (1991).

[131] *Id.*

[132] 12 U.S.C. § 1461 (1933). As a result of the events in this case, Congress repealed FHLBB and enacted Financial Institutions Reform, Recovery, and Enforcement Act of 1989 ("FIRREA"). *Gaubert*, 499 U.S. at 319 n.1.

[133] 12 U.S.C. § 1464(a) (1933).

[134] *Gaubert*, 499 U.S. at 318-19.

[135] *Id.* at 320.

[136] *Id.* at 322-25.

[137] *Id.* at 322.

regulation, or policy specifically prescribes a course of action for an employee to follow."[138] The Court then framed the second question: whether the judgment involved "is of the kind that the discretionary function exception was designed to shield."[139] To qualify for immunity, an employee's "'actions and decisions [must be based] on considerations of public policy.'"[140] *Gaubert* is the last word from the Supreme Court on the discretionary function exception.[141]

C. Chaos in the Courts

The *Feres* doctrine can be confusing. Appellate courts agree that service members cannot sue for their own injuries and civilians also may be barred for their own injuries by the *Feres* doctrine and its genesis test.[142] The Supreme Court has even extended the government's immunity to include protection against third-party indemnity suits, where the government has entered into a contract with a private business, but in the course of performing the contract, the business causes injury to a service member.[143] The service member may sue and recover against the business entity, but when the business pursues an indemnity action against the government (to recover the payments made to the service member), the *Feres* doctrine bars the contractor's suit, even when the government contract terms *required* the business/contractor to use the instrumentality that caused the service member's injury.[144] Essentially, the contractor performs according to the government's specifications and when those requirements cause a service member's injury, the *contractor* has to pay.[145]

To highlight the inconsistency and confusion *Feres* creates, consider a hypothetical situation proposed by Justice Scalia in the *Johnson* case:[146]

> A serviceman is told by his superior officer to deliver some papers to the local United States Courthouse. As he nears his destination, a wheel on his Government vehicle breaks, causing the vehicle to injure him, his daughter

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[138] *Id.*

[139] *Id.* at 322-23 (citing Berkovitz v. United States, 486 U.S. 531, 536 (1988)).

[140] *Id.* at 323 (quoting *Berkovitz*, 486 U.S. at 537).

[141] For an in-depth analysis of *Gaubert*, see Barry Goldman, Note, *Can the King Do No Wrong? A New Look at the Discretionary Function Exception to the Federal Tort Claims Act*, 26 GA. L. REV. 837 (1992).

[142] *E.g.*, Del Rio v. United States, 833 F.2d 282 (11th Cir. 1987); Scales v. United States, 685 F.2d 970 (5th Cir. 1982); Jefferson v. United States, 178 F.2d 518 (4th Cir. 1949); Griggs v. United States, 178 F.2d 1 (10th Cir. 1949).

[143] *See* Boyle v. United Techs. Corp., 487 U.S. 500 (1988); Stencel Aero Eng'g Corp. v. United States, 431 U.S. 666 (1977).

[144] *Stencel*, 431 U.S. at 666. *See also infra* note 147 and accompanying text.

[145] *Stencel*, 431 U.S. at 666.

[146] United States v. Johnson, 481 U.S. 681, 701-02 (1987) (Scalia, J., dissenting).

> (whose class happens to be touring the courthouse that day), and a United States marshal on duty. Under [current] caselaw and federal statutes, the serviceman may not sue the Government (*Feres*); the guard may not sue the Government (because of the exclusivity provision of the Federal Employees' Compensation Act (FECA)); the daughter may not sue the Government for the loss of her father's companionship (*Feres*), but may sue the Government for her own injuries (FTCA). The serviceman and the guard may sue the manufacturer of the vehicle, as may the daughter, both for her own injuries and for the loss of her father's companionship. The manufacturer may assert contributory negligence as a defense in any of the suits. Moreover, the manufacturer may implead the Government in the daughter's suit and in the guard's suit, even though the guard was compensated under a statute that contains an exclusivity provision (FECA). But the manufacturer may *not* implead the Government in the serviceman's suit, even though the serviceman was compensated under a statute the does *not* contain an exclusivity provision (VBA).[147]

In the medical malpractice context, the *Feres* doctrine consistently bars service member suits,[148] while civilian medical malpractice cases against the government are generally allowed.[149] The most difficult situations occur when the victim's injuries can be tenuously linked to military service, such as when a pregnant service member receives negligent prenatal care and/or labor and delivery treatment.[150] Courts are divided on how to apply *Feres* to these fact situations.[151]

For instance, in 1984, in *West v. United States*,[152] the Seventh Circuit Court of Appeals held that the *Feres* doctrine did not bar the claim of two minor twins for the wrongful death of one and the birth defects of the other.[153] Because the injury was independent of their father's service, the children could recover for their own injuries, even though the government's negligence occurred because the father's blood type was incorrectly recorded on his pre-induction physical.[154] The court explained that the inquiry into medical

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[147] *Id.* (citations omitted).

[148] *See, e.g.*, Del Rio v. United States, 833 F.2d 282 (11th Cir. 1987); Scales v. United States, 685 F.2d 970 (5th Cir. 1982); Jefferson v. United States, 178 F.2d 518 (4th Cir. 1949).

[149] *See, e.g.*, Romero v. United States, 954 F.2d 223 (4th Cir. 1992); West v. United States, 729 F.2d 1120 (7th Cir. 1984).

[150] *See Romero*, 954 F.2d 223; *Del Rio*, 833 F.2d 282; *West*, 729 F.2d 1120; *Scales*, 685 F.2d 970.

[151] *See, e.g.*, *Scales*, 685 F.2d 970 (holding that *Feres* bars a suit brought by the child of a service member for mental and physical retardation caused by the negligent administration of the rubella vaccine). *But see Romero*, 954 F.2d 223 (holding that *Feres* does not bar a suit brought by the child of a service member for cerebral palsy caused by premature birth).

[152] 729 F.2d 1120.

[153] *Id.* at 1121.

[154] *Id.*

malpractice was unrelated to any "distinctly military" inquiry.[155] The court allowed recovery and stated that the military discipline rationale did not apply to medical malpractice claims.[156]

Similarly in 1992, the Fourth Circuit Court of Appeals decided *Romero v. United States*,[157] in which the court held that the *Feres* doctrine did not bar the suit of a minor child with cerebral palsy, even though the negligent prenatal care that caused the injury was given to Romero's mother, an active duty servicewoman.[158] The court reasoned that, although the medical treatment was administered through the mother's body, the purpose was to ensure the health of the child.[159] Rather than addressing the military discipline rationale, this court correctly decided not to characterize the injury as incident-to-service because the injury was primarily to the child, not the service-member mother.[160]

In contrast, a more recent case relied on the military discipline rationale to bar an infant's claim.[161] In 1982, in *Scales v. United States*,[162] the Fifth Circuit Court of Appeals applied the *Feres* doctrine to bar a suit brought by the parents of a boy who was born with mental and physical retardation.[163] The injuries resulted from the negligent administration of a rubella vaccination during his service-member mother's pregnancy.[164] The court reasoned that because the negligent treatment was given to his active duty mother and the infant's claim was derivative to an injury that occurred incident-to-service, the claim was barred.[165] The court also stated that the military discipline rationale required that the claim be barred because the inquiry into the decisions and conduct of the government employees would occur, regardless of whether the mother or the child brought the suit.[166]

The Eleventh Circuit Court of Appeals took a similar approach to nearly identical facts in *Del Rio v. United States* in 1987.[167] *Del Rio* involved an active duty servicewoman who received negligent prenatal care, which resulted in the death of one twin and injuries to the other twin.[168] The court concluded that the injuries were incident-to-service because the treatment was

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[155] *Id.* at 1126.
[156] *Id.* at 1127.
[157] 954 F.2d 223 (4th Cir. 1992).
[158] *Id.* at 224.
[159] *Id.* at 225.
[160] *Id.*
[161] *See*, Scales v. United States, 685 F.2d 970 (5th Cir. 1982).
[162] 685 F.2d 970.
[163] *Id.* at 971.
[164] *Id.*
[165] *Id.* at 974.
[166] *Id.*
[167] 833 F.2d 282 (11th Cir. 1987).
[168] *Id.* at 284.

provided for the mother, and that the suit would adversely affect military discipline because the court would be required to "second-guess the medical decisions of the military physicians."[169]

The only way to reconcile these cases is to characterize the Fourth and Seventh Circuit Courts as result-oriented and the Fifth and Eleventh Circuit Courts as unwilling to depart from precedent.[170] The Seventh Circuit's 1984 *West* case could have been barred based on the same incident-to-service and military discipline rationale applied in the Fifth Circuit's 1982 decision in *Scales*.[171] Similarly, the Fourth Circuit Court could have used the Eleventh Circuit Court's *Del Rio* analysis to bar the 1992 *Romero* case, but chose not to do so.[172] The issue in all four cases involved the administration of medical procedures to a service member, which resulted in harm to third party civilians, specifically, the children, and in each case, the court could justify any holding by using *Feres*'s rationales.[173]

Courts have not come to any consensus on how to address these difficult types of cases, and the split in jurisdictions reflects how the courts have attempted to reconcile the *Feres* doctrine's mandatory bar in cases where the "right" result is to allow the suit to proceed.[174] Drawing arbitrary lines to determine who may and may not sue serves no practical purpose and results in irreconcilable inconsistency in the law. As Justice Scalia once said, "non-uniform recovery cannot possibly be worse than . . . uniform nonrecovery."[175]

III. OVERRULE FERES: APPLY THE DISCRETIONARY FUNCTION EXCEPTION TO SERVICE MEMBER MEDICAL MALPRACTICE CLAIMS

The discretionary function analysis should replace the *Feres* doctrine in all medical malpractice cases brought against the government by *service members or their families* because the discretionary function exception test better achieves the purposes behind the FTCA exceptions and provides consistent, fair results for the victims of medical malpractice.[176] None of the reasons for the *Feres* doctrine support barring medical malpractice suits, whereas the

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[169] *Id.* at 286.

[170] *Compare Del Rio*, 833 F.2d 282 and *Scales*, 685 F.2d 970 *with* Romero v. United States, 954 F.2d 223 (4th Cir. 1992) and West v. United States, 729 F.2d 1120 (7th Cir. 1984).

[171] *West*, 729 F.2d at 1121; *Scales*, 685 F.2d at 974.

[172] *Romero*, 954 F.2d at 224; *Del Rio*, 833 F.2d at 286.

[173] *See Romero*, 954 F.2d 223; *Del Rio*, 833 F.2d 282; *West*, 729 F.2d 1120; *Scales*, 685 F.2d 970.

[174] *See Romero*, 954 F.2d 223; *Del Rio*, 833 F.2d 282; *West*, 729 F.2d 1120; *Scales*, 685 F.2d 970.

[175] *United States v. Johnson*, 481 U.S. 681, 695-96 (1987) (Scalia, J., dissenting).

[176] *See* Federal Employees Liability Reform and Tort Compensation Act, Pub. L. No. 100-694, 102 Stat. 4563 (codified as 28 U.S.C. §§ 2674, 2679, 2680 (1988)).

discretionary function test can effectively achieve the *Feres* goals.[177] The discretionary function exception can protect the critical governmental decision-making process without unilaterally barring valid claims.[178] Further, the Supreme Court is the proper branch of government to remedy the *Feres* doctrine problem because the language of the FTCA is clear when interpreted narrowly.[179] Service member-victims of government negligence should not be prevented from recovering simply because of discrepancies across jurisdictions, especially because of the uniquely national, mobile aspect of the military.

A. Is It Time To Overrule Feres?

None of the *Feres* rationales—military discipline, federal character or dual recovery—justify barring medical malpractice claims.[180] Even the most justified reason, military discipline, is not supportable in the medical malpractice context.

1. Military discipline

Military medical malpractice suits brought by service members are no more threatening to military discipline than civilian suits that require an inquiry into military affairs.[181] Military discipline is not adversely affected when a service member recovers from the government after a military doctor negligently caused an injury.[182] Applying the *Feres* doctrine to bar medical malpractice claims does not preserve the military discipline structure because *all* medical personnel are immune from suit.[183] Although the doctor may outrank the patient, it is not a command relationship. The patient is under no obligation to follow the "doctor's orders," regardless of the rank of the patient or the care provider, any more than a civilian patient would be. The relationship between

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[177] *See* Feres v. United States, 340 U.S. 135, 140-44 (1950) (holding that service member suits, including medical malpractice, are barred when the federal character, dual recovery, or military discipline rationales apply).

[178] United States v. Gaubert, 499 U.S. 315, 323 (1991).

[179] *See* 28 U.S.C. § 2680(a) (2000).

[180] *See infra* Part III.A.1-3. *See also Feres*, 340 U.S. at 140-44.

[181] *See generally* Brian P. Cain, Note, *Military Medical Malpractice and the* Feres *Doctrine*, 20 GA. L. REV. 497 (1986) (discussing Meagher v. United States, 551 F.2d 313 (9th Cir. 1977), and proposing that H.R. 1161, amended and passed by the House as H.R. 3174, 99th Cong. (2d Sess. 1985), be passed by the Senate).

[182] *See* West v. United States, 729 F.2d 1120 (7th Cir. 1984).

[183] *See* 28 U.S.C. § 2679 (2000).

service member doctors and their patients is equivalent to its civilian counterpart.[184]

Further, the concern for maintaining military discipline assumes that the doctor outranks the patient, which could allow junior service members to question the decisions of their doctor/superiors. But not all patients are low-ranking service members. All service members, including high-ranking officers, are treated in military hospitals.[185] If the military discipline rationale could justify the government's immunity, it would preclude only junior service member-patients from suing, but not an officer who outranks the doctor. A service member who outranked the doctor could sue because questioning the actions of the junior doctor would not upset the military discipline system. This rationale, as applied, cannot legitimately justify the government's immunity in *all* medical malpractice cases.

Additionally, questioning a doctor's *medical* decisions does not undermine the military's disciplinary system when those decisions require the doctor only to treat soldiers with the same standard of care as a civilian doctor. The military discipline rationale was intended to preserve the command structure by preventing a superior's decision from being questioned.[186] Policy and administrative decisions, or professional military judgments are the types of decisions supported by the military discipline rationale, but medical determinations do not fall into any of these categories.[187]

Military discipline requires "unhesitating and decisive action by military officers."[188] This requirement is counter productive in the medical context where doctors need to make well thought out decisions about medical care and procedures. Questioning the medical decisions of a doctor may cause some tension between service members and their doctor/superior, but the tension created when service members are harmed with no remedy is equally problematic. Preventing a legitimate medical malpractice suit does not create or preserve the trust relationship necessary in the military; it allows discipline to erode under the guise of immunity. Nor is the mission of the military hospital hindered by this type of inquiry. On the contrary, allowing medical malpractice suits can promote the mission of military hospitals by enforcing a standard of care.[189] The hospital's mission is to provide quality medical care for soldiers, which requires that patients be treated with the profession's

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[184] *See* Cain, *supra* note 181, at 519.

[185] *See* U.S. Dep't of Def. Military Health Sys., *Tricare: Your Military Health Plan, at* http://www.tricare.osd.mil/frequentlyaskedquestions/frequentlyaskedquestions.cfm (last updated Aug. 2003).

[186] United States v. Brown, 348 U.S. 110, 112 (1954).

[187] United States v. Shearer, 473 U.S. 52, 59 (1985).

[188] Chappell v. Wallace, 462 U.S. 296, 304 (1983).

[189] *See* Cain, *supra* note 181, at 524.

minimum standard of care.[190] Allowing service members to sue would improve the current quality of care by establishing a legal remedy against doctors who fail to meet a minimum standard of care. Malpractice suits could have the effect of forcing military doctors to conform their conduct accordingly. Currently, however, military doctors are completely immune from personal liability and do not have their medical decisions questioned regarding the mistreatment of a service member.[191]

Conversely, if *Feres* no longer applies, the government may have a stronger incentive to regulate medical care to curtail the amount of "sloppy doctoring" that currently exists.[192] Questioning a doctor's medical judgment will beneficially, rather than adversely, affect the manner in which medical care is provided. Service members and civilian patients alike should receive a thorough assessment and treatment of their ailment. Providing higher quality medical care positively affects the mission of the military by ensuring the readiness of the armed forces through effective medical care and services for soldiers and their families.

2. *Parallel private liability*

Feres's parallel private liability argument, or federal character, also fails to support the Supreme Court's conclusion that Congress did not intend to include service member suits when they enacted the FTCA.[193] The Act expressly prohibits suits for "combatant activities" during "time of war," which directly addresses service member suits.[194] The Court's extension of

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[190] *See* Costley v. United States, 181 F.2d 723 (5th Cir. 1950).

[191] Through the Medical Malpractice Immunity Act ("Gonzalez Act") of 1988, 10 U.S.C. § 1089, and later the same year with FELRTCA, the only remedy left for a victim of a government employee's medical malpractice is to sue the United States. 28 U.S.C. § 2679 (2000). The Gonzales Act substitutes the government for the individual defendant and the claim proceeds under the FTCA. *Id.* Before these Acts passed, victims could sue the doctor personally. 10 U.S.C. § 1089 (1988). Because the United States replaces the individual defendant, the *Feres* doctrine and discretionary function exceptions became available to the government as defenses to liability for claims that would not have otherwise had immunity. For a useful comparison of the Supreme Court's analysis of medical malpractice immunity before and after enactment of FELRTCA, see Westfall v. Erwin, 484 U.S. 292, 297-98 (1988) (holding that "absolute immunity from state tort-law actions should be available only when the conduct of federal officials is within the scope of their official duties *and* the conduct is discretionary in nature"); *but cf.* United States v. Smith, 499 U.S. 160, 166 (1991) (stating that the legislative history supports the view that Congress "recognized that the required substitution of the United States as the defendant in tort suits filed against Government employees would sometimes foreclose a tort plaintiff's recovery altogether").

[192] *See* Cain, *supra* note 181, at 524.

[193] *See* Feres v United States, 340 U.S. 135, 144 (1950).

[194] 28 U.S.C. § 2680(j) (2000).

this provision to include *all* service member suits does not support the argument that the military is a "distinctly federal" activity where no parallel private liability exists.[195] The parallel private liability argument, if necessary to establish governmental liability, would negate most of the FTCA's exceptions because the federal government has responsibilities outside the scope of any private person.[196] The government cannot be held liable under circumstances where a private person would be held liable because the federal government does not act like a private person.[197] If this rationale applied to all the FTCA's exceptions, many would be rendered superfluous because they involve activities that only the federal government has the authority to conduct (e.g., postal activities).[198] Even though the original *Feres* concerns justified barring service member suits, the past fifty years of case law interpreting *Feres* has expanded the doctrine beyond its anticipated limits. While recognizing the legitimate concerns for both preserving military discipline and the critical decision-making process of the government, some legislators, military groups, and many courts have recognized that *Feres* no longer achieves those goals.[199]

One reason for the *Feres* doctrine's ineffectiveness is that the military has changed dramatically since the 1950's—it is no longer a conscript military, but rather a volunteer force. Beyond the inducement to "serve one's country," the military must now compete to enlist young, smart citizens to serve in the armed forces. Soldiers recognize that enlistment requires giving up some rights that ordinary citizens enjoy, but asking soldiers to put their health and lives at risk because of *substandard medical care* is unconscionable. Furthermore, the government pays soldiers lower salaries than their civilian counterparts.[200] From a purely economic standpoint, prospective soldiers will not enlist unless the total "benefits package," including medical care, is an adequate substitute for the reduced income.

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[195] 28 U.S.C. § 1346(b) (2000).

[196] Johnson v. United States, 481 U.S. 681, 694-95 (Scalia, J., dissenting). *See also Feres*, 340 U.S. at 140; 28 U.S.C. § 2674 (2000).

[197] *See* 28 U.S.C. § 1346(b).

[198] *Johnson*, 481 U.S. at 694-95 (Scalia, J., dissenting).

[199] *Id. See also* Latchum v. United States, 181 F. Supp. 2d 1220 (D. Haw. 2001).

[200] *See* James Hosek & Jennifer Sharp, *Keeping Military Pay Competitive: The Outlook for Civilian Wage Growth and Its Consequences*, Rand Publications, 1, *at* http://www.rand.org/publications/IP/IP205; Def. Fin. & Accounting Serv., *Basic Pay—Effective Jan. 1, 2003*, tbl., *at* http://www.dfas.mil/money/milpay/pay/2003paytable.pdf.

3. Dual recovery and beyond

The dual recovery justification for governmental immunity assumes that in enacting the FTCA, Congress did not intend to allow service members or their families to be over-compensated for death or injuries that occurred incident-to-service.[201] The *Feres* Court concluded that the absence of any offset provision provided persuasive evidence that Congress meant for service members to be compensated only once, under the VBA.[202] The rationale was largely addressed after *Feres* and finally deemed "no longer controlling" by the Supreme Court thirty-five years later.[203] Although the Court has more recently breathed new life into all three *Feres* rationales,[204] the fact remains that soldiers, both before and after *Feres*, have been allowed to bring FTCA claims despite VBA compensation.[205]

Aside from the fact that VBA benefits are modest, service members have no financially feasible alternative to government medical services.[206] Service members have the option to join a medical insurance plan subsidized by the government, called TRI-CARE, which allows them to choose a private doctor, and pay only a co-payment for each office visit, exam, etc.[207] Even with the subsidized payments, most soldiers cannot afford the cost of private medical care, and although a solider can choose the TRI-CARE plan for his family, soldiers themselves must use the military medical facilities.[208] Service members, who have little choice as to where and from whom they will receive care, are the primary plaintiffs precluded from suit.[209] Total privatization of the military's medical needs could resolve this problem, but because the government needs to maintain qualified doctors and medical personnel to support the armed forces during wartime, the privatization of military medical treatment is not a practical or economically viable solution. The only way to

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[201] *See Feres*, 340 U.S. at 144-45.

[202] *Id.* at 144.

[203] United States v. Shearer, 473 U.S. 52, 58 n.4 (1985).

[204] Stencel Aero Eng'g Corp. v. United States, 431 U.S. 666, 671-72 (1977).

[205] United States v. Johnson, 481 U.S. 681, 697-98 (1987) (Scalia, J., dissenting) (referring to both Brooks v. United States, 337 U.S. 49 (1949), and United States v. Brown, 348 U.S. 110, 111 (1954)).

[206] *See generally U.S. Dep't of Def. Military Health Sys.*, *supra* note 185.

[207] *See id.* at 1.

[208] Privates, the lowest ranking soldier in the Army, are currently paid barely over $1,000.00/month. Additional monies for food and housing are provided only if the soldier has a family and housing on the installation is not available. *See* Def. Fin. & Accounting Serv., *Basic Pay—Effective Jan. 1, 2003*; tbl., *at* http://www.dfas.mil/money/milpay/pay/2003paytable.pdf.

[209] *See* Jefferson v. United States, 178 F.2d 518 (4th Cir. 1949); Griggs v. United States, 178 F.2d 1 (10th Cir. 1949).

ensure that soldiers receive the "benefit" of the medical services provided as part of their payment package is to ensure that the treatment meets the medical profession's standard of care.[210]

The Supreme Court has yet to remedy the *Feres* doctrine problem. Apparently the Court still expects Congress to further amend the FTCA according to the Court's invitation set forth more than fifty years ago in *Feres*.[211] The Court has since relied on Congress's failure to do so as a *de facto* affirmation of *Feres*'s interpretation.[212] Some commentators, who acknowledge the *Feres* doctrine problem, have suggested that an appropriate remedy would be an amendment to the FTCA that allows service members to bring medical malpractice claims against the government.[213] Although an amendment to the Act could have remedied the immediate problem, the *Feres* doctrine has had over fifty years to swallow the rule that created it.[214] Furthermore, Congressional attempts to amend the FTCA have been unsuccessful.[215]

The most recent attempt was a bill introduced by the House of Representatives in 1985, which would have amended the FTCA to allow service members to sue the government for medical malpractice.[216] The House passed the bill, but the Senate refused to do so.[217] Congress's inability to remedy the problem merely demonstrates that the proper forum for correcting the *Feres* interpretation is with the Supreme Court. No matter what "band-aid" remedies Congress could provide, the language of the Act is sufficiently clear, and therefore Congress may not believe it necessary to amend legislation that was written and intended to be interpreted narrowly.[218] If the language of the FTCA is as Congress intended it, the Act needed no alteration but for the judiciary's broad interpretation of the exception.[219] The judiciary should correct their own mistake by overruling *Feres* and narrowly interpret the existing language of the FTCA to accomplish the intended goals of the Act.

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[210] *See infra* Part III.B.

[211] Feres v. United States, 340 U.S. 135, 138 (1950).

[212] *Id.* at 140.

[213] *See* Cain, *supra* note 181, at 525-31; *see also* Jennifer L. Carpenter, Note, Latchum v. United States*: The Ninth Circuit Court's Four-Factor Approach to the* Feres *Doctrine*, 25 U. HAW. L. REV. 231, 251 (2002).

[214] *See* Cain, *supra* note 181, at 502-18.

[215] *See* H.R. 3174, 99th Cong., 2 CONG. INDEX (CCH) p.35,055 (1985-86). The bill was sent to the Senate Judiciary Committee at 10:30 p.m. on October 9, 1985 and no action on the bill has occurred since. 131 CONG. REC. 133 (daily ed. October 9, 1985).

[216] Cain, *supra* note 181, at n.122 (citation omitted).

[217] *See* H.R. 3174, 99th Cong., 2 CONG. INDEX (CCH) p.35,055 (1985-86); 131 CONG. REC. 133 (daily ed. Oct. 9, 1985).

[218] 28 U.S.C. § 2680 (2000); Federal Employee's Liability Reform and Tort Compensation Act of 1988, Pub. L. No. 100-694, 102 Stat. 4563 (1988) (comments by Rep. Owens, Utah, to the Subcommittee on Administrative Law).

[219] Feres v. United States, 340 U.S. 135, 144 (1950).

Overruling the *Feres* doctrine could have the effect of increasing litigation, and the government would bear the expense of the additional payments.[220] Based on the DoD's initial report of medical malpractice litigation, the number of military claims is approximately half that of the civilian sector.[221] If service members are allowed to sue, those numbers are likely to reflect the trend in the private sector.[222] Although this is an increase in litigation, the increase is not too burdensome when compared to the benefits of those suits. Furthermore, only thirteen percent of current cases go to trial, while forty percent are settled.[223] With an offset mechanism to preclude dual recovery, the only claims that would benefit financially from suit are those that seek to recover more than veteran's benefits provide. Only the most egregious injuries or death may receive larger benefit amounts as warranted by the degree of injury.[224]

None of the *Feres* doctrine rationales justify barring all service member medical malpractice claims.[225] Military discipline is not affected by questioning the medical treatment provided by government doctors, and veteran's benefits are inadequate compensation in most medical malpractice cases. It is time to remedy the *Feres* doctrine problem, and overruling the case is the most viable solution, at least in the medical malpractice context.

B. The Discretionary Function Exception as a Solution

When applying the discretionary function exception, appellate courts have adopted a narrow, consistent, and fair method for establishing governmental immunity in medical malpractice cases.[226] Because both the discretionary function exception and the *Feres* doctrine are rooted in the FTCA, the Act's intent, to hold the United States liable in the same manner and to the same extent as a private person, is equally applicable to both exceptions.[227] Because the discretionary function exception has been interpreted narrowly, the FTCA's intent is better achieved under this exception than under *Feres*. The

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[220] Granville, *supra* note 40, at 2 (assuming the government would pay for the same proportionate share of lawsuits that would be settled or lost at trial).

[221] *Id.* at 2.

[222] *See supra* Part II.A.

[223] *See* Granville, *supra* note 40, at 4.

[224] *See id.* at 10 tbl.10 (showing that four percent of claims received forty-seven percent of the total recovery amount).

[225] *See* Feres v. United States, 340 U.S. 135, 140-44 (1950).

[226] *See* Collazo v. United States, 850 F.2d 1 (1st Cir. 1988); Keir v. United States, 853 F.2d 398 (6th Cir. 1988); Rise v. United States, 630 F.2d 1068 (5th Cir. 1980); Supchak v. United States, 365 F.2d 844 (3d Cir. 1966); United States v. Grigalauskas, 195 F.2d 494 (1st Cir. 1952); Costley v. United States, 181 F.2d 723 (5th Cir. 1950).

[227] *See* 28 U.S.C. § 1346(b) (2000).

discretionary function exception has more flexibility than the *Feres* doctrine because the DFE allows a case-by-case analysis. Even though more medical malpractice suits are allowed under the discretionary function exception, decisions that concern policy judgments or resource allocation are still protected.[228]

Early cases deciding medical malpractice issues based upon the discretionary function exception produced some inconsistent results, but courts quickly adjusted to the narrow interpretation intended by Congress.[229] One member of the Senate Committee on Administrative Law addressed the legitimate use of the discretionary function—to protect critical decision-making processes—but recognized that "[the] discretionary function . . . does not relieve you of the obligation, once you have made the decision, to try and execute [a] decision with some concern for the people involved."[230]

Courts have adopted this policy underlying the discretionary function. For example, the Fifth Circuit Court has allowed at least two negligent medical

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[228] *See* Blitz v. Boog, 328 F.2d 596 (2d Cir. 1964) (holding that a physician's decision to treat patient for apparent mental rather than physical disorder was a decision protected by discretionary function exception).

[229] Denny v. United States, 171 F.2d 365, 365 (5th Cir. 1948); *Costley*, 181 F.2d at 723. For example, in 1948 the Fifth Circuit Court of Appeals, in *Denny*, barred a wrongful death suit brought by a dependent Army spouse who was denied admittance to a military hospital while experiencing complications with her pregnancy. *Denny*, 171 F.2d at 365. As a result of the Army's failure to furnish necessary hospital services, Mrs. Denny's child was stillborn. *Id.* at 366. The court reasoned that medical services to family members were merely "gratuitous medical services," and that the decision whether to admit patients is a policy decision protected by the discretionary function. *Id.* The discrepancy in Fifth Circuit cases can be explained by the language of the statutes governing dependent medical care in the military. The applicable statute in 1948 was 10 U.S.C. § 96, which provided that dependents were entitled only to medical care "whenever practicable." *Denny*, 171 F.2d at 366. Under 10 U.S.C. § 1076 (a)(1), dependents were entitled, "upon request, to the medical and dental care prescribed by section 1077 of this title in facilities of the uniformed services, subject to the availability of space and facilities and the capabilities of the medical and dental staff." *Denny*, 171 F.2d at 366. In *Denny*, a pregnant, dependent spouse was denied admission to a hospital and, as a result, delivered a stillborn child. *Id.* at 366. Because the court reasoned that admission of patients was a policy decision based upon availability of services, the court applied the discretionary function exception to bar the suit. *Id.* at 366-67. In the revised § 1079, the Secretary of Defense must contract for medical and dental services. "To assure that medical care is available for dependents . . . the Secretary of Defense . . . shall contract . . . for medical care." 10 U.S.C § 1079(a) (2000). Therefore, although some courts barred early medical malpractice claims based on the discretionary function, the post-amendment case law allows claims for negligent treatment when no policy decisions are implicated. Military hospitals can no longer arbitrarily turn away patients without an evaluation of their condition. As a result of the changed statutory language, the Fifth Circuit Court was able to allow plaintiffs to recover without contradicting the *Denny* decision. *See Denny*, 171 F.2d 365.

[230] Hearing Before the House Subcomm. on Admin. Law of the House Comm. on the Judiciary, 100th Cong. 30-32 (1988) (statement of Rep. Owens, Utah).

treatment claims, one in 1950, and another more recently in 1980.[231] In 1950, in *Costley v. United States*, the court held that a dependent spouse *could* recover against the Army for causing her paralysis by negligently administering an anesthetic.[232] The court held that the Army made a discretionary decision when they decided to admit Mrs. Costley to the hospital, but after that decision, a duty arose to treat her "with the same care, skill, diligence, and ability, that would be owing by a private person or corporation under the same or similar circumstances."[233]

Later, in 1980, the Fifth Circuit again allowed recovery against the government for failure to diagnose a carotid aneurysm in *Rise v. United States*.[234] When the patient died, her active duty spouse was able to recover, even though the patient was referred to and treated by a civilian doctor, because regulations required that the Army maintain supervision over her treatment.[235] The court held that the decision to refer Mrs. Rise to a civilian doctor was not discretionary, but rather a step in her care that required the Army to render non-negligent medical services.[236]

The later decisions reflect the intent of the FTCA provision that holds the United States liable in the same manner as a private citizen under similar circumstances.[237] Congress intended for the FTCA exceptions to be narrowly construed. During the hearings on the FELRTCA, Representative Owens commented that "[t]he government's agents sometimes do commit wrongs, and when they do, *except in the most narrow category*, the government should be liable for its negligence."[238] In presenting FELRTCA, the purpose of the FTCA and its exceptions was expressed: "[V]ictims should not have to suffer and shoulder the burdensome medical expenses for the federal government's negligent acts."[239] Administrative Law subcommittee Chairman Frank went further to say that "I would think it would be a principle . . . [that] the Government would have to pay for the costs it imposes . . . . [O]bviously [there are] some situations, times of war and others, where that does not make any sense."[240] These comments demonstrate that Congress intended for the government, acting as the insurer, to pay for injuries caused by negligent

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[231] *Collazo*, 850 F.2d 1; *Keir*, 853 F.2d 398; *Rise*, 630 F.2d 1068; *Supchak*, 365 F.2d 844;; *Costley*, 181 F.2d 723.

[232] *Costley*, 181 F.2d at 723.

[233] *Id.* at 725.

[234] 630 F.2d at 1070.

[235] *Id.*

[236] *Id.* at 1072.

[237] 28 U.S.C. § 1346(b) (2000).

[238] Hearing Before the House Subcomm. on Admin. Law of the House Comm. on the Judiciary, 100th Cong. 30-32 (1988) (statement of Rep. Owens, Utah) (emphasis added).

[239] *Id.* at 31 (statement of Rep. Frank, Chairman, Subcomm. on Admin. Law).

[240] *Id.*

government employees.[241] Congress intended for the government to be liable when its employees cause harm, rather than allowing victims to sue the individual tortfeasor: "[T]he Federal Government has much 'deeper pockets.' [Therefore] it is appropriate that the Federal Government be substituted."[242]

When the government undertook to provide medical benefits to service members, the government should have understood that the level of care required of doctors would have to meet minimum professional standards. In passing the FELRTCA, Congress intended to protect government employees from personal liability, not to extend the reach of governmental immunity.[243] The government should not pretend to act as an insurer for victims injured by negligent government employees and then be allowed to exempt itself from that responsibility.[244] Congress intended to provide protection for government employees.[245] Application of the *Feres* doctrine has produced the opposite result: immunizing one group of government employees at the expense of another. A narrow construction of the FTCA's discretionary function exception, as currently applied in medical malpractice cases, is the proper application of immunity, and demonstrates the consistency that the discretionary function analysis provides.

Beginning in 1950, other circuits began to allow medical malpractice suits to proceed against the government.[246] For example, the Third Circuit Court of Appeals held, in *Supchek v. United States*, that the discretionary function exception did not bar a suit against the government for prematurely discharging a patient.[247] In *Supchek*, a paraplegic veteran previously treated for convulsions sought medical attention after experiencing a recent episode.[248] After being examined by a doctor and discharged, *Supchek* suffered another convulsion and died on the way home from the hospital.[249] The court allowed the suit because the hospital was aware of the patient's condition based on his previous treatment, and therefore, the medical exam was not performed with reasonable care.[250]

More recently, in 1988, the First Circuit Court of Appeals held that the discretionary function exception did not apply when a Veteran's Administration ("VA") hospital denied admission to a mentally ill veteran with suicidal

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[241] *Id.*

[242] *Id.* at 32 (statement of Rep. Wolf, Virginia).

[243] *Id.* at 30-32.

[244] *Id.*

[245] *Id.*

[246] Grigalauskas v. United States, 195 F.2d 494 (1st Cir. 1952); Costley v. United States, 181 F.2d 723 (5th Cir. 1950); Dishman v. United States, 93 F. Supp. 567, 571 (D. Md. 1950).

[247] Supchak v. United States, 365 F.2d 844, 845 (3d Cir. 1966).

[248] *Id.* at 845.

[249] *Id.*

[250] *Id.* at 845-46.

tendencies, who killed himself the next day.[251] The court stated, in *Collazo v. United States*, that the government provided no evidence that the decision whether or not to admit Mr. Collazo was based on policy or anything other than a medical determination that could be classified as discretionary.[252] The *Collazo* court examined the reason for failing to admit the patient, rather than characterizing all admissions decisions as discretionary.[253]

The same year, the Sixth Circuit Court of Appeals permitted a mother to sue on behalf of her child for partial blindness caused by a government doctor's failure to diagnose a tumor on her child's eye.[254] Because the doctor failed to follow the standard procedures for referring patients to a specialist, the court held that the discretionary function exception did not immunize the government.[255] The court reasoned that the doctor's unauthorized decision to deviate from procedure was not discretionary because the policy was firmly established and should have been followed.[256] The doctor failed to protect himself when he chose to depart from procedure.[257]

Because medical decisions rarely involve policy decisions, appellate courts now tend to allow medical malpractice suits against the government, notwithstanding the discretionary function exception.[258] This narrow interpretation of the discretionary function exception's grant of immunity provides a legitimate balance between victims' recovery and protecting critical governmental decisions.[259] The rationale for the discretionary function exception is similar to the military discipline rationale underlying the *Feres* doctrine.[260] Both intend to maintain the separation of powers by "prevent[ing] judicial 'second-guessing' of legislative and administrative decisions grounded in social, economic, and political policy through the medium of an action in tort."[261]

Because the discretionary function exception and the *Feres* doctrine attempt to protect a unique relationship between the federal government and its employees, the government needs only one test to establish immunity in medical malpractice cases. The discretionary function analysis is the better test because it can satisfy the intent of the FTCA without needlessly barring

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[251] Collazo v. United States, 850 F.2d 1, 1 (1st Cir. 1988).

[252] *Id.* at 2.

[253] *Id.*

[254] Keir v. United States, 853 F.2d 398, 403 (6th Cir. 1988).

[255] *Id.* at 409.

[256] *Id.*

[257] *Id.*

[258] *See supra* Part II.B.2.

[259] *See* United States v. Gaubert, 499 U.S. 315, 323 (1991) (stating that the discretionary function exception only protects actions and decisions based on public policy).

[260] *See* United States v. S. A. Empresa de Viacao Aerea Rio Grandense (Varig Airlines), 467 U.S. 797, 814 (1984); Dalehite v. United States, 346 U.S. 15 (1953).

[261] *Varig Airlines*, 467 U.S. at 814.

claims. The desire for "unhesitating and decisive action by military officers and equally disciplined responses by enlisted personnel" is not usually implicated in the treatment of patients.[262] Quoting the Ninth Circuit Court, "[n]o military discipline applies to the care a conscientious physician will provide" and therefore, military discipline should not support a *Feres* bar on medical malpractice claims.[263] For this reason, courts should apply *only* the discretionary function exception analysis to justify governmental immunity in the medical malpractice context. Not only do two tests produce inconsistent results, but in addition, the *Feres* doctrine can bar a plaintiff's recovery based solely upon the jurisdiction of the injury.[264] Although variations in state tort law are expected, the effects of these differences on a national mobile military are compounded by maintaining two inconsistent tests.

Medical malpractice does not "involve the sort of close military judgment calls that the *Feres* doctrine was designed to insulate from judicial review."[265] The concern underlying the *Feres* doctrine is not present in the medical malpractice context, but if a case did arise concerning these types of decisions, for example, in a field hospital, the discretionary function exception could legitimately protect the doctor's decisions.[266] The doctor's medical decisions in a field hospital would be based on available time and equipment resources, as well as his experience and skill. As long as the doctor performed to the best of his ability "under the circumstances," the discretionary function exception could apply to immunize his decisions regarding care in that situation.

For an example of how the discretionary function exception can remedy some of the *Feres* problems, recall the hypothetical proposed by Justice Scalia in *United States v. Johnson*.[267] The suits that would be barred by *Feres*, specifically, the injured serviceman's suit against the government for his own injuries and the daughter's suit for the loss of her father's companionship, would both be allowed if the discretionary function exception applied in lieu of *Feres*.[268] Because neither suit would involve an inquiry into policy or resource allocation decisions, which would jeopardize the government's ability to make critical judgment calls, the discretionary function exception

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[262] Atkinson v. United States, 825 F.2d 202, 205 (9th Cir. 1987) (quoting Chappell v. Wallace, 462 U.S. 296, 304 (1983)).

[263] *Id.*

[264] Romero v. United States, 954 F.2d 223 (4th Cir. 1992); Del Rio v. United States, 833 F.2d 282 (11th Cir. 1987); West v. United States, 729 F.2d 1120 (7th Cir. 1984); Scales v. United States, 685 F.2d 970 (5th Cir. 1982).

[265] Johnson v. United States, 704 F.2d 1431, 1440 (9th Cir. 1983).

[266] *Varig Airlines*, 467 U.S. at 808.

[267] United States v. Johnson, 481 U.S. 681, 701-02 (1987) (Scalia, J., dissenting). *See also* text accompanying note 147.

[268] *Id.*

would not immunize the government.[269] Recall that the manufacturer was also barred from impleading the government in the service member's suit.[270] In this situation, however, the government may have a case for a discretionary function exception. If the government specified the requirements for the manufacturer based upon policy or resource allocation, the decision could have involved the type of critical decision-making process protected by the discretionary function exception and could therefore justify immunity.[271]

Other areas of legitimate concern were addressed by Major General Nolan Sklute during the 2002 Senate hearings on the *Feres* doctrine.[272] Major Sklute emphasized the military discipline rationale for maintaining the *Feres* doctrine and suggested four situations in which legitimate concerns would arise if Congress abolished the *Feres* doctrine.[273]

> 1 An airman who is denied a security clearance (based upon a mental health diagnosis) challenges his commander's decision in court, in an effort to obtain an adverse ruling that undermines the commander's decision.
> 2 A pilot removed from flying status, because of a medical diagnosis, seeks judicial relief challenging that diagnosis.
> 3 An airman injured in a training accident seeks damages for such injuries claiming they resulted from his commander's negligence in planning and executing the training scenario.
> 4 An F-16 maintenance crew chief who bails out of an F-16 aircraft that flames out during an incentive flight, files a claim for his resulting injuries, alleging that the flame out was caused by the negligence of a maintenance squadron commander and the F-16 pilot.[274]

The first example raised by Major Sklute, in the absence of *Feres*, could be resolved in two ways. First, the mental health decision made by the *doctor* could be challenged by the soldier without an adverse impact on discipline. Second, the claim against the commander, even if negligence and damages were proven, could be protected by the discretionary function exception because withholding security clearance based on medical evaluations is a policy decision. The soldier's superior officer made a judgment call well within his command discretion about the soldier's ability to perform a particular task, and based it on evidence provided by a medical professional.

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[269] *See* Indian Towing Co. v. United States, 350 U.S. 61 (1955).

[270] *Id.*

[271] *See* 28 U.S.C. § 2680(a) (2000).

[272] *Privacy Lawsuits by Members of the Military: Hearing Before the S. Judiciary Comm.*, 109th Cong. 2 (2002) (statement of Major General Nolan Sklute, Retired, Judge Advocate General, U.S. Air Force).

[273] *Id.*

[274] *Id.*

The second example also concerns challenging a medical diagnosis, which should be allowed for the same reasons that *Feres* is not supported in medical malpractice cases. Deciding not to allow a medically questionable pilot to fly a multi-million dollar aircraft *is* a policy decision—and a good one—that would be protected by the discretionary function exception. However, MG Sklute's example is a challenge to the *medical diagnosis*, a challenge that should be allowed because the hierarchical discipline system of concern (between the pilot and his commander) will not disintegrate if the doctor's medical decision was questioned.[275]

The third and fourth examples could be barred on two theories. First, the language of the FTCA itself, "combatant" and "during time of war," could easily be interpreted to cover a training accident, without providing *Feres*'s unfettered immunity in a situation where the government legitimately cannot have decisions questioned.[276] An appropriate interpretation of the FTCA's "combatant" exception language could include any activities in the scope of employment that a service member should have anticipated to be potentially harmful at the time they entered the service, including, but not limited to, training exercises.[277] While the advocates for the *Feres* doctrine raise some legitimate concerns about military discipline and dual recovery, no one has argued that the *Feres* doctrine is the best, or even an efficient method for preserving those goals.[278]

The discretionary function provides flexibility to courts when evaluating the impact of a particular suit, whereas the *Feres* doctrine provides a blanket bar to service member and some civilian claims. Due to the special nature of medical malpractice suits, the *Feres* doctrine must be eliminated to produce consistent results across jurisdictions. Cases decided using the discretionary function exception would provide uniformity and predictability, which are necessary in this context because of the nation-wide interest at stake and the required mobility of the armed forces. The federal government can protect vital decision-making processes when necessary and maintain FELRTCA's protection for individual doctors without eliminating the legitimate claims of medical malpractice victims.[279] By using the discretionary function exception

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[275] *See supra* Part III.A.1.

[276] *See* Carpenter, *supra* note 213, at 251 (arguing that the proper construction of the FTCA's "combatant" exception language should include any activities in the scope of employment that a service member should have anticipated to be potentially harmful at the time they entered the service, including, but not limited to, war, hazardous duty assignments, and training exercises).

[277] *Id.*

[278] *See Privacy Lawsuits by Members of the Military: Hearing Before the Senate Judiciary Committee*, 109th Cong. (2002) (statement of Major General Nolan Sklute, Retired, Judge Advocate General, U.S. Air Force).

[279] *See generally* 28 U.S.C. § 2679 (2000).

analysis, courts would apply a uniform national standard to medical malpractice claims under the FTCA, and provide a remedy to victims not currently available in certain jurisdictions.

Some commentators criticize the discretionary function test because it has provided government immunity very broadly in other areas, but in the medical malpractice context, the discretionary function exception has not gone beyond its original boundaries. The discretionary function analysis should replace *Feres* in medical malpractice cases because the analysis effectively achieves the intent of both the FTCA and the *Feres* doctrine without unilaterally barring suits or adversely affecting military discipline. Although the legislative history does not indicate any congressional intent to prefer one exception over another, the discretionary function exception strikes the desired balance between governmental immunity and compensating victims and is therefore the better solution.

IV. CONCLUSION

The *Feres* doctrine has outlived its purpose. The three reasons that initially supported the doctrine's application are no longer valid because of the broad application to service member suits against the government. Particularly in the medical malpractice arena, service member suits do not create a discipline problem because military medical personnel are outside the service member's command. Additionally, providing quality care is the mission of military hospitals and, by allowing medical malpractice suits against the government, military hospitals will be forced to meet a standard of care when treating soldiers and their family members. Veteran's benefits do not provide adequate compensation for victims of medical malpractice and the government could offset any judgment amount from those benefits to eliminate the dual recovery problem. By enacting the FTCA and FELRTCA, Congress intended to protect government employees from individual liability by acting as an insurer against their negligence, and as such, should not differentiate between service member and civilian victims. Overruling the *Feres* doctrine is not equivalent to allowing all service member suits. The proper remedy is not to carve multiple exceptions out of an outdated and illogical doctrine, but to eliminate it and start anew.

The discretionary function exception to the FTCA is a fairer method than the *Feres* doctrine for establishing governmental immunity in medical malpractice cases and should be the only test applied in service member and civilian claims alike. Using the discretionary function analysis in medical malpractice cases would provide consistency and predictability in the law. The discretionary function exception can provide immunity for the government in sensitive areas where a concern for protecting vigorous administrative

and policy decision-making exists, while maintaining a cause of action for victims negligently injured by government employees. Application of the discretionary function exception in medical malpractice cases would allow service member suits without eroding governmental immunity in other contexts. The discretionary function exception is an appropriate solution to the *Feres* doctrine crisis and is a change that must be implemented by the same court from which this outdated doctrine came.

Jennifer L. Carpenter[280]

[280] J.D. Candidate 2004, William S. Richardson School of Law, University of Hawai'i at Manoa. I would like to thank my family for their support, not only on this article, but also throughout law school.

A Political Solution for a Legacy Under Attack: The Akaka Bill's Potential Effect on the Kamehameha Schools

I. INTRODUCTION

Round one went to the Kamehameha Schools[1] ("Kamehameha") in its epic battle to preserve its Hawaiians-only admission policy.[2] On November 17, 2003, United States Senior District Judge Alan Kay granted Kamehameha's motion for summary judgment against an anonymous minor who challenged the validity of Kamehameha's century-old admissions policy.[3] Acknowledging the "exceptionally unique circumstances" of the case, Judge Kay upheld the validity of the admissions policy, which gives preference to and addresses the needs of Native Hawaiian students.[4]

This ruling came one day before United States Chief District Judge David Ezra heard arguments in another case challenging Kamehameha's admissions policy. In August, 2003, seventh-grade student Brayden Mohica-Cummings ("Mohica-Cummings") and his mother, both non-Hawaiians, sued Kamehameha after it rescinded Mohica-Cummings's offer of admission.[5] Kamehameha discovered that Mohica-Cummings's mother falsely submitted records indicating that Mohica-Cummings had Hawaiian ancestry. Mohica-Cummings currently attends Kamehameha pursuant to a court order issued by

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[1] The Kamehameha Schools is a nonprofit charitable trust with an educational purpose. *See* Letter from L.B. Jerome, Chief, Exempt Organizations Branch of the Internal Revenue Service to Frank E. Midkiff et al., Trustees, Bernice Pauahi Bishop Estate (April 16, 1969) (*available at* http://www.ksbe.edu/newsroom/tax_info/exempt_ltr.html (last visited Mar. 12, 2003)). Collectively, the trust and the schools were previously known as "Kamehameha Schools/Bernice Pauahi Bishop Estate," but the organization is now referred to as the Kamehameha Schools. *See* Lynda Arakawa, *Supreme Court struggles as cases, criticism pile up*, HONOLULU ADVERTISER, Nov. 23, 2003, at A1, A6. For purposes of this article, the entire organization, including the school and the trust, will hereinafter be referred to as "Kamehameha."

[2] *See* Order Denying Plaintiff's Motion for Partial Summary Judgment With Respect to Declaratory and Injunctive Relief and Granting Defendants's Counter-Motion for Summary Judgment at 93, Doe v. Kamehameha Schools/Bernice Pauahi Bishop Estate et al. (No. 03-00316 ACK-LEK).

[3] *See id.* In a telling move, Judge Kay read a prepared ruling immediately after counsel for both Kamehameha and the plaintiff argued for and against cross motions for summary judgment. *See* David Waite, *Policy faces second challenge in court today*, HONOLULU ADVERTISER, Nov. 18, 2003, at A1, A2 [hereinafter "Second Challenge"].

[4] *See id.* at 1.

[5] *See* Rosemarie Bernardo, *50 Protest Ezra Ruling at Kamehameha Gate*, HONOLULU STAR BULL., Aug. 21, 2003, at A1, A12.

Judge Ezra in August.[6] The court order, the first of its kind, forced Kamehameha to enroll the non-Hawaiian student pending the court's ruling on the validity of Kamehameha's admissions policy.[7]

Kamehameha is a non-profit charitable trust funded by a multi-billion dollar endowment.[8] In 1884, Princess Bernice Pauahi Bishop ("Pauahi") willed the "bulk of her vast estate to be used for the creation and operation of [the]

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[6] David Waite, *School Admission Suit Hinges on 1866 Act*, HONOLULU ADVERTISER, Aug. 25, 2003, at A6 [hereinafter "Admission Suit"]. Judge Ezra granted Plaintiff Mohica-Cummings's Application for Temporary Restraining Order ("TRO") and granted a preliminary injunction in Plaintiff's favor allowing Mohica-Cummings to attend Kamehameha, pending the court's ruling on "the validity of [Kamehameha's] policy of racial preference." Order Granting Plaintiff's Application for Temporary Restraining Order and Preliminary Injunction at 2, 16, Mohica-Cummings v. Kamehameha Schools/Bernice Pauahi Bishop Estate et al. (No. 03-00441 DAE-BMK). Mohica-Cummings was admitted to Kamehameha for the 2003-2004 school year as a seventh grader. *Id.* at 2. Kamehameha discovered that Mohica-Cummings's mother, Kalena Santos, did not submit the birth certificate of her biological father, pursuant to Kamehameha's policies, and had, instead, submitted the birth certificate of her adoptive, Hawaiian father. *Id.* at 9. When she was unable to prove that she or her son were actually of Hawaiian ancestry, Kamehameha rescinded its offer of admission, and plaintiffs initiated a lawsuit. Waite, *Admission Suit*, *supra* note 6, at A6. Though the court ordered Kamehameha to admit Mohica-Cummings, the court clearly limited its ruling to the unique facts and circumstances of Mohica-Cummings's case, including his prior acceptance to a Kamehameha summer program, the late revelations regarding his application and birth certificate, and the fact that Hawai'i public schools had begun the school year three weeks prior to the rescinding of Kamehameha's offer. Order Granting Relief at 16, *Mohica-Cummings* (No. 03-00441 DAE-BMK).

[7] Order Granting Relief at 16, *Mohica-Cummings* (No. 03-00441 DAE-BMK). This court action ignited a familiar storm of controversy among Hawaiians and non-Hawaiians about Kamehameha's much debated admissions policy. Waite, *Admission Suit*, *supra* note 6, at A6. Kalani Rosell, a freshman from Wailuku, Maui, was the first non-Hawaiian student admitted into Kamehameha, through its admissions process, in over thirty years. Rick Daysog, *Holding On: Kamehameha struggles to adjust as courts redefine native entitlement rights*, HONOLULU STAR BULL., July 21, 2002, at A1, *available at* http://starbulletin.com/2002/07/21/news/story2.html (last visited Sept. 5, 2003) [hereinafter "Holding On"]. Kamehameha's trustees and Chief Executive Officer admitted Rosell, who began his freshman year at Kamehameha's Maui campus in August, 2002, after the list of eligible Native Hawaiian applicants had been exhausted. *Id.* This move sent shockwaves through the Hawaiian community, resulting in an uproar that "led the trust (Kamehameha) to reaffirm its Hawaiians-only preference admission system." Rick Daysog, *Suit brings warnings of dire effects*, HONOLULU STAR BULL., Aug. 21, 2003, at A12 [hereinafter "Suit brings warnings"]. The admission sparked an outburst of controversy similar to that occurring today with the admittance of Mohica-Cummings. *See* Bernardo, *supra* note 5, at A1, A12.

[8] *See generally* KAMEHAMEHA SCHOOLS, 2001-2002 ANNUAL REPORT 58-96 (2002), *available at* http://www.ksbe.edu (last visited Mar. 12, 2003) [hereinafter "Annual Report"]. Kamehameha's "Spending Policy sets a target of 4 percent of the five-year average market value of its endowment to be expended annually on its education mission." *Id.* at 64.

Kamehameha Schools."[9] Her will gives broad discretion to the trustees of her estate to use the endowment to fulfill her desire to educate Native Hawaiians.[10]

Today, Kamehameha enrolls approximately 4,835 Native Hawaiian students, ranging from preschool to the twelfth grade.[11] Kamehameha also serves an additional 5,199 students through its academic and cultural enrichment programs,[12] and assists thousands more in achieving their post-highschool educational goals through Kamehameha's college financial aid program.[13] Through its direct and indirect support, Kamehameha's impact on Native Hawaiians and the State of Hawai'i ("State") is extensive.

Kamehameha has fought an ongoing battle to protect its admissions policy, which promotes Pauahi's mission to educate Native Hawaiians and encourages their advancement.[14] While this battle has created a controversial

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[9] Answer of Defendants Constance H. Lau et al., to Complaint for Declaratory Relief, Injunctive Relief and Damages Filed June 25, 2003 at 2, John Doe v. Constance H. Lau et al. (No. 03-00316 ACK-LEK). Pauahi's lands, which financially support Kamehameha, were allocated by Kamehameha III to the chiefs of the Kamehameha line through the Great Māhele. Jon M. Van Dyke, *Why Kamehameha Schools Will Prevail in its Efforts to Limit Enrollment to Hawaiians Only*, HONOLULU STAR BULL., Aug. 24, 2003, at D1, D6. The Great Māhele of 1848 introduced Hawai'i to the western system of land tenure and ownership, which was previously unknown to the islands, and changed Hawai'i's centuries-old land system virtually overnight. Kamehameha Schools, The Lands, *at* http://www.ksbe.edu/endowment/lands/lands.html (last visited Aug. 25, 2003) [hereinafter "Kamehameha Schools, The Lands"]. Pauahi, the last direct descendant of King Kamehameha I and sole heir to the Kamehameha crown lands, received lands from her parents, her aunt, and her cousin, Princess Ruth Ke'elikōlani, totaling 378,500 acres. *Id.* Combined with her personal estate and that of her husband, Charles Reed Bishop, Pauahi's lands totaled 431,378 acres throughout Hawai'i. *Id.* Upon her death in 1884, Pauahi's "wish was that her Estate exist in perpetuity to provide for the creation and support of the Kamehameha Schools." *Id.* The income from these lands have provided financial support for Kamehameha since its establishment in 1887. *Id.*

[10] *See* Will of Princess Bernice Pauahi Bishop, *at* http://www.ksbe.edu/endowment/bpbishop/will/allwill.html (last visited Feb. 26, 2003) [hereinafter "Pauahi's will"].

[11] ANNUAL REPORT, *supra* note 8, at 11.

[12] *Id.* at 44.

[13] *Id.*

[14] *See* KAMEHAMEHA SCHOOLS, 2000-2015 STRATEGIC PLAN 16 (2000), *at* http://www.ksbe.edu/pubs/stratplan/SPFNL.pdf (last visited Mar. 12, 2003) [hereinafter "Strategic Plan"]. In his attempt to elaborate on Pauahi's intentions, Mr. Charles Reed Bishop ("Mr. Bishop"), Pauahi's husband, stated that:

> [I]n order that her own people might have the opportunity for fitting themselves . . . [to] be able to hold their own in a manly and friendly way, without asking any favors which they were not likely to receive, these schools [Kamehameha] were provided for, in which Hawaiians have the preference, and which she hoped they would value and take the advantages of as fully as possible.

Id. (citing 1 HANDICRAFT 1 (Honolulu, 1889)). Judge Kay found Mr. Bishop's statement to represent "the core of the schools' mission." Order Denying Plaintiff's Motion at 34, *John Doe* (No. 03-00316 ACK-LEK).

atmosphere surrounding Kamehameha, the fight to protect Kamehameha has not ended at shielding its admissions policy alone; Kamehameha and its underlying trust have been attacked on various other grounds as well.[15] In recent years, these attacks have materialized into several lawsuits or government actions that have also questioned Kamehameha's federal tax exemption[16] and threatened its ownership of certain profitable land holdings.[17]

The latest challenges to Kamehameha come at a time when Native Hawaiians are faced with a "national 'chess game' pitting the rights of native Hawaiians against opponents of racial entitlement programs."[18] The United States Supreme Court's landmark decision in *Rice v. Cayetano*[19] caused a significant shift in a legal landscape that had previously supported Native Hawaiian rights and programs and afforded Native Hawaiians the political status protections enjoyed by Native Americans and Alaska Natives.[20]

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[15] *See* John Tehranian, *A New Segregation? Race, Rice v. Cayetano, and the Constitutionality of Hawaiian-Only Education and the Kamehameha Schools*, 23 U. HAW. L. REV. 109, 111 (1999) (positing that Kamehameha faces questions regarding its Hawaiians-only admission policy and its federal tax exemption, especially after *Rice v. Cayetano*). *See also* Treena Shapiro, *Council approves forced conversion of condo leasehold*, HONOLULU ADVERTISER, Dec. 5, 2002, at A1, A13, *available at* http://the.honoluluadvertiser.com/article/2002/Dec/05/ln/ln01a.html (last visited May 5, 2003).

[16] *See* Evelyn Brody, *A Taxing Time for the Bishop Estate: What is the I.R.S. Role in Charity Governance*, 21 U. HAW. L. REV. 537 (1999) (The Internal Revenue Service threatened to revoke Kamehameha's federal tax-exemption if the existing trustees did not resign); *see* Tehranian, *supra* note 15, at 111. "[I]ndirect government sponsorship of racially discriminatory organizations such as [Kamehameha], through the granting of non-profit, tax-exempt status, can constitute state action impermissible under the Constitution." *Id.*

[17] *See* Shapiro, *supra* note 15, at A1, A13.

[18] Daysog, *Holding On*, *supra* note 7, at A1. John Goemans and Eric Grant, the attorneys for the anonymous minor and Mohica-Cummings, were also the attorneys for Big Island rancher Freddy Rice in the landmark case *Rice v. Cayetano*, 528 U.S. 495 (2000). Daysog, *Holding On*, *supra* note 7, at A1; *see also* Waite, *Admission Suit*, *supra* note 6, at A6 ("Lawyers John Goemans of the Big Island and Eric Grant of Sacramento, Calif., [are] the authors of two lawsuits filed in federal court in the past two months."). *Rice* invalidated the Hawaiians-only voting scheme for trustees of the Office of Hawaiian Affairs. *See Rice*, 528 U.S. at 524 (2000).

[19] 528 U.S. 496 (2000). The U.S. Supreme Court restricted its decision to the issues raised under the Fifteenth Amendment and purposely did not address the Fourteenth Amendment challenges raised by plaintiffs. *Id.*

[20] Randall W. Roth, *The Kamehameha Schools Admissions Policy Controversy*, 5 INT'L J. NOT-FOR-PROFIT LAW 1 (Sept. 2002), http://www.icnl.org/journal/vol5iss1/ar_rothprint.htm (last visited Aug. 25, 2003). Though narrow in application to the issue of voting rights, the *Rice* decision preceded a deluge of legal challenges to Native Hawaiian programs and entitlements that have the Hawaiian community fighting a seemingly endless battle to defend Native Hawaiian rights. *See* Daysog, *Holding On*, *supra* note 7, at A1. The focus on *Rice* propelled the status of Native Hawaiians into the national spotlight. *See* John Heffner, Note, *Between Assimilation and Revolt: A Third Option for Hawai'i as a Model for Minorities World-Wide*, 37 TEX. INT'L L.J. 591, 599 (2002). Many used the decision as a "springboard to bring a 'color

Amidst this adverse setting, the search for new ways to protect Kamehameha's 116-year old trust and its beneficiaries is a daunting task for Native Hawaiians.[21] In 2000, on the heels of *Rice*, Hawai'i Senator Daniel Akaka introduced to the United States Senate a measure currently known as the Native Hawaiian Recognition Act of 2003, also commonly referred to as the Akaka Bill.[22] This bill seeks to include Native Hawaiians in the federal policy of self-determination for Native peoples, extending to Native Hawaiians a "status similar to that of other Native Americans and Alaska Natives within the United States."[23] If passed, the bill will "provide a process for the recognition by the United States of a Native Hawaiian governing entity for purposes of continuing a government-to-government relationship."[24] The bill will also increase protections for Native Hawaiian rights and entitlements.[25] Hailed as both a blessing and a curse for the Hawaiian community, the controversial bill offers some answers to the many legal challenges that threaten Kamehameha's mission to educate Native Hawaiians and its land and financial base.[26]

Preserving the valuable institution of Kamehameha, as it currently exists, is a priority for Native Hawaiians and the State.[27] This article explores the

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blind Constitution' once and for all to Hawai'i." *Id.* at 601. To that end, shortly after the *Rice* decision made headlines, two lawsuits were launched challenging the constitutionality of Hawaiians-only programs: *Barrett v. State of Hawai'i* (No. 00-00645 DAE/KSC) and *Carroll v. Nakatani* (No. 00-00641 DAE). *See* R. Hōkūlei Lindsey, Comment, *Akaka Bill: Native Hawaiians, Legal Realities, and Politics as Usual*, 24 U. HAW. L. REV. 693, 706-707 (2002) ("Immediately following the U.S. Supreme Court's decision in *Rice*, several other cases were filed that were intended to build upon the ruling in *Rice* and broaden its impact to all Native Hawaiian entitlements."). The Ninth Circuit consolidated these lawsuits. *See Carroll v. Nakatani*, 342 F.3d 934 (9th Cir. 2003). Both plaintiffs claimed that Article XII of the Hawai'i Constitution, and its implementing statutes, violated the Equal Protection clause of the Fourteenth Amendment "because it restrict[ed] benefits to only those classified as 'native Hawaiians' or 'Hawaiians.'" *Id.* at 938. The Ninth Circuit affirmed the District Court of Hawai'i's dismissal of both cases due to the plaintiffs's lack of standing. *Id.* at 948. While *Carroll* was on appeal, another lawsuit was filed against the Department of Hawaiian Homelands ("DHHL") and the Office of Hawaiian Affairs ("OHA"). *See Arakaki v. Lingle* (No. 02-00139 SOM-KSC). The plaintiffs, non-Hawaiian, Hawai'i residents, seek to enjoin the State of Hawai'i from appropriating state tax revenue for the Hawaiian Home Lands lease program administered by the DHHL and for programs administered by the OHA. *Id.*

[21] *See* Roth, *supra* note 20.

[22] S. 344, 108th Cong. (2003).

[23] *See* Lindsey, *supra* note 20, at 714-16.

[24] S. 344, § 3(b).

[25] *See* Lindsey, *supra* note 20, at 718.

[26] Christine Donnelly & Mary Adamski, *Hawaiian Rights Bill Introduced: It is Labeled Both as Blessing, Curse*, HONOLULU STAR BULL., July 21, 2000, at B1.

[27] Kamehameha plays "an important role in our community by promoting and protecting Hawaiian culture." Van Dyke, *supra* note 9, at D6; *see* Roth, *supra* note 20 ("The trustees are

potential effect of the Akaka Bill on Kamehameha and discusses ways in which the Akaka Bill may contribute to the preservation of Kamehameha and its trust. As the bill sets the stage for a Native Hawaiian government ("NHG") to be established by the Hawaiian community, this article analyzes the potential interaction between an NHG and Kamehameha. The establishment of an NHG and the federal recognition of Native Hawaiians substantially fortifies Kamehameha's legal position in protecting its programs and policies and preserving the trust corpus that supports Kamehameha.

Part II discusses the background of Kamehameha, its admissions policy and federal tax exemption. This section further discusses the legal challenges to Kamehameha and explores the main elements of the Akaka Bill. Part III analyzes the potential effect of the Akaka Bill and an NHG on Kamehameha's admissions policy, federal tax-exemption and leasehold conversion issues. This section suggests potential solutions to those issues and sets forth ways to implement these solutions. The analysis presumes that Kamehameha remains private and independent of an NHG. Finally, Part IV concludes by positing that Kamehameha is an important Native Hawaiian institution that must be preserved, and that the Akaka Bill provides new legal and political protections to aid in that preservation.

II. BACKGROUND ON KAMEHAMEHA, THE ATTACKS ON KAMEHAMEHA, AND THE AKAKA BILL

A. Kamehameha: An Influential Institution at Risk

Kamehameha is an extraordinary institution supported by a trust founded by Pauahi in 1884.[28] Established at a time when Native Hawaiians were a disenfranchised people suffering from the effects of foreign immigration, Kamehameha quickly rose to become an advocate and leader in the education

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planning a series of community gatherings both [in Hawai'i] and on the mainland to discuss [Kamehameha] issues. How all of this gets resolved will shape the future of the single most important private institution in the [S]tate of Hawaii."). State Attorney General Mark Bennett filed an amicus brief with the United States District Court, District of Hawai'i, supporting Kamehameha's admissions policy in the *John Doe* case. Curtis Lum, *State Supports Kamehameha in admissions suit*, HONOLULU ADVERTISER, Nov. 7, 2003, at B3. In his brief, Bennett argued that "preferences for Native Hawaiians, which Congress itself recognizes in a variety of statutes, are political, not racial." *Id.* He further argued that "'[i]t would be ludicrous to believe that a Congress that would authorize funding for Kamehameha Schools precisely because it specifically serves Native Hawaiians would at the same time deem its Native Hawaiian admissions preference policy illegal.'" *Id.*

[28] *See* Pauahi's will, *supra* note 10.

and advancement of Native Hawaiians.[29] This section discusses the founding of Kamehameha, its commitment to Native Hawaiians and non-Hawaiians, and further discusses Kamehameha's admissions policy and federal tax-exemption.

1. Kamehameha: A princess's legacy

Pauahi, the last direct descendant of King Kamehameha I,[30] declined King Kamehameha V's[31] dying wish that she succeed him to the throne.[32] Instead of ruling her people, she chose to serve them through the legacy of Kamehameha.[33] In 1884, she willed the vast land holdings and assets that she had accumulated over her lifetime, totaling approximately 431,378 acres and various homes and estates throughout Hawai'i, to establish Kamehameha.[34]

The entire organization of Kamehameha is a non-profit charitable trust[35] with a mission to educate and "improve the capability and well-being" of Native Hawaiians.[36] Kamehameha's mission is "inspired by" and seeks to remedy "the deprivations suffered by Hawaiians both prior and subsequent to

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[29] *See* Letter from Colleen I. Wong, Acting Chief Executive Officer, Kamehameha Schools, to the Kamehameha 'Ohana (August 27, 2003) (on file with the author) ("Kamehameha has been a leader in educating Hawaiians and preserving our indigenous culture ... [by] provid[ing] educational opportunities that help contribute to better lives for students and their families.").

[30] *See* Richardson v. City and County of Honolulu, 124 F.3d 1150, 1154 (9th Cir. 1997). King Kamehameha I was Pauahi's great-grandfather and the first king of the Hawaiian Islands who is credited with uniting the islands under one rule and establishing the Kingdom of Hawai'i. *Id. See also* GEORGE H.S. KANAHELE, PAUAHI x-xi (1986) ("Bernice Pauahi Bishop, the great-grandaughter of Kamehameha I ... founded [Kamehameha] not to honor herself, but to honor the ideals and achievements [that Kamehameha I] and his successors represented.").

[31] *See* KANAHELE, *supra* note 30, at 112-17. King Kamehameha V, Lot Kamehameha, ruled the Hawaiian Kingdom for nine years. *Id.* at 113. He offered the throne to Pauahi in 1872 when it became apparent that he was dying from a form of pleurisy. *Id.* at 107, 110.

[32] *Id.* at 112.

[33] *Id.* at 172.

[34] *See* Kamehameha Schools, The Lands, *supra* note 9.

[35] On February 9, 1939, the Internal Revenue Service ruled that Kamehameha was exempt from federal income tax under § 101(6) of the Internal Revenue Code ("Code") of 1939, the predecessor of § 501(c)(3) of the Code. *See* Letter from L.B. Jerome to Frank E. Midkiff, *supra* note 1. The 1939 ruling was later affirmed on November 10, 1952 and on April 16, 1969. *See id.* It was most recently reaffirmed in 2000. *See* Letter from Marvin Friedlander, Manager, Technical Group 1 Exempt Organizations, to Interim Trustees, Kamehameha Schools/Bernice Pauahi Bishop Estate (Feb. 23, 2000) (on file with author) ("[W]e hereby reaffirm that [Kamehameha] is an organization exempt from federal income tax under section 501(a) of the Code as an organization described in section 501(c)(3) and as an educational organization described in section 170(b)(1)(A)(i)"); *see also* Oswald Stender, *Hawaiian Preference was the Princess' Gift to Her People*, HONOLULU STAR BULL., Sept. 29, 2002, at D1, D6.

[36] Defendant's Answer at 2, *John Doe* (No. 03-00316 ACK-LEK).

the involuntary loss of their right of self-governance in 1893."[37] With an endowment portfolio valued at approximately $6 billion, Kamehameha is one of the wealthiest trusts of its kind[38] and is the largest independent school in the United States.[39] In fulfilling its mission, Kamehameha plays a vital role in perpetuating the Hawaiian culture and supporting Native Hawaiians by providing them with invaluable services and educational opportunities.[40]

Above and beyond its commitment to Native Hawaiian students, Kamehameha also supports the education of non-Hawaiian students.[41] Kamehameha provides direct support to the State Department of Education by offering the State's public schools resources, funding, curriculum, materials and staff development.[42] Kamehameha also supports the State's charter public schools by matching a minimum of $1 for every $4 per pupil given to the charter public schools by the State.[43] Most importantly, the funding and other support given by Kamehameha to the State are expended not only for the benefit of Native Hawaiian students, but also for the benefit of non-Hawaiian students.[44]

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[37] *See id.* In 1893, the Hawaiian kingdom was illegally overthrown by the United States. *See* Annmarie M. Liermann, Comment, *Seeking Sovereignty: The Akaka Bill and the Case for the Inclusion of Hawaiians in Federal Native American Policy*, 41 SANTA CLARA L. REV. 509, 516-17 (2001) (explaining that Queen Lili'uokalani abdicated her throne to avoid bloodshed when United States Minister John Stevens positioned 200 United States Marines in front of 'Iolani Palace to prevent the Queen from introducing a new constitution that would damage the sugar industry's interests).

[38] Daysog, *Suit brings warnings*, *supra* note 7, at A12.

[39] *See* Kamehameha Schools, Legacy of a Princess, *at* http://www.ksbe.edu (last visited Aug. 25, 2003).

[40] *See generally* ANNUAL REPORT, *supra* note 8, at 10-55. Though predominantly noted for its college preparatory campuses for children of Hawaiian ancestry, Kamehameha also supports the education of Native Hawaiians and non-Native Hawaiians beyond its campuses. *See id.* This support is achieved through Kamehameha's extension education programs, funding for the State of Hawai'i's charter schools, and scholarships for pre-school through college students. *See id.* As of September 2001, combined enrollment of Kamehameha's three college preparatory campuses was 4,835 students, with 3,192 students at the Kapālama campus on O'ahu, 272 students at the Pukalani campus on Maui, and 340 students at the Kea'au campus on Hawai'i island. *Id.* at 11.

[41] *See* Roth, *supra* note 20.

[42] ANNUAL REPORT, *supra* note 8, at 7.

[43] *Id.* The State legislature recently enacted Act 002, which allows non-profit organizations to partner with the Department of Education to "manage and operate a new century conversion charter school as a division of the nonprofit organization, in which the charter school's local school board would consist of the board of directors of the nonprofit organization." Act of Apr. 4, 2002, No. 002, 21st Leg., Reg. Sess. (2002), *reprinted in* Haw. Sess. Laws 002 [hereinafter "Act 002"].

[44] Kamehameha's Ho'olako Like program, an initiative designed to implement Act 002, requires charter schools to serve student populations with at least 70% or more students of Hawaiian ancestry. Email from Council for Native Hawaiian Advancement to cnha@

2. The admissions policy: Preference for Native Hawaiians

Despite the many benefits Kamehameha offers to Native Hawaiians and the State, Kamehameha's preferential admissions policy has been a legal and political hot topic for years. The lawsuits that have recently emerged have again raised questions regarding the validity of the policy. While the focus of the lawsuits has been to characterize the policy as racially discriminatory, a proper understanding of the admissions policy must take into account Pauahi's intentions and the status of Native Hawaiians.

The first trustees of Kamehameha determined that Native Hawaiians should be given preference for admission to Kamehameha.[45] While Pauahi's will only directed her trustees to educate orphans and other indigents, giving preference to pure or part-Hawaiians, the will also gave broad powers to the trustees to develop Kamehameha's admissions policy.[46] The first trustees, under the direction of Pauahi's husband and trustee Charles Reed Bishop ("Mr. Bishop"), expanded the will's devotion to Native Hawaiian students to include all Hawaiians "because they believed that was [Pauahi's] intention."[47]

Through her will, Pauahi attempted to remedy the past social wrongs and injustices suffered by Hawaiians.[48] In his address at the first Kamehameha Schools Founder's Day Ceremony in December 1889, Mr. Bishop described Pauahi's heavy heart "when she saw the rapid diminution of the Hawaiian people going on decade after decade and felt it was largely the result of their ignorance."[49] She wanted her people to have the opportunity to "be able to

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hawaiiancouncil.org (March 3, 2003, 10:41:00 PST) (on file with author). As such, not all students must be of Hawaiian ancestry, and the program benefits students of other ancestries who are a part of the State's public charter school system. *See id.*

[45] *See* STRATEGIC PLAN, *supra* note 14, at 16.

[46] *See* Roth, *supra* note 20; *see* Pauahi's will, *supra* note 10.

[47] STRATEGIC PLAN, *supra* note 14, at 16. Mr. Bishop wrote that:

> [I]t was intended that the Hawaiians having aboriginal blood would have preference, provided that those of suitable age, health, character, and intellect should apply in number sufficient to make up a good school.

Id. (citing 1 HANDICRAFT 1 (Honolulu, 1889)).

[48] *See* Letter from Colleen I. Wong to Kamehameha 'Ohana, *supra* note 29.

[49] STRATEGIC PLAN, *supra* note 14, at 16. During Pauahi's lifetime and at her death, Hawaiians were "a people in need of educational leadership to move them into the twentieth century," from "an appalling condition, being physically, morally, and economically depressed." Judge Robert Mahealani M. Seto & Lynne Marie Kohm, *Of Princesses, Charities, Trustees, and Fairytales: A Lesson of the Simple Wishes of Princess Bernice Pauahi Bishop*, 21 U. HAW. L. REV. 393, 400 (1999). In the year that Pauahi was born, the Native Hawaiian population was 124,449, having declined since the first western contact in 1778 from over 300,000. *Id.* At the time of her death, the Native Hawaiian population had dwindled to a mere 40,014. *Id.* Many Native Hawaiians were highly susceptible to the new diseases brought by immigrating foreigners due to a lack of opportunity to develop the appropriate immunities. *Id.* at 401. Today,

hold their own in a manly and friendly way, without asking any favors which they were not likely to receive."[50] Kamehameha, "in which Hawaiians have the preference," was established to provide this opportunity in the hope that Hawaiians would value and make the most of the educational advantages Pauaki gave them.[51]

Today, "Native Hawaiians continue to suffer from economic deprivation, low educational attainment, poor health status, substandard housing, and social dislocation."[52] While Kamehameha has room for 4,800 students in its campus programs, over 70,000 Native Hawaiian children are enrolled in grades kindergarten through twelve throughout the State.[53] Kamehameha "has made great strides over the years in expanding its capacity to provide an education for thousands of" Native Hawaiian children, but has yet to meet the needs of all Native Hawaiians who seek admittance.[54] Until the time that Kamehameha can provide all Native Hawaiian students with educational opportunities, the admission preference will remain in place to "overcome the manifest imbalance in socioeconomic and educational" disadvantages of Native Hawaiians.[55]

B. Attacking the Will of a Princess

Kamehameha has been a prime target for legal challenges over the century of its existence. These challenges have mainly focused on Kamehameha's admissions policy, federal tax-exemption and the leasehold conversion of its

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Hawaiians are consistently counted among the lowest socioeconomic category and have, for the most part, been unsuccessful in Hawai'i's public school system that insufficiently addresses the cultural challenges that Hawaiian students face. *See* Daysog, *Suit brings warnings*, *supra* note 7, at A12.

[50] STRATEGIC PLAN, *supra* note 14, at 16 (discussing the first Founder's Day address by Charles Reed Bishop). Coupled with the foreign diseases, many Native Hawaiians were also "psychologically traumatized by their own education and economic inadequacies to face the new powerful class of American sugar planters." Seto & Kohm, *supra* note 49, at 401.

[51] STRATEGIC PLAN, *supra* note 14, at 16.

[52] Order Denying Plaintiff's Motion at 19, *John Doe* (No. 03-00316 ACK-LEK) (citing UNITED STATES DEP'T. OF JUSTICE & UNITED STATES DEP'T. OF THE INTERIOR, FROM MAUKA TO MAKAI: THE RIVER OF JUSTICE MUST FLOW FREELY 1-2 (2000)). *See also* SHAWN MALIA KANA'IAUPUNI & KOREN ISHIBASHI, KAMEHAMEHA SCHOOLS POLICY ANALYSIS AND SYSTEM EVALUATION, LEFT BEHIND? THE STATUS OF HAWAIIANS STUDENTS IN HAWAI'I PUBLIC SCHOOLS 5 (2003) ("By virtually every measure of well-being, Hawaiians are among the most disadvantaged and marginalized ethnic groups in the State of Hawai'i, with disproportionately high rates of unemployment, poverty, health risks, disease, adolescent risk behavior, child abuse and neglect, arrests, and incarceration."). Native Hawaiians students have also "languished in the state public school system." *Id.*

[53] Order Denying Plaintiff's Motion at 38-9, *John Doe* (No. 03-00316 ACK-LEK).

[54] *Id.* at 80.

[55] *Id.* at 82.

trust lands. The most recent legal actions have sought to invalidate Kamehameha's admissions preference for Native Hawaiians and to have the courts declare the preference a racially discriminatory, illegal practice.[56] Not only would such a definition jeopardize Kamehameha's federal tax-exemption, but it would "ignore[] centuries of injustice to the Hawaiian people" and overlook Kamehameha's mission to overcome these injustices and provide Hawaiians with educational and cultural advancement opportunities.[57] At the same time, Kamehameha has also faced recent legal action focused on the condemnation of Kamehameha's trust lands by the City and County of Honolulu ("CCH") for public purposes.[58] Though undecided as of yet, all of these challenges threaten the benefits that Pauahi sought to provide for her people through Kamehameha.

1. The legal link between the Kamehameha's admissions policy and federal tax-exemption

The two lawsuits challenging Kamehameha's admissions policy claim that any preference for Native Hawaiians constitutes illegal discrimination on the basis of race in violation of the 1866 Civil Rights Act.[59] Judge Kay dispelled this claim in his November, 2003 ruling, by ruling that Kamehameha's admissions policy and program constitute a "remedial race-conscious" action plan with a legitimate justification.[60] Despite this ruling, however, the plaintiffs are likely to appeal,[61] and the admissions policy remains vulnerable to a higher court's review.

As the fate of Kamehameha's admissions policy remains pending, the fate of Kamehameha's federal tax-exemption hangs in the balance along with it.

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[56] Waite, *Admission Suit*, *supra* note 6, at A6.

[57] Daysog, *Holding On*, *supra* note 7, at A1.

[58] *See* Shapiro, *supra* note 15, at A1, A13.

[59] Defendant's Answer at 3, *John Doe* (No. 03-00316 ACK-LEK). Both plaintiffs allege that the admissions policy is a violation of the 1866 Civil Rights Act, codified at 42 U.S.C. § 1981. *Id.*

[60] *See* Order Denying Plaintiff's Motion at 92, *John Doe* (No. 03-00316 ACK-LEK). As of November 23, 2003, Judge Ezra has not released his ruling in the case of Mohica-Cummings.

[61] *See* Waite, *Second Challenge*, *supra* note 3, at A1, A2 ("Goemans, meanwhile, said he expects the matter to go to the federal Ninth Circuit Court of Appeals. Goemans, who challenged Hawaiians-only voting for trustees to the state Office of Hawaiian Affairs, received adverse verdicts in federal court here and at the Ninth Circuit Court of Appeals before prevailing in the U.S. Supreme Court in February 2000."). *See also Kamehameha court win just start of story*, HONOLULU ADVERTISER, Nov. 18, 2003, at A6 ("It is likely that this case (along with a similar one being heard today before Judge David Ezra) will eventually end up before the U.S. Supreme Court. That was the pattern in an earlier lawsuit against a Hawaiians-only voting requirement for the Office of Hawaiian Affairs.").

As a charitable nonprofit educational trust, Kamehameha is not subject to federal income taxes.[62] A ruling declaring Kamehameha's admissions policy to be racially discriminatory could directly impact the status of Kamehameha's federal tax-exemption.[63]

Under § 501(a) of the Internal Revenue Code, qualifying § 501(c)(3) charitable organizations are exempted from federal income tax, federal social security ("FICA") tax, and federal unemployment ("FUTA") tax.[64] To maintain an exemption, the Internal Revenue Service requires a private school exempted from federal income tax to annually certify that its admissions policies are non-racially discriminatory.[65] Although in the past Kamehameha has consistently met this requirement,[66] failure to meet the certification standards, due to an adverse court ruling in the pending suits, could result in the revocation of Kamehameha's federal tax-exempt status.[67]

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[62] *See* Letter from Marvin Friedlander to Interim Trustees, *supra* note 35.

[63] Some experts assert that an "institution ceases to be private and exposes any racially discriminatory practices to constitutional challenge when it accepts the benefit of a tax exemption." *See* Roth, *supra* note 20.

[64] Bob Jones University v. Simon, 416 U.S. 725, 727 (1974). To qualify for a tax exemption, an organization must comply with the language of § 501(c)(3) and obtain a letter from the IRS declaring that the organization qualifies under § 501(c)(3). *Id.* at 728. Once the organization obtains this letter, it is listed on the IRS's "Cumulative List of Organizations" which notifies the public of organizations that are federally tax-exempt. *Id.* at 728-29. Kamehameha has been tax-exempt since 1939, with its most recent letter from the IRS having been reissued in 2000. *See* Letter from L.B. Jerome to Frank E. Midkiff, *supra* note 1; *see also* Letter from Marvin Friedlander to Interim Trustees, *supra* note 35.

[65] Rev. Proc. 75-50, 1975-49 I.R.B. 46. Under this procedure, every organization that claims an exemption from federal income tax under section 501(c)(3) of the Internal Revenue Code and operates or controls a private school must file a certification of racial nondiscrimination. *Id.* A racially nondiscriminatory policy with regard to students means that the school:

> [A]dmits students of any race to all the rights, privileges, programs, and activities generally accorded or made available to students at that school and that the school does not discriminate on the basis of race in [the] administration of its education policies, admissions policies, scholarship and loan programs, and athletic and other school-administered programs.

Id. at § 3.01.

[66] *See* Roth, *supra* note 20.

[67] Opponents to Kamehameha's admissions policy often attempt to draw similarities between Kamehameha and *Bob Jones*. *See* Daysog, *Holding On*, *supra* note 7, at A1. Kamehameha's admissions policy, however, can be distinguished from *Bob Jones*, which depicts the revocation of a private schools' federal tax-exemption. *Bob Jones*, 416 U.S. at 727. Bob Jones University was a private institution that qualified for a federal tax-exemption under § 501(c)(3) of the Internal Revenue Code. *Id.* The privately funded university was issued an Internal Revenue Service ("IRS") ruling letter in 1942 declaring it as a federal tax-exempt organization. *Id.* at 735. In 1970, the IRS announced that it would no longer extend federal tax-exempt status to private school, 501(c)(3) organizations that employed racially discriminatory admissions policies. *Id.* Upon the IRS's request for proof of nondiscriminatory admissions

If Kamehameha's federal tax-exemption were revoked, some speculate that Kamehameha would have to pay out an initial $1 billion in taxes upon revocation.[68] Kamehameha could potentially be subjected to retroactive taxes as well.[69] Having to pay subsequent federal income taxes, FICA and FUTA taxes could dramatically diminish Kamehameha's annual operating budget, which supports its three campuses, extension, and financial aid programs, by a catastrophic forty percent.[70]

2. *Leasehold conversion: The forced sale of Kamehameha's lands*

While the challenges to Kamehameha's admissions policy and federal tax-exemption await resolution, Kamehameha must also fight a battle to protect its trust lands and assets that financially support Kamehameha's schools and programs. Kamehameha and other large and small landowners in Hawai'i are not strangers to the CCH's attempts to force the sale of their lands,[71] and the problem has once again risen as a substantial threat to Kamehameha's land

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policies, Bob Jones notified the IRS that some of its policies were racially discriminatory. *Id.* In September 1971, the IRS took administrative steps to revoke the University's federal tax-exempt status. *Id.* The United States Supreme Court affirmed the revocation of Bob Jones University's tax-exempt status because the "institution's purpose is 'so at odds with the common community conscience as to undermine any public benefit that might otherwise be conferred.'" Van Dyke, *supra* note 9, at D6. The public benefit that Kamehameha confers to Native Hawaiians and the people of the State of Hawai'i, as evidenced by many voices of support for Kamehameha and its admissions policy, is not "so at odds with the common community conscience" as to undermine its benefit to Hawai'i. Van Dyke, *supra* note 9, at D6. Furthermore, Kamehameha's preference for Native Hawaiians is "aimed at helping Hawaiians overcome socio-economic disadvantages and is distinguishable from admission policies used by schools established by white segregationists in the South to deliberately circumvent federal school desegregation programs." Waite, *Admission Suit*, *supra* note 6, at A6. Thus, Kamehameha's admissions policy can hardly be compared to the type of "invidious discrimination" practiced by Bob Jones University to keep African Americans out of the school. *Id.*

[68] *See* Roth, *supra* note 20.

[69] *Id.*

[70] *Id.*

[71] The Residential Condominium Cooperative Housing and Residential Planned Development Leasehold Conversions, HONOLULU, HAW., REV. ORDINANCES ch. 38 (1991), Ordinance 91-95, enacted by the City and County of Honolulu, enables the CCH to:

> [A]cquire, either by voluntary purchase or through exercise of power of eminent domain, the fee simple interest in land situated underneath condominium developments from the fee owners of the land in order to convey fee simple title to the owner-occupants of the condominium units, who, prior to the City's acquisition, leased the fee interests from the fee owners.

Coon v. City and County of Honolulu, 98 Hawai'i 233, 237 n.1, 47 P.3d 348, 352 (2002). *See also* Ordinance 91-95.

and revenue base.[72] In December 2002, the CCH's City Council authorized the CCH to condemn Kamehameha's beachfront property beneath the 196-unit Kāhala Beach Apartments and force the trust to sell its fee interest to the lessee owners of the condominiums.[73] In response to a request by the thirty-one lessee owners,[74] the CCH instructed its Department of Corporation Counsel to condemn the coveted property located near the Wai'alae Country Club and the Kāhala Mandarin Oriental Hawai'i Hotel.[75] This is not the first time Kamehameha's lands have been condemned, nor is it likely to be the last.[76]

The revenue generated from the Kāhala Beach Apartments provides Kamehameha with a stable income of $3.2 million per year.[77] Kamehameha uses the income to support such programs as preschool financial aid, high school and college financial aid, and funding for more than 4,500 students in the State's charter public schools.[78] The entire property is valued at $50 million and is located in an area zoned for resorts, which has a higher earning capacity than does a residential zone.[79] The forced sale of these condominiums would have the immediate effect of a steady $3.2 million per year loss, but more importantly would result in serious, long-term consequences to Kamehameha's earning potential.[80]

The steady conversion and forced sale of Kamehameha's lands over the years has eroded the school's vast landholdings and continues to jeopardize Kamehameha's revenue base.[81] Weighing the benefits of all the programs

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[72] Shapiro, *supra* note 15, A1, A13.

[73] KAMEHAMEHA SCHOOLS, IMUA 12 (2003) [hereinafter "Imua"]. Two resolutions heard at the same hearing condemned lands owned by the First United Methodist Church and another parcel owned jointly by the Kekuku Family Trust and the Sisters of the Order of the Sacred Heart. *Id. See* Steve Jefferson, *City Suing Estate for Sale of Condo Fee*, PACIFIC BUS. NEWS, Jan. 27, 2003, *available at* http://pacific.bizjournals.com/pacific/stories/2003/01/27/story1.html (last visited Feb. 20, 2003).

[74] *Coon*, 98 Hawai'i at 240 n.1, 47 P.3d at 355. Condominium owners "may convert their leased fee interests into fee simple interests appurtenant to their condominium units." *Id.* (citing HAW., REV. ORDINANCES ch. 38 (1991)). The ordinance authorized the CCH's Department of Housing and Community Development to draft administrative rules to "facilitate the lease-to-fee conversion process." *Id.*

[75] *IMUA*, *supra* note 73, at 12.

[76] In 1995, Kamehameha trustees filed suit on behalf of the trust to declare CCH Ordinance 91-95 unconstitutional. *See* Richardson v. City and County of Honolulu, 124 F.3d 1150 (9th Cir. 1997). The Ninth Circuit Court of Appeals ruled against Kamehameha and upheld the validity of the ordinance. *Id.*

[77] *IMUA*, *supra* note 73, at 13.

[78] *Id.*

[79] Jefferson, *supra* note 73.

[80] *See IMUA*, *supra* note 73, at 13.

[81] *See id.* Today, Kamehameha owns less than 200 single-family and 5,000 multi-family units. Id. Mandatory conversions and voluntary sales over the years have drastically reduced Kamehameha's former holdings of 14,000 single-family units and 13,000 condominiums and

these revenues support (e.g., Kamehameha's three campuses, financial and technical support for State charter schools), any diminution of Kamehameha's land base and earning potential would adversely affect all who benefit from Pauahi's generosity, including the State of Hawai'i.

C. Federal Recognition and the Akaka Bill: The Future of Native Hawaiians in the Hands of the Federal Government

As legal challenges against Kamehameha continue, a potential political solution to its legal difficulties is currently being debated in the United States Congress. After years of attempting to get the Akaka Bill passed, and numerous revisions and rewrites, the bill stands on the verge of determining the future of Native Hawaiians and the State of Hawai'i.[82] Although an NHG is still merely a construct in the minds of scholars and Native Hawaiian rights activists and supporters, it may offer a political alternative to the legal solutions Kamehameha has been seeking from the judicial system.

In the 1970s, Congress began to include Native Hawaiians in legislation relating to Native Americans without formally recognizing Native Hawaiians as a political class.[83] The policy of analogizing Native Hawaiians to Native Americans, however, created legal disparities because Native Hawaiians were not federally recognized as a political class.[84] Since the inclusion of Native Hawaiians in legislation relating to Native Americans, courts have struggled with the issue of what standard of judicial review to apply to legislation and programs establishing preferential treatment for Native Hawaiians.[85]

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apartments throughout the State. *Id.* at 12-13.

[82] The bill was first introduced to the United States Senate in 2000 as Senate Bill 2899. *See* S. 2899, 106th Cong. (2000). *See also* Liermann, *supra* note 37, at 511. It failed to pass in the Senate due to Republican objections, and was reintroduced in 2001 as Senate Bill 1783. S. 1783, 107th Cong. (2001); *see also* Liermann, *supra* note 37, at 511. It failed to pass again, and was most recently reintroduced on February 11, 2003 as Senate Bill 344. *See* S. 344, 108th Cong. (2003). The bill is a controversial subject in Hawai'i, with some supporting it while others oppose it on the premise that Hawaiians should instead seek complete independence from the United States. Liermann, *supra* note 37, at 511.

[83] Liermann, *supra* note 37, at 523. Despite this legislation and the Apology Resolution of 1993, in which former President Bill Clinton publicly apologized to Native Hawaiians for the overthrow of the Hawaiian Kingdom, *Id.* at 509-10, Congress does not recognize Native Hawaiians as a political class similar to Native Americans and Alaska Natives. *Id.* at 523.

[84] *Id.*

[85] *Id.* at 520. This judicial review is in relation to constitutional challenges to this preferential treatment for Native Hawaiians.

1. The levels of judicial review and political classification for Native Americans, Alaska Natives and Native Hawaiians

The United States Supreme Court, in *Grutter v. Bollinger*,[86] reaffirmed that "all racial classifications imposed by a government 'must be analyzed by a reviewing court under strict scrutiny.'"[87] This strict scrutiny approach has evolved into the test for "judging (and invalidating) statutes that disadvantage racial minorities through the overt use of racial criteria."[88] In order for racial classifications to "pass constitutional muster, they must be justified by a compelling governmental interest and must be 'necessary . . . to the accomplishment' of their legitimate purpose."[89]

Congress treats federally recognized Native Americans and Alaska Natives as political classes rather than racial classes.[90] Thus, courts review legislation and programs giving federally recognized Native Americans and Alaska Natives preferential treatment under the rational basis standard of review.[91] This less stringent level of scrutiny only requires that a government policy or action be reasonably and rationally related to a legitimate government goal.[92] Accordingly, the United States Supreme Court held in *Morton v. Mancari*[93] that "as long as . . . special treatment can be tied rationally to the fulfillment of Congress' unique obligation toward . . . Indians, such legislative judgments will not be disturbed."[94] In *Mancari*, the Court employed a rational-basis level of scrutiny in reviewing the Bureau of Indian Affairs' hiring preference for Native Americans because the preference "was not a racial classification

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[86] __ U.S. __, 123 S. Ct. 2325 (2003) (upholding the University of Michigan Law School's admissions policy that considered race as a factor of admission). The court deferred to the "Law School's educational judgment that . . . diversity is essential to its education mission." *Id.* at __, 123 S. Ct. at 2339.

[87] *Id.* at __, 123 S. Ct. at 2337 (quoting Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 227 (1995)). Eloquently put, "strict scrutiny is not 'strict in theory, but fatal in fact.'" *Id.* at __, 123 S. Ct. at 2338 (quoting *Adarand*, 515 U.S. at 237).

[88] DANIEL A. FARBER ET AL., CASES AND MATERIALS ON CONSTITUTIONAL LAW: THEMES FOR THE CONSTITUTION'S THIRD CENTURY 134 (2d ed. 1998).

[89] Palmore v. Sidoti, 466 U.S. 429, 432-33 (1984) (quoting McLaughlin v. Florida, 379 U.S. 184, 196 (1964)).

[90] *Adarand*, 515 U.S. at 245. The high court concluded that the classification of Native Americans was not 'racial' because it did not encompass all Native Americans, but only those belonging to federally recognized tribes. *Id.* There are approximately 332 Native American tribes and 229 Alaska Native villages that are federally recognized. Randall Akee, *O Ke Kahua Mamua, Mahope Ke Kukulu: First the foundation, then the building*, HONOLULU WEEKLY, Aug. 27, 2003, at 6-8.

[91] Liermann, *supra* note 37, at 523.

[92] *See* Morton v. Mancari, 417 U.S. 535 (1974).

[93] *Id.*

[94] *Id.* at 555.

based on indigenous ethnicity, but a political one based on membership in tribes that had a government-to-government relationship with the United States."[95]

Until *Rice v. Cayetano*,[96] courts had consistently viewed Native Hawaiians in a light similar to Native Americans and Alaska Natives.[97] As such, courts applied a rational basis standard of review to legislation granting preferential treatment to Native Hawaiians.[98] After *Rice* declared Native Hawaiians to be a racial class for voting purposes,[99] however, establishing Native Hawaiians as a political class has become imperative to avoid the use of the strict scrutiny level of judicial review against Native Hawaiian preference programs and entitlements.

The Akaka Bill seeks to give Native Hawaiians the same political classification as Native Americans and Alaska Natives.[100] Such recognition would clarify the application of a rational basis level of judicial scrutiny to programs giving preference to Native Hawaiians and would prevent the application of strict scrutiny to Native Hawaiian programs in the wake of *Rice*.[101] This will potentially prevent the application of strict scrutiny to Native Hawaiian programs that may apply in the wake of *Rice*.[102] Under rational basis scrutiny, Native Hawaiian programs will have to show that a program or policy giving preference to Native Hawaiians is "rationally related to the goals of promoting self-determination and self-sufficiency for the native group."[103]

The application of a rational basis level of review to Native Hawaiian preferential programs would benefit Kamehameha in the legal challenges to its admissions policy and federal tax-exemption.[104] These challenges focus on Kamehameha's actions or policies that are, according to challengers, racially discriminatory.[105] Pursuant to current legal precedent, Kamehameha's policies

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[95] FARBER, *supra* note 88, at 904.

[96] 528 U.S. 495 (2000).

[97] Liermann, *supra* note 37, at 523; *see also* Roth, *supra* note 20.

[98] Liermann, *supra* note 37, at 523.

[99] *Rice*, 528 U.S. at 524.

[100] *See* Vicki Viotti, *Conservatives Blamed for Stalling Akaka Bill*, HONOLULU ADVERTISER, Aug. 29, 2003, at B1.

[101] *See* Liermann, *supra* note 37, at 531.

[102] *See Rice*, 528 U.S. 495 (2000); *see also* Stuart Minor Benjamin, *Equal Protection and the Special Relationship: The Case of Native Hawaiians*, 106 YALE L. J. 537, 539-40 (arguing that, absent a Native Hawaiian governing entity, Native Hawaiian programs are subject to strict scrutiny).

[103] Van Dyke, *supra* note 9, at D6.

[104] *See* Liermann, *supra* note 37, at 530 ("[F]ederal recognition of Hawaiians as Native Americans could help preserve the preferential programs currently in existence.").

[105] *See* Waite, *Admission Suit*, *supra* note 6, at A6.

could be subjected to the strict scrutiny level of judicial review.[106] Though Kamehameha could meet the requirements of the strict scrutiny test,[107] the burden on Kamehameha to defend its admissions policy and federal tax-exemption would be substantially lowered if rational basis clearly applied to Native Hawaiians.[108] Under rational basis, Kamehameha's admissions policy would likely survive a constitutional challenge since "there is a clear link between [Kamehameha's] . . . ancestral limitations and the advancement of legitimate non-racial interests related to Native Hawaiians-namely the preservation of Native Hawaiian culture and language, the advancement of self-governance, and the promotion of self-sufficiency."[109]

In granting Kamehameha's motion for summary judgment, Judge Kay found it unnecessary to address the question of whether Kamehameha's admissions policy would pass muster under the strict scrutiny standard.[110] He considered, instead, whether Kamehameha's remedial race-conscious action plan was supported by legitimate justification.[111] Judge Kay found that Kamehameha's plan:

> [H]as a legitimate justification and serves a legitimate remedial purpose by addressing the socioeconomic and educational disadvantages facing Native Hawaiians, producing Native Hawaiian leadership for community involvement, and revitalizing Native Hawaiian culture, thereby remedying current manifest imbalances resulting from the influx of western civilization.[112]

This ruling significantly upholds Kamehameha's policies as rationally related to Kamehameha's mission to educate and improve the status of Native Hawaiians. Despite this, however, an appellate court may reach the strict scrutiny question, at which time the fate of Kamehameha's admissions policy will ultimately be decided.

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[106] *See* Benjamin, *supra* note 102, at 539-40; *but see* Tehranian, *supra* note 15, at 134.

[107] *See* Van Dyke, *supra* note 9, at D1 ("[I]t is premature to suggest that the schools will lose the legal battle."). *See also* Tehranian, *supra* note 15, at 137.

[108] *See* Liermann, *supra* note 37, at 530.

[109] Tehranian, *supra* note 15, at 137.

[110] *See* Order Denying Plaintiff's Motion at 58, *John Doe* (No. 03-00316 ACK-LEK). The plaintiff brought his claim under § 1981 of the Civil Rights Act. *See id.* at 42. The court held that a § 1981 challenge involving private entities must be read in concert with Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e et seq. (2000), and not the Fourteenth Amendment's Equal Protection Clause. *Id.* at 57-8. Therefore, strict scrutiny should not apply. *Id.*

[111] *Id.* at 84.

[112] *Id.* at 84-5.

2. The Akaka Bill: Establishing a Native Hawaiian governing entity

The Akaka Bill's passage will establish two important levels of protection for Native Hawaiians: federal recognition and an NHG that will operate on a government-to-government basis with the United States.[113] Federal recognition will likely bring Native Hawaiians within the purview of Native American and Alaska Native federal protections. It is, however, the establishment of an NHG that will give Native Hawaiians more control over their future.

Under the Akaka Bill, the United States will recognize the "right of the Native Hawaiian people to organize for their common welfare and to adopt appropriate organic governing documents."[114] The United States will also acknowledge the country's "special trust relationship to promote the welfare of the native people of the United States, including Native Hawaiians."[115] This special trust relationship between the United States and Native Americans, Alaska Natives, and Native Hawaiians is directly related to the latter's status as aboriginal, indigenous, native people of the United States.[116]

An NHG will serve to conduct government-to-government relations with the federal government.[117] It will provide Native Hawaiians with a government to exert "control over their lands, cultural resources, and internal affairs" beyond what they currently exercise.[118] Native Hawaiians will have the opportunity to organize their NHG, adopt organic governing documents, and elect officers who will determine and shape the future of Native Hawaiians.[119]

For Kamehameha's purposes, an important part of the Akaka Bill and the ensuing NHG is the definition of a Native Hawaiian. The bill initially defines Native Hawaiians, prior to the recognition by the United States of an NHG, as:

> [T]he indigenous, native people of Hawaii who are the direct lineal descendants of the aboriginal, indigenous, native people who resided in the islands that now comprise the State of Hawaii on or before January 1, 1893, and who occupied and exercised sovereignty in the Hawaiian archipelago, including the area that now constitutes the State of Hawaii, and includes all Native Hawaiians who

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[113] *See* S. 344.

[114] *Id.* § 6(a).

[115] *Id.* § 1(3).

[116] *Id.* § 1(22).

[117] *Id.* § 3(b); *see also* Lindsey, *supra* note 20, at 716.

[118] Lindsey, *supra* note 20, at 711.

[119] *See* S. 344, § 6(b). The Akaka Bill does not provide the exact format or content of the organic governing documents to be drafted by Native Hawaiians. Therefore, it is unclear at this point exactly how an NHG will be structured, what its policies will be, and who may or may not join, among other issues.

were eligible in 1921 for the programs authorized by the Hawaiian Homes Commission Act (42 Stat. 108, chapter 42) and their lineal descendants.[120]

During the development of an NHG's organic documents, Native Hawaiians may broaden or narrow the definition assigned to Native Hawaiians by the Akaka Bill to suit an NHG's purposes.[121] The ability of Native Hawaiians to define themselves is key to Hawaiians's autonomy over their internal affairs and central to Native Hawaiians's right to self-determination and self-governance.[122] Membership becomes the key issue to determining those Native Hawaiians who will be federally recognized and who will benefit from a political classification. Kamehameha's admissions policy preference for Native Hawaiians will be directly impacted by the definition of a Native Hawaiian for an NHG's purposes.

III. Analysis of Kamehameha's Relationship with the Native Hawaiian Governing Entity

This section analyzes Kamehameha's relationship with an NHG by considering how Kamehameha, as it currently exists, will interact with a newly formed Native Hawaiian governing entity. This section discusses how Kamehameha's relationship with an NHG can ameliorate legal difficulties facing Kamehameha regarding its admissions policy and federal tax-exemption, and can curb the CCH's ability to condemn Kamehameha's lands for leasehold conversion.

A. Preserving Kamehameha's Admissions Policy and Federal Tax-exemption

In terms of legal challenges, Kamehameha's admissions policy and federal tax-exemption are directly related. The potential for the admissions policy to be declared racially discriminatory is a crucial threat to Kamehameha's federal tax-exemption.[123] The upholding of Kamehameha's admissions policy and federal tax-exemption are thus critical to the preservation of Kamehameha

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[120] *See id.* § 2(6)(A).

[121] *See id.* § 2(6)(B). Under this section, following the recognition of an NHG by the United States, the "term 'Native Hawaiian' shall have the meaning given to such term in the organic governing documents of the Native Hawaiian governing entity." *Id.* This arguably does not give Native Hawaiians carte blanch to define themselves since the definition, along with the entire organic document, must still be approved by the Secretary of the Interior.

[122] *See id.* § 3(a)(4)(A)-(B). Under this section, Congress recognizes that Native Hawaiians have "an inherent right to autonomy in their internal affairs . . . [and] an inherent right of self-determination and self-governance." *Id.*

[123] *See, e.g.*, Bob Jones University v. Simon, 416 U.S. 725 (1974).

as it currently exists. The benefits that will flow from the federal recognition of Native Hawaiians could contribute to the preservation of Kamehameha's admissions policy, and, in turn, its federal tax-exemption.

Passage of the Akaka Bill would grant to Native Hawaiians federal recognition as a political group rather than as a racial group.[124] Within the framework of Native American and Alaska Native law, federal recognition would afford Native Hawaiians a political status similar to that enjoyed by Native Americans and Alaska Natives.[125] Federal recognition would also subject Native Hawaiian preference programs and entitlements to the rational basis standard of judicial review.[126] Kamehameha's policies and programs could benefit from this political recognition and the judicial review that accompanies such recognition.

Many educational institutions, not located on Native American and Alaska Native tribal lands, support programs that give preferential treatment to Native Americans and Alaska Natives.[127] In 1975, the University of New Mexico's School of Engineering established a Native American Program to "increase the number of American Indian students earning degrees in engineering at the University of New Mexico."[128] The program provides Native American college students pursuing degrees in science, engineering, and mathematics with academic support services, scholarships, and informational workshops.[129] The program's Navajo Engineering Construction Authority scholarship requires applicants to submit verification of "Tribal Enrollment" indicating that the applicant is a member of a federally recognized tribe.[130]

Other universities have similar programs targeting Native Americans. At Washington State University, Native American students are recruited for participation in the Department of Speech and Hearing Sciences Native American Program.[131] A goal of the program is to establish a "critical mass" of Native American students committed to serving Native American populations in the field of speech and hearing sciences.[132] At the University

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[124] *See generally* S. 344.

[125] *See* Lindsey, *supra* note 20, at 716.

[126] *See id.*

[127] The overwhelming justification for these programs giving preference to Native Americans is to increase the Native American presence in underrepresented fields of study and profession. *See infra* note 128 and accompanying text.

[128] University of New Mexico Native American Program, School of Engineering, *at* http://www.unm.edu/~napcoe/about (last visited Sept. 5, 2003).

[129] *Id.*

[130] *Id.*

[131] Native American Program, Department of Speech and Hearing Sciences, Washington State University, *at* http://libarts.wsu.edu/speechhearing/academics/native-american.html (last visited Sept. 5, 2003).

[132] *Id.*

of South Florida, the Native American Recruitment and Retention Program of the College of Nursing is intended to "increase Native American representation in the nursing workforce providing health care services to Native Americans."[133] The program's admissions policy gives preference to Native Americans students interested in the field of nursing.[134]

Kamehameha's pool of potential applicants would be federally recognized. Thus, Kamehameha would likely operate in a manner similar to the Native American programs. Should Kamehameha seek to strengthen its position by invoking the protections of federal recognition, it could condition acceptance into the school upon enrollment in an NHG. Therefore, Kamehameha's student population would be federally recognized, and Kamehameha's admissions policy would be based on a political, not racial, classification.[135] The rational basis level of judicial scrutiny would likely apply in the event of a legal challenge to the admissions policy, and Kamehameha would only have to show that there is a rational relationship between its preference policy and its mission to educate Native Hawaiians.[136] Indeed, Judge Kay has already determined that Kamehameha's admissions policy is reasonably related to Kamehameha's mission to improve the status of Native Hawaiians.[137]

B. Leasehold conversion: condemnation of Pauahi's lands

While the federal recognition of Native Hawaiians enhances the legal position of Kamehameha's admissions policy and protects its tax-exempt status, the formation of an NHG augments Kamehameha's defense against leasehold conversion. The lease to fee conversion of Kamehameha's lands in Kāhala[138] currently poses a significant threat to the trust's control over the lands and other assets that support Kamehameha.[139] After several lengthy court battles, Kamehameha has remained highly vulnerable to condemnation of its trust lands.[140] Transferring portions of the trust lands to an NHG, especially those

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[133] Native American Program, the University of South Florida College of Nursing, *at* http://hsc.usf.edu/nursing/Student/NativeAmerican.htm (last visited Sept. 5, 2003).

[134] *Id.*

[135] *See* S. 344, 108th Cong. (2003); *see also* Lindsey, *supra* note 20, at 714-16.

[136] *See Morton v. Mancari*, 417 U.S. 535, 554-55 (1974).

[137] Order Denying Plaintiff's Motion at 84, *John Doe* (No. 03-00316 ACK-LEK) (stating that Kamehameha's "means reasonably relate to its quest to achieve the remedial goal of providing an education for the Native Hawaiian people.").

[138] *See supra* section II (B)(2).

[139] *Kamehameha Schools Calls Council Vote Disappointing*, PACIFIC BUS. NEWS, Dec. 5, 2002, *available at* http://pacific.bizjournals.com/pacific/stories/2002/12/02/daily75.html (last visited Feb. 20, 2003).

[140] A decade of "forced lease-to-fee conversions" has diminished Kamehameha's former apartment and condominium unit holdings from 13,000 in 1990 to fewer than 300 today.

that are currently at high risk of condemnation by the CCH, could protect Kamehameha's lands from leasehold conversion. This section analyzes such a transfer and discusses the advantages and disadvantages that may arise.

1. Removing the CCH's ability to condemn Kamehameha's trust lands or initiate eminent domain proceedings

The "policy of leaving Indians free from State jurisdiction" is deeply rooted in American history.[141] Unless Congress has expressly intended that State laws should apply on Indian lands, States do not have jurisdiction over Indians.[142] Because the authority of city and county governments is determined by the State, the same holds true for County governments.[143]

Assuming that an NHG will operate its lands in a fashion similar to an Indian reservation, the policy of leaving Indians free from State jurisdiction should apply to Native Hawaiians and an NHG's lands. Consequently, absent clear Congressional intent authorizing the CCH to condemn lands of an NHG for a public purpose, the CCH would lack the jurisdiction to initiate condemnation or eminent domain proceedings against lands of an NHG.[144] If Kamehameha transferred its lands to an NHG, it could prevent the mandatory

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Jefferson, *supra* note 73. Its two remaining multifamily residential properties that have not been offered to the leaseholder are the Kāhala Beach Apartments and Ha'ikū Gardens in Kāne'ohe, O'ahu. *Id.*

[141] Gobin v. Snohomish County, 304 F.3d 909, 914 (9th Cir. 2002) (citing Rice v. Olson, 324 U.S. 786, 789 (1945)) (holding that the right of Indians to alienate their lands freely does not provide a county with a concomitant right to exert in rem land use regulation over those lands, and no special circumstances existed under which the county could exercise jurisdiction over the Indian land).

[142] *Id.* Congress must make "unmistakably clear" its intent to subject reservation lands to state or local taxation. Cass County, Minnesota v. Leech Lake Band of Chippewa Indians, 524 U.S. 103, 109, 115 (1998) (holding that Congress, in making Indian reservation land freely alienable, manifests an unmistakably clear intent to render the land subject to state and local taxation, and an Indian tribe's repurchase of the land does not cause the land to reassume tax-exempt status). An exception to the general rule is that a State may, in exceptional circumstances, assert jurisdiction over tribal members on reservation lands without the express consent of Congress. *Gobin*, 304 F.3d at 917 (citing California v. Cabazon Band of Mission Indians, 480 U.S. 202, 214-15 (1987)). The exceptional circumstances are "weighed against traditional notions of Indian sovereignty and the congressional goal of encouraging tribal self-determination, self-sufficiency, and economic development." *Id.*

[143] *See generally* MASHAW ET AL., CASES AND MATERIALS ON ADMINISTRATIVE LAW: THE AMERICAN PUBLIC LAW SYSTEM (3d ed. 1992).

[144] *See, e.g., Cass County*, 524 U.S. at 109-10. *See also* County of Yakima v. Confederated Tribes and Bands of the Yakima Indian Nations, 502 U.S. 251, 270 (1992) (holding that the Indian General Allotment Act permitted a county to impose ad valorem taxes on reservation lands patented in fee pursuant to the Act, but rejecting the County's request to enforce its excise tax on sales of such lands).

conversion of its lands and forestall erosion of Kamehameha's land and revenue base. Transferring portions of Kamehameha lands to an NHG would allow an NHG to protect the lands from condemnation by the CCH and forced alienation by leaseholders.

2. Land holdings of an NHG

The incentive for Kamehameha to transfer its valuable lands to an NHG will depend on the method in which an NHG would hold its lands. Native American and Alaska Native lands are either held in trust by the federal government or in fee by a tribal government or corporation.[145] Noticeably absent from the Akaka Bill is the specific way in which an NHG's lands will be held.[146] An examination of lands held in trust or in fee will offer insight into the advantages and disadvantages associated with both forms of tribal land holdings, and how this may affect Kamehameha's decision to transfer lands to an NHG.

The federal government holds in trust the lands of 332 federally recognized Native American tribal nations on the continental United States.[147] There is limited tribal jurisdiction over lands held in trust.[148] Purchases or sales of these lands are subject to approval by the Secretary of the Department of the Interior.[149] Lands held in trust also create significant hurdles for tribal economic development as these lands cannot be used as collateral for business investments or capital.[150] The trade-off is that there is a trust relationship between Native American tribes and the federal government, and the tribal lands are protected by the federal government.[151] To this end, should an NHG's lands be held in trust by the federal government,[152] the Kamehameha

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[145] Akee, *supra* note 90, at 6-8.

[146] *See* S. 344, 108th Cong. (2003). The bill discusses the United States's policy and purpose regarding Native Hawaiians, the establishment of a Native Hawaiian Relations office, the establishment of a Native Hawaiian interagency coordinating group, the process for the recognition of the Native Hawaiian governing entity, and various other aspects of the process for Native Hawaiian federal recognition. *See id.* The ultimate decision regarding the manner in which an NHG will hold its lands is left to the Native Hawaiian people. *Id.* § 6(a) ("The right of the Native Hawaiian people to organize for their common welfare and to adopt appropriate organic governing documents is hereby recognized by the United States.").

[147] Akee, *supra* note 90, at 6-8.

[148] *Id.*

[149] *Id.*

[150] *Id.*

[151] *Id.*

[152] Approximately 200,000 acres of land are already held in trust for Native Hawaiians by the federal government. Carroll v. Nakatani, 342 F.3d 934, 943 (9th Cir. 2003). Pursuant to the Hawaiian Homes Commission Act ("HHCA"), these lands were set aside by the federal government for the homesteading of Native Hawaiians. *Id.*; *see also* HHCA (Act 42), Pub. L.

lands transferred to an NHG would be protected by the federal government from condemnation or eminent domain proceedings initiated by the CCH.[153]

Another alternative to the federal government's holding land in trust is the tribal government's ownership of its lands in fee simple.[154] The Alaska Native Claims and Settlement Act of 1971[155] "resolved land claims through cash payments and by transferring territory in fee to village and regional corporations organized under state law, yet subject to substantial federal regulation and restrictions."[156] To get around some of the restrictions that have arisen with lands held in trust, the Alaska Native villages created corporations to hold their lands in fee, issuing eligible village members equity shares in the corporation.[157]

The advantages of holding the land in fee are offset by legal and practical problems, some of which plague Alaska Native village corporations and other Native American tribes.[158] The United States Supreme Court has distinguished the Alaska Native fee simple lands from those held in trust by the federal government, diminishing the Alaska Native villages' jurisdiction to levy taxes on non-natives doing business on tribal lands.[159] In another invasion of tribal autonomy, the Confederated Tribes and Bands of the Yakima Indian Nation were subjected to property taxes imposed by the county government on reacquired fee simple lands that were previously alienated from the tribe.[160] Another problem created by holding lands in fee simple is that the lands may be sold.[161] The lands may also be used as collateral for loans, which inherently subjects the lands to potential foreclosure.[162] In the end, holding land in fee limits the tribal government's power to tax, allows state and county governments to tax certain tribal lands, and ultimately

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No. 34, 42 Stat. 108 (1920). As a condition for admission to the United States in 1959, Hawai'i was required to adopt the HHCA as part of its Constitution. *Carroll*, 342 F.3d at 943. The federal government granted title of the HHCA lands to the State, but "reserved to itself a right of consent to any changes in the homestead lease qualifications." *Id.*

[153] *See* Akee, *supra* note 90, at 6-8.

[154] *Id.*

[155] Alaska Native Claims Settlement Act, 43 U.S.C.S. § 1601 (West Supp. 1971).

[156] Brief of Amici Curiae Richard B. Collins et al. at 12-13, State of Alaska v. Native Village of Venetie Tribal Government, 522 U.S. 520 (1997) (No. 96-1577).

[157] Akee, *supra* note 90, at 6-8.

[158] *Id. See* Alaska v. Native Village of Venetie Tribal Government, 522 U.S. 520 (1997) (holding that Alaska Native lands are not considered "Indian Country" and therefore Alaska Native village corporations may not tax non-natives doing business on native lands).

[159] *Venetie*, 522 U.S. at 530.

[160] County of Yakima v. Confederated Tribes and Bands of the Yakima Indian Nations, 502 U.S. 251, 270 (1992).

[161] Akee, *supra* note 90, at 6-8.

[162] *Id.*

subjects the tribal government to serious potential for the erosion of its land base.

Despite the aforementioned drawbacks, the right of the states to assert jurisdiction over fee simple tribal lands, beyond taxation, is narrow.[163] The Ninth Circuit Court of Appeals, in *Gobin v. Snohomish*,[164] held that a county may not exert land use regulations over tribal lands held in fee simple.[165] *Gobin* reaffirmed the core concept set forth in *County of Yakima v. Confederated Tribes and Bands of the Yakima Indian Nations*,[166] which stated that, unless Congress has unmistakably intended it, states may not completely regulate Indians on tribal lands.[167]

Because tribal lands held in fee simple are subject to some state and county exercises of taxation jurisdiction, should an NHG opt to hold its lands in this manner, Kamehameha's lands could potentially be subject to condemnation or eminent domain proceedings.[168] The courts have yet to reach the issue of whether a county government may condemn tribal lands for leasehold conversion purposes.[169] Under exceptional circumstances, a state may assert jurisdiction over tribal members on reservation lands absent clear congressional intent to do so.[170] These exceptional circumstances, however, are "weighed against traditional notions of Indian sovereignty and the congressional goal of encouraging tribal self-determination, self-sufficiency, and economic-development."[171] Within the current Native American and Alaska Native legal framework of state jurisdiction over tribal lands and people, condemnation of an NHG's lands for leasehold conversion purposes would likely fall outside the scope of state jurisdiction absent clear congressional intent for NHG lands to be condemned for such purposes.[172]

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[163] Gobin v. Snohomish County, 304 F.3d 909, 915 (9th Cir. 2002). At the time this case was decided, neither the United States Supreme Court nor the Ninth Circuit Court of Appeals had extended the holding in *County of Yakima* to "find that Congress had expressly authorized any other State regulation of the Indians when it made Indian fee lands freely alienable." *Id.*

[164] *Id.*

[165] *Id.* at 918.

[166] 502 U.S. 251 (1992)

[167] *Gobin*, at 915-16.

[168] *See id.*

[169] *See id.*

[170] *Id.* at 917.

[171] *Id.*

[172] *See id.* at 915-16.

3. Cooperative agreement between Kamehameha, an NHG, and state and county governments

The strategy of transferring certain of Kamehameha's high-risk lands to an NHG presents risks of subjection to taxation or some other form of state or county jurisdiction.[173] To minimize these risks, Kamehameha could consider a solution presented by cooperative agreement models currently being used by Indian nations and state and county governments to negotiate and determine jurisdictional roles and responsibilities on tribal land.[174] These agreements arose as a result of unclear legal precedents regarding the "rights of tribes to control activities within their territories."[175] The economies of many Indian nations suffered due to the uncertainty of the "jurisdictional changes in Supreme Court jurisprudence."[176] Some tribes have taken the initiative to enter into cooperative agreements with relevant state and county governing bodies to introduce a measure of certainty to their tribal jurisdiction.[177]

By the year 2001, nearly 200 voluntary tribal-state agreements had been negotiated to address various tax issues.[178] Some cooperative agreements exist to address uncertainties in land use and zoning.[179] Cooperative agreements have also been used or suggested for potential tribal-state cooperation in issues relating to commercial law and tribal sovereign immunity.[180]

The transfer of Kamehameha's lands could take place through a similar cooperative agreement between Kamehameha, an NHG, and the federal, state

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[173] *See supra* section III (B)(2).

[174] *See* Lorie Graham, *The Role of Jurisdiction in the Quest for Sovereignty: Securing Economic Sovereignty Through Agreement*, 37 NEW ENG. L. REV. 523, 527 (2003).

[175] *See id.* at 527. At the onset of self-determination in Indian law, the United States Supreme Court liberally awarded broad authority to tribal governments to raise revenue, enact and enforce their laws, and conduct government-to-government relations with the United States. *Id.* at 526. Yet in the 1970s, the high court's liberal swing shifted, and it seemed less inclined to grant broad jurisdiction to tribal governments over the happenings on tribal lands. *Id.* at 525-27. This resulted in a confusing set of precedents that created an "unstable jurisdictional crazy quilt" regarding the extent of tribal jurisdiction over tribal lands. *Id.* at 528.

[176] *Id.* at 535.

[177] *Id.* The incentive for states to enter into cooperative agreements with tribes is to reduce uncertainty in the law "regarding the scope of state powers in this area to support negotiation over litigation." *Id.* at 536. A further incentive for states is the economic benefits that may result from reservation businesses. *Id.*

[178] *Id.* at 535.

[179] *Id.* at 536. An example of a land use and zoning cooperative agreement is the Swinomish Indian Tribal Community land use agreement with Skagit County, Washington. *Id.* The agreement "establishes a comprehensive land use plan[;] . . . a coordinated framework for conducting permitting activities; an agreed upon mechanism for resolving disputes; and a planning board consisting of tribal appointees, county appointees, and a neutral facilitator." *Id.*

[180] *Id.* at 538-39.

and county governments.[181] First, Kamehameha should negotiate with the NHG to secure Kamehameha's benefit from revenue generated from the lands transferred to the NHG. To achieve this end, Kamehameha and the NHG could draft a cooperative agreement for Kamehameha to retain a determined percentage of the revenues earned by the land, with title being transferred to the NHG.[182] Second, this agreement should include the federal, state and county governments. Through agreement, the NHG and Kamehameha could negotiate with the state and county governments to resolve the uncertainties in Native American jurisprudence regarding condemnation of tribal lands.[183] The CCH could agree to refrain from initiating condemnation proceedings against NHG lands in exchange for certain terms from the NHG. This agreement may also be the best instrument to resolve uncertainties regarding Kamehameha's leasehold tenants who may not want to be subjected to the NHG's jurisdiction.

4. The Trustees's duty: Do Kamehameha's Trustees have the authority to transfer Kamehameha lands to an NHG?

Before a transfer of lands could occur, an important question to consider is whether or not Kamehameha's Trustees have the authority to transfer trust lands to an NHG. To determine the Trustees's authority, it is important to analyze the three main documents that govern the trustees' decisions regarding Kamehameha: Pauahi's will and two codicils to her will; the Kamehameha Schools Governance Policy developed in 1999; and the Kamehameha Schools Strategic Plan 2000–2015.[184]

Pauahi's will devised and bequeathed a substantial portion of her real and personal estate to trustees to "forever . . . erect and maintain . . . the Kamehameha Schools."[185] Her will vests in the trustees "full power to lease or sell any portion of [her] real estate, and to reinvest the proceeds and the balance of [her] estate in real estate, or in such other manner as to [her] said trustees may seem best."[186] It further authorizes the trustees to "act in all cases . . . [to] convey real estate."[187] This power is to be executed in maintaining the

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[181] *See id.* at 527.

[182] *See* Pauahi's will, *supra* note 10. Pauahi granted her trustees "full power to lease or sell any portion of [her] real estate, and to reinvest the proceeds and the balance of [her] real estate, or in such other manner as to [her] said trustees may seem best." *Id.*

[183] *See* Akee, *supra* note 90, at 6-8.

[184] Pauahi's will, *supra* note 10; KAMEHAMEHA SCHOOLS, 2000 KAMEHAMEHA SCHOOLS GOVERNANCE POLICY 1 (2000), *at* http://www.ksbe.edu/newsroom/filings/govern_doc.pdf (last visited Feb. 26, 2003) [hereinafter "GOVERNANCE POLICY"]; STRATEGIC PLAN, *supra* note 14.

[185] *See* Pauahi's will, *supra* note 10.

[186] *See id.*

[187] *See id.*

trust in perpetuity, and gives the trustees broad discretion in dealings with Kamehameha's trust assets.[188]

The Kamehameha Schools Governance Policy, developed in 1999 and revised and restated on November 22, 2000, directs the Trustees and its Chief Executive Officer ("CEO") to "collectively [carry] out the testamentary wishes of Bernice Pauahi Bishop as set forth in her Will and two codicils thereto, as construed by judicial decisions concerning [Kamehameha]."[189] As the preamble sets forth:

> K[amehameha] S[chools] is a perpetual, charitable trust estate established for exclusively educational purposes, namely, "to erect and maintain . . . the Kamehameha Schools." All activities of K[amehameha] S[chools] must be consistent with and in furtherance of this primary purpose. Any activity of K[amehameha] S[chools] inconsistent with or that jeopardizes this primary purpose is to be avoided.[190]

Accordingly, the "Board [of Trustees] sets policy, [and] management [the CEO] implements policy; the Board is responsible for oversight of the Estate while the day-to-day management of the operations of the Estate is the responsibility of the CEO."[191]

Provided that the Trustees's and CEO's actions are consistent with the primary purpose of the will, to "erect and maintain the Kamehameha Schools," it is likely that the Trustees and CEO could transfer trust lands to an NHG.[192] If the transfer of Kamehameha's lands is determined to be the most prudent, responsible exercise of fiduciary discretion and duty, such a decision by the Trustees and implementation by the CEO, will likely be in line with the purposes of Pauahi's will.[193] Transferring Kamehameha's lands to an NHG may preserve the revenue generated by those lands, which, in turn, will continue the financial support flowing to the education of Native Hawaiian students. As such, the transfer of Kamehameha lands to an NHG will not be precluded by a breach of fiduciary duty. Indeed, transferring Kamehameha's lands to an NHG may prove to be the best way to protect the lands from leasehold conversion to ensure the continued generation of

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[188] *See id.*

[189] GOVERNANCE POLICY, *supra* note 184, at pmbl.

[190] *Id.*

[191] *Id.*

[192] *Id. See also* Pauahi's will, *supra* note 10.

[193] *See* Pauahi's will, *supra* note 10, at Codicil 1, Section 17 ("I give unto the trustees named in my will the most ample power to sell and dispose of any lands or other portion of my estate, and to exchange lands and otherwise dispose of the same; and to purchase land, and to take leases of land whenever they think it expedient, and generally to make such investments as they consider best.").

revenues. If this is the case, it may almost be a breach of the Trustees' fiduciary duty *not* to transfer the lands.

IV. CONCLUSION

Native Hawaiians stand on the brink of change. With or without the Akaka Bill, the Kamehameha Schools has an uncertain road ahead of it. In the current legal and political climate, the legal challenges facing Kamehameha may prevail in dramatically altering Kamehameha as we know it today. As a private institution that administers a vast portfolio of assets to educate Native Hawaiians, Kamehameha can use the Akaka Bill and the establishment of an NHG as a tool to aid in the fight to protect Pauahi's legacy.

Native American and Alaska Native jurisprudence is not exactly tailored to Native Hawaiians. It does offer, however, a structure and pattern of precedents dealing with Native peoples to follow, and equally as many to avoid. Kamehameha should analyze the preferential programs and tribal jurisdiction issues of Native Hawaiians's North American counterparts to determine the best format for Kamehameha's interaction with an NHG. Such issues demand close attention and diligent study of Native American and Alaska Native examples to ensure that the most prudent course is taken to protect and preserve Kamehameha.

It is imperative that not only Native Hawaiians, but also the State of Hawai'i, realize the magnitude of what is at risk should Kamehameha fail in its effort to protect Pauahi's dying wishes. The legal challenges assaulting Kamehameha may be premised on the rhetoric of racial discrimination and color-blindness, but they are ultimately a direct attack on the resources that support the many programs Kamehameha administers. Without its resources, Kamehameha's many educational, financial and cultural endeavors that benefit Native Hawaiians and the people of the State of Hawai'i will be seriously impacted, if not destroyed. A Hawai'i without Kamehameha, as it currently exists, would constitute blatant disregard for the testamentary wishes of a Princess who saw education as the salvation of her people.

Crystal K. Glendon[194]

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[194] Crystal K. Glendon, Class of 2003, William S. Richardson School of Law, University of Hawai'i at Mānoa; Class of 1996, Kamehameha Schools. Mahalo to the 2003-2004 University of Hawai'i Law Review staff for their assistance; Professor Melody K. MacKenzie, for giving me the idea for this comment and providing guidance on an earlier draft; Professor Jon M. Van Dyke, for his insight and ideas; and my editors, Van Luong and Jodene Arakaki, for their advice, patience and belief in me.

Scientific Expert Admissibility in Mold Exposure Litigation: Establishing Reliability of Methodologies in Light of Hawai'i's Evidentiary Standard

"No one will deny that the law should in some way effectively use expert knowledge wherever it will aid in settling disputes. The only question is as to how it can do so best."

-Learned Hand[1]

I. INTRODUCTION

In the humid, tropical climate of Hawai'i, it is not surprising that mold infestation has become a growing public concern. The Hilton Hawaiian Village Hotel in Waikiki recently shut down its brand new Kalia Tower due to mold infestation.[2] Millions of dollars of furniture, bedding, wallpaper and curtains were removed from every guest room and completely destroyed.[3] Although there were no reports of health problems, the closing of the 453-room Kalia Tower is expected to cost the Hilton at least $55 million.[4] Both the University of Hawaii[5] and the United States Federal District Court building[6] have also encountered mold contamination that required extensive remediation efforts. While mold litigation is only beginning to emerge in Hawai'i trial courts, the trend of mold cases across the nation has already gained a notorious reputation of being the next asbestos.[7]

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[1] Minner v. Am. Mortgage & Guar. Co., 791 A.2d 826, 833 (Del. 2000) (quoting Learned Hand, *Historical and Practical Considerations Regarding Expert Testimony*, 15 HARV. L. REV. 40, 40 (1901)).

[2] Andrew Gomes, *Mold Closes New Hilton Tower*, HONOLULU ADVERTISER, July 25, 2002, at A1.

[3] Andrew Gomes, *Hilton Mold Fix May Cost $20M*, HONOLULU ADVERTISER, Oct. 23, 2002, at A1.

[4] Andrew Gomes, *Mold Costs Rise at Hilton*, HONOLULU ADVERTISER, Jan. 28, 2003, at C1.

[5] *See* Beverly Creamer, *Mold Problems Festering at UH*, HONOLULU ADVERTISER, July 30, 2002, at B3 ("A number of years ago, books on every floor of Hamilton Library were also plagued by mold. The books were cleaned up . . . although any area that has been attacked by mold is prone to a recurrence.").

[6] *See* Debra Barayuga, *Mold Disrupts Work at Two Federal Buildings*, HONOLULU STAR-BULL., Aug. 16, 2002, at A1, A9 (indicating that Federal Magistrate Judge Leslie Kobayashi was forced to evacuate her chambers due to mold infestation).

[7] *See generally* Stephanie F. Cahill, *For Some Lawyers, Mold Is Gold: Toxic Troubles Translate into Millions of Dollars for a Practice That's Bound to Grow*, A.B.A. J., Dec. 2001,

In recent years, mold-related claims have cropped up in courtrooms around the world. In the past three years, plaintiffs filed approximately 10,000 new mold cases in the United States and Canada.[8] The onset of such a voluminous wave of mold litigation may have spawned from the controversial death of an infant in Cleveland, Ohio in 1994.[9] Upon investigation of the infant's death, doctors correlated the diagnoses of pulmonary hemorrhage and hemosiderosis (bleeding of the lungs) in ten infants to the presence of mold in their water-damaged homes.[10] Since then, the media has played a significant role in fueling the public perception of mold as "hazardous," thereby making impending health concerns impossible to ignore.[11] One reason for the increase in mold claims in the civil litigation context is the potential for large jury awards. A Texas jury recently awarded plaintiffs a $32 million verdict in a personal injury mold case.[12] With the possibility of such large jury verdicts,

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at 22 (portraying mold litigation as a growing practice area akin to asbestos litigation of the 1980s). *But cf.* Randy J. Maniloff, *Mold: 5 Reasons Why It Is Not the "Next Asbestos"*, MEALEY'S LITIG. REP.: MOLD, June 2002, at 6. (distinguishing mold litigation from the unique characteristics of asbestos litigation).

[8] Sharon M. Stecker et al., *Protecting Against Toxic Mold Lawsuits*, REAL EST. WEEKLY, Aug. 28, 2002, at 14.

[9] *See* Ruth Etzel et al., *Acute Pulmonary Hemorrhage in Infants Associated With the Exposure to* Stachybotrys atra *and Other Fungi*, 152 ARCHIVE OF PEDIATRIC ADOLESCENT MED. 757 (1998).

[10] *Id.* at 758. *But see*, STEPHEN C. REDD, M.D., STATE OF THE SCIENCE ON MOLDS AND HUMAN HEALTH, U.S. DEP'T OF HEALTH AND HUMAN SERVICES 4 (2002) (conceding that although the initial study indicated a possible association between exposure to mold and disease, upon further investigation it was determined that there was insufficient evidence of an association).

[11] *See generally* Matthew J. Milano, Ph.D., *Emerging Attitudes Regarding Mold and Sick-Building Litigation*, MEALEY'S LITIG. REP.: MOLD, Jan. 2002, at 1 (speculating that the news stories conveying evocative language such as "toxic mold" will affect jurors' perception of mold). The latest news coverage about anthrax has also familiarized the general public with the dangerousness of invisible spores. *Id.* Public perception that spores are capable of causing severe injuries, including death, lends credence to the plaintiff's general proposition that mold is dangerous. *Id.* Celebrities such as Ed McMahon and Erin Brockovich have filed personal mold-related lawsuits that have been highlighted by the media. *See* Christopher Oster, *Homeowners Finally Get Insurance Break*, WALL ST. J., May 6, 2003, at D1 (reporting that Ed McMahon filed a $20 million lawsuit against insurance company after mold growth in his home allegedly sickened his wife and killed their dog); Anastasia Hendrix, *Erin Brockovich Crusades Against Mold: State Lawmakers Told of Potential Health Dangers*, SAN FRANCISCO CHRON., Mar. 8, 2001, at A3 (describing famed activist Erin Brockovich's experience with mold contamination of her Southern California home, which has cost her more than $600,000 in repairs).

[12] Ballard v. Fire Ins. Exch., No. 99-05252 (Tex. Dist. Ct. June 2001). *See also* Centex-Rooney Constr. Co. v. Martin County, 706 So. 2d 20, 24 (Fla. Dist. Ct. App. 1998) (reporting a jury verdict in the amount of $11,550,000 against construction manager defendants in a breach of contract mold case). The *Centex-Rooney* court subsequently entered an amended final

mold exposure plaintiffs are more apt to accept the risks of litigation notwithstanding the hurdle of proving causation.[13] As personal injury mold cases begin to surface in Hawai'i courts, proving causation will emerge as a significant obstacle to recovery.

Causation is the primary impediment to a mold plaintiff's personal injury claim. Because there are no conclusive studies indicating that specific levels of mold are hazardous to human health,[14] the plaintiff's case often rests entirely on opinions offered by scientific experts.[15] For example, plaintiffs' experts commonly assert that mold exposure exacerbates existing conditions of asthma or allergies.[16] Two methods typically used by mold plaintiffs to establish that the mold exposure aggravated their asthma or allergies are: (1) air sampling, and (2) differential diagnosis. The results of air sampling are used to support an argument that excessive mold levels probably contributed to the plaintiff's injuries.[17] Differential diagnosis is commonly used to isolate mold as the cause of a plaintiff's symptoms by a process of elimination.[18]

The scientific uncertainty in mold exposure cases gives rise to the need for expert testimony. The Hawai'i Rules of Evidence ("HRE") Rule 702, patterned after the Federal Rules of Evidence ("FRE") Rule 702, governs expert admissibility in Hawai'i Courts.[19] Hawai'i's current expert admissibility standard encompasses HRE 702 as well as the Hawai'i Supreme Court's standard as set forth in *State v. Montalbo*.[20] When air sampling and differential diagnosis are analyzed according to the *Montalbo* standard, these methodologies meet Hawai'i's criteria of reliability and validity of expert testimony.[21] As such, air sampling and differential diagnosis provide mold exposure plaintiffs with the opportunity to present their theory of causation to

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judgment for $14,211,156, comprised of $8,800,000 in damages and $5,411,156 in prejudgment interest. *Id.*

[13] *See, e.g.*, Mazza v. Schurtz, No. 00AS04795 (Cal. Super. Ct. Nov. 2001) (awarding a $2,721,373 verdict). Another reason mold claims are especially attractive is because they entail a blend of real property, contract, tort, construction defect, environmental, and insurance law, not to mention the fact that the classes of defendants vulnerable to mold-related lawsuits are virtually infinite in number. Edward H. Cross, *Litigation A La Mold*, L.A. LAW., Jan. 2002, at 28, 30.

[14] *See infra* Part II.

[15] David F. Blundell, *Proliferation of Mold and Toxic Mold Litigation: What is Safe Exposure to Airborne Fungi Spores Indoors?*, 8 ENVTL. LAW. 389, 394 (2002).

[16] *See, e.g.*, New Haverford P'Ship v. Stroot, 772 A.2d 792, 796 (Del. 2001) ("[Plaintiff's expert] opined that the high concentration of toxic mold at [the Plaintiff's apartment] significantly and permanently increased the severity of [her] asthma.").

[17] *See infra* Part IV.B.1.

[18] *See infra* Part IV.B.2.

[19] *See infra* Part III.

[20] 73 Haw. 130, 828 P.2d 1274 (1992); *see infra* text accompanying note 156.

[21] *See infra* Part IV.B.

a jury even though science has not yet established universally accepted exposure standards.[22]

This article proposes that, when faced with mold exposure cases, Hawai'i courts should admit expert testimony on air sampling and differential diagnosis under the *Montalbo* standard. Section II of this paper begins with a general discussion of mold, including its potential effects on human health. The section then addresses the causation problems facing mold exposure plaintiffs and explains how scientific expert testimony assists plaintiffs in overcoming these hurdles. Section III discusses the federal law on expert admissibility, including FRE 702 and interpreting case law. It then scrutinizes Hawai'i's standard of expert admissibility, focusing on the novel aspects of HRE 702 and the reliability factors set forth by the Hawai'i Supreme Court in *Montalbo*. Because Hawai'i appellate courts have not yet encountered a mold-exposure case, Section IV begins with a survey of case law from other jurisdictions that have decided issues of scientific expert admissibility in mold litigation. Using *Montalbo*'s reliability factors, Section IV then analyzes air sampling and differential diagnosis to demonstrate how these methodologies satisfy Hawai'i's standard of scientific expert admissibility. Finally, Section IV proposes that policy reasons, including fairness and jury integrity, support the admission of expert testimony in mold exposure cases. Section V concludes that expert testimony on air sampling and differential diagnosis is reliable, and should therefore be admissible in mold exposure cases.

II. BACKGROUND

In order to fully appreciate the implications of both the federal and Hawai'i Rule 702 in the area of mold exposure litigation, it is important to have a basic understanding of mold and the causation problems it triggers. This section sets forth a brief description of mold and some of the potential health effects of exposure.[23] The individualistic nature of mold exposure injuries and the lack of legislation delineating a bright-line standard for unsafe levels of mold exacerbate efforts to establish causation in the courtroom.[24] Because existing scientific evidence on the health effects of mold is far from conclusive, mold exposure plaintiffs must establish causation using an aggregate of scientific expert testimony.[25]

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[22] *See infra* Part IV.B.1.

[23] *See* discussion *infra* Part II.A.

[24] *See* discussion *infra* Part II.A, II.B.

[25] *See infra* text accompanying notes 65–69.

A. The Nature of the Mold Problem

Although the recent surge in public awareness of mold-related health risks would suggest that the presence of mold is a fairly new phenomenon, mold has been causing problems for humans throughout history.[26] Mold is a type of fungi, which requires four basic elements to survive: food, water, appropriate temperature, and lack of ventilation.[27] There are more than 100,000 species of mold on Earth.[28] Mold spores exist nearly everywhere, permeating both indoor and outdoor environments.[29] Mold spores produce fungal metabolites called mycotoxins, which are known to have serious health effects on humans.[30] Most healthy individuals have built up a tolerance to mold and consequently do not experience significant adverse reactions to the average household strains of mold.[31] Other people, especially those with compromised immune systems, can suffer severe aggravation of existing conditions.[32] Physical reactions to mold are highly individualistic.[33] The following factors

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[26] The Old Testament of the *Bible* refers to mold:

> [The priest] is to examine the mildew on the walls, and if it has greenish or reddish depressions that appear to be deeper than the surface of the wall, the priest shall go out the doorway of the house and close it up for seven days. On the seventh day the priest shall return to inspect the house. If the mildew has spread on the walls, he is to order that the contaminated stones be torn out and thrown into an unclean place outside the town. *Leviticus* 14:37-40 (New International Version).

[27] Stephen J. Henning & Daniel A. Berman, *Mold Contamination: Liability and Coverage Issues: Essential Information You Need To Know For Successfully Handling and Resolving Any Claim Involving Toxic Mold*, HASTINGS W.-NW. J. ENVTL. L. & POL'Y, Fall 2001, at 73, 74 (citing BUREAU OF ENVTL. AND OCCUPATIONAL DISEASE EPIDEMIOLOGY, N.Y. CITY DEP'T OF HEALTH, FACTS ABOUT MOLD (2001), http://nycdoitt.ci.nyc.ny.us/html/doh/html/epi/epimold.html).

[28] Blundell, *supra* note 15, at 389.

[29] N.Y. CITY DEP'T OF HEALTH AND MENTAL HYG. BUREAU OF ENVTL. AND OCCUPATIONAL DISEASE EPIDEMIOLOGY, GUIDELINES ON ASSESSMENT AND REMEDIATION OF FUNGI IN INDOOR ENVIRONMENTS, at *Introduction* (2002), http://www.nyc.gov/html/doh/html/epi/moldrpt1.html (last visited Nov. 20, 2003) [hereinafter NYC Guidelines].

[30] Blundell, *supra* note 15 at 391. Mycotoxins have devastating potential as weapons of biological warfare. *See, e.g.*, Thomas W. McGovern et al., *Cutaneous Manifestations of Biological Warfare and Related Threat Agents*, 35 JAMA 311, 313 (1999) (averring that aerolization of mycotoxins can cause death in humans within minutes to hours by destroying inhibiting protein and RNA synthesis, thereby killing human tissue). As many as seventeen countries were identified as harboring biological weapons as of 1995. *Id.* at 312. In fact, "[t]he United States accused the Soviet Union and its proxies of using mycotoxins (yellow rain) as biological weapons in Afghanistan and Southeast Asia between 1974 and 1981." *Id.* at 314.

[31] Nana Nakano, *Toxic Mold in California: Recent Verdicts and Legislation*, ANDREWS TOBACCO INDUS. LITIG. REP., July 12, 2002.

[32] *Id.*

[33] Interview with George Wong, Associate Professor of Botany, University of Hawai'i, in Honolulu, Haw. (Feb. 21, 2003). "Toxic" mold has recently become the subject of extensive

determine the impact of mold on humans: (1) the species of mold involved; (2) the metabolic products the species produces; (3) the quantity and duration of an individual's exposure to the mold; and (4) the specific susceptibility of the individual exposed.[34]

The adverse health effects of mold exposure are diverse in nature, and are generally characterized as allergic, inflammatory, or toxic.[35] On the mild end of the spectrum, typical allergy-related symptoms of mold exposure include runny nose, eye irritations, cough, congestion, and aggravated asthma.[36] Toxic strains of mold, however, are suspected of eliciting far more agonizing symptoms such as fatigue, nausea, headaches, depression, tremors, rashes, respiratory distress, intestinal hemorrhage, diarrhea, vomiting, and bleeding of the lungs.[37] Some of the more notorious toxic molds produce mycotoxins that have even been classified as human carcinogens.[38] Exposure to mycotoxins can occur through ingestion, inhalation, or dermal exposure.[39] When inhaled, air contaminated with certain types of mycotoxins can cause extremely severe

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media coverage. These certain identified strains of fungi are thought to pose an increased risk of harm to the majority of the population, including healthy individuals. Due to their acute "toxic" effects, the four strains of mold that have generated the most public concern are: *Aspergillus*, *Cladosporium*, *Penicillium*, and *Stachybotrys*. *See generally* Robert M. Peterson & Mary E. Gregory, *Mold Exposures in Bad Faith Litigation*, MEALEY'S LITIG. REP.: MOLD, June 2002.

[34] Blundell, *supra* note 15 at 391. *See also* Nakano, *supra* note 31.

[35] Cross, *supra* note 13, at 32.

[36] Blundell, *supra* note 15, at 391. *See also* Miller v. Lakeside Vill. Condo. Ass'n, 2 Cal. Rptr. 2d 796, 803 (Cal. Ct. App. 1991) (establishing a link between the mold in plaintiff's condominium unit and plaintiff's extreme allergic reaction and severe aggravation of asthma).

[37] Blundell, *supra* note 15, at 391. *See also* Peterson, *supra* note 33 (explaining that other negative health effects have been attributed to mycotoxin exposure). "These complaints range from asthma and rashes to chronic liver damage, acute or chronic central nervous system damage, and cancer." *Id.*

[38] Redd, *supra* note 10, at 2. The National Toxicology Program recognizes the cancer-causing properties of toxic mold. *Id.*

[39] Ruth A. Etzel, M.D., Ph.D., *Mycotoxins*, 287 JAMA 425, 425 (2002) http://www.jama.amaassn.org/issues/v287n4/rfull/jct10020.html#r1. While inhalation of mycotoxins is viewed as being an extremely potent route of exposure, ingestion of mycotoxins is thought to be of minimal concern in civilized societies. Alexander Robertson IV, *Mold an Emerging Construction Defect*, GPSOLO, Apr.-May 2001, at 45, 46. *But see* G. Holcomb Jr. et al., *Outbreaks of Gastrointestinal Illness of Unknown Etiology Associated With Eating Burritos—United States, October 1997—October 1998*, 281 JAMA 1263 (1999) (noting serious health effects from ingested mycotoxins). Mycotoxins are a suspected cause in the 1997-1998 outbreaks of gastrointestinal illness associated with eating burritos in seven U.S. states. *Id.* "Outbreaks with symptoms and incubation periods similar to those described in this report have occurred in China and India, where illness has been linked to consumption of products made with grains contaminated with fungi." *Id.* at 1264.

respiratory problems for infants, the elderly, and individuals with weakened immune systems.[40]

Because mold thrives in humid environments, Hawai'i is an ideal breeding ground for mold and, consequently, mold litigation.[41] In places with characteristically warm weather, people tend to run their air conditioning units constantly, which can cause a problem if their heat, ventilation and air conditioning ("HVAC") systems are defective or leaking.[42] When there is a leak in an air conditioning unit, the constant water intrusion paired with poor ventilation encourages mold growth.[43]

In addition to the increased use of centralized HVAC systems, another factor that contributes to the prevalence of mold today is the relatively new architectural designs of large commercial buildings.[44] The surge in mold litigation is possibly a consequence of the major architectural revolution of the 1970s.[45] To conserve energy during the Arab oil embargo, buildings were designed to be tightly sealed and insulated.[46] In effect, the new "construction techniques . . . make early water leakage detection more difficult, and modern building materials, although more energy efficient, provide substantial 'mold food.'" [47] When these problems are combined with poor ventilation and improper maintenance of HVAC systems, mold growth in modern buildings results.[48] Given the substantial amount of time spent indoors in twentieth century urban America, it is not surprising that humans are more susceptible to mold-related illnesses now than ever before.

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[40] *See* Nakano, *supra* note 31, at 1-2 ("Studies have suggested that individuals such as children, immuno-compromised people (e.g. HIV) or pregnant women appear to be more susceptible to negative health effects from mold exposure.").

[41] The threat of mold, however, is present in dry climates as well as in moist climates. Mold-related lawsuits have surfaced in arid climates such as Texas and Nevada. *Id.* at 1-2. Nakano, a California attorney who has represented corporate clients in mold exposure litigation, handled a case that involved an alleged mold problem at an apartment complex in Las Vegas. *Id. See also* Seaman v. McKesson Corp., 846 P.2d 280, 280 (Nev. 1993) (indicating that the plaintiff contracted a rare lung disease called *Aspergillosis* from working in an onion processing plant located in Nevada). *Aspergillosis* is one of the few known infectious diseases associated with fungi exposure. NYC Guidelines, *supra* note 29, at 6. The disease is caused by exposure to certain species of *Aspergillus* (one of the infamous "toxic molds"), and is especially hazardous to immunosuppressed individuals. *Id.*

[42] Nakano, *supra* note 31, at 2.

[43] *Id.*

[44] *See* Laurence Kirsch & Andrew Perel, *Defense Can Win Toxic Mold Lawsuits: Difficulties in Proving Causation and Lack of Scientific Evidence Could be Key*, N.Y. L.J., June 24, 2002, at S8.

[45] *Id.*

[46] *Id.*

[47] *Id.*

[48] *Id.*

B. Legislation and Guidelines

In response to increasingly pervasive mold problems, state and federal governments have developed legislation and guidelines that attempt to set forth safety standards for mold exposure. On the legislative front, California's Toxic Mold Protection Act is the first and only set of laws enacted to address mold issues.[49] Despite California's efforts to pioneer mold legislation, the Toxic Mold Protection Act merely directs the California Department of Health Services to establish permissible mold exposure limits.[50] Still, California's mold legislation prompted other states to propose legislative action. In early 2003, six other states introduced legislation addressing mold issues.[51] The State of Hawai'i has not yet proposed any mold remediation legislation, in spite of recent mold problems. Based on the millions of dollars at stake in the highly publicized Hilton litigation,[52] it is likely that Hawai'i will follow the national trend in addressing mold problems through legislation.

On the federal level, Michigan Rep. John Conyers, Jr. introduced H.R. 5040, commonly referred to as the "Melina Bill," to Congress in July 2002 to provide national guidelines for mold inspection and remediation.[53] The Melina Bill called upon the Centers for Disease and Control, the Environmental Protection Agency, and the National Institutes of Health to undertake a comprehensive study of the health effects of indoor mold growth, including establishing standards on acceptable levels of mold.[54] The bill additionally provided a federal toxic mold insurance program,[55] and a tax credit for toxic mold inspection and remediation.[56] The Melina Bill was reintroduced to Congress on March 13, 2003 as H.R. 1268,[57] although no major legislative action has occurred thus far.[58]

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[49] CAL. HEALTH & SAFETY CODE § 26101 (Deering 2001).

[50] *Id.* In spite of California's progress toward setting some standards in the area of mold safety, the practical reality is that the Toxic Mold Protection Act has yet to be implemented due to lack of funding. Peterson, *supra* note 33, at 6 (commenting that "it is not certain when the Act will be implemented as the Department is not required to enforce the statute unless it has sufficient funds in its budget").

[51] NAT'L ASSOC. OF MUT. INS. COMPANIES, *Mold-Related Legislation Introduced in Six States So Far This Year, at* http://www.namic.org/topnews/030219_1.asp (Feb. 19, 2003).

[52] *See supra* notes 2-4 and accompanying text.

[53] United States Toxic Mold Safety & Prevention Act of 2002 ("Melina Bill"), H.R. 5040, 107th Cong. (2002).

[54] *Id.* at § 102.

[55] *Id.* at § 602.

[56] *Id.* at § 501.

[57] United States Toxic Mold Safety & Prevention Act of 2003 ("Melina Bill"), H.R. 1268, 107th Cong. (2003).

[58] 108 Bill Tracking, H.R. 1268, available in LEXIS, LESIG library, BLTRCK file.

In addition to legislation, various government agencies have begun to provide guidelines relating to mold. The United States Environmental Protection Agency ("EPA") released information in 2001, intending to aid the public in dealing with mold issues.[59] While the EPA guidelines provide some educational background about mold, the guidelines mainly focuses on conveying remediation guidelines for domestic and commercial buildings.[60] As of November 2003, the EPA has not yet provided national guidelines for mold detection, investigation, or evaluation.[61] The New York City Department of Health & Mental Hygiene created its own Guidelines on Assessment and Remediation of Fungi in Indoor Environments ("NYC Guidelines") in 2000.[62] The NYC Guidelines go a step further than the EPA, providing procedures that promote reliable scientific methods in collection and analysis of mold samples.[63] Although the NYC Guidelines also do not supply permissible exposure limits, they do make recommendations regarding environmental assessment of mold. The NYC Guidelines propose that visual inspection, bulk/surface sampling, air monitoring, and analysis of environmental samples should be used to assess mold contagion.[64]

The fact that more states are proposing mold legislation and guidelines suggest that mold *is* a threat to human health. Still, the lack of universally accepted standards concerning safe levels of mold exposure make it difficult for mold plaintiffs to establish causation.

C. Causation Problems in Mold Litigation

The inconclusive nature of mold injuries poses significant causation problems for plaintiffs, distinguishing it, in considerable respects, from the traditional tort construct. Mold cases require a prima facie showing of negligence in order to establish liability for injuries.[65] The elements for a cause of action founded on negligence are: (1) duty; (2) breach; (3) causation; and (4) damages.[66] Under the causation prong of a mold case, the plaintiff must prove that the defendant negligently allowed moisture intrusion and that

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[59] *See* U.S. ENVTL. PROT. AGENCY, MOLD REMEDIATION IN SCHOOLS AND COMMERCIAL BUILDINGS (2001), *available at* www.epa.gov/iaq/molds/index.html.

[60] *Id.*

[61] *Id.* at 25.

[62] NYC Guidelines, *supra* note 29.

[63] NYC Guidelines, *supra* note 29.

[64] *See id.* at §§ 2.1, 2.2, 2.3, & 2.4.

[65] *See, e.g.*, Mondelli v. Kendel Homes Corp., 631 N.W.2d 846, 852-53 (Neb. 2001) (analyzing a mold construction defect case using the traditional elements of negligence).

[66] PROSSER & KEETON ON THE LAW OF TORTS § 30, at 164-65 (W. Page Keeton et al. eds., 5th ed. 1984).

the moisture resulted in mold growth.[67] The plaintiff must then show the consequences of the mold contamination, including physical symptoms, if personal injuries are at issue.[68] Proof of causation is especially critical for plaintiffs litigating personal injury mold claims because scientific expert testimony is usually the only evidence available to correlate mold exposure with the plaintiff's injury.[69] Defendants are frequently successful at excluding potential scientific expert witnesses by using procedural mechanisms such as motions in limine.[70] Without expert testimony to prove causation, the case will be dismissed. Such a result precludes injured plaintiffs from adjudicating potentially valid claims.[71]

Causation in a mold exposure case requires proof of general and specific causation.[72] To prove general causation, a plaintiff must show that the mold at issue is capable of causing the injuries from which the plaintiff suffers.[73] To show specific causation, a plaintiff is then required to prove that the mold actually entered the plaintiff's body via some pathway and therefore actually contributed, at least in part, to the plaintiff's injuries.[74] In toxic tort cases,[75] where a causal connection is difficult to establish, the general causation element is routinely met by the utilization of epidemiology[76] or toxicology.[77]

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[67] Cross, *supra* note 13, at 32.

[68] *Id.*

[69] Blundell, *supra* note 15, at 394.

[70] If a judge grants a defendant's motion in limine to exclude expert witnesses from testifying as to causal relationships in mold cases, the case will likely be subject to summary judgment for lack of proof of causation. *See, e.g.*, Nat'l Bank of Commerce v. Associated Milk Producers, Inc., 22 F. Supp. 2d 942 (E.D. Ark. 1998) (involving a claim that exposure to mold-contaminated milk caused Plaintiff to contract laryngeal cancer). In *Nat'l Bank of Commerce*, the Arkansas district court granted the Defendant's Motion to Exclude Opinion Testimony of Plaintiff's Experts, thereby dismissing Plaintiff's complaint for lack of medical causation. *Id.* at 984.

[71] *See* Danielle Conway-Jones, *Factual Causation in Toxic Tort Litigation: A Philosophical View of Proof and Certainty in Uncertain Disciplines*, 35 U. RICH. L. REV. 875, 928 (2002) (maintaining that "toxic tort plaintiff[s] should not be penalized unjustly for the inherent uncertainty of medical diagnoses"). Scientific expert witnesses proffered by toxic tort plaintiffs should be admissible to support plaintiff's causation argument "so long as such diagnoses are based on medically valid techniques or methodologies." *Id.*

[72] Merrell Dow Pharms., Inc. v. Havner, 953 S.W.2d 706, 714 (Tex. 1997).

[73] *In re* Hanford Nuclear Reservation Litig., 292 F.3d 1124, 1133 (9th Cir. 2002).

[74] *See Havner*, 953 S.W.2d at 714 ("General causation is whether a substance is capable of causing a particular injury, while specific causation is whether a substance caused a particular individual's injury.").

[75] *See generally* Daniel A. Farber, *Toxic Causation*, 71 MINN. L. REV. 1219, 1222–37 (1987) (providing background on the law of toxic torts and its attendant causation problems).

[76] Epidemiology is the study of the incidence of disease in populations and operates under the assumption that "disease is not distributed randomly in a group of individuals and that identifiable subgroups, . . . exposed to certain agents, are at increased risk of contracting

The burden of proof then resides with the plaintiff to show specific causation, particularly that the alleged mold exposure was "more likely than not" the cause of the plaintiff's injuries.[78] Specific causation is a significant problem for plaintiffs in mold exposure cases because science has not yet established a causal link between mold mycotoxins and disease.[79]

There are several factors that militate against a finding of specific causation in mold exposure claims. First, the absence of universally accepted standards of safe levels of mold exposure make it extremely difficult for plaintiffs to demonstrate that the amount of mold spores found at any particular site is, per se, "unsafe."[80] Second, the determination of specific causation is highly

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particular diseases." MICHAEL D. GREEN, ET AL., REFERENCE MANUAL ON SCI. EVID. 333, 335 (2d ed. 2000). The author goes on to explain:

> Epidemiologic evidence identifies agents that are associated with an increased risk of disease in groups of individuals, quantifies the amount of excess disease that is associated with an agent, and provides a profile of the type of individual who is likely to contract a disease after being exposed to the agent. *Id.* Epidemiology provides evidence of association but not necessarily of causation. When epidemiological studies are conducted properly, however, many courts have recognized the value of epidemiological studies in showing increased risk in exposure cases. *See, e.g., Havner*, 953 S.W.2d at 715. In this toxic tort case against the manufacturer of the morning sickness drug, Bendectin, the Supreme Court of Texas held that "[a]lthough we recognize that there is not a precise fit between science and legal burdens of proof, we are persuaded that properly designed and executed epidemiological studies may be part of the evidence supporting causation in a toxic tort case."

Id. at 717.

[77] Toxicology is the study of the negative impact chemicals have on living organisms. BERNARD D. GOLDSTEIN & MARY SUE HENIFIN, REFERENCE MANUAL ON SCI. EVID. 401, 403 (2d ed. 2000).

[78] *See* PROSSER AND KEETON ON THE LAW OF TORTS § 41, at 269 (W. Page Keeton et al. eds., 5th ed. 1984) (stating that in causation issues, "the plaintiff, in general, has the burden of proof"). "The plaintiff must introduce evidence which affords a reasonable basis for the conclusion that it is more likely than not that the conduct of the defendant was a cause in fact of the result." *Id.*

[79] U.S. Envtl. Prot. Agency, *supra* note 59, at 42 ("More studies are needed to get a clear picture of the health effects related to most mycotoxins."). *But see* Mondelli v. Kendel Homes Corp., 631 N.W.2d 846, 856 (Neb. 2001) (finding that "[t]he list of publications which have addressed the presence of microbiological organisms and their relationship to asthma and allergies showed that the scientific community has generally accepted the principle that a connection exists between the presence of mold and health").

[80] *See* NYC Guidelines, *supra* note 29, at § 1.1 (explaining that "because measurements of exposure are not standardized and biological markers of exposure to fungi are largely unknown, it is not possible to determine 'safe' or 'unsafe' levels of exposure for people in general"); *see also* Peterson, *supra* note 33, at 7 (indicating that "various agencies have deemed the establishment of these standards for mold as impossible: 'due to the variances in personal sensitivities and the vast array of molds, it has been impossible to set exposure limits that can be applied to all humans.'" (citing Pamela J. Davis, *A Mold Primer*, CAL-OSHA REPORTER, Apr. 20, 2001)). *See* discussion *supra* Part II.B.

individualistic.[81] Human reactions to mold spores vary greatly, depending on existing sensitivities, allergies, immunities, tolerances, and other external considerations.[82] Finally, "it is currently impossible to measure mycotoxins in animal or human tissue[.]"[83] Consequently, plaintiffs are forced to rely on circumstantial evidence paired with diagnosis of symptoms known to be caused by mold spores.[84] In order to establish causation based on circumstantial evidence alone, parties in a mold exposure case must invoke expert testimony. For this reason, understanding the Rules of Evidence that govern the admission of expert testimony is crucial in evaluating a mold case.

III. FEDERAL AND HAWAI'I LAW CONCERNING THE ADMISSIBILITY OF SCIENTIFIC EXPERT TESTIMONY

Where uncertainty exists, the legal system allows scientific expert witnesses to provide the lay juror with scientific or technical knowledge necessary to make factual determinations.[85] HRE 702[86] governs the admissibility of expert testimony in Hawai'i courts. HRE 702 is patterned after FRE 702,[87] but the current language of HRE 702 and the interpreting case law differs from the federal standard. Valuable perspective on the future treatment of expert testimony in mold cases in Hawai'i can be gained by charting the evolution of Hawai'i's statutory and judicial expert admissibility law and examining its relationship to federal law. A chronological approach is especially useful in understanding the development of expert admissibility standards because both FRE 702 and HRE 702 underwent judicial interpretation and subsequent amendments in arriving at their current state.[88] As a starting point, a survey

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[81] *See supra* note 33 and accompanying text.

[82] Cross, *supra* note 13, at 30. *See, e.g.*, Polk v. Planet Ins. Co., 951 P.2d 1015 (Mont. 1997) (explaining that the plaintiff, a chronic smoker, experienced heightened symptoms of fever, chills, shortness of breath and lightheadedness as a result of handling moldy grain in a factory with poor ventilation). *See also supra* text accompanying note 35.

[83] Blundell, *supra* note 15 at 396 (citing Harriet Ammann, WASH. STATE DEP'T OF HEALTH, Is Indoor Mold Contamination a Threat to Health?, at 2, *available at* http://www.doh.wa.gov/ehp/oehas/mold.html (last visited Feb. 1, 2002)).

[84] *See, e.g.*, New Haverford P'ship v. Stroot, 772 A.2d 792, 796-97 (Del. 2001) (holding that expert testimony as to the excessive presence of mold in plaintiffs' apartment building and the causation thereof was properly admitted).

[85] *See* FED. R. EVID. 703 ("If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion . . . .").

[86] HAW. R. EVID. 702.

[87] FED. R. EVID. 702.

[88] *See infra* Part III.A, III.B.

of federal law on expert testimony is necessary to understand the legal context in which Hawai'i's scientific expert admissibility standard developed.[89]

A. Federal Law

The impetus for the federal expert admissibility standard was the early twentieth century case of *Frye v. United States*.[90] Nearly seventy years following *Frye*, Congress enacted the Federal Rules of Evidence, including FRE 702 which specifically addressed expert testimony.[91] The broad FRE 702 standard provoked much judicial discourse, resulting in the United States Supreme Court case of *Daubert v. Merrell Dow Pharmaceuticals*[92] and its progeny.[93] The whirlwind of expert admissibility law of the 1990s eventually compelled Congress to amend FRE 702 in 2000, in an attempt to clarify the federal expert admissibility standard.[94]

1. Federal common law: Frye v. United States

Since 1923, the standard for scientific expert admissibility in federal courts was based on the federal common law rule set forth in *Frye*. At issue in *Frye* was the admissibility of scientific expert testimony regarding a "systolic blood pressure deception test[,]"[95] a precursor to the modern lie detector test. In the early twentieth century, when *Frye* was decided, the proffered lie detector test was considered novel science.[96] In a succinct opinion, devoid of citations, the U.S. Court of Appeals for the District of Columbia determined that the appropriate test for admissibility is whether the evidence was based on a scientific technique "sufficiently established to have gained *general acceptance* in the particular field in which it belongs."[97] Accordingly, the court held that the systolic blood pressure deception test had not gained enough scientific recognition to justify its admission.[98] For nearly seventy years, the *Frye* "general acceptance" test was followed by the majority of federal and state jurisdictions.[99]

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[89] *See* HAW. R. EVID. 702 commentary.

[90] 293 F. 1013 (D.C. Cir. 1923).

[91] *See infra* Part III.A.2.

[92] 509 U.S. 579 (1993).

[93] *See infra* Part III.A.3.

[94] *See infra* Part III.A.4.

[95] *Frye*, 293 F. at 1013.

[96] *See id.* at 1014 ("Counsel for defendant, in their able presentation of the novel question involved, correctly state in their brief that no cases directly in [sic] point have been found.").

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

[98] *Id.*

[99] Daubert v. Merrell Dow Pharms., 509 U.S. 579, 584 (1993).

Despite its widespread use, *Frye* was the subject of much debate concerning its assumption that acceptance equals scientific validity.[100] The primary criticism was that the *Frye* test was unduly restrictive in admitting testimony based only on "general acceptance."[101] Although much controversy surrounded its application, many courts, including the Ninth Circuit, continued to follow the *Frye* "general acceptance" test, or modified versions of it.[102] When FRE 702 was subsequently enacted, courts and commentators disputed whether it superseded the *Frye* test.[103]

2. *FRE 702*

In 1975, Congress enacted the Federal Rules of Evidence.[104] FRE 702, in particular, governs the admissibility of expert testimony at trial.[105] FRE 702 provides that "[i]f scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise."[106] FRE 702 should be read with FRE 703 which basically states that if the underlying facts or data are "of a type reasonably relied upon by experts in the particular field in forming opinions or inferences," then those underlying facts or data need not be admissible in order for the expert testimony to be admitted.[107] The expert admissibility rules also provide the trial judge with the discretionary role of making the preliminary determination of whether an expert is qualified, pursuant to FRE 104(a).[108] The trial judge's

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[100] Andrew Gagen, *What Is An Environmental Expert? The Impact of* Daubert, Joiner & Kumho Tire *on the Admissibility of Scientific Expert Evidence*, 19 UCLA J. ENVTL. L. & POL'Y 401, 405 (2001-2002).

[101] *See* Brief of Amici Curiae Physicians, Scientists, and Historians of Science, *Daubert*, 509 U.S. 579 (1993) (No. 92-102), *available at* 1992 U.S. Briefs 102 (LEXIS) ("The quality of a scientific approach or opinion depends on the strength of its factual premises and on the depth and consistency of its reasoning, not on its appearance in a particular journal or on its popularity among other scientists.").

[102] *Daubert*, 509 U.S. at 584.

[103] *Id.* at 587 (comparing United States v. Williams, 583 F.2d 1194 (Cal. Ct. App. 1978) (asserting that *Frye* is superseded by the Rules of Evidence), with Christophersen v. Allied-Signal Corp., 939 F.2d 1106, 1111 (Cal. Ct. App. 1991) (en banc) (asserting that *Frye* and the Rules coexist)).

[104] FED. R. EVID. MANUAL (2002).

[105] *See* FED. R. EVID. 702 advisory committee's note.

[106] FED. R. EVID. 702.

[107] FED. R. EVID. 703.

[108] FED. R. EVID. 104(a) (providing that "[p]reliminary questions concerning the qualification of a person to be a witness . . . shall be determined by the court").

discretionary function and the FRE 403 balancing test[109] should be taken into consideration in any discussion of expert admissibility.[110] The Advisory Committee's Note to FRE 702 indicate that the primary consideration in admitting expert testimony is whether it will assist the trier of fact in understanding and determining the facts of the case.[111] The broad language of FRE 702 is in line with the liberal thrust of the Federal Rules of Evidence,[112] but it remained wide open to judicial interpretation.

The 1975 version of FRE 702 provided little guidance for judicial application.[113] Consequently, federal courts continued to grapple with the issue of how to determine whether expert testimony was "reliable." The federal case law that emerged from this struggle provides valuable assistance in the interpretation of FRE 702 and laid the foundation for Hawai'i's expert admissibility law.

3. FRE 702 interpreted: The Frye vs. Daubert *controversy*

The landmark federal cases discussing FRE 702's admissibility of expert testimony primarily consist of *Daubert*, and *Kumho Tire*.[114] In 1993, the United States Supreme Court had occasion to scrutinize the *Frye* "general acceptance" test and FRE 702, and in doing so, it overruled *Frye* as the appropriate test in governing the admissibility of expert witnesses.[115] In *Daubert*,[116] the Court held that the adoption of the Federal Rules of Evidence supplanted the "general acceptance" standard as the sole criteria for determining the admissibility of expert testimony.[117]

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[109] FED. R. EVID. 403 ("Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.").

[110] HAW. R. EVID. 702 commentary.

[111] *Id.*

[112] *See* Heller v. Shaw Indus., Inc., 167 F.3d 146, 155 (3d Cir. 1999).

[113] *See* FED. R. EVID. MANUAL (2002) ("[W]hile molding rules to fit particular facts may do justice in individual cases, it becomes difficult to predict what a Court will say about the rules of evidence in any given case.").

[114] Kumho Tire Co. v. Carmichael, 526 U.S. 137 (1999).

[115] *See* Daubert v. Merrell Dow Pharms., 509 U.S. 579, 597 (1993) (concluding that "'[g]eneral acceptance' is not a necessary precondition to the admissibility of scientific evidence under the Federal Rules of Evidence").

[116] 509 U.S. 579 (1993).

[117] *Id.* at 586. In *Daubert*, two families alleged that Bendectin, a prescription anti-nausea drug ingested by the plaintiffs, caused birth defects in their infant children. *Id.* at 582. The plaintiffs sought to admit epidemiological evidence indicating that Bendectin is capable of causing birth defects. *Id.* at 583. The district court granted the defendant's motion for summary judgment, concluding that epidemiology was not generally accepted in the scientific community,

By effectively rejecting *Frye*, the *Daubert* court liberalized the FRE 702 analysis, introducing several other factors to be considered in conjunction with the "general acceptance" test.[118] The following factors were offered as guidelines for assessing the reliability of scientific expert testimony:

> (1) whether or not the scientific theory or technique has been tested or proven to be valid,
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> (2) whether or not the theory or technique has been subject to peer review or publication,
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> (3) whether or not there is a known or potential rate of error and how . . . control standards [are] maintained, and
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> (4) whether or not the theory gained widespread acceptance in the scientific community.[119]

These four factors were proffered by the Court as non-exclusive considerations in ascertaining the reliability of any given scientific expert's methodology.

The requirement in FRE 702 that an expert's testimony pertain to "scientific knowledge" establishes a standard of reliability to be enforced by trial judges.[120] *Daubert* maintained that FRE 702's specific limitation of testimony to "scientific knowledge" contemplates regulation of the subjects and theories about which an expert may testify.[121] Yet, the Court qualified its definition of "scientific knowledge" by asserting that "it would be unreasonable to conclude that the subject of scientific testimony must be 'known' to a certainty; arguably, there are no certainties in science."[122] The *Daubert* Court declared that "[t]he focus, of course, must be solely on principles and methodology, not on the conclusions that they generate."[123] Thus, *Daubert* shifted the emphasis from general acceptance of the proposed theory, to reliability of the underlying methodology.

The *Daubert* decision brought about substantial change in American evidence law, yet certain intricacies of its application remained unanswered. Specifically, the question of what constituted an "expert" was left unclear. Six years later, in *Kumho Tire Co.*,[124] a unanimous United States Supreme

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and the Ninth Circuit affirmed on similar grounds. *Id.* The U.S. Supreme Court vacated and remanded the Ninth Circuit decision because of its exclusive reliance on the general acceptance test. *Id.* at 598.

[118] *See id.* at 593-94 (posturing the "general acceptance" test alongside three other factors, namely testability, peer review and publication, and potential rate of error).

[119] *See id.*

[120] *Id.* at 590.

[121] *Id.* at 589.

[122] *Id.* at 590.

[123] *Id.* at 595.

[124] 526 U.S. 137 (1999).

Court held that expert admissibility standards articulated in *Daubert* apply not only to scientific expert testimony, but to all types of expert testimony.[125] In addition to clarifying the scope of expert admissibility, the Court also reinforced its approval of utilizing a flexible analysis of reliability pursuant to *Daubert*.[126] The non-exclusive *Daubert* factors allowed for much latitude in trial court discretion, but provided little in the way of uniformity of judicial opinions.

4. 2000 amendment to FRE 702

In response to *Daubert* and its progeny, FRE 702 was amended to provide trial courts with guideposts in analyzing the reliability of expert testimony. On December 1, 2000, the following requirements were added to the existing FRE 702: "(1) the testimony is based upon sufficient facts or data; (2) the testimony is the product of reliable principles and methods; *and* (3) the witness has applied the principles and methods reliably to the facts of the case."[127] The grammatical structure of the amendment arguably suggests a strict interpretation because the added sentence is a conjunctive phrase made up of three conditions linked by the word "and."[128] The Advisory Committee's Note to FRE 702, however, refutes this harsh construction, indicating that "the amendment makes no attempt to set forth procedural requirements for exercising the trial court's gatekeeping function over expert testimony."[129] The 2000 amendment to FRE 702 affirms the heightened discretion granted

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[125] *Id.* at 147. The United States Supreme Court later held that the standard of review for expert admissibility is the "abuse of discretion" standard. Gen. Elec. Co. v. Joiner, 522 U.S. 136, 139 (1997). This high standard of review supports the discretionary function of the trial judge under *Daubert*.

[126] *Kumho Tire*, 526 U.S. at 150 ("We can neither rule out, nor rule in, for all cases and for all time the applicability of the factors mentioned in *Daubert* . . . . Too much depends upon the particular circumstances of the particular case at issue.").

[127] FED. R. EVID. 702 (emphasis added).

[128] *See id.* Even though the drafters explain that "[l]anguage was added to the Committee Note to clarify that no single factor is necessarily dispositive of the reliability inquiry mandated by Evidence Rule 702[,]" its codification runs the risk that courts will apply it with a strict hand. *See, e.g.*, Daniel Capra, *The Daubert Puzzle*, 32 GA. L. REV. 699, 766 (1998) ("Trial courts should be allowed substantial discretion in dealing with [expert admissibility] questions; any attempt to codify procedures will likely give rise to unnecessary changes in practice and create difficult questions for appellate review."). Misunderstood perceptions of the 2000 amendment to FRE 702 could be especially disadvantageous to plaintiffs in mold exposure cases, because the available expert testimony may meet some, but not all, of the elements of the 2000 amendments.

[129] FED. R. EVID. 702 advisory committee's note.

to trial judges and provides general standards that the trial court must use to assess the reliability and helpfulness of expert testimony.[130]

After the 2000 amendment to FRE 702, it is uncertain whether federal courts will continue to apply a *Daubert* analysis.[131] On one hand, *Daubert*'s common law doctrine is supplanted by the 2000 amendment to FRE 702.[132] *Rudd v. General Motors Corp.*,[133] the first published opinion addressing the 2000 amendment, appears to echo this view by contrasting the heightened factual inquiry required under the 2000 amendment to FRE 702 with the former *Daubert* standard. In *Rudd*, the Alabama district court stated that "the new [FRE] 702 appears to require a trial judge to make an evaluation that delves more into the facts than was recommended in *Daubert*, including as the rule does an inquiry into the sufficiency of the testimony's basis . . . and an inquiry into the application of a methodology to the facts."[134] On the other hand, the Advisory Committee's Note to FRE 702 supports a *Daubert*-like analysis. The Note maintains that "[c]ourts have shown considerable ingenuity and flexibility in considering challenges to expert testimony under *Daubert*, and it is contemplated that this will continue under the amended Rule."[135] Either way, the focus of the FRE 702 inquiry requires trial judges to ascertain the reliability of methods to a greater extent than was required under the pure *Frye* test.

While federal courts are bound by FRE 702 and U.S. Supreme Court decisions interpreting the Rule, state courts are divided as to what evidentiary standard should be applied to scientific experts.[136] Following the *Daubert* decision, some state courts continued to follow *Frye*, some adopted *Daubert*, and others created a modified version of *Frye*.[137] Currently, a pure *Frye* standard is followed in seventeen states.[138] Based on data compiled by the National Center for State Courts, "roughly two-thirds of the [*Frye*] jurisdic-

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[130] *Id.*

[131] *See generally* Kiran Mehta, *Gatekeepers of Expert Testimony*, NAT'L L.J., Apr. 2001, at B9.

[132] *See, e.g.*, United States v. Abel, 469 U.S. 45, 51 (1984) ("[U]nder the Federal Rules no common law of evidence remains.") (citing Cleary, *Preliminary Notes on Reading the Rules of Evidence*, 57 NEB. L. REV. 908, 915 (1978)).

[133] 127 F. Supp. 2d 1330 (D. Ala. 2001).

[134] *Id.* at 1336.

[135] FED. R. EVID. 702 advisory committee's note.

[136] 136 *See* Bert Black, *Post*-Daubert *and* Joiner *Caselaw: The Good, The Bad, and The Ugly*, SC33 ALI-ABA 145, 169 (1998) (providing a table that delineates the current status of *Daubert* and *Frye* in all fifty states).

[137] *See generally Master Class*, NAT'L L.J., May 15, 2002, at B11 (exploring the issue of why some state courts are so adamant about supporting *Frye* and rejecting *Daubert*).

[138] *Id.* (identifying the following states as *Frye* jurisdictions: Alabama, Arizona, California, Colorado, Florida, Illinois, Kansas, Maryland, Michigan, Minnesota, Mississippi, Missouri, Nevada, New Jersey, New York, Pennsylvania and Washington).

tions fall within the [twenty-five] most litigious states. The upshot is that while [*Frye*] is technically a minority view, the probability is that the clear majority of state trials are conducted in [*Frye*] jurisdictions."[139] One possible explanation for why states adhering to *Frye* oppose *Daubert* is that they simply see no need to change the status quo.[140] This seems to be a plausible reason why Hawai'i has also declined to adopt *Daubert*.

B. Hawai'i Law

Hawai'i's evidentiary standard regarding scientific expert admissibility encompasses HRE 702 and the 1992 Hawai'i Supreme Court case of *State v. Montalbo*.[141] Although *Montalbo* was decided two years before *Daubert*, its emphasis on liberalizing admissibility of expert testimony foreshadowed the theoretical underpinnings of *Daubert*. The essence of Hawai'i's standard is ensuring "trustworthiness and validity" of expert testimony.[142] Because this standard is unique to Hawai'i law, a history of HRE 702 and its interpretive case law is imperative to any discussion of expert admissibility in Hawai'i courts.

1. HRE 702

The first component of Hawai'i's expert admissibility standard is HRE 702. In 1981, Hawai'i adopted the 1975 version of FRE 702, which consisted of only the first sentence of the present HRE 702.[143] The current HRE 702 deviates from the current FRE 702. The current HRE 702 states, in its entirety:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise. In determining the issue of

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[139] *Id.*

[140] *Id. Accord* State v. Copeland, 922 P.2d 1304, 1314 (Wash. 1996) (mentioning that the application of *Frye* "has not been so difficult . . . as to call for its abandonment"); Dow Chem. Co. v. Mahlum, 970 P.2d 98, 108 n.3 (Nev. 1998) (stating that "we do not presently perceive a need to adopt *Daubert*").

[141] 73 Haw. 130, 828 P.2d 1274 (1992).

[142] HAW. R. EVID. 702.

[143] *See* HAW. R. EVID. 702 commentary; State v. Maelega, 80 Hawai'i 172, 180, 907 P.2d 758, 766 (1995) (citing HAW. R. EVID. 702 commentary). "The 1992 amendment . . . 'incorporate[d] a reliability factor[,]' thereby making it explicit that although '[g]eneral acceptance in the scientific community is highly probative of the reliability of a new technique[, it] . . . should not be used as an exclusive threshold for admissibility determinations.'" *Maelega*, 80 Hawai'i at 180, 907 P.2d at 766 (first omission added) (alterations in original).

> assistance to the trier of fact, the court may consider the *trustworthiness and validity* of the scientific technique or mode of analysis employed by the proffered expert.[144]

The first sentence of HRE 702 is identical to that of FRE 702. HRE 702, however, was later amended to add the second sentence, which distinguished it from FRE 702 and launched Hawai'i's unique expert admissibility standard.[145]

2. *Hawai'i case law: The* Montalbo *factors*

The second component of the Hawai'i expert admissibility standard is the seminal case of *Montalbo*. In *Montalbo*, the state introduced expert testimony on DNA profiling, in order to convict the defendant of sexual assault.[146] On appeal, the defendant argued that the trial court should have granted his motions in limine to exclude the DNA profiling evidence because it did not meet the *Frye* standard.[147] The test for admissibility under *Frye* is whether the scientific procedure, upon which the expert testimony is based, is "sufficiently established to have gained general acceptance in the particular field in which it belongs."[148] Prior to *Montalbo*, Hawai'i courts had not adopted a standard for scientific expert admissibility.[149] In deciding what standard to adopt, the Hawai'i Supreme Court discussed the current status of the *Frye* standard[150] and pointed out the weaknesses of applying a "pure" *Frye* analysis.[151]

After considering the merits of the *Frye* debate, the court adopted a modified version of the *Frye* test.[152] First, the court technically adopted the *Frye* test under the reliability prong of the expert admissibility analysis.[153]

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[144] HAW. R. EVID. 702 (emphasis added).

[145] *See infra* Part III.B.3.

[146] *Montalbo*, 73 Haw. at 132, 828 P.2d at 1277.

[147] *Id.* at 136, 828 P.2d at 1279.

[148] Frye v. United States, 293 F. 1013, 1014 (D.C. Cir. 1923).

[149] *See Montalbo*, 73 Haw. at 137, 828 P.2d at 1279 (stating that the *Frye* standard was not previously adopted in State v. Chang, 46 Haw. 22, 374 P.2d 5 (1962)). The court explains that, "*Chang* relied primarily on precedent from other jurisdictions and merely quoted New York authority similar to the *Frye* rule." *Id.*

[150] *Id.* at 137, 828 P.2d at 1279 ("[T]he current status of the Frye test is difficult to assess, as courts have deviated from strict application of the test, have developed variants, or have selectively applied the test." (citing P. Giannelli, *The Admissibility of Novel Scientific Evidence* Frye v. United States, *a Half-Century Later*, 80 COLUM. L. REV. 1197, 1228 (1980))).

[151] *See id.* at 136, 828 P.2d at 1279 (observing that in the original *Frye* test, "the focus of the test is not the validity of the underlying theory or the procedure itself, but the opinions of experts within the relevant scientific field"). *See also id.* ("*Frye* has been criticized as obscuring the critical question of the relevance of scientific evidence to the issues in dispute.").

[152] *Id.* at 140, 828 P.2d at 1280.

[153] *Id.*

Then, in an attempt to address criticism that the *Frye* standard obscured the relevance of scientific evidence, the court held that the general acceptance factor should be considered among other factors.[154] The court reasoned that "[a]lthough general acceptance in the scientific field is highly probative of the reliability of a scientific procedure, there are other indicators of suitability for admission at trial."[155] The following factors were espoused as the standard for admissibility of scientific expert testimony:

> (1) whether the evidence will assist the trier of fact to understand the evidence or to determine a fact in issue;
>
> (2) whether the evidence will add to the common understanding of the jury;
>
> (3) whether the underlying theory is generally accepted as valid;
>
> (4) whether the procedures used are generally accepted as reliable if performed properly;
>
> (5) whether the procedures were applied and conducted properly in the present instance.[156]

Montalbo therefore formulated a comprehensive expert admissibility standard, requiring both relevancy and reliability of expert testimony,[157] whereas the pure *Frye* test dealt only with the reliability prong. The *Montalbo* factors are consistent with HRE 702, in that "Rule 702's assistance requirement contemplates expert testimony based upon . . . an explicable and reliable system of analysis."[158] Applying its newly adopted *Montalbo* factors, the court ultimately held that the trial court did not abuse its discretion in admitting the DNA profiling evidence.[159]

3. 1992 amendment to HRE 702

Three months after the *Montalbo* decision, the Hawai'i legislature amended HRE 702, adding the second sentence: "In determining the issue of assistance to the trier of fact, the court may consider the ***trustworthiness and validity*** of the scientific technique of mode of analysis employed by the proffered expert."[160] Contrary to popular belief, the 1992 amendment to HRE 702 was

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[154] *Id.* at 140, 828 P.2d at 1280.

[155] *Id.* at 138, 828 P.2d at 1280.

[156] *Id.* at 140, 828 P.2d at 1280-81.

[157] *See also* State v. Fukusaku, 85 Hawai'i 462, 473, 946 P.2d 32, 43 (1997) ("[E]xpert testimony must be (1) relevant and (2) reliable.").

[158] HAW. R. EVID. 702 commentary.

[159] *Montalbo*, 73 Haw. at 143, 828 P.2d at 1282.

[160] HAW. R. EVID. 702 (emphasis added); Act 191, § 7, 16th Leg., Reg. Sess. (1992) *reprinted in* 1992 Haw. Sess. Laws 410.

not merely a codification of *Montalbo*.[161] The legislative history of HRE 702 reveals that although the amendment to HRE 702 was enacted after *Montalbo*, it was actually introduced approximately two months prior to the *Montalbo* decision.[162] Incorporating this broad language into HRE 702 therefore had the effect of expanding the scope of the reliability analysis, independent of *Montalbo*. In turn, the 1992 amendment to HRE 702 conferred a substantial amount of discretion to the trial judge.[163] Compared with the three distinct requirements for reliability under the 2000 amendment to FRE 702, HRE 702 imparts trial judges with more flexibility in admitting scientific expert testimony.[164] Despite different requirements, HRE 702 is the functional equivalent of FRE 702 because they both seek to ensure that scientific expert testimony is based on reliable methodologies.

4. The future of Hawai'i's expert admissibility standard

Since 1992, Hawai'i appellate courts have maintained their *Montalbo* standard despite the federal *Daubert* decision in 1993.[165] Most notably, the 2001 case of *State v. Vliet*[166] averred that the Hawai'i Supreme Court has not adopted the *Daubert* factors and "expressly refrains from doing so."[167] *Vliet*, however, cited a substantial portion of the *Daubert* opinion and appeared to promote a flexible application of the *Montalbo* factors not unlike that of *Daubert*.[168] Therefore, it seemed as though *Vliet* favored the reasoning and policies underlying *Daubert*.

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[161] *See, e.g.*, ADDISON M. BOWMAN, HAW. R. EVID. MANUAL 423 (1998) ("[T]he 1992 amendment had the effect of codifying *State v. Montalbo*.").

[162] *See* S.B. 2228, 16th Leg., Reg. Sess. (Haw. 1992) (indicating that the bill was introduced to the Hawai'i State Legislature on January 15, 1992); HAW. R. EVID. 702 (listing June 12, 1992 as the effective date of the amendment); *Montalbo*, 73 Haw. 130, 828 P.2d 1274 (decided on March 27, 1992).

[163] *See* BOWMAN, supra note 161, at 415 (noting that the second sentence of HRE 702 authorizes the court "in determining the issue of assistance to the trier of fact, . . . [to] consider the trustworthiness and validity of the scientific technique or mode of analysis employed by an expert witness") (alterations in original).

[164] *Compare* HAW. R. EVID. 702 (providing trial judges with a broad standard of "trustworthiness" and "validity" in determining whether to admit expert testimony) *with* FED. R. EVID. 702 (limiting the scope of the reliability analysis to three requirements).

[165] *See, e.g.*, Acoba v. Gen. Tire, Inc., 92 Hawai'i 1, 986 P.2d 288 (1999); State v. Maelega, 80 Hawai'i 172, 907 P.2d 758 (1995); State v. Ito, 90 Hawai'i 225, 978 P.2d 191 (Haw. Ct. App. 1999); *In re* Doe, 91 Hawai'i 166, 981 P.2d 723 (Haw. Ct. App. 1999).

[166] 95 Hawai'i 94, 19 P.3d 42 (2001).

[167] *Id.* at 105, 19 P.3d at 53.

[168] *Id.* at 110, 19 P.3d at 58 ("Nevertheless, we are hesitant to establish categories of factors that unnecessarily limit the scope of discretion exercised by the trial courts.").

Most recently, in the 2002 case of *State v. Pauline*,[169] the court limited its discussion on scientific expert testimony to Hawai'i case law, choosing not to mention *Daubert* at all. [170] The court's lack of citation to *Daubert* or its progeny, paired with its emphasis on *Montalbo*, implies that it is unlikely that Hawai'i will change its expert admissibility standard in the near future. Therefore, an analysis of scientific expert admissibility in mold exposure litigation in Hawai'i must necessarily be placed against the backdrop of Hawai'i's *Montalbo* factors.

IV. ANALYSIS

This section begins by examining how other jurisdictions have dealt with the admissibility of a vast array of scientific expert testimony in mold exposure cases. It then delineates the common methodologies of air sampling and differential diagnosis and illustrates how they meet Hawai'i's evidentiary standard of expert testimony as articulated in *Montalbo*. Finally, the discussion highlights the fundamental policies that would be served by allowing scientific expert testimony on air sampling and differential diagnosis to be presented to a jury.

A. How Other Jurisdictions Treat Scientific Expert Admissibility in Mold Cases

Hawai'i appellate courts have not yet faced a mold-related personal injury case.[171] Other jurisdictions, however, have encountered a handful of mold

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[169] 100 Hawai'i 356, 60 P.3d 306 (2002).

[170] *See id.* Perhaps this may be attributed to the fact that commentators have argued that *Daubert* will become obsolete after the 2000 amendments to FRE 702. *See* Mehta, *supra* note 131, at B9.

[171] Although Hawai'i appellate courts have not yet addressed the issue of expert admissibility in mold litigation, Komatsu v. Bd. of Tr., 67 Haw. 485, 693 P.2d 405 (1984), an occupational hazard case involving mold, may be indicative of the Hawai'i Supreme Court's inclination to allow scientific expert testimony in the future. In *Komatsu*, the plaintiff argued that the mold contaminants constituted an "occupational hazard" under Hawai'i law, because the mold exposure caused his asthmatic bronchitis, which rendered him incapacitated. *Id.* at 493, 693 P.2d at 410. The Intermediate Court of Appeals of Hawai'i ("ICA") construed the statute against the plaintiff, holding that the respiratory problems caused by mold contamination were not an "accident" under the language of the applicable statute. *Id.* at 491, 693 P.2d at 409. The Hawai'i Supreme Court subsequently vacated the ICA's judgment, holding that because "the peril of noxious organisms emitting from faulty air-conditioning systems is hardly incident to employment generally, we are led to the ineluctable conclusion that the intermediate court erred [in its holding]." *Id.* at 495, 693 P.2d at 412.While the issue in *Komatsu* is clearly outside the realm of expert admissibility, in the absence of pertinent case law, it is interesting to observe the varying treatments given to a mold issue by Hawai'i's appellate courts. The ICA chose to apply

exposure cases in recent years.[172] Although these courts vary in their application of *Daubert*, *Frye*, or a hybrid thereof, the general acceptance analysis has been a primary focus in the admissibility of experts in most of the reported mold exposure cases. Under Hawai'i law, it is well settled that courts may consider "case law from other jurisdictions to determine the reliability of a particular scientific test." [173] For this reason, it is appropriate to look to mold exposure cases in other jurisdictions for guidance. This section summarizes the leading case law addressing the issue of scientific expert admissibility in mold exposure cases. It also illuminates analytical approaches undertaken by various courts, and notes trends in expert admissibility.

One of the early mold exposure cases involving a dispute over scientific expert admissibility is *Centex-Rooney Construction Co. v. Martin County*.[174] In this 1997 breach of contract case, Martin County ("County") hired Centex-Rooney Construction Co. ("Centex") to serve as the construction manager on a project to build a courthouse and office building.[175] The County alleged that the work performed by Centex resulted in "serious structural and electrical defects, several of which contributed to the water infiltration and result[ed] [in] mold infestation."[176] The County retained two indoor air quality experts who concluded that (1) several of the exposed individuals had symptoms associated with work-related asthma, and (2) air and bulk samples indicated a significant amount of two unusual toxic molds.[177] Relying upon the information from the two experts, the County decided to evacuate the building and remediate the extensive mold growth, sustaining economic damages in the

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an extremely stringent construction of the statute, adhering only to the examples listed in the legislative committee reports. *See* Komatsu v. Bd. of Tr., 5 Haw. App. 279, 288, 687 P.2d 1340, 1347 (1984) (concluding erroneously that because the legislative committee reports only mention firemen and sewer workers, the legislature did not intend for cumulative injuries to qualify as an "accident"). In contrast, the Hawai'i Supreme Court emerged as the more sympathetic of the two courts, an observation which may be gleaned from the poignantly descriptive language of its holding. The fact that *Komatsu* was decided in the mid-1980s offers faint optimism that given the opportunity to hear a mold exposure case today, the Hawai'i Supreme Court may allow expert testimony to benefit injured plaintiffs who have suffered the "peril of noxious organisms emitting from faulty air-conditioning systems." *Komatsu*, 67 Haw. at 495, 693 P.2d at 412.

[172] *See, e.g.*, New Haverford P'ship v. Stroot, 772 A.2d 792 (Del. 2001), Minner v. Am. Mortgage & Guar. Co., 791 A.2d 826 (Del. Super. Ct. 2000), Centex-Rooney Constr. Co. v. Martin County, 706 So. 2d 20 (Fla. Dist. Ct. App. 1997), Mondelli v. Kendel Homes Corp., 631 N.W.2d 846 (Neb. 2001).

[173] State v. Ito, 90 Hawai'i 225, 243, 978 P.2d 191, 209 (1999).

[174] 706 So. 2d 20.

[175] *Id.* at 23.

[176] *Id.* at 25.

[177] *Id.* at 24.

process.[178] The jury returned a verdict in favor of the County.[179] On appeal, Centex objected to the admission of the expert testimony, arguing that studies establishing a causal link between toxic molds and health risks were not generally accepted in the scientific community.[180]

The Florida court was not persuaded by Centex's contention, and affirmed the trial court's admission of the expert testimony under the *Frye* standard.[181] In so doing, the court reasoned that the case was distinguishable from those situations in which the expert's opinion completely lacks scientific basis.[182] The court pointed out that the experts "each testified about numerous publications accepted in the scientific community recognizing the link between exposure to the highly unusual toxigenic molds and adverse health effects."[183] As such, the court held that "the County met its burden under *Frye* of proving by a preponderance of the evidence that the basic underlying principles of scientific evidence were sufficiently tested and accepted by the relevant scientific community."[184]

Minner v. American Mortgage & Guaranty Co.,[185] decided by a Delaware trial court in 2000, offers an in-depth analysis of various methodologies and individual experts proffered in mold contamination cases. In *Minner*, the plaintiffs alleged that they suffered from various illnesses as a result of mold infestation in their workplace.[186] The defendants filed motions in limine to exclude the testimony of twelve scientific and medical experts on the theory that the plaintiffs' diagnoses lacked sufficient methodological foundation.[187] Although the court applied a *Daubert* analysis, it focused primarily on the general acceptance factor in excluding expert witnesses.[188] For example, in analyzing the admissibility of expert testimony by Dr. Ziem regarding Sick Building Syndrome,[189] the court considered an array of scientific studies and

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[178] *See id.* ("This evacuation required the relocation of all County employees from these buildings to remote work sites. The County hired a coordinator for the remediation of the buildings, an engineering firm to advise on building repair, and an environmental firm to assist with removal of the molds.").

[179] *Id.* at 25.

[180] *Id.* at 26.

[181] *Id.*

[182] *See id.* (distinguishing Porter v. Whitehall Lab., Inc., 9 F.3d 607 (7th Cir. 1993)).

[183] *Id.*

[184] *Id.*

[185] 791 A.2d 826 (Del. Super. Ct. 2000).

[186] *Id.* at 833.

[187] *Id. See, e.g., id.* at 847 (noting the basis of each of the twelve arguments set forth by defendants).

[188] *See, e.g., id.* at 851–52 (discussing whether a diagnosis of Sick Building Syndrome is generally accepted in the medical community).

[189] Sick Building Syndrome involves ill health effects from exposure to improper air ventilation in buildings. *Id.* at 851.

respectable medical journals. The court concluded that, "[t]he literature in totality indicates that the medical community has not accepted as valid a diagnosis of [Sick Building Syndrome]. Therefore, Dr. Ziem's diagnosis . . . lacks the pertinent characteristics in sound scientific methodology to be put before the jury."[190] The *Minner* court applied a similar general acceptance-based analysis to the remaining experts' diagnoses. In short, the court excluded expert testimony on Multiple Chemical Sensitivity,[191] Sick Building Syndrome,[192] Chronic Fatigue Syndrome,[193] and Fibromyalgia,[194] but admitted testimony on Reactive Airway Dysfunction Syndrome[195] and Toxic Encephalopathy.[196] Therefore, the court tended to admit testimony based on general and non-severe diagnoses, and exclude testimony based on specific and severe diagnoses.

While *Minner* examined some typical diagnoses of mold plaintiffs, *New Haverford Partnership v. Stroot*[197] dealt with the issue of reliability of expert testimony regarding air sampling methodologies. In *Stroot*, two plaintiffs brought a negligence claim against their landlord, alleging that substantial mold growth in their apartment complex caused their health to deteriorate.[198] One plaintiff faced the problem of establishing causation because she had

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[190] *Id.* at 852.

[191] *Id.* at 851. Multiple Chemical Sensitivity generally concerns immunological dysfunction resulting from exposure to toxins, although there is no standard definition. *Id.* at 849.

[192] *Id.* at 852.

[193] *Id.* at 854. Chronic Fatigue Syndrome "can be diagnosed when a patient has had six or more consecutive months of severe fatigue, reported to be unrelieved by sufficient bed rest and accompanied by non-specific symptoms, including flu-like symptoms, generalized pain, and memory problems." *Id.* at 852 (citing U.S. CENTER FOR DISEASE CONTROL, DIAGNOSIS OF CHRONIC FATIGUE SYNDROME, http://www.cdc.gov.ncidod/diseases/cfs/cfs_info4.htm, Dec. 22, 1999).

[194] *Id.* at 855. Fibromyalgia is "a type of muscular soft-tissue rheumatism that principally affects muscles and their attachment to bones, but which is also commonly accompanied by fatigue, sleep disturbances, changes in mood or thinking, anxiety or depression." *Id.* at 854–55 (citing Russell v. UNUM Life Ins. Co., 40 F. Supp. 2d 747, 751 (1999)).

[195] *Id.* at 857. Reactive Airway Dysfunction Syndrome is:

> [A] condition . . . whereby asthma symptoms appear to be initiated by a low or moderate-level exposure to an irritant substance or material in the workplace or environment, and is characterized clinically by the development of asthma symptoms and physiologically by the findings of an atopic status and the presence of non-specific airway hyperresponsiveness.

Id. at 856 (citing Stewart M. Brooks, *Reactive Airway Syndromes*, J. OCCUPATIONAL HEALTH & MED. 215 (1992)).

[196] *Id.* at 858. Toxic Encephalopathy is a mental impairment onset by exposure to chemicals. *Id.* at 857.

[197] 772 A.2d 792 (Del. 2001).

[198] *Id.* at 795.

suffered from allergies and asthma since childhood.[199] The plaintiffs presented expert testimony of a physician specializing in mycology and microbiology who took bulk and air samples from the apartment and opined that excessive mold growth posed a health risk to tenants.[200] An environmental and occupational medicine physician also testified that "the high concentration of toxic mold at Haverford Place significantly and permanently increased the severity of Stroot's asthma."[201] The jury awarded Stroot $1 million for personal injuries and $5,000 for property damage, which was reduced to account for Stroot's contributory negligence.[202]

On appeal to the Delaware Supreme Court, the defendant challenged the admission of expert testimony on causation. The defendant argued that the sampling methods employed by the plaintiffs' experts were unreliable because they failed to establish a proper baseline from which to compare the levels of mold present in the apartment building.[203] The court ultimately rejected the defendant's reasoning and was persuaded by the fact that, although the plaintiffs' experts did not engage in extensive baseline testing, the mold sample taken at Haverford Place measured mold spores in amounts ten times greater than that of the outdoor air.[204] The court concluded that "the failure to conduct extensive baseline testing goes to the weight of the experts' opinions, not their admissibility."[205] Accordingly, the court affirmed the trial court's decision to admit the experts' testimony relating to excessive mold in the apartment building and causation of the plaintiffs' health problems.[206]

The 2001 case of *Mondelli v. Kendel Homes Corp.*[207] illustrates one court's struggle with admitting expert testimony regarding unsafe levels of mold contamination in the absence of universally accepted exposure standards. *Mondelli* was a construction defect case in which a family sought to recover damages for personal injuries allegedly sustained from exposure to mold spores that circulated throughout their home.[208] The Mondellis complained of health problems including headaches, nasal congestion, shortness of breath,

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[199] *Id.* at 796.

[200] *Id.*

[201] *Id.*

[202] *Id.* at 797.

[203] *Id.* at 799.

[204] *Id.* at 800.

[205] *Id.*

[206] *Id.*

[207] 631 N.W.2d 846 (Neb. 2001).

[208] *Id.* at 850-51. Plaintiffs claimed that "surface water and rainwater leaked through the exterior of the house into the interior and that mold, fungi and airborne spores began growing in the exterior wall insulation and interstitial spaces between the interior and exterior walls of the house." *Id.*

coughing, and asthma.[209] The trial court precluded causation testimony of an environmental toxicologist because there were no standards in the scientific community as to acceptable levels of mold in a house.[210]

Utilizing the *Frye* standard, the Nebraska Supreme Court reversed the trial court's decision, finding that the exclusion of the toxicologist's expert testimony was an abuse of discretion.[211] The court engaged in a lengthy discussion of the numerous scientific publications consulted by the toxicologist in arriving at her opinion that the mold levels in the plaintiffs' home far exceeded those found in nationally conducted clinical studies.[212] The court found that, although there were no established standards concerning safe mold exposure, "[t]he list of publications which have addressed the presence of microbiological organisms and their relationship to asthma and allergies showed that the scientific community has generally accepted the principle that a connection exists between the presence of mold and health."[213]

Departing from the general trend toward admitting expert testimony in the above cases, the Texas Appellate Court upheld the exclusion of causation expert testimony in *Allison v. Fire Insurance Exchange*.[214] *Allison* was based on a homeowner's insurance claim for mold damage to a home purchased in a foreclosure sale.[215] During the course of the insurance dispute, air samples were taken revealing that strains of "toxic" mold, including *stachybotrys*,[216] were present in the home.[217] The plaintiff alleged that exposure to mold in his house caused a type of brain damage called toxic encephalopathy, and presented expert testimony supporting his allegations.[218] The trial court dismissed the Plaintiff's personal injury claims on the ground that the Plaintiff's "expert witnesses did not have reliable epidemiological studies about the health effects of mold exposure."[219] The Plaintiff's wife's insurance bad faith and breach of contract claims, on the other hand, went to the jury and she was awarded over $33 million.[220] The Plaintiff appealed the district court's judgment dismissing his personal injury claims, contending that the district court erred in excluding his causation experts.[221] The Court of Appeals of

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[209] *Id.* at 851–52.
[210] *Id.* at 853.
[211] *Id.* at 854, 857.
[212] *Id.* at 855.
[213] *Id.* at 856.
[214] 98 S.W.3d 227 (Tex. Ct. App. 2002).
[215] *Id.* at 234-36.
[216] *See supra* note 33.
[217] *Allison*, 98 S.W.3d at 236.
[218] *Id.* at 239.
[219] *Id.* at 237.
[220] *Id.* at 233, 237.
[221] *Id.* at 234.

Texas reasoned that "[s]pecific causation cannot be based on inferred general causation; general causation must be affirmatively proved,"[222] and affirmed the district court's judgment.[223] The court agreed with the trial judge that, although Allison's causation testimony satisfied the *Daubert* factors, it did not qualify as a reliable epidemiological study.[224] As a result, the court held that the trial court did not abuse its discretion by excluding testimony of Allison's causation experts.[225]

In the recently published mold decision, *Roche v. Lincoln Property Co.*,[226] a federal district court in Virginia held that expert testimony purporting that exposure to mold in the Plaintiffs' apartment caused personal injuries was inadmissible under *Daubert*.[227] The Roches claimed that as a result of leaky fixtures and plumbing in their apartment building, toxic levels of mold developed within the apartment.[228] The Roches' subsequently developed health problems including "memory loss, chronic headaches, sinus problems, . . . chest congestion and shortness of breath."[229] The Roches filed a personal injury law suit founded upon negligent failure to maintain the premises.[230] To establish specific causation, the Roches' produced expert testimony of Dr. Bernstein, an allergist who performed a differential diagnosis in arriving at his opinion that the presence of mold in the Roches' apartment caused their symptoms.[231] Defendants moved to exclude Dr. Bernstein's expert testimony as to specific causation for failure to meet the *Daubert* factors, and because his differential diagnosis was flawed.[232]

The court's analysis centered on the fact that Dr. Bernstein's differential diagnosis was scientifically invalid and unreliable.[233] The court recognized that the methodology of differential diagnosis, when "faithfully applied," satisfies the *Daubert* factors.[234] Yet, it found that the differential diagnosis performed in this instance failed to ensure reliability of the methodology on a number of grounds.[235] The court concluded that "Dr. Bernstein's testimony is based on conflicting facts, conflicting reports and literature, fails to rule-in

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[222] *Id.* at 239.
[223] *Id.* at 234.
[224] *Id.* at 239.
[225] *Id.* at 240
[226] 278 F. Supp. 2d 744 (E.D. Va. 2003).
[227] *Id.* at 746.
[228] *Id.*
[229] *Id.*
[230] *Id.*
[231] *Id.* at 747.
[232] *Id.*
[233] *Id.* at 751.
[234] *Id.*
[235] *Id.* at 751–52 (enumerating ten major flaws of Dr. Bernstein's methodology).

and rule-out several potential allergens, and relies solely on temporal relation; thus, his differential diagnosis is unsupported and unreliable."[236] The exclusion of scientific expert testimony premised on differential diagnosis in *Roche* is primarily attributed to the facts of that case. Although Dr. Bernstein's methodology was found to be unreliable, the court clearly appreciated the reliability of a properly conducted differential diagnosis. Hence, *Roche* is in accord with other jurisdictions that have admitted differential diagnosis expert testimony in mold exposure cases.

The exclusion of expert testimony in *Allison*, compared with the admission of expert testimony in other previously discussed mold cases, suggests that the nature of the alleged injuries is of as much import as the type of methodology used. In cases such as *Allison*, courts generally exclude expert testimony that mold exposure caused *severe* injuries such as laryngeal cancer and brain injury, and other severe diagnoses.[237] Courts reject such claims on grounds that science and government agencies have declared that there is currently insufficient evidence to establish a conclusive relationship between mold mycotoxins and serious diseases.[238] On the other hand, courts generally admit expert testimony in cases where the plaintiff's injuries are less serious, such as aggravation of asthma and allergies.[239] These types of injuries may be characterized as mild and subjective. Such a characterization is critical to the issue of expert admissibility, because:

> subjective conditions such as headaches and respiratory problems are more difficult to define and to rule out as having been caused by mold exposure .... Given that it is a generally accepted fact that mold can cause allergic reactions, it may be more difficult to exclude expert testimony where the alleged illnesses arise from this disease model.[240]

The general trend, therefore, favors admitting expert testimony relating to alleged injuries that are general in nature and excluding expert testimony where the injuries are specific in nature. Having gleaned some insight on the legal analysis employed in other jurisdictions, we now turn to Hawai'i's expert admissibility standard.

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[236] *Id.* at 750.

[237] *See, e.g.*, Nat'l Bank of Commerce v. Associated Milk Producers, 22 F. Supp. 2d 942 (E.D. Ark. 1998) (excluding expert testimony that exposure to toxins in mold caused laryngeal cancer).

[238] U.S. Envtl. Prot. Agency, *supra* note 59, at 42.

[239] *See* New Haverford P'ship v. Stroot, 772 A.2d 792, 795 (Del. 2001), Mondelli v. Kendel Homes Corp., 631 N.W.2d 846 (Neb. 2001).

[240] John Payne et al., *The Latest Developments in Mold Exposure Litigation*, 17 NAT. RES. & ENV'T 132, 134 (2002).

B. Applying Hawai'i's Expert Admissibility Standard to Mold Methodologies

Applying Hawai'i's *Montalbo* factors to the available methods of determining causal factors of mold injuries would ease the burden on plaintiff's experts in mold exposure cases. Establishing causation in mold cases requires testing of both the environment and the exposed individual.[241] This section analyzes air sampling and differential diagnosis by first describing their methodologies, and second applying the procedures and methods to the *Montalbo* factors. The legal analysis will apply only to the third and fourth reliability factors set forth in *Montalbo*, namely, that "the underlying theory is generally accepted as valid"[242] and "the procedures used are generally accepted as reliable if performed properly".[243] The fifth reliability factor, questioning whether "the procedures were applied and conducted properly in the present case,"[244] is not suitable for analysis because it is, by definition, a highly fact-specific inquiry that requires a case-by-case examination. Therefore, the foregoing analysis assumes that the procedures were conducted properly.

1. Air sampling

The first method typically used to prove specific causation in mold cases is air sampling. Air sampling involves either collection of mold spores in agar plates,[245] or funneling air through a device that traps airborne particulate matter on collection strips.[246] The former is the traditional procedure, which has been criticized for underestimating total spore counts.[247] The latter is the

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[241] Alexander Robertson IV, *supra* note 39, at 48.

[242] State v. Montalbo, 73 Haw. 130, 140, 828 P.3d 1274, 1281 (1992).

[243] *Id.*

[244] *Id.*

[245] Agar is "[a] gelatinous material prepared from certain saltwater algae and used in bacterial culture media . . . ." AM. HERITAGE DICTIONARY 16 (3d ed. 1994). The agar plate method of air sampling involves placing agar in a Petri dish and allowing airborne organisms to be trapped on the sticky surface of the agar substance. Interview with George Wong, *supra* note 33. The Petri dishes are then incubated in a laboratory so that the organisms captured on the agar medium can grow and be identified. *Id.*

[246] Interview with George Wong, *supra* note 33. Proper environmental testing includes analysis of surface and air sampling. Surface sampling involves swiping the surface of visible mold with a swab for analysis by a microbiologist. *Id.* Generally, if visible mold growth is present, then sampling is unnecessary for identifying the presence of mold in a suspected area. *See* U.S. Envtl. Prot. Agency, *supra* note 59, at 25. Surface sampling may be useful in identifying the types of mold present, which will aid the physician in properly diagnosing the exposed individual. Robertson, *supra* note 39, at 48.

[247] Robertson, *supra* note 39, at 48 ("According to [the American Industrial Hygiene Association], air samples impacted on agar mediums can greatly underestimate the total numbers for

modern procedure, which utilizes a device marketed as "Air-O-Cell cassettes."[248] Air-O-Cell technology is currently the most widely used in the United States for evaluating airborne fungal levels in indoor environments.[249] The cassettes are sterilized and sealed to ensure that the collection surface is not contaminated.[250] Air is filtered through the cassette, and airborne molds, pollens and other particulates adhere to the surface of a clear sample collection slide.[251] The collection slide is more sensitive than the traditional agar medium, allowing it to detect both viable and non-viable spores.[252] In comparison, only *viable* fungal spores germinate on agar plates.[253] The cassette is then sent to a laboratory where qualified technicians, including mycologists and microbiologists, are able to identify and count the collected particulates.[254] Total concentrations of fungal particulates are measured in terms of the number of colony-forming-units per cubic meter of air (CFU/m^3).[255]

Even when samples are properly collected, the interpretation of results must take into account the fact that the mold spore count in a given outdoor environment is constantly in flux.[256] "Amounts of fungal spores often fluctuate widely during the course of a day, and a single air sample reflects only a momentary 'snapshot' condition."[257] Typically, the mold spore count in outdoor environments can vary 10,000 CFU/m^3 from day to day, depending on climate change, whereas indoor levels do not vary as much.[258] Using only one outdoor sample as a baseline number could therefore lead to inaccurate results. A more reliable approach would involve two sources of comparison: (1) an air sample from inside a building in the regional area that has no mold problem, and (2) an outdoor sample,[259] "so that the genus and spore counts of

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three reasons: (1) decline in propagule viability with age and exposure to ambient environmental conditions; (2) choice of agar medium; and (3) damage to propagules during sampling.").

[248] The Air-O-Cell cassette was patented in part by Daniel Baxter in 1996, but was premised on split impaction technology which has been widely used in the field of bioaerosols for the last twenty years. Telephone Interview with Daniel Baxter, Environmental Systems (Apr. 14, 2003).

[249] Stella M. Tsai et al., *A Comparative Study of Collection Efficiency of Airborne Fungal Matter Using Andersen Single-Stage N6 Impactor and the Air-O-Cell Cassettes*, 1999 BIOAEROSALS, FUNGI & MYCOTOXINS: HEALTH EFFECTS, ASSESSMENT, PREVENTION & CONTROL 457–64.

[250] Telephone Interview with Daniel Baxter, *supra* note 248.

[251] *Id.*

[252] *See* Tsai, *supra* note 249.

[253] *Id.*

[254] *See* Telephone Interview with Daniel Baxter, *supra* note 248.

[255] Tsai, *supra* note 249.

[256] *Id.*

[257] Robertson, *supra* note 39 at 48–49.

[258] Telephone Interview with Daniel Baxter, *supra* note 248.

[259] *Id.*

fungi found inside can be compared to those found outside" of the building in question.[260] A comparison between indoor and outdoor air samples must reflect a significant discrepancy in order to suggest a causal connection between mold exposure and injury.[261] Plaintiffs in mold exposure cases are then able to use the results of air sampling procedures as circumstantial evidence of specific causation.

Although there is currently no legislation delineating safe exposure standards, [262] mold exposure plaintiffs may be able to meet the threshold requirement for expert admissibility using the *Montalbo* factors. First, pursuant to the third factor, the underlying theory of air sampling is generally accepted as valid. There is a general consensus on three principles of mold sampling: (1) fungi should generally not be growing in indoor environments, (2) levels of fungi indoors should be lower than outdoor air, and (3) there should not be different species of fungi in indoor air than in the nearby outdoor air.[263] Therefore, if the air sampling results indicate that the mold levels indoors are greater than the outdoors or that there are different types of mold in the indoor air, then an expert's testimony to this effect would satisfy the general acceptance requirement. Under this theory, mold plaintiffs might be able to show that mold levels indoors are grossly disproportionate to that of the outdoors, lending credence to the proposition that the presence of mold more likely than not caused the plaintiff's injuries.[264] The *Montalbo* factors would therefore qualify expert testimony on air sampling, premised on the generally accepted principle that levels of fungi in indoor air should be lower than outdoor air.

Second, under the fourth *Montalbo* factor, the procedures used are generally accepted as reliable if performed properly. The most current and widely used air sampling procedure, Air-O-Cell, yields accurate results approximately ninety-five percent of the time.[265] The Air-O-Cell cassette itself is designed to protect the sample from external contamination during transportation, a problem that skewed results of the traditional agar procedure.[266] Laboratories

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[260] *Id. But see* New Haverford P'ship v. Stroot, 772 A.2d 792, 800 (Del. 2001) (admitting testimony on air sampling results despite the fact that minimal outdoor samples were taken for comparison). The court concluded that "the failure to conduct extensive baseline testing goes to the weight of the experts' opinions, not their admissibility." *Id.*

[261] Telephone interview with Daniel Baxter, *supra* note 248.

[262] *See* U.S. Envtl. Prot. Agency, *supra* note 59, at 25 ("Since no EPA or other Federal threshold limits have been set for mold or mold spores, sampling cannot be used to check a building's compliance with Federal mold standards.").

[263] Cross, *supra* note 13, at 33.

[264] *See, e.g., Stroot*, 772 A.2d at 800 (admitting expert testimony on causation, based on the theory that indoor mold levels were ten times greater than outdoor air).

[265] Telephone Interview with Daniel Baxter, *supra* note 248.

[266] *Id.*

that analyze the air samples take many precautions to ensure that testing procedures minimize potential error in test results.[267] Air-O-Cell technology is generally accepted as reliable, and should therefore be admitted under *Montalbo*'s fourth factor.

This analysis of air sampling procedure and theory is consistent with the reasoning of *Mondelli*, [268] as discussed above. The Nebraska Supreme Court is the only court that has examined air sampling procedures in detail. The plaintiffs' expert collected air samples using a procedure similar to the Air-O-Cell technology described above. The sampling procedure used in *Mondelli* "draws a volume of air through the instrument and a set of impellers forces spores or other organisms into an agar plate. After the sampler is allowed to run for a certain period of time, the agar strip is removed and the number of organisms counted."[269] One of plaintiff's experts, a biologist, testified that the air sampler is reliable.[270] The court also noted that the air sampling device had an error rate of plus or minus two percent.[271] Even though the plaintiffs' expert did not consult any objective publications regarding the accuracy of the air sampler, the court nonetheless concluded that the procedure was generally accepted as reliable.[272]

Likewise, the *Mondelli* court analyzed the theory underlying air sampling methods and found it to be reliable. The plaintiffs' second expert was an environmental toxicologist who stated that there were no industry standards regarding acceptable mold levels.[273] Yet, the plaintiffs' expert also testified that, based on general scientific information, "a house with less than 100 colony-forming units per cubic meter . . . is a house with no mold problem."[274] The court noted that the air sampling results yielded mold levels in the range of 550-725 spores per cubic meter in open areas.[275] In contrast, the results of outdoor air samples taken at the Mondellis' property line indicated only 100 spores per cubic meter.[276] Moreover, the species of mold found inside the

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[267] *Id.*

[268] Mondelli v. Kendel Homes, Corp., 631 N.W.2d 846 (Neb. 2001). *See also supra* text accompanying notes 207-213.

[269] *Id.* at 857.

[270] *Id.*

[271] *Id.*

[272] *Id.* at 857-58.

[273] *Id.* at 854-55.

[274] *Id.*

[275] *Id.* There was a dispute as to the accuracy of other air samples taken from underneath plastic furniture coverings, which yielded results of up to 1,675 spores per cubic meter. *Id.* These readings, however, are not prejudicial because the jury was informed that these excessive readings were taken from under plastic coverings. *Id.*

[276] *Id.*

Mondellis' home was different from those found outside their home.[277] The court held that the expert's theory, that the excessive mold exposure was capable of causing the plaintiff's asthma and allergy injuries, was generally accepted in the scientific community.[278]

The Nebraska court's analysis of both the procedure and the theory of air sampling provides sound guidance for other state courts. *Mondelli* affirms that the theory of air sampling is "generally accepted as valid" and the procedure is "generally accepted as reliable if performed properly."[279] Thus, Hawai'i courts should follow the persuasive reasoning of *Mondelli* in determining the reliability of air sampling in mold exposure cases.

2. *Differential diagnosis*

The second method often used to prove specific causation in mold cases is differential diagnosis. Differential diagnosis is a standard clinical technique that identifies the cause of a medical condition by eliminating other likely causes.[280] The physician achieves this by examining the patient, and reviewing a collaboration of medical histories, clinical tests, laboratory tests, and similar techniques until the most probable cause is isolated.[281] Differential diagnosis is particularly useful in proving specific causation in mold exposure cases because it takes into account the multitude of factors that affect the presence and severity of general injuries such as asthma and allergies. Courts generally approve of a reliable differential diagnosis because it enjoys widespread acceptance in the medical community.[282] The only situations where courts exclude differential diagnosis testimony is when it does not conform to standard diagnostic techniques,[283] or when the expert opinion is based entirely on a plaintiff's medical complaints in anticipation of litigation.[284] When differential diagnosis is properly performed, however, no court has excluded it.[285]

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[277] *Id.*

[278] *Id.* at 856.

[279] State v. Montalbo, 73 Haw. 130, 140, 828 P.2d 1274, 1281 (1992).

[280] Westberry v. Gislaved Gummi AB, 178 F.3d 257, 262 (4th Cir. 1999).

[281] *Id.*

[282] MARGIE SEARCY-ALFORD, GUIDE TO TOXIC TORTS § 10.03, at 7 (2003).

[283] *See* Moore v. Ashland Chem., Inc., 151 F.3d 269, 277-279 (5th Cir. 1998) (holding that the trial court did not abuse its discretion in excluding causation testimony based on differential diagnosis).

[284] *See, e.g., In re* Paoli R.R. Yard PCB Litig., 35 F.3d 717, 762 (3d Cir. 1994) (affirming the exclusion of two experts who "based their conclusion as to a plaintiff's symptoms solely on the plaintiff's self-report of illness in preparation for litigation.").

[285] Joseph Sanders & Julie Machal-Fulks, *The Admissibility of Differential Diagnosis Testimony to Prove Causation in Toxic Tort Cases: The Interplay of Adjective and Substantive Law*, LAW & CONTEMP. PROBS., Autumn 2001, at 107, 120.

Differential diagnosis also passes muster under the reliability factors of *Montalbo*. The theory that differential diagnosis can isolate causal factors of an injury is generally accepted as valid in the medical community, in accordance with the third factor of the *Montalbo* standard.[286] The procedures used in differential diagnosis are also generally accepted as reliable when performed properly. These propositions are well settled in case law, because "the overwhelming majority of the courts of appeals that have addressed the issue have held that a medical opinion on causation based upon a reliable differential diagnosis is sufficiently valid to satisfy the first prong of the Rule 702 inquiry."[287] The remaining question is whether differential diagnosis is valid and reliable in the context of mold-related injuries.

New Haverford Partnership v. Stroot[288] addressed expert admissibility of differential diagnosis in a mold exposure case. One of the plaintiffs in *Stroot* alleged that excessive mold levels in her apartment aggravated her asthma and allergies, which forced her to be hospitalized seven times.[289] The defendants argued that the causation testimony was flawed because the experts failed to exclude alternate causes of plaintiff's medical problems.[290] The defendants claimed that the plaintiff who suffered from aggravated asthma was also a smoker and owned a dog although she was allergic to dogs.[291] The Delaware Supreme Court observed that the expert "followed the scientifically accepted procedure of obtaining a medical history and a detailed questionnaire from the plaintiffs. [The expert] then ruled out other possible causes of plaintiffs' health problems by reviewing that information together with the blood test results and the data collected from the apartment buildings."[292] Concluding that the expert employed a generally accepted technique of differential diagnosis, the court upheld the trial court's decision to admit the causation opinion.[293] The court reasoned that "the foundation for an expert's causation opinion need not be established with the precision of a laboratory experiment."[294] Failure to eliminate other possible causes of the plaintiff's health

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[286] *See* Turner v. Iowa Fire Equip. Co., 229 F.3d 1202, 1208 (8th Cir. 2000) ("The circuits reason that a differential diagnosis is a tested methodology, has been subjected to peer review/publication, does not frequently lead to incorrect results, and is generally accepted in the medical community.").

[287] Westberry v. Gislaved Gummi AB, 178 F.3d 257, 263 (4th Cir. 1999).

[288] 772 A.2d 792 (Del. 2001); *see supra* text accompanying notes 197-206.

[289] Strast, 772 A.2d at 796.

[290] *Id.* at 799-800.

[291] *Id.* at 800.

[292] *Id.*

[293] *Id.*

[294] *Id.*

problems "goes to the weight of the experts' opinions, not their admissibility."[295]

Stroot's analysis is commensurate with Hawai'i's expert admissibility standard. Differential diagnosis is a highly accepted method of determining specific causation that meets the criteria of *Montalbo*. Symptoms associated with mold exposure are common and could conceivably be caused by a number of potential factors.[296] Differential diagnosis provides a reliable method of establishing causation in spite of this. Hence, when faced with mold exposure cases, Hawai'i courts should admit differential diagnosis testimony pursuant to the *Montalbo* standard.

C. Public Policy Favors Admitting Expert Testimony in Mold Cases

Policies of fairness and jury integrity provide additional reasons for admitting expert testimony in mold exposure cases. Part one of this section contends that it is unfair to penalize mold exposure plaintiffs for deficiencies in science. Part two explains that although the current scientific knowledge of mold effects on human health does not meet the relatively high legal standard of general acceptance, the jury should, nonetheless, be given the opportunity to weigh the credibility of the evidence.

1. Fairness: Plaintiffs should not be penalized for deficiencies in science

Scientific knowledge on the health effects of mold lacks the certainty required by existing legal standards of causation. Studies regarding the effects of mold on human health are very much in their infant stages and will probably remain below the standard of "scientific certainty" for years to come.[297] Until then, the role of the trial judge, as espoused by Hawai'i courts and by the U.S. Supreme Court, [298] can help bridge the causation gap for disadvantaged plaintiffs in mold suits. In conformity with this expansive ideology, the liberal allocation of responsibility conferred upon trial judges under Hawai'i's expert admissibility law allows plaintiffs some latitude in establishing causation in an area where science has not yet caught up with the law. "[I]t would be

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[295] *Id.*

[296] *See supra* text accompanying note 36.

[297] U.S. Envtl. Prot. Agency, *supra* note 79, at 42 (stating that "[m]ore studies are needed to get a clear picture of the health effects related to most mycotoxins").

[298] *See* State v. Vliet, 95 Hawai'i 94, 107, 19 P.3d 42, 55 (2001) ("'Rule 702 grants the [trial] judge the discretionary authority, reviewable for its abuse, to determine reliability in light of the particular facts and circumstances of the particular case.'") (quoting Kumho Tire Co. v. Carmichael, 526 U.S. 137, 158 (1999) (alterations in original)).

unreasonable to conclude that the subject of scientific testimony must be 'known' to a certainty; arguably, there are no certainties in science."[299]

The fact that the objectives of science and the law are fundamentally at odds with one another should not bar valid claims of mold exposure plaintiffs. For evidentiary purposes, "scientific certainty" has a different meaning in the laboratory than it does in the courtroom.[300] Essentially, science and the law have conflicting goals. Science, on the one hand, is epistemic, striving to understand phenomena in an endless pursuit of the "truth."[301] This being said, science views the search for truth as an infinite quest, one that is subject to constant re-evaluation and modification.[302] Law, on the other hand, operates under a more rigid rule-based system, aiming for a just resolution of disputes between parties.[303] The tension between the goals of science and the law raises particular difficulties in litigation involving novel science. The *Daubert* Court commented on this issue, profoundly declaring:

> [Science] is advanced by broad and wide-ranging consideration of a multitude of hypotheses, for those that are incorrect will eventually be shown to be so, and that in itself is an advance. Conjectures that are probably wrong are of little use, however, in the project of reaching a quick, final, and binding legal judgment—often of great consequence—about a particular set of events in the past. We recognize that, in practice, a gatekeeping role for the judge, no matter how flexible, inevitably on occasion will prevent the jury from learning of authentic insights and innovations. That, nevertheless, is the balance that is struck by

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[299] Daubert v. Merrell Dow Pharms., 509 U.S. 579, 590 (1993). *See also*, Cross, *supra* note 13, at 33 (asserting that the lack of a definitive test in ascertaining mold contamination does not render all diagnoses invalid). "There are numerous diseases—such as migraine headaches, lower back pain, and even the common cold—for which there is no conclusive test, but that are well-described clinically and are not the least bit controversial in the medical community." *Id.*

[300] *See generally*, Sheila Jasanoff, *Judging Science: Issues, Assumptions, Models, in* REPORT OF THE 1997 FORUM FOR STATE COURT JUDGES, SCIENTIFIC EVIDENCE IN THE COURTS: CONCEPTS & CONTROVERSIES 14-17 (The Roscoe Pound Found. ed., 1998). "The requirements for truth and objectivity are different in legal and scientific settings, and there are substantial differences as well between the goals, methods, and processes of legal and scientific fact-finding." *Id.* at 14.

[301] Carl F. Cranor & David A. Eastmond, *Scientific Ignorance and Reliable Patterns of Evidence in Toxic Tort Causation: Is There a Need for Liability Reform?*, 64 LAW & CONTEMP. PROBS. 5, 18 (2001).

[302] *See, e.g.*, Edward J. Imwinkelried, *Evidence Law Visits Jurassic Park: The Far-Reaching Implication of the Daubert Court's Recognition of the Uncertainty of the Scientific Enterprise*, 81 IOWA L. REV. 55, 61-62 (1995) ("[T]he modern scientist realizes that the conclusive demonstration of absolute truth is impossible . . . . Even when the available research appears to support an hypothesis, the acceptance of the hypothesis must be contingent and provisional.").

[303] *Id.* at 65-66.

> Rules of Evidence designed not for the exhaustive search for cosmic understanding but for the particularized resolution of legal disputes.[304]

Daubert used the disparate relationship between science and the law to justify giving heightened discretion to trial judges, a concept not unlike that underlying Hawai'i's expert admissibility standard. The broad language of HRE 702 allows trial judges to accommodate for such discrepancies between science and the law as long as the minimum requirements of "trustworthiness and validity"[305] are met. Under the same principle, Hawai'i courts should recognize more subtle, yet still reliable, forms of expert testimony.

It is unfair to demand that mold exposure plaintiffs meet stringent standards of causation at the admissibility stage, when scientists are still in the process of researching biological evidence linking mold exposure to disease.[306] A Rule 702 inquiry must be distinguished from a merit-based causation inquiry. At the admissibility stage of litigation, the plaintiff's experts only have to demonstrate by a preponderance of the evidence that their opinions are reliable, not that they are correct.[307] The fact that there are no universal exposure standards in place to indicate whether mold levels are inherently unsafe should not bar plaintiffs from seeking judicial relief.[308] Hawai'i courts should admit reasonably reliable scientific expert testimony, thereby leaving the ultimate decision of liability to the jury.

2. *Jury integrity: Juries, not judges, should weigh the credibility of expert testimony*

The above-mentioned discrepancies between science and the law, ever-present in mold litigation, offer a compelling reason to allow juries to determine whether or not expert testimony is reliable. Making the distinction

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[304] *Daubert*, 509 U.S. at 597.

[305] HAW. R. EVID. 702.

[306] "[S]tronger and better evidence is unavailable through no fault of anyone and a decision based on the preponderance of the available evidence, rather than imposing an evidentiary threshold, would seem in keeping with the role of the civil justice system." Michael D. Green, *Expert Witnesses and Sufficiency of Evidence in Toxic Substances Litigation: The Legacy of* Agent Orange *and Bendectin Litigation*, 86 NW. U. L. REV. 643, 681 (1992).

[307] *See In re* Paoli R.R. Yard PCB Litig., 35 F.3d 717, 744 (3d Cir. 1994) (stating that the evidentiary requirement of reliability is lower than the merits standard of correctness). Proponents "do not have to demonstrate to the judge by a preponderance of the evidence that the assessments of their experts are correct, they only have to demonstrate by a preponderance of evidence that their opinions are reliable." *Id.*

[308] U.S. Envtl. Prot. Agency, *supra* note 59. *See also* NYC Guidelines, *supra* note 29, at § 1.1 ("[B]ecause measurements of exposure are not standardized and biological markers of exposure to fungi are largely unknown, it is not possible to determine 'safe' or 'unsafe' levels of exposure for people in general.").

between the roles of the judge and jury is crucial in mold exposure cases where a conglomeration of expert testimony may be the sole basis for proving causation.[309] It is well established that the fact-finding function of the jury operates to determine the credibility and weight to be given to testimony.[310] When a trial judge excludes reasonably reliable expert testimony at the admissibility stage, that judge essentially assumes the role of the fact finder.[311] Perceived problems in the reliability of expert testimony should bear on the weight of the experts' opinions, not on its admissibility.[312] For over a century, juries have served the function of weighing the credibility of experts in civil cases and are capable of performing the same role in mold exposure litigation.

The United States has historically valued the jury trial, often regarding it as one of the cornerstones of the American legal system.[313] The right to a civil jury trial stems from the Seventh Amendment to the United States Constitution, which states that "[i]n Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of common law."[314]

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[309] *See, e.g.*, Borel v. Fibreboard Paper Prods. Corp., 493 F.2d 1076, 1094 (5th Cir. 1973) ("Whether the defendant's conduct was a substantial factor is a question for the jury, unless the court determines that reasonable men could not differ.").

[310] 47 AM. JUR. 2D *Jury* § 2 (2002).

[311] Suffice it to say, trial judges should act as gatekeepers to exclude expert testimony that is clearly unreliable. *See, e.g.*, Kumho Tire Co. v. Carmichael, 526 U.S. 137, 151 (1998) ("*Daubert*'s general acceptance factor does not show that an expert's testimony is reliable where the discipline itself lacks reliability, as, for example, do theories grounded in any so-called generally accepted principles of astrology or necromancy.").

[312] Michael H. Gottesman, *Should State Courts Impose "Reliability" Thresholds on the Admissibility of Expert Scientific Testimony Respecting Causation in Tort Cases?*, *in* REPORT OF THE 1997 FORUM FOR STATE COURT JUDGES, SCIENTIFIC EVIDENCE IN THE COURTS: CONCEPTS & CONTROVERSIES, 45 (The Roscoe Pound Found. ed., 1998). Gottesman communicates the view that:

> If an expert's methodology is outside the mainstream, or unsupported by the scientific literature, those points surely will be put before the jury by the opposing party's evidence. *It is then for the jury, not the judge, to decide whether the expert's approach is unreliable.* Judges are allowed to usurp the jury function . . . only when the evidence is such that no reasonable juror could believe one side's version on the basis of the record evidence. But, by definition, an honest expert's opinion provides a reasonable basis for a juror's belief in that opinion. *Id.* (emphasis added).

[313] Lisa S. Meyer, Note, *Taking the "Complexity" Out of Complex Litigation: Preserving the Constitutional Right to a Civil Jury Trial*, 28 VAL. U. L. REV. 337, 342 (1993) ("[The Seventh Amendment] is a most important and valuable amendment, and places upon the high ground of constitutional rights the inestimable privilege of a trial by jury in civil cases, . . . which is conceded by all to be essential to political and civil liberty." (citing 2 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 633 (1833))).

[314] U.S. CONST. amend VII.

Through the Seventh Amendment, the jury is the fact finder, and bears the responsibility of weighing the evidence and judging the credibility of witnesses in civil cases.[315] The United States Supreme Court stresses the importance of the jury trial, noting that, "[m]aintenance of the jury as a fact-finding body is of such importance and occupies so firm a place in our history and jurisprudence that any seeming curtailment of the right to a jury trial should be scrutinized with the utmost care."[316] The exclusion of otherwise reliable scientific expert testimony in mold cases may deprive citizens of this deeply ingrained right to a jury trial.

Although the Seventh Amendment to the United States Constitution, a federal mandate, does not apply to the states, the right to a civil jury is preserved in Hawai'i state law. Both the Hawai'i Constitution[317] and the Hawai'i Rules of Civil Procedure[318] secure the right to a trial by jury in most civil cases. In addition, it is well established that Hawai'i appellate courts consider a jury trial to be both a constitutional and fundamental right that should be fervently protected.[319] The Hawai'i Supreme Court has commented that "[h]aving stood the test of long experience as one of the best means of protecting property and human liberty, the [jury] system must be jealously guarded against any unauthorized encroachment."[320] The "fundamental" classification of civil jury trials in Hawai'i is not absolute. Rather, it only protects the right to a jury trial from unreasonable obstruction in order to ensure that "the ultimate determination of issues of fact by the jury [are] not interfered with."[321] In short, "laws, practices, and procedures affecting the right to trial by jury under article I, § 13 are valid as long as they *do not significantly burden or impair the right to ultimately have a jury determine issues of fact.*"[322] In the context of mold litigation, a refusal to admit scientific

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[315] Edmonson v. Leesville Concrete Co., 500 U.S. 614, 630 (1991).

[316] Dimick v. Schiedt, 293 U.S. 474, 486 (1935). In highlighting the essential nature of the civil jury to a democratic government, some scholars analogize the right to a civil jury trial with the right to vote. *See generally*, Vikram David Amar, *Jury Service as Political Participation Akin to Voting*, 80 CORNELL L. REV. 203 (1995).

[317] HAW. CONST. art. I, § 13 (1978) ("In suits at common law where the value in controversy shall exceed five thousand dollars, the right of trial by jury shall be preserved.").

[318] HAW. R. CIV. P. 38(a) (2000) ("The right of trial by jury as given by the Constitution or a statute of the State or the United States shall be preserved to the parties inviolate.").

[319] Seong v. Trans-Pacific Airlines, Ltd., 41 Haw. 231, 1955 WL 8794, 7 (Haw. Terr. 1955) ("It is well-established that trial by jury being a constitutional and fundamental right, 'courts indulge every reasonable presumption against the waiver of such right.'") (citing Aetna Ins. Co. v. Kennedy, 301 U.S. 389, 393 (1937))).

[320] Chau v. Nagai, 44 Haw. 290, 293, 353 P.2d 998, 1000 (1960).

[321] Richardson v. Sport Shinko, 76 Hawai'i 494, 513, 880 P.2d 169, 188 (1994) (citing Kimbrough v. Holiday Inn, 478 F. Supp. 566, 568 (E.D. Pa. 1979)).

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

expert testimony would likely impair the right to have a jury determine issues of fact bearing on the causation of the plaintiff's injuries.

Notwithstanding the history and tradition of the jury trial in American courts, the increasing use of technology and the complexity of legal issues in modern day civil trials sparked a debate over whether lay jurors have the competence to fulfill their traditional role. Some courts have held that there is no right to a jury trial in complex litigation involving antitrust violations or other highly scientific/technical issues.[323] Other courts have held that the right to a jury trial survives litigation designated as "complex."[324] Courts that refuse to carve out an exception in complex litigation cases express confidence in the ability of jurors to make fair decisions in complex litigation trials. For example, the Ninth Circuit has opined that, "this argument [that jurors are incompetent] unnecessarily and improperly demeans the intelligence of the citizens of this Nation . . . . Jurors, if properly instructed and treated with deserved respect, bring collective intelligence, wisdom, and dedication to their tasks, which is rarely equaled in other areas of public service."[325] The sentiment of the Ninth Circuit resonates in social studies conducted by the Federal Judicial Center[326] and the American Bar Association.[327] The

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[323] *See, e.g., In re* Japanese Elec. Prod. Antitrust Litig., 631 F.2d 1069, 1089 (3d Cir. 1980) (holding that the Seventh Amendment does not guarantee a right to a civil jury trial when the jury is "unable to understand the case and decide it rationally"). The rationale for such a distinction is premised on the Fifth Amendment right to due process of the law. *Id.* Several characteristics of this case suggested that it was extraordinarily complex. The length of the litigation exceeded nine years and produced *millions* of documents and over 100,000 pages of depositions. *Id.* at 1073. Further, allegations were made against 100 international firms and purported to prove a conspiracy occurring over the course of thirty years. *Id.* at 1074. Finally, the case concerned complicated financial issues that would have required the jury to understand business and market conditions in Japan. *Id.*

[324] *See, e.g., In re* U.S. Fin. Sec. Litig., 609 F.2d 411, 432 (9th Cir. 1979) (holding that no complexity exception exists even in the context of complex litigation).

[325] *Id.* at 430.

[326] Joe S. Cecil et al., FEDERAL JUDICIAL CENTER, JURY SERVICE IN LENGTHY CIVIL TRIALS (1987).

[327] *See* Anthony Z. Roisman, *Conflict Resolution in the Courts: The Role of Science*, 15 CARDOZO L. REV. 1945, 1953-54 (1994) (citing THE BROOKINGS INSTITUTION, *Charting a Future for the Civil Jury System in* report from an American Bar Association/Brookings Symposium (1992)). The report highlights the virtues of the civil jury system in America:

> First, the jury is a valuable process for decisionmaking and an effective means for arriving at a fair resolution of disputed facts . . . . Second, the jury provides important protections against the abuse of power by legislatures, judges, the government, business, or other powerful entities. . . . Third, . . . juries provide the best mechanism for bringing broadly based community values to bear on the issues involved in private disputes but doing so with their public function in mind . . . . Fourth, the jury provides an important check on the bureaucratization and professionalization of the legal system . . . . Finally, the jury system provides a means for legitimizing the outcome of dispute resolution and

consensus is that jurors in civil trials *are* competent in the majority of civil trials.[328]

The case for allowing juries to determine the credibility of experts in mold cases is further strengthened by the fact that the testimony typically offered in mold litigation cannot be classified as "complex litigation." Unlike complex litigation cases, mold exposure cases involve a limited amount of testimony that is relatively easy to understand. Testimony on air sampling methods is straightforward, requiring only an evaluation of how many mold spores were detected indoors as compared with the outdoors.[329] Testimony on differential diagnosis is not only uncomplicated, but is also commonly admitted in personal injury cases. In any event, mold cases are not so complicated as to warrant an exception to the right to a jury trial.

It seems as though the primary goal in mold exposure litigation is to achieve a balance between allowing enough expert testimony to ensure that plaintiffs have a chance at a fair trial, and preventing "junk science" from entering the doors of the courtroom.[330] Admitting reliable expert testimony in mold cases will ensure fairness for plaintiffs and defendants alike. To illustrate, a defendant may benefit from presenting expert testimony showing that air sampling yielded low levels of mold, and could therefore not have caused the plaintiff's alleged injuries. A defendant could likewise proffer expert testimony on differential diagnosis tending to prove that the plaintiff's injuries may be attributed to alternate causes (e.g., dust mites, pollen, pets, etc.). Furthermore, defendants in mold cases may invoke appropriate procedural safeguards to ensure that patently unreliable evidence is either excluded or substantially weakened. For example, "[v]igorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence."[331] Admitting testimony pursuant to the *Montalbo* standard will therefore *not* give plaintiffs a "windfall" in mold exposure cases. Rather, it will level the playing field for plaintiffs with valid claims who are currently faced with an insurmountable burden of proof in litigating mold claims. Thus, admitting expert testimony to prove causation in mold cases would effectuate

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facilitating public understanding and support for and confidence in our legal system. *Id.*

[328] *See* Joe S. Cecil et al., *Citizen Comprehension of Difficult Issues: Lessons From Civil Jury Trials*, 40 AM. U. L. REV. 727, 764 (1991) ("[T]he overall picture of the jury that emerges from the available data indicates that juries are capable of deciding even very complex cases, especially if procedures to enhance jury competence are used.").

[329] *See supra* text accompanying notes 263-264.

[330] *See supra* Part IV.C.1.

[331] Daubert v. Merrell Dow Pharms., 509 U.S. 579, 596 (1993). Directed verdict and summary judgment are also at a judge's disposal in the event that the admitted testimony turns out to be unreliable. *Id.* (citing FED. R. CIV. P. 50(a) and FED. R. CIV. P. 56).

some of the basic objectives of the Rules of Evidence, that is, the ascertainment of truth and the just determination of proceedings.[332]

V. CONCLUSION

The magnitude of the mold problem is reflected in the volume of mold-related litigation across the nation.[333] The advent of mold exposure litigation calls for a close examination of scientific expert admissibility standards. Although Hawai'i appellate courts have not yet addressed the issue of admissibility of air sampling and differential diagnosis in the context of mold litigation,[334] the flurry of mold cases on national and local levels suggests that Hawai'i will soon be required to do so. Based on the mold cases in other state courts, the trend appears to be toward admitting scientific expert testimony that is generally accepted as reliable regardless of whether the court is in a *Daubert* or *Frye* jurisdiction.[335] The reasoning of these courts is sound and persuasive. Hawai'i should follow the national trend and admit reliable methodologies pursuant to its own standard for expert admissibility: the *Montalbo* factors. Two methodologies commonly used by mold plaintiffs, namely air sampling and differential diagnosis, meet the reliability requirements of *Montalbo*.[336] Thus, when faced with mold exposure cases, Hawai'i courts should admit scientific expert testimony on air sampling and differential diagnosis pursuant to *Montalbo*.

Chenise S. Kanemoto[337]

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[332] HAW. R. EVID. 102 ("These rules shall be construed to secure fairness in administration, elimination of unjustifiable expense and delay, and promotion of growth and development of the law of evidence to the end that the *truth may be ascertained* and proceedings justly determined." (emphasis added)).

[333] *See supra* text accompanying note 8.

[334] *See supra* note 171 and accompanying text.

[335] *See supra* Part IV.A.

[336] *See supra* Part IV.B.1-2.

[337] Class of 2004, William S. Richardson School of Law, University of Hawai'i at Manoa. Special thanks to the Honorable Richard Pollack, Professor John Barkai, and Professor Carla Caratto for their insights on earlier drafts of this article. Thank you to Malia Lee, Jodene Arakaki, Wendy Hanakahi, Liann Ebesugawa, Alison Kunishige, and the 2002-2004 University of Hawai'i Law Review editorial boards for their guidance. Finally, thanks to Joshua Magno for his continued encouragement and support.

The Strict Products Liability Sleeper in Hawai'i: Toward Exclusion of the "Unreasonably Dangerous" Standard

I. INTRODUCTION

A construction worker is on the job at a University of California at Santa Cruz build site when his life is forever changed. Mr. Ray Barker, while operating a massive loading machine,[1] was seriously injured[2] in August of 1970, when lumber fell from the loader and struck him.[3] While he survived the incident, Mr. Barker blamed the manufacturer of the loader for designing the machine in such a way as to allow the lumber to tip, fall, hit, and injure him.[4] He therefore filed suit against the manufacturer and the lessor[5] of the loader based on strict products liability to recover for his injuries.[6]

At trial, the defendants claimed that Mr. Barker's accident resulted from misuse rather than the machine's design.[7] The evidence conflicted sharply as to which party was at fault for the accident.[8] This conflicting testimony combined with an erroneous instruction to the jury deprived Mr. Barker of the only remedy available for the injuries he suffered. The trial court mistakenly

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[1] The loader is so large that it was designed to lift 5,000 pound loads to heights of 32 feet. This fork-lift type machine is 23 feet long, 8 feet wide, weighs over 17,000 pounds, and sits on tires "which are about the height of a person's chest." Barker v. Lull Eng'g Co., Inc., 573 P.2d 443, 447 (Cal. 1978).

[2] Interestingly, the author, after thorough research, has been unable to discover what exact injuries befell Mr. Barker as a result of this accident.

[3] *Barker*, 573 P.2d at 445-47. California law has been influential in the development of Hawai'i law in the area of strict products liability law. *See* discussion *infra* Part II.C.

[4] *Barker*, 573 P.2d at 447-48.

[5] It should be noted that while Lull Engineering Company, Inc. manufactured the loader, George M. Philpott Co., Inc. leased the loader to Barker's employer, and suit was instituted against both the manufacturer and the lessor in *Barker*. *Id.* at 445.

Generally manufacturers, sellers and/or lessors are all equally liable under strict products liability for defective products. *See* RESTATEMENT (THIRD) OF TORTS: PROD. LIAB. § 1 (1998). "One engaged in the business of selling *or otherwise distributing products* who sells or distributes a defective product is subject to liability for harm to persons or property caused by the defect." *Id.* (emphasis added). *See also* Stewart v. Budget Rent-A-Car Corp., 52 Haw. 71, 75, 470 P.2d 240, 243 (1970). "[O]ne who sells *or leases* a defective product which is dangerous to the user or consumer or to his property is subject to liability for physical harm caused by the defective product to the ultimate user or consumer, or to his property . . . ." *Id.* (emphasis added). This article concentrates on the manufacturer alone for the sake of simplicity.

[6] *Barker*, 573 P.2d at 445-46.

[7] *Id.* at 448.

[8] *Id.* at 449.

instructed the jury "that strict liability for the defect in design of a product is based on a finding that the product was *unreasonably* dangerous for its intended use . . . ."[9] On appeal, the California Supreme Court reversed and remanded the case for retrial due to the erroneous inclusion of the words "unreasonably dangerous" in the jury instruction.[10]

California courts, the first to adopt strict products liability as a cause of action,[11] have since remained at the forefront of strict products liability law.[12] Hawai'i courts adopted and modified their own strict products liability standard based on the California model.[13] For example, after the California Supreme Court's holding in *Barker*, the "unreasonably dangerous" standard was purposely excluded from strict products liability claims in California courts and for many years in Hawai'i courts.[14] These courts viewed the standard as prejudicial to injured plaintiffs and unnecessarily confusing to jurors.[15] The *Barker* court emphasized this reasoning, noting that Mr. Barker might not have lost his case at trial had the jury understood that he was not required to prove that the product was ultrahazardous, but that it was merely designed in a way that made it dangerous to the consumer using it in a reasonably foreseeable manner.[16]

Barker exemplifies the prejudice a plaintiff may face if required in strict products liability claims to prove that the offending product was not only defective, but also that the defect caused the product to be "unreasonably" dangerous. While plaintiffs in California have not faced such a burden after *Barker*, plaintiffs in Hawai'i are currently at risk of being prejudiced by the confusing and unnecessary inclusion of the "unreasonably dangerous" standard in strict products liability claims.[17]

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[9] *Id.* at 449 n.4 (emphasis added).

[10] *Id.* at 458.

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

[12] *See, e.g., infra* Part II.B.

[13] *See infra* Part II.C.

[14] *See infra* notes 77-78 and accompanying text; *See generally* discussion *infra* Part II.C. The language was purposely excluded in Hawai'i until the Intermediate Court of Appeals' ("ICA") decision in Wagatsuma v. Patch, 10 Haw. App. 547, 879 P.2d 572 (1994). *See* discussion *infra* Part II.C. A products liability claim is a common law claim. *See* discussion *infra* Part II.

[15] *See Barker*, 573 P.2d at 451-52.

[16] *See id.* at 452 nn.8-9.

[17] Interestingly, relatively few cases turn on the issue of whether a defect amounts to an unreasonably dangerous condition. "[I]n most cases, once it is established that a defective condition in a product caused an injury, no real argument can be made that the condition was not 'unreasonably dangerous' and therefore the issue is not raised." Allan E. Korpela, *Products Liability: Product as Unreasonably Dangerous or Unsafe Under Doctrine of Strict Liability in Tort*, 54 A.L.R.3d 352 at § 2[a] (1973). *See also infra* note 119.

Because a case will usually not turn on the issue of unreasonable dangerousness, this

It is presently unclear whether proof of unreasonable dangerousness is an element of a plaintiff's strict products liability claim in Hawai'i. The Hawai'i Supreme Court had expressly excluded unreasonable dangerousness from the strict products liability rule until the *Tabieros v. Clark Equipment Co.*[18] decision in 1997, when the "unreasonably dangerous" language was included in their citation of the rule without reasoning or comment by the court.[19] This article argues that Hawai'i courts should not require proof of unreasonable dangerousness in claims alleging strict products liability. Section II discusses California cases that pioneered the strict products liability rule, explores the Second Restatement of Torts section 402A ("Second Restatement") and the reaction of the California courts to the Second Restatement, and traces the adoption and evolution of strict products liability in Hawai'i's courts. Section III argues that the Hawai'i Supreme Court should retain the strict products liability common law rule as first adopted. The original Hawai'i rule did not require unreasonable dangerousness and is more attuned to Hawai'i's tort jurisprudence, public policy, and follows the direction that California courts and the Third Restatement of Torts: Products Liability[20] ("Third Restatement") are taking. Section IV suggests that the Hawai'i Supreme Court should preserve either a hybrid of its existing caselaw[21] or adopt the Third Restatement[22] to best achieve the intended objectives of strict products liability.

II. BACKGROUND

It is important in any discussion of strict products liability to review the California courts' ground-breaking decisions that created the claim for strict products liability. This section therefore begins by tracing the development of strict products liability through California Supreme Court decisions. It then discusses the American Law Institute's promulgation of the Second Restatement and the California courts' subsequent rejection of the terminology used

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issue is a "sleeper," i.e., one which is important, but has not really caught the attention of courts or the bar. There are no other law review articles focusing on this terminology, and no courts, other than California's *Barker* and *Cronin* courts and Hawai'i's *Ontai* court, have directly stated a holding as to this language. *See infra* notes 52-62, 87-88 and accompanying text.

[18] 85 Hawai'i 336, 944 P.2d 1279 (1997).

[19] *See* discussion *infra* Part II.C.

[20] RESTATEMENT (THIRD) OF TORTS: PROD. LIAB. §§ 1, 2 (1998); *See* discussion *infra* Part III.C.2.

[21] The "hybrid" would consist of combining the rules of Ontai v. Straub Clinic & Hospital, Inc., 66 Haw. 237, 659 P.2d 734 (1983) and *Tabieros*, 85 Hawai'i 336, 944 P.2d 1279. *See* discussion *infra* Part II.C.

[22] Specifically, this article proposes consideration of sections one and two of the Third Restatement.

in that Restatement. Finally, this section outlines the Hawai'i cases relevant to a discussion of the "unreasonably dangerous" requirement.

A. California's Initiation of the Current Strict Products Liability Claim

The modern view of and rationale for strict products liability began with Justice Traynor's concurrence in *Escola v. Coca Cola Bottling Co.*[23] In this 1944 California Supreme Court opinion, the majority held the defendant bottling company liable for injuries caused by the explosion of a bottle of "Coca Cola" under the tort theory of negligence and *res ipsa loquitur*.[24] In his concurrence, Justice Traynor agreed that the bottling company should be held liable for the injury, but disagreed with the majority about applying tort negligence and *res ipsa loquitur*.[25] Traynor advocated an entirely new common law theory: strict liability in tort. He stated: "In my opinion it should now be recognized that a manufacturer incurs an absolute liability when an article that he has placed on the market, knowing that it is to be used without inspection, proves to have a defect that causes injury to human beings."[26]

Historically, plaintiffs injured by defective products could sue only under theories of contract warranty or tort negligence.[27] Over time, courts across the country began to recognize problems in requiring plaintiffs to sue under either of these theories.[28] One problem arose when the injured party was not the direct purchaser of the product, in so far as a suit for breach of warranty generally required the plaintiff to prove privity of contract with the defendant manufacturer.[29] Prior to recognition of this problem, a plaintiff lacking such privity was barred from suit despite having been injured by the defendant's

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[23] 150 P.2d 436 (Cal. 1944).

[24] *Id.* at 437-39. *Res ipsa loquitur* is defined as "[t]he doctrine providing that, in some circumstances, the mere fact of an accident's occurrence raises an inference of negligence so as to establish a prima facie case." BLACK'S LAW DICTIONARY 1311 (7th ed. 1999).

[25] *See generally Escola*, 150 P.2d at 440-44 (Traynor, J., concurring).

[26] *Id.* at 440 (Traynor, J., concurring).

[27] *See* William L. Prosser, *Strict Liability to the Consumer in California*, 18 HASTINGS L.J. 9, 10-16 (1966); 2 DAN B. DOBBS, THE LAW OF TORTS, § 353 at 972-73 (2001); S.R. Shapiro, Annotation, *Products Liability: Strict Liability in Tort*, 13 A.L.R.3d 1057, § 2 (1967) [hereinafter Shapiro].

[28] *See* W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 98, at 692 (5th ed. 1984); Shapiro, *supra* note 27, § 2. *See also Escola*, 150 P.2d at 440-44 (Traynor, J., concurring) (implying that tort negligence and/or contract warranty were no longer sufficient as the sole grounds for liability).

[29] *See infra* note 30 and accompanying text. Privity of contract is the "relationship between the parties to a contract, allowing them to sue each other but preventing a third party from doing so." BLACK'S LAW DICTIONARY 1217 (7th ed. 1999).

defective product.[30] A different problem arose when the plaintiff instead sued under tort negligence.[31] In negligence cases, the plaintiff must prove that the defendant committed a negligent act or omission.[32] In the area of product manufacture and distribution, it was impossible in many circumstances for the average plaintiff to pinpoint the specific negligent act or omission that had occurred somewhere along the chain of distribution.[33]

In his ground-breaking *Escola* concurrence, Justice Traynor explained why the law should shift to hold manufacturers strictly liable, stating:

> Even if there is no negligence . . . public policy demands that responsibility be fixed wherever it will most effectively reduce the hazards to life and health

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[30] *See* MacPherson v. Buick Motor Co., 111 N.E. 1050 (N.Y. 1916) (one of the first courts to recognize the privity problem and to hold a car manufacturer liable to the car purchaser despite the lack of direct privity of contract).

In *MacPherson*, the manufacturer had sold a defective car to a car dealership and claimed that it should be liable only to the dealership. Justice Cardozo rejected the argument, stating:

> The dealer was indeed the one person of whom it might be said with some approach to certainty that by him the car would not be used. Yet the defendant would have us say that he was the one person whom it was under a legal duty to protect. The law does not lead us to so inconsequent a conclusion.

Id. at 1053. The court held:

> If the nature of a thing is such that it is reasonably certain to place life and limb in peril when negligently made, it is then a thing of danger. Its nature gives warning of the consequences to be expected. If to the element of danger there is added *knowledge that the thing will be used by persons other than the purchaser*, and used without new tests, *then, irrespective of contract, the manufacturer of this thing of danger is under a duty to make it carefully* . . . . If he is negligent, where danger is to be foreseen, a liability will follow.

Id. (emphasis added).

See also Roger J. Traynor, *The Ways and Meanings of Defective Products and Strict Liability*, 32 TENN. L. REV. 363, 365 (1965). "The right to disclaim, the requirement of timely notice, and chronic preoccupation with privity of contract barred recovery in ways that were 'pernicious and entirely unnecessary.'" *Id.* (quoting William L. Prosser, *The Assault Upon the Citadel (Strict Liability to the Consumer)*, 69 YALE L. J. 1099, 1126 (1960)). *See also* William L. Prosser, *The Assault Upon the Citadel (Strict Liability to the Consumer)*, 69 YALE L. J. 1099, 1100 (1960). "The courts began by the usual process of developing exceptions to the 'general rule' of nonliability to persons not in privity." *Id.* (citing MacPherson v. Buick Motor Co., 111 N.E. 1050 (N.Y. 1916)). *See also id.* at 1133-34. "'[W]arranty,' as a device for the justification of strict liability to the consumer, carries far too much luggage in the way of undesirable complications . . . . If there is to be strict liability in tort, let there be strict liability in tort, declared outright, without an illusory contract mask." *Id.*

[31] *See infra* note 33 and accompanying text.

[32] *See infra* note 33 and accompanying text.

[33] *See* 2 DOBBS, *supra* note 27, § 353 at 973. "[N]egligence of a manufacturer or even a retailer remained difficult to prove." *Id.* *See* RESTATEMENT (THIRD) OF TORTS: PROD. LIAB. § 2 cmt. a (1998). "In many cases manufacturing defects are in fact caused by manufacturer negligence but plaintiffs have difficulty proving it." *Id.*

> inherent in defective products that reach the market. It is evident that the manufacturer can anticipate some hazards and guard against the recurrence of others, as the public cannot. Those who suffer injury from defective products are unprepared to meet its consequences. The cost of an injury and the loss of time or health may be an overwhelming misfortune to the person injured, and a needless one, for the risk of injury can be insured by the manufacturer and distributed among the public as a cost of doing business. It is to the public interest to discourage the marketing of products having defects that are a menace to the public. If such products nevertheless find their way into the market it is to the public interest to place the responsibility for whatever injury they may cause upon the manufacturer, who, even if he is not negligent in the manufacture of the product, is responsible for its reaching the market. However intermittently such injuries may occur and however haphazardly they may strike, the risk of their occurrence is a constant risk and a general one. Against such a risk there should be general and constant protection and the manufacturer is best situated to afford such protection.[34]

Justice Traynor's novel approach to addressing the increased injuries of the mass-production era was entirely based on public policy. This portion of the *Escola* concurrence became the main basis for subsequent adoption of strict liability for defective products in courts across the nation.[35]

In 1963, strict products liability was officially ushered in with *Greenman v. Yuba Power Products, Inc.*[36] In a unanimous opinion authored by Justice Traynor, the California Supreme Court held in *Greenman* that a "manufacturer is strictly liable in tort when an article he places on the market, knowing that it is to be used without inspection for defects, proves to have a defect that causes injury to a human being."[37] The standard set by *Greenman* no longer required a plaintiff to prove privity of contract[38] or negligence[39] on the part of the manufacturer. Instead, the *Greenman* court adopted the public policy reasoning of Traynor's concurrence in *Escola* to hold manufacturers of defective products strictly liable to anyone injured by the product.[40] The court

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[34] Escola v. Coca Cola Bottling Co., 150 P.2d 436, 440-41 (Cal. 1944).

[35] *See infra* notes 39-40 and accompanying text.

[36] 377 P.2d 897 (Cal. 1963). *See* Prosser, *supra* note 27, at 17 (characterizing *Greenman* as the "first case" to adopt the strict products liability approach without contract or negligence elements); KEETON ET AL., *supra* note 28, § 98 at 694.

[37] *Greenman*, 377 P.2d at 900.

[38] *See* 2 DOBBS, *supra* note 27, § 353 at 974 (stating that after *Greenman*, "the claim was now to be perceived as one brought in tort, privity was not required.").

[39] *See* RESTATEMENT (SECOND) OF TORTS § 402A (1965) (stating in paragraph (2) that the strict products liability rule applies despite (a) a lack of negligence on the part of the manufacturer and (b) a lack of contract privity). *See also* 2 DOBBS, *supra* note 27, § 353 at 974 (asserting that Section 402A was modeled after the *Greenman* holding).

[40] *Greenman*, 377 P.2d at 901. *See supra* text accompanying note 34 (setting forth Justice Traynor's reasoning in the *Escola* concurrence).

further justified the adoption of strict liability by stating that a manufacturer who places a product on the market implicitly promises all users that the product will "safely do the jobs for which it was built."[41]

After this landmark opinion by the California Supreme Court, the remainder of the United States quickly began recognizing the strict products liability cause of action.[42] In fact, within just two years of the *Greenman* opinion, the American Law Institute ("ALI") drafted and published a statement of this new rule of strict products liability.[43] An overview of Section 402A of the Second Restatement of Torts is therefore important to a full understanding of the way strict products liability law has progressed across the nation in general, and in California and Hawai'i courts specifically.

B. Promulgation of the Second Restatement of Torts and Reaction of the California Supreme Court

The Restatement (Second) of Torts, published by the ALI in 1965, incorporated strict products liability as established by *Greenman*[44] into existing tort doctrine.[45] Section 402A, entitled *Special Liability Of Seller Of Product For Physical Harm To User Or Consumer*, provides that the seller of a "product in a defective condition *unreasonably dangerous* to the user or consumer or to his property" is liable for harm to "the ultimate user or consumer, or to his property," if (a) the defendant is "engaged in the business of selling such a product," and (b) the product is "expected to and does reach the user or consumer without substantial change in the condition in which it is sold."[46] This rule applies even though the seller "has exercised all possible care in the preparation and sale of his product," and even if the user or consumer "has not bought the product from or entered into any contractual relation with the seller."[47]

William Prosser, a definitive scholar on American tort law, drafted this section of the Second Restatement and added the "unreasonably dangerous" language to the *Greenman* rule to prevent a manufacturer from becoming

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[41] *Greenman*, 377 P.2d at 901.

[42] *See infra* note 43 and accompanying text; *infra* note 191 and accompanying text.

[43] *See* discussion *infra* Part II.B.

[44] *See* 2 DOBBS, *supra* note 27, § 353 at 974. *See also* Harvey E. Henderson, Jr., *Recurring Issues in Hawaii Products Liability Law: A Historical Perspective*, HAW. B.J. 6 (Oct. 1995) (stating that the Second Restatement essentially incorporated the *Greenman* rule).

[45] *See* KEETON ET AL., *supra* note 28, § 98 at 693 (asserting that this section of the Second Restatement "accepts the principle of strict liability in tort as a more realistic theory of recovery than that of contract-warranty").

[46] RESTATEMENT (SECOND) OF TORTS § 402A (1965) (emphasis added).

[47] *Id.*

automatically liable for harm caused by products with "inherent possibilities for harm."[48] In other words, Prosser and the ALI were concerned about liability for products that are "in themselves unavoidably dangerous."[49] In comment (i) of section 402A for example, it becomes clear that "such innocuous products as sugar and butter, unless contaminated, would not give rise to a strict liability claim merely because the former may be harmful to a diabetic or the latter may aggravate the blood cholesterol level of a person with heart disease."[50] To preclude a manufacturer from being an insurer against all harms that could arise from their products, the "unreasonably dangerous" language was added to the Second Restatement to preclude liability for harms that could arise from use of ordinary, non-defective products.[51]

California courts soon rejected the way in which the Second Restatement had attempted to address liability for such innocuous products.[52] In *Cronin v. J.B.E. Olson Corp.*,[53] the California Supreme Court stated:

> The result of the [unreasonably dangerous] limitation [in the Second Restatement] . . . has not been merely to prevent the seller from becoming an insurer of his products with respect to all harm generated by their use. Rather, *it has burdened the injured plaintiff with proof of an element which rings of negligence* . . . . Yet the very purpose of our pioneering efforts in this field was to relieve the plaintiff from problems of proof inherent in pursuing negligence and warranty remedies . . . .[54]

In addition to concerns about making a plaintiff prove something resembling negligence, the *Cronin* court expressed another reason for its rejection of the "unreasonably dangerous" language in the Second Restatement. The

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[48] *See* Cronin v. J.B.E. Olson Corp., 501 P.2d 1153, 1161 (Cal. 1972) (citing William L. Prosser, *Strict Liability to the Consumer in California*, 18 HASTINGS L.J. 9, 23 (1966)).

[49] Prosser, *supra* note 27, at 23. *See also* 2 DOBBS, *supra* note 27, § 354 at 978-79, 979 n.11. "The point of requiring unreasonable danger was not to import negligence thinking; it was rather to insist that risky products were not necessarily defective and that a defect was indeed required . . . . Because of the danger of confusion with negligence, California refused to permit the 'unreasonably dangerous' phrase in jury instructions." *Id.*

[50] *Cronin*, 501 P.2d at 1161. *See also* RESTATEMENT (SECOND) OF TORTS § 402A cmt. i (1965) (explaining that the requirement of unreasonable dangerousness is not meant to apply to ordinary, non-defective products which could have some harmful effect if used improperly or over-consumed; rather, the requirement is meant to require that the product "be dangerous to an extent beyond that which would be contemplated by the ordinary consumer . . . with the ordinary knowledge common to the community as to its characteristics."); 2 DOBBS, *supra* note 27, § 354 at 978-79 (asserting that the unreasonably dangerous requirement was actually only a defectiveness requirement).

[51] *See supra* note 50.

[52] *See Cronin*, 501 P.2d at 1161-62; Barker v. Lull Eng'g Co., Inc., 573 P.2d 443, 446 (Cal. 1978).

[53] 501 P.2d 1153 (Cal. 1972).

[54] *Id.* at 1161-62 (emphasis added) (citations omitted).

Second Restatement's terminology could be interpreted to place a dual burden on the plaintiff to prove "that the product is, first, defective and, second, unreasonably dangerous."[55] The *Cronin* court found that the possible interpretation of "unreasonably dangerous" would place a "significantly increased burden" on the injured plaintiff and would be "a step backward in the area pioneered" by the California courts.[56]

In *Barker*, the court further clarified that its "objection to the 'unreasonably dangerous' terminology in *Cronin* went beyond the 'dual burden' issue."[57] The California courts' rejection of the Second Restatement's language "was based, more fundamentally, on a substantive determination that the Restatement's 'unreasonably dangerous' formulation represented an undue restriction on the application of strict liability principles."[58] The Second Restatement adopted the "unreasonably dangerous" language to confine strict liability to apply only to products which did not meet consumer expectations as to safety, for example, products which failed the "consumer-expectation test."[59] While the Second Restatement only recognized the consumer-expectation test for determining whether a product was defective, the *Cronin* court clearly opposed confining the application of strict liability only to situations when the product failed to meet ordinary consumer expectations.[60] The *Barker* court criticized the Second Restatement as treating consumer expectations as a "'ceiling' on a manufacturer's responsibility under strict liability principles, rather than as a 'floor.'"[61] The court emphasized that "*at a minimum* a product must meet ordinary consumer expectations as to safety to avoid being found defective."[62]

The court in *Barker* then added a second method by which injured plaintiffs could demonstrate a product's defectiveness, the "risk-utility" test.[63] Under this test, a product could alternatively be found defective if "the plaintiff

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[55] *Id.* at 1162.

[56] *Id.*

[57] *Barker*, 573 P.2d at 451.

[58] *Id.*

[59] *Id.* While the *Barker* court did not directly call this the "consumer expectation test," this is the commonly used term for this test. *See, e.g.*, 2 DOBBS, *supra* note 27, § 356 at 981.

[60] *Barker*, 573 P.2d at 451.

[61] *Id.* at 451 n.7.

[62] *Id.*

[63] *Id.* at 452. *Barker* did not characterize this test as the "risk-utility" test. Since this is the term commonly employed for this test, it is used for consistency throughout this article. *See* Wagatsuma v. Patch, 10 Haw. App. 547, 879 P.2d 572 (1994); 2 DOBBS, *supra* note 27, § 357 at 985.

Plaintiffs in California thereafter got a second bite at the apple, because even if a product satisfied consumer expectations (and was therefore not defective), the plaintiff could convince a jury of a product's design defectiveness under the risk-utility test.

proves that the product's design proximately caused injury and the defendant fails to prove, in light of the relevant factors, that on balance the benefits of the challenged design outweigh the risk of danger inherent in such design."[64] The court declared the two tests for defectiveness "appropriate in light of the rationale and limits of the strict liability doctrine."[65] The tests subjected manufacturers to liability whenever there was "something 'wrong' with a product's design," under either the consumer expectation or the risk-utility tests.[66] At the same time, application of the two tests stopped "short of making the manufacturer an insurer for all injuries which may result from the use of its product."[67]

The California courts' rejection of the Second Restatement's language became important for the evolution of Hawai'i's strict products liability rule. Hawai'i courts have basically followed the California courts, rather than adopting the Second Restatement.[68] The following section discusses the evolution of Hawai'i's strict products liability standard.

C. Adoption and Evolution of Strict Products Liability in Hawai'i Courts

In 1970, the Hawai'i Supreme Court followed California's lead and adopted strict products liability in *Stewart v. Budget Rent-A-Car Corp.*[69] The Hawai'i court found that "the modern trend and the better reasoned view" was to apply strict liability to manufacturers of defective products.[70] The court in *Stewart* cited *Greenman* positively[71] and adopted the *Greenman*-like rule that:

> [O]ne who sells or leases a defective product which is *dangerous* to the user or consumer or to his property is subject to liability for physical harm caused by the defective product to the ultimate user or consumer, or to his property, if (a) the

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[64] *Barker*, 573 P.2d at 452. The factors that a jury may consider include:

> [A]mong other relevant factors, [1] the gravity of the danger posed by the challenged design, [2] the likelihood that such danger would occur, [3] the mechanical feasibility of a safer alternative design, [4] the financial cost of an improved design, and [5] the adverse consequences to the product and to the consumer that would result from an alternative design.

Id. at 455.

[65] *Id.* at 456.

[66] *Id.*

[67] *Id.* The "dangerousness" definitions espoused in *Cronin* and *Barker* were later adopted in Hawai'i. *See* Ontai v. Straub Clinic & Hosp., Inc., 66 Haw. 237, 243, 659 P.2d 734, 740 (1983); *see also* discussion *infra* Part II.C.

[68] *See* discussion *infra* Part II.C.

[69] 52 Haw. 71, 470 P.2d 240 (1970).

[70] *Id.* at 74, 470 P.2d at 243.

[71] *See id.* at 74 n.3, 470 P.2d at 243 n.3. *See also* Larsen v. Pacesetter Sys., Inc., 74 Haw. 1, 21, 837 P.2d 1273, 1284 (1992).

> seller or lessor is engaged in the business of selling or leasing such product, and (b) the product is expected to and does reach the user or consumer without substantial change in its condition after it is sold or leased.[72]

The court essentially adopted the Second Restatement's rule, but modified the ALI's wording by excluding the term "unreasonably" from the Hawai'i rule.[73] The *Stewart* rule therefore resembled California's *Greenman* and *Barker* rules more closely than the Second Restatement. Because the *Stewart* court had not provided reasoning for the exclusion of the term "unreasonably" from Hawai'i's rule, however, the "debate raged among the trial bar over whether the omission was intentional or inadvertent" after publication of the *Stewart* opinion.[74]

Ten years later, in *Brown v. Clark Equipment Co.*,[75] the Hawai'i Supreme Court seemed to resolve the confusion over which strict products liability rule would be applied in Hawai'i.[76] The *Brown* court stated that it "did not adopt the literal definition of strict liability embodied in said Section 402A,"[77] clarifying that omission of the word "unreasonably" from the standard was purposeful and that the court intended to adopt a rule broader than the Second Restatement.[78] Despite this, the court did adopt a definition of "dangerous" similar to the Second Restatement's definition of "unreasonably dangerous."[79]

In 1983, the *Ontai v. Straub Clinic & Hospital, Inc.*[80] opinion rejected *Brown*'s definition of "dangerous" products.[81] As noted above,[82] the rejected

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[72] *Stewart*, 52 Haw. at 75, 470 P.2d at 243 (emphasis added).

[73] *Id. See* Armstrong v. Cione, 6 Haw. App. 652, 655 n.3, 736 P.2d 440, 443 n.3 (1987). "Under the modified rule [adopted in *Stewart*] a plaintiff need only show that a defective product is 'dangerous,' rather than 'unreasonably dangerous,' as is the case under the [Second] Restatement rule." *Id.*

[74] Henderson, *supra* note 44, at 7.

[75] 62 Haw. 530, 618 P.2d 267 (1980).

[76] *See* Henderson, *supra* note 44, at 7 (citing *Brown*, 62 Haw. 530, 618 P.2d 267).

[77] *Brown*, 62 Haw. at 541, 618 P.2d at 274.

[78] *See* Henderson, *supra* note 44, at 7; *Brown*, 62 Haw. at 541-43, 618 P.2d at 274-75 (clarifying that *Stewart*'s exclusion of the unreasonably dangerous language was purposeful); Kaneko v. Hilo Coast Processing, 65 Haw. 447, 452 n.4, 654 P.2d 343, 347 n.4 (1982) (affirming that the exclusion of the unreasonable dangerousness requirement in *Stewart* was intentional).

[79] Henderson, *supra* note 44, at 7. *Compare* RESTATEMENT (SECOND) OF TORTS § 402A cmt. i (1965) (defining "unreasonably dangerous" as "dangerous to an extent beyond that which would be contemplated by the ordinary consumer who purchases it, with the ordinary knowledge common to the community as to its characteristics"); *with Brown*, 62 Haw. at 541, 618 P.2d at 274 (defining "dangerous" as a product "dangerous to an extent beyond that which would be contemplated by an ordinary user using it for its intended use").

[80] 66 Haw. 237, 659 P.2d 734 (1983).

[81] *See* Henderson, *supra* note 44, at 7.

[82] *See supra* notes 76-79 and accompanying text.

definition of "dangerous" products in *Brown* was similar to the definition of "unreasonably dangerous" products in the Second Restatement.[83] Instead, the *Ontai* court adopted the two definitions of "defective" products from California's holding in *Barker*.[84] The court held:

> [A] product may be found defective in design, so as to subject a manufacturer to strict liability for resulting injuries, under either of two alternative tests. *First*, a product may be found defective in design if the plaintiff establishes that the product failed to perform as safely as an ordinary consumer would expect when used in an intended or reasonably foreseeable manner. *Second*, a product may alternatively be found defective in design if the plaintiff demonstrates that the product's design proximately caused his injury and the defendant fails to establish, in light of the relevant factors, that, on balance, the benefits of the challenged design outweigh the risk of danger inherent in such design.[85]

Similar to California's *Barker* and *Cronin* opinions,[86] the Hawai'i Supreme Court in *Ontai* mentioned in a footnote that it was rejecting the Second Restatement's "unreasonably dangerous" terminology and definition.[87] The "unreasonably dangerous" language restricted plaintiffs to only the consumer-expectation test to prove defectiveness and was too restrictive toward Hawai'i's injured plaintiffs.[88]

Although the Hawai'i Supreme Court rejected the "unreasonably dangerous" language until this point, the Intermediate Court of Appeals ("ICA")

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[83] *See* Henderson, *supra* note 44, at 7 (noting that the definition of "defective" in *Brown* is "almost identical to the definition of 'unreasonably dangerous' set forth in Comment i to the Restatement").

Henderson's comparison of the two definitions rings true. The court in *Brown* approved the following jury instruction: "In order to establish their claims of strict liability, the burden is upon the plaintiffs . . . to prove . . . . [t]hat a product . . . is defective if it is *dangerous to an extent beyond that which would be contemplated by an ordinary user* using it for its intended use . . . ." *Brown*, 62 Haw. at 540-41, 618 P.2d at 274 (emphasis added). Comment (i) to the Second Restatement defines an "unreasonably dangerous" product as one which is "*dangerous to an extent beyond that which would be contemplated by the ordinary consumer* who purchases it, with the ordinary knowledge common to the community as to its characteristics." RESTATEMENT (SECOND) OF TORTS § 402A cmt. i (1965) (emphasis added).

[84] *See* Henderson, *supra* note 44, at 7-8.

[85] *Ontai*, 66 Haw. at 242, 659 P.2d at 739-40 (quoting with approval the holding of *Barker*) (emphasis added). The first test adopted is known as the "consumer expectation test," the second is known as the "risk-utility test." *See* Wagatsuma v. Patch, 10 Haw. App. 547, 566, 879 P.2d 572, 584 (1994).

[86] *See* discussion *supra* Part II.B; Cronin v. J.B.E. Olson Corp., 501 P.2d 1153 (Cal. 1972); Barker v. Lull Eng'g Co., Inc., 573 P.2d 443 (Cal. 1978).

[87] *Ontai*, 66 Haw. at 241 n.1, 659 P.2d at 739 n.1.

[88] *See Brown*, 62 Haw. at 541-43, 618 P.2d at 274-75.

modified the rule without fanfare in 1994.[89] In *Wagatsuma v. Patch*,[90] the ICA inserted the word "unreasonably" into the existing Hawai'i strict products liability standard.[91] Directly citing *Ontai* for this rule, the *Wagatsuma* court stated: "The plaintiff's burden in such a case is to prove (1) a defect in the product which rendered it *unreasonably* dangerous for its intended or reasonably foreseeable use; and (2) a causal connection between the defect and the plaintiff's injuries."[92] The court, however, neither addressed the differing terminology nor its reasons for the change.[93] Furthermore, the court did not appear to change the tests available to plaintiffs to prove defectiveness because the ICA retained the "consumer expectation test" and the "risk-utility test" adopted in *Ontai*.[94]

Again without comment as to the addition of the "unreasonably dangerous" language, the Hawai'i Supreme Court cited the modified strict products liability rule from *Wagatsuma* in *Tabieros v. Clark Equipment Co.*[95] It is unclear, however, if the changed rule is part of the *Tabieros* holding because the court cited the rule twice: once from *Wagatsuma*, including the "unreasonably dangerous" language,[96] and once from *Ontai*, excluding the "unreasonably dangerous" language.[97] The *Tabieros* court did not specify which of these two standards was correct, or which one to apply.[98] Nowhere in the opinion did the court mention whether or not it was adopting a different rule than that which had previously been applied in cases like *Stewart* and *Brown*.[99]

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[89] *See Wagatsuma*, 10 Haw. App. 547, 879 P.2d 572; *infra* text accompanying note 91.

[90] 10 Haw. App. 547, 879 P.2d 572 (1994).

[91] *Id.* at 566, 879 P.2d at 583-84.

[92] *Id.* (citing *Ontai*, 66 Haw. at 243, 659 P.2d at 740) (emphasis added).

[93] *See generally Wagatsuma*, 10 Haw. App. 547, 879 P.2d 572.

[94] *Id.* at 566, 879 P.2d at 584.

[95] 85 Hawai'i 336, 354, 944 P.2d 1279, 1297 (1997) (citing *Wagatsuma*, 10 Haw. App. at 565, 879 P.2d at 583. *Tabieros* is important because it is a decision of the Supreme Court of Hawai'i, as opposed to an ICA decision, like *Wagatsuma*. Though the "unreasonably dangerous" language was added to the strict products liability cause of action in *Wagatsuma*, *Wagatsuma* was a decision by the ICA, which does not become the law of the State. The ICA's decisions "may be reviewed by the Supreme Court." *Hawai'i State Judiciary: Intermediate Court of Appeals*, http://www.courts.state.hi.us/ page_server/Courts/Appeals/4942E2685D7 AF75AEBD824637E.html (last visited Feb. 26, 2003). "The Supreme Court of Hawai'i is the State's highest court. Its decisions are binding on all other Hawai'i courts." *Hawai'i State Judiciary: Hawai'i Supreme Court*, http://www.courts.state.hi.us/page_server/Courts/Supreme/ 72D2260755E8199BEBD3ACE8C3.html (last visited Feb. 26, 2003).

[96] *Tabieros*, 85 Hawai'i at 354, 944 P.2d at 1297 (quoting *Wagatsuma*, 10 Haw. App. at 565, 879 P.2d at 583).

[97] *Id.* at 367, 944 P.2d at 1310 (citing *Ontai*, 66 Haw. at 241, 659 P.2d at 739).

[98] *See generally Tabieros*, 85 Hawai'i 336, 944 P.2d 1279.

[99] *See generally id.*

In 1997, the ICA formally recognized that the rule may have been changed when, in its *Torres v. Northwest Engineering Co.*[100] opinion, it remarked:

> In *Stewart v. Budget Rent-a-Car Corp.*, . . . the Hawai'i Supreme Court specifically eliminated the *Second Restatement on* [sic] *Torts* § 402A requirement that a defective product must have been "unreasonably dangerous" to the user or consumer . . . . It is sufficient that a product be "dangerously defective." It *appears* that under *Tabieros*, the "unreasonably dangerous" standard is now the requirement for a strict products liability claim.[101]

The language used by the ICA in *Torres* indicates that Hawai'i's courts require elucidation from the supreme court as to what the requirement is, for a strict products liability claim, and reasoning therefor.

III. ANALYSIS

Hawai'i's courts need clarification about what the strict products liability standard requires.[102] This section therefore argues that, at the next available opportunity, the Hawai'i Supreme Court should declare that unreasonable dangerousness is *not* required in Hawai'i strict products liability claims. Hawai'i's common law, public policy, and the current nation-wide legal trend support the renewed exclusion of the "unreasonably dangerous" terminology from strict products liability cases in Hawai'i.

A. Hawai'i's Common Law Favors Exclusion of the "Unreasonably Dangerous" Terminology

Hawai'i is well known as a pro-plaintiff jurisdiction.[103] When this is considered in light of the fact that the Hawai'i Supreme Court has never provided reasoning for its recent inclusion of unreasonable dangerousness in strict products liability claims,[104] a requirement of unreasonable dangerousness is clearly inappropriate in Hawai'i. The State's jurisprudence therefore indicates that the "unreasonably dangerous" terminology should be excluded from strict products liability claims brought in Hawai'i.

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[100] 86 Hawai'i 383, 949 P.2d 1004 (App. 1997).

[101] *Id.* at 397 n.7, 949 P.2d at 1018 n.7 (emphasis added).

[102] *See* discussion *supra* Part II.C.

[103] *See* discussion *infra* Part III.A.2.

[104] *See* discussion *infra* at Part III.A.1.

1. The Hawai'i Supreme Court has not provided reasoning for the changed terminology

From the *Stewart* holding in 1970, until the *Tabieros* decision almost thirty years later,[105] the strict products liability standard had remained without the "unreasonably dangerous" language.[106] The terminology then changed without comment or explanation by the courts.[107] This lack of reasoning indicates that the changed language is therefore *not* part of the strict products liability standard in Hawai'i.

Appellate courts must give reasoning for their holdings to provide guidance to the bar and to courts in their jurisdiction. Case law would have little or no precedential value without the reasoning and analysis that courts place in their opinions. Precedent is particularly important in areas governed by common law,[108] which includes tort law (and therefore strict products liability). It has been argued that "(f)irst, precedent provides certainty in the law," by ensuring that like cases will be treated alike, thus allowing people to "arrange and conduct their affairs with stability and predictability."[109] Second, precedent "fosters judicial economy," by enabling the judiciary "to rely on the reasoning and analysis of past decisions," as a foundation for later decisions, thus promoting efficiency.[110]

The aftermath of the *Stewart* opinion illustrates why it is important for courts to provide reasoning for their decisions. When the *Stewart* court stated that it was "essentially" adopting the Second Restatement rule, it did not literally adopt the Second Restatement's language.[111] Namely, the court had omitted the word "unreasonably" from the Second Restatement.[112] For ten years, there was no word from the Hawai'i Supreme Court as to whether the

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[105] *Tabieros* was decided in 1997. *See supra* note 95.

[106] *See generally* Stewart v. Budget Rent-A-Car Corp., 52 Haw. 71, 470 P.2d 240 (1970); Brown v. Clark Equip. Co., 62 Haw. 530, 618 P.2d 267 (1980); Kaneko v. Hilo Coast Processing, 65 Haw. 447, 654 P.2d 343 (1982); Ontai v. Straub Clinic & Hosp., Inc., 66 Haw. 237, 659 P.2d 734 (1983); Armstrong v. Cione, 6 Haw. App. 652, 736 P.2d 440 (1987) (all applying the rule adopted in *Stewart* without the "unreasonably dangerous" requirement). *See* discussion *supra* Part II.C.

[107] *See supra* notes 90-101 and accompanying text. Neither the ICA in *Wagatsuma*, nor the Hawai'i Supreme Court in *Tabieros* remarked as to the changed terminology.

[108] *See* Sheree L. K. Nitta, Casenote, *The Price of Precedent*: Anastasoff v. United States, 23 U. HAW. L. REV. 795, 797 n.12 (2001) (citing Anastasoff v. United States, 223 F.3d 898 (8th Cir. 2000)). "The *Anastasoff* court began their opinion by articulating the importance of precedent in a common law system of justice." *Id.*

[109] *Id.* at 797-98.

[110] *Id.* at 798.

[111] *See Stewart*, 52 Haw. at 75, 470 P.2d at 243; Henderson, *supra* note 44; *supra* notes 72-78 and accompanying text.

[112] *See* sources cited *id.*

omission was intentional or accidental, and this caused confusion for attorneys in Hawai'i.[113] This decade of darkness for the Hawai'i bar marked a period of much uncertainty regarding what the law required. Only when *Brown* clarified that the exclusion had indeed been intentional did the issue become settled enough to provide guidance to the bar and to lower courts.[114] This meant that in trial courts, similar cases might have received differing treatment, the bar was probably less able to predict which law would be applied, and judges may have wasted time and resources attempting to determine which rule to apply.

A lesson should be learned from *Stewart*. The Hawai'i Supreme Court must provide clear reasons for its choice of terminology in the strict products liability arena. The lack of comment by the *Tabieros* court suggests that its inclusion of the word "unreasonably" was unintentional. For example, in one part of the *Tabieros* opinion, the court quotes the rule, including the "unreasonably dangerous" language from *Wagatsuma*,[115] but in another part of the opinion, just a few pages away, cites the rule *without* the "unreasonably dangerous" term, directly from *Ontai*.[116] This makes it unclear which, if either, citation is part of their holding as to the rule of strict products liability.

The lack of reasoning provided for the differing terminology utilized in *Tabieros* has created a need for clarification by the Hawai'i Supreme Court that only proof of a dangerous defect is required. The *Tabieros* opinion does not serve the precedential values of certainty or fairness. Plaintiffs' attorneys prior to the *Tabieros* case would not have included proof of unreasonable dangerousness at trial, and would not have been prejudiced without it because it had not been a part of their prima facie strict products liability claim. Now, after *Tabieros*, it is unclear whether plaintiffs need to put on proof of unreasonable dangerousness at trial. Furthermore, *Tabieros* appears to treat current plaintiffs unfairly because they may now have the "dual-burden" to first prove that the product contained a defect and second that it was "unreasonably dangerous," instead of just having to prove that a dangerous defect existed.

One might conclude that because of the Hawai'i Supreme Court's continuing desire to protect innocent plaintiffs injured by defective products,[117] the citation in *Wagatsuma* of the *Ontai* rule, and the subsequent quotation of the *Wagatsuma* language in *Tabieros*, were accidental.[118] If that is the case,

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[113] *See* Henderson, *supra* note 44; *supra* notes 76-78 and accompanying text.

[114] *See* sources cited *id.*

[115] Tabieros v. Clark Equip. Co., 85 Hawai'i 336, 354, 944 P.2d 1279, 1297 (1997).

[116] *Id.* at 367, 944 P.2d at 1310.

[117] *See* discussion *infra* Part III.A.2.

[118] In addition, when the *Tabieros* court discussed defective products, it applied *Ontai*'s tests for defectiveness, not the Second Restatement's test for unreasonable dangerousness. *See supra* note 94 and accompanying text.

it is appropriate for the Hawai'i Supreme Court to remedy this at the next available opportunity by simply clarifying which version of the rule will be applied, and why.[119] Hawai'i's jurisprudence, public policy, and the national trend all favor exclusion of the "unreasonably dangerous" terminology.[120]

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[119] It should be noted here that the current strict products liability "rule" may further be unclear to Hawai'i's trial courts because West's Hawai'i Court Rules, which provide standard civil jury instructions, have not included the "unreasonably dangerous" terminology following the *Tabieros* decision. The *Tabieros* opinion was published in 1997, and as stated in this article, appears to have held that proof of unreasonable dangerousness is required in Hawai'i. The standard strict products liability jury instruction, however, updated through July 1, 2002, does *not* include the "unreasonably dangerous" terminology. HAW. CIV. JURY INSTR. 11.1 (West 2002).

The standard jury instruction in Hawai'i reads:

> To prevail on the claim of strict products liability against defendant(s), plaintiff(s) must prove all of the following elements:
> The product was defective; and
> The defect was a legal cause of injury to plaintiff(s); and
> Defendant(s) was/were part of the "chain of distribution" of the product. Defendant(s) was/were part of the "chain of distribution" of a product if he/she/it/they was/were a manufacturer, seller, or lessor of that product.

Id.

Circuit Court (Hawai'i's trial court) Judge Victoria S. Marks stated in an interview that West's Hawaii Court Rules' Civil Jury Instructions is the "first place" that circuit court judges go for their jury instructions, including the basic strict products liability instruction. Judge Marks herself would use the standard jury instruction stated above if a products liability case in her court went to trial, especially since this is the non-case specific part of the jury instruction (where standard jury instructions may appropriately be used). Interview with the Honorable Victoria S. Marks, Judge, Circuit Court of the First Circuit (April 1, 2003).

The impact of the *Tabieros* opinion may therefore not have prejudiced plaintiffs yet, because trial judges may just be deferring to the standard jury instruction which does not include the "unreasonably dangerous" language. In fact, it is unlikely that unreasonable dangerousness of defective products has even arisen as an issue due to the low number of jury trials in the personal injury context in Hawai'i. In all of Hawai'i's Circuit Courts combined, there were only thirteen "personal injury or property damage or both, non-motor vehicle" cases that went to trial by jury, only four of which were tried in the First Circuit (Oahu) for the fiscal year July 1, 2001 to June 30, 2002. *See* JUDICIARY ST. OF HAW. 2002 ANN. REP. STATISTICAL SUPP. Tables 7-8 *available at* http://www.courts.state.hi.us/attachment/25C2BB5252D534DIEB48B81B5B/AD-P-525.pdf (last visited Apr. 21, 2003).

If a trial judge were to notice the changed language regarding dangerousness in *Tabieros* though, they might be currently adding "unreasonably dangerous" into their instructions to the jury. This further illustrates that the Hawai'i Supreme Court should make a definitive ruling directly stating that the unnecessary and confusing "unreasonably dangerous" terminology should hereafter be excluded from jury instructions.

[120] *See* discussion *supra* Part III.A.1; *infra* Part III.A.2; *infra* Part III.B; *infra* Part III.C.

2. Hawai'i favors plaintiffs in general

After reviewing the lack of reasoning provided by the Hawai'i Supreme Court for the changed terminology, it is also important to consider Hawai'i's judicial tendencies. This portion of the analysis will further illuminate why the "unreasonably dangerous" terminology should be excluded from the strict products liability standard. Hawai'i's jurisprudence favors exclusion of the "unreasonably dangerous" language because Hawai'i courts favor protection of the innocently injured and aim to provide such victims with a smooth and fair path for recovery.

Since the 1960s, when William S. Richardson[121] became Chief Justice of the Hawai'i Supreme Court, Hawai'i has had a "liberal and activist," pro-plaintiff court.[122] Even when the mid-1970s to early 1980s saw tort and insurance reform under the guidance of Chief Justice Herman Lum,[123] and the veritable end of "the pro-plaintiff tort revolution," the Lum court continued the Richardson court's liberal views toward plaintiffs' claims in products liability cases.[124] In fact, the court under Chief Justice Lum demonstrated even greater tendencies in favor of products liability plaintiffs than the previous court had.[125]

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[121] "William S. Richardson was appointed and qualified as Chief Justice of the Hawaii Supreme Court March 25, 1966. He served as Chief Justice until his retirement on December 30, 1982." Richard S. Miller & Geoffrey K. S. Komeya, *Tort and Insurance "Reform" in a Common Law Court*, 14 U. HAW. L. REV. 55, 59 n.17 (1992).

[122] *See id.* at 59-66.

[123] *See id.* at 107. Justice Herman Lum served as Chief Justice of the Hawai'i Supreme Court from 1983 until 1993. William Keoniakelelani Shultz, Recent Development, Mitchell v. State *and HRS § 386-3: Workers' Compensation Reform in the State of Hawai'i*, 21 U. HAW. L. REV. 807, 815 n.54 (1999).

[124] Miller & Komeya, *supra* note 121, at 62-66. An observation on Justice Lum's jurisprudence was made by Miller and Komeya, who stated:

> With regard to the question whether the seller or manufacturer of a product should be held liable for injuries caused by manufacturing or design defects in its product, *the Hawaii Supreme Court under Justice Lum has continued without significant hesitation to follow the pro-claimant trend of its predecessor and of the California Supreme Court*, at least in cases where the ultimate liability is likely to carry up the distributional chain to a large manufacturer.

Id. at 107 (emphasis added).

[125] *See id.* at 66-67.

The current court, under Chief Justice Moon,[126] decided the *Tabieros* case in 1977.[127] There, the Moon court defined some of the outer limits of products liability when it refused to extend *negligence* liability to include a duty to retrofit products after manufacture and sale.[128] In so holding, the court pointed out:

> The clear effect of imposing such a duty [to retrofit] *would be to inhibit manufacturers from developing improved designs that in any way affect the safety of their products*, since the manufacturer would then be subject to the onerous, and often times impossible, duty of notifying each owner of the previously sold product that the new design is available for installation, despite the fact that the already sold product [sic] are, to the manufacturer's knowledge, safe and functioning properly.[129]

The court's refusal to create a duty to retrofit focused on the fact that such a duty would discourage the creation of safer products, rather than on any fear of extending liability or being excessively favorable to plaintiffs.

The *Tabieros* opinion demonstrates the Moon court's commitment to protecting plaintiff–consumers because it instead created a *duty to warn* of dangers that become known to the manufacturer, even *after* the product has been purchased. The *Tabieros* court stated that:

> The duty to warn exists where a danger concerning the product becomes known to the manufacturer subsequent to the sale and delivery of the product, even though it was not known at the time of the sale.
>
> After a product involving human safety has been sold and dangerous defects in design have come to the manufacturer's attention, the manufacturer has a duty either to remedy such defects, or, if a complete remedy is not feasible, to give users adequate warnings and instructions concerning methods for minimizing danger.[130]

This post-sale duty to warn clearly indicates the court's continuing concern for safe products and consumer protection.

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[126] Chief Justice Ronald T. Y. Moon was appointed to serve as Chief Justice of the Hawai'i Supreme Court from March 31, 1993 to March 30, 2003. *See Hawai'i State Judiciary: Chief Justice Ronald T.Y. Moon*, http://www.courts.state.hi.us/page_server/Courts/Supreme/Judges/2A9E0A14BEDC309EBD80ECA55.html (last visited Feb. 26, 2003).

[127] The *Tabieros* opinion was authored by Justice Steven H. Levinson. *See* Tabieros v. Clark Equip. Co., 85 Hawai'i 336, 348, 944 P.2d 1279, 1291 (1997).

[128] *See id.* at 352-53, 944 P.2d at 1295-96.

[129] *Id.* at 357, 944 P.2d at 1300 (emphasis added) (quoting Lynch v. McStome & Lincoln Plaza Assoc., 548 A.2d 1276, 1281 (Pa. Super. 1988)).

[130] *Id.* at 356, 944 P.2d at 1298 (quoting with approval the Colorado Court of Appeals in Downing v. Overhead Door Corp., 707 P.2d 1027, 1033 (Colo. Ct. App. 1985)).

In *Armstrong v. Cione*,[131] the Hawai'i Supreme Court further revealed its pro-plaintiff stance in holding that Hawai'i's modified comparative negligence statute[132] did not apply in strict products liability cases.[133] Imposing modified comparative negligence would have meant that in any case where the jury found the plaintiff's contributory negligence was greater than the defendant's percentage of fault, the plaintiff would be completely barred from any recovery.[134] The *Armstrong* court found this an unacceptable outcome, reasoning that its "desire to protect consumers and hold manufacturers and distributors accountable for placing unsafe goods in the market is best served by ensuring that application of comparative negligence principles does not inadvertently create an 'all or nothing' bar to plaintiffs' recovery."[135] Modified comparative negligence would not encourage production of safer products either, because even where a manufacturer or distributor was partially responsible for the plaintiff's injuries, the defendant could escape responsibility.[136] The Hawai'i Supreme Court therefore held that pure comparative negligence principles would apply in strict products liability claims, which reduces but does not bar a plaintiff's recovery in cases involving contributory negligence.[137]

Masaki v. General Motors Corp.[138] demonstrates Hawai'i's partiality in favor of injured plaintiffs in the damages context. In general, punitive damages are only allowed in intentional tort cases to punish a defendant's intentional wrongdoing.[139] *Masaki* held, however, that punitive damages

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[131] 69 Haw. 176, 738 P.2d 79 (1987).

[132] Hawai'i Revised Statutes ("HRS") section 663-31 is Hawai'i's modified comparative negligence provision. HRS section 663-31 provides that in negligence actions, if a plaintiff's contributory negligence was less than or equal to the (aggregate) negligence of the defendant(s), the plaintiff's claim is not barred, but is merely reduced by the percentage of contributory negligence. HAW. REV. STAT. § 663-31(a) (1984). If a plaintiff's contributory negligence, however, is greater than the (aggregate) negligence of the defendant(s), the plaintiff is barred from any recovery. HAW. REV. STAT. § 663-31(c) (1984).

[133] *See Armstrong*, 69 Haw. at 179-80, 738 P.2d at 81.

Hawai'i is pro-plaintiff as compared to other jurisdictions in this arena. Many jurisdictions have chosen instead to apply contributory negligence principles to their strict products liability rule. *See id.* at 181 n.3, 738 P.2d at 82 n.3 (citing Kansas, Minnesota, New Jersey, Wisconsin, New Hampshire and Maine as jurisdictions which have applied comparative negligence from their respective statutes to strict products liability).

[134] *See id.* at 180-83, 738 P.2d at 81-83.

[135] *Id.* at 182, 738 P.2d at 82.

[136] *Id.*

[137] *Id.* at 182-83, 738 P.2d at 82-83.

[138] 71 Haw. 1, 780 P.2d 566 (1989).

[139] *See generally id.* at 6-9, 780 P.2d at 570-71 (noting that the inquiry in awarding punitive damages focuses on the defendant's mental state and will be allowed when the defendant's conduct was malicious in nature).

could be awarded in strict products liability claims,[140] despite the fact that in strict products liability cases the "defendant's liability arises not from any finding of fault, but rather from a finding that the product is defective," and that no showing of intentional wrongdoing is required.[141] *Masaki* is therefore one more case in which Hawai'i courts have chosen to protect injured plaintiffs to the utmost.

Since the dawn of strict products liability in the jurisdiction, Hawai'i courts have demonstrated their commitment to protecting injured plaintiffs.[142] To further their commitment, they should exclude the "unreasonably dangerous" language from the plaintiff's prima facie strict products liability claim. As the California Supreme Court stated in *Cronin*, the result of the "unreasonably dangerous" requirement "has not been merely to prevent the seller from becoming an insurer of his products with respect to all harm generated by their use. Rather, it has burdened the injured plaintiff with proof of an element which rings of negligence."[143] Yet the very purpose of the court's pioneering efforts in the strict products liability arena "was to relieve the plaintiff from problems of proof inherent in pursuing negligence and warranty remedies."[144] The *Cronin* court also rejected placing a significantly increased burden on injured plaintiffs to prove both that the product was defective and that it was "unreasonably dangerous."[145] In adopting California's version of strict products liability, as opposed to the Second Restatement's version, Hawai'i courts expressed the same desire to protect injured plaintiffs by providing an easier method for recovery than that of Second Restatement jurisdictions.

In addition to the California courts' reasons for rejecting the "unreasonably dangerous" language stated in *Cronin*, the California Supreme Court in *Barker* cited yet another basis for its rejection of the unreasonable dangerousness requirement. The court was concerned that the "unreasonably dangerous" language could confuse jurors as to what a products liability plaintiff is required to prove.[146] The *Barker* court explained that the Second Restatement's language is "potentially misleading because '[it] may suggest an idea like ultra-

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[140] *Id.* at 11, 780 P.2d at 572-73 (holding that punitive damages may be allowed where the plaintiff proves that "the defendant 'has acted wantonly or oppressively or with such malice as implies a spirit of mischief or criminal indifference to civil obligations'; or where there has been 'some wilful misconduct or that entire want of care which would raise the presumption of a conscious indifference to consequences.'" (quoting Bright v. Quinn, 20 Haw. 504, 512 (1911))).

[141] *Id.* at 9, 780 P.2d at 572.

[142] *See, e.g.*, *Armstrong*, 69 Haw. 176, 738 P.2d 79 (refusing to apply the "all or nothing bar" of comparative negligence in strict products liability cases); *Masaki*, 71 Haw. 1, 780 P.2d 566 (allowing punitive damages in strict products liability claims).

[143] Cronin v. J.B.E. Olson Corp., 501 P.2d 1153, 1161-62 (Cal. 1972).

[144] *Id.* at 1162 (citations omitted). *See also* discussion *supra* Part II.B.

[145] *Cronin*, 501 P.2d at 1162.

[146] *See* Barker v. Lull Eng'g Co., Inc., 573 P.2d 443, 452 n.8 (Cal. 1978).

hazardous, or abnormally dangerous, and thus give rise to the impression that the plaintiff must prove that the product was unusually or extremely dangerous.'"[147] California courts thus recognize that the potential for juror confusion constitutes a further reason to refrain from employing the "unreasonably dangerous" terminology in defining defective products.[148] Because this terminology 1) requires plaintiffs to prove something approaching negligence, 2) creates the dual-burden of proving defect and unreasonable dangerousness, and 3) could mislead or confuse jurors, the "unreasonably dangerous" language is as inappropriate a requirement in a pro-plaintiff jurisdiction like Hawai'i as it is in California. Even if the "unreasonably dangerous" language was purposely added to the strict products liability requirement in Hawai'i, there are strong public policy reasons for omitting it from Hawai'i's strict products liability standard.

B. Public Policies for Imposition of Strict Liability for Defective Products Support Exclusion of the "Unreasonably Dangerous" Terminology

The policies that support imposition of strict liability for defective products also support exclusion of the unreasonable dangerousness requirement. These policies include, among others, first, "loss-spreading" or "risk distribution," and, second, deterrence of the creation of dangerous products and greater public safety. A third policy for imposition of strict products liability is based on the implied representation that products placed on the market are safe for use.[149]

The first important policy justification for imposing strict liability on a manufacturer is loss-spreading, which is also known as risk distribution. This rationale is based on the idea that the "costs of damaging events due to defectively dangerous products can best be borne by the enterprisers who make and sell these products."[150] Thus, "manufacturer liability is socially desirable as a means of spreading losses that would be a hardship upon individuals but that

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[147] *Id.* (quoting John W. Wade, *On the Nature of Strict Tort Liability for Products*, 44 MISS. L.J. 825, 832 (1973)).

[148] *See id.*

[149] *See* discussion *infra* Part III.B.

[150] KEETON ET AL., *supra* note 28, § 98 at 692-93. Keeton et al. further explain that:

> Those who are merchants and especially those engaged in the manufacturing enterprise have the capacity to distribute the losses of the few among the many who purchase the products. It is not a 'deep pocket' theory but rather a 'risk bearing economic' theory. The assumption is that the manufacturer can shift the costs of accidents to purchasers for use by charging higher prices for the costs of products. *This can be regarded as a fairness and justice reason of policy.*

Id. at 693 (emphasis added).

can be passed on by enterprises through insurance and increased prices."[151] This loss-spreading justification for strict products liability has become synonymous with Justice Traynor's *Escola* concurrence.[152] Traynor reasoned that "[t]hose who suffer injury from defective products are unprepared to meet its consequences. The cost of an injury and the loss of time or health may be an overwhelming misfortune to the person injured, and a needless one."[153]

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[151] 2 DOBBS, *supra* note 27, § 353 at 975.

A study performed by the Consumer Federation of America reveals that the "cost of Product Liability Insurance is remarkably small and declining." Press Release, Consumer Federation of America, *Product Liability Insurance Costs Are Small, Declining* (June 10, 1998), *at* http://www.consumerfed.org/prodliab.pdf (last visited Mar. 14, 2003) (on file with author).

> The study revealed that product liability insurance costs manufacturers only 24 cents for each $100 of product sales in America over the decade 1987 to 1996. The cost in 1996 was a mere 16 cents per $100 of product sales. This cost includes not just jury verdicts, but all product liability insurance claims: those settled without going to court and those claims where no lawyers were involved.
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> . . . .
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> . . . [T]he cost of product liability insurance per $100 of sales has fallen by 56% over the decade, in actual dollars. Adjusted for inflation, the costs have fallen by about 75%.
>
> Less than half (46%) of the 2.8 million claimants whose claims closed over the last ten years got any payment at all. For those who got a payment, the average payment was under $12,000. This low average cost shows that although million dollar verdicts occur, the vast number of claims are small claims, driving the overall cost per claim down.
>
> "Product Liability Insurance in America is not in any sort of crisis," said J. Robert Hunter, Director of Insurance for CFA [Consumer Federation of America] and former Texas Insurance Commissioner. "It has costs that are so small you can't chart them. Also, even these minute costs are in steep decline. It appears that we build very safe products in this country and that judges and juries are totally reasonable when deciding lawsuits."
>
> Hunter, the author of the [CFA] report, concluded "The product liability system is not only not broke, it is an amazing system with remarkably low cost considering it takes care of all people hurt by products in our nation."

Id. CFA is a "federation of some 250 pro-consumer groups, with a combined membership of over 50 million, that was founded in 1968 to advance the consumer interest through advocacy and education." *Id.*

A different version of the "loss-spreading" or "risk distribution" rationale, also asserted by Dobbs, is that "strict liability is just in imposing liability for harms that are statistically associated with the enterprise. This view is that the enterprise should 'pay its own way.'" 2 DOBBS, *supra* note 27, § 353 at 975.

See also PROSSER, *supra* note 30 at 1120 (the risk-spreading argument "maintains that the manufacturers, as a group and an industry, should absorb the inevitable losses which must result in a complex civilization from the use of their products, because they are in a better position to do so, and through their prices to pass such losses on to the community at large."); KEETON ET AL., *supra* note 28, § 98 at 692-693.

[152] *See* PROSSER, *supra* note 30, at 1120.

[153] Escola v. Coca Cola Bottling Co., 150 P.2d 436, 440-41 (Cal. 1944) (Traynor, J., concurring).

The risk of injury, Traynor asserted, could instead be insured against by manufacturers and "distributed among the public as a cost of doing business."[154]

When Hawai'i courts first adopted strict products liability, the *Stewart* court relied on this "loss-spreading" justification as part of its rationale, stating: "[T]he burden of accidental injuries caused by defective chattels should be placed upon those in the chain of distribution as a cost of doing business . . . ."[155] This reasoning implicitly incorporates the "fairness" goal of compensating the injured plaintiff: as between manufacturers and "innocent victims who suffer harm because of defective products, the product sellers as business entities are in a better position than are individual users and consumers to insure against such losses."[156]

A second justification for imposing strict liability upon producers of defective products is that courts wish to deter manufacturers from placing dangerous goods into the stream of commerce, and thereby increase public safety. The basis for this rationale is that "[t]he public interest in human life, health and safety demands the maximum possible protection that the law can give against dangerous defects in products which consumers must buy, and against which they are helpless to protect themselves."[157] This "justifies the imposition, upon all suppliers of such products, of full responsibility for the harm they cause, even though the supplier has not been negligent."[158] This rationale reflects the view that manufacturers will labor to make products safer if threatened with strict liability for any defect(s) in their products,[159] and if

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[154] *Id.* at 441.

[155] Stewart v. Budget Rent-A-Car Corp., 52 Haw. 71, 75, 470 P.2d 240, 243 (1970). *See also* Larsen v. Pacesetter Sys., Inc., 74 Haw. 1, 23, 837 P.2d 1273, 1285 (1992). "The costs of injury due to defective products may best be borne by enterprisers who make and sell the product, profit from sales, and who can shift the costs to purchasers." *Id.*

[156] RESTATEMENT (THIRD) OF TORTS: PROD. LIAB. § 2 cmt. a (1998).

[157] PROSSER, *supra* note 30, at 1122.

[158] *Id.*

[159] *See* 2 DOBBS, *supra* note 27, § 353 at 975 (2001). Dobbs asserts that:

> This rationale is usually grounded in economic analysis. It is sometimes associated with the idea that liability will require manufacturers of products either to make them safer or to raise prices and that either action would promote safety. Higher prices would promote safety because the higher prices would reflect true costs (including losses resulting from injuries) and buyers, to save money, would often seek cheaper substitutes, which would tend to be safer. A related proposition is that the manufacturer is, or sometimes is, in the best position to weigh risks and utilities and is therefore the "cheapest cost avoider." It has also been suggested that the cost of contracting for appropriate safety and the cost of regulation may be so high that it may be efficient to decide after injury whether the defendant should be liable, which of course is the common law method.

Id. at 975-76 (citations omitted).

plaintiffs' burden of proving negligence is eliminated.[160] Strict liability is an incentive for those up the chain of distribution to be on their guard against defects.[161]

The third justification for strict liability in defective product cases is that courts have implied a promise from manufacturer to user. By placing goods upon the market, the supplier "represents to the public that . . . [the goods] are suitable and safe for use."[162] The supplier, "by packaging, advertising or otherwise . . . does everything that he can" to induce the belief that the product is safe for use in any reasonably foreseeable manner.[163] Furthermore, the supplier "intends and expects that the product will be purchased and used in reliance upon this assurance of safety; and it is in fact so purchased and used."[164] The supplier has thus "invited and solicited the use; and when it leads to disaster, he should not be permitted to avoid the responsibility by saying that he has made no contract with the consumer."[165]

These three justifications (loss-spreading, encouraging creation of safer products, and the implied representation of safety) apply equally whether a product is "dangerous" or "unreasonably dangerous." In light of courts' desires to protect consumers against the "general and constant" risk of injury from defective products, a plaintiff should not be required to prove anything in addition to a defect in the product which caused harm. These reasons justified adoption of strict products liability by California and Hawai'i courts, and they remain valid to this day.

Manufacturers today continue to be in a better position to spread the risks of loss through insurance and/or increased prices than the injured plaintiff.[166]

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[160] *Larsen*, 74 Haw. at 23, 837 P.2d at 1285 (citing with approval PROSSER AND KEETON ON TORTS, § 98 at 692-93 (Keeton et al. eds., 5th ed. 1984)).

[161] *See* Stewart v. Budget Rent-A-Car Corp., 52 Haw. 71, 75, 470 P.2d 240, 243 (1970).

[162] Prosser, *supra* note 30, 1123.

[163] *Id.*

[164] *Id.*

[165] *Id. See also id.* at 1123 n.150.

> It would be but to acknowledge a weakness in the law to say that he could thus create a demand for his products by inducing a belief that they are suitable for human consumption, when, as a matter of fact, they are not, and reap the benefits of the public confidence thus created, and then avoid liability for the injuries caused thereby merely because there was no privity of contract between him and the one whom he induced to consume the food.

Id. (quoting Jacob E. Decker & Sons v. Capps, 164 S.W.2d 828, 832-33 (Tex. 1942))). *See also* 2 DOBBS, *supra* note 27, § 353 at 976. "Manufacturers at least implicitly represent their products as healthy and safe, and consumers are entitled to rely upon that appearance." *Id.*

Hawai'i has adopted this reasoning. *Stewart*, 52 Haw. at 74-75, 470 P.2d at 243. *See also Larsen*, 74 Haw. at 23, 837 P.2d at 1285. "Liability will compensate consumers or users whose expectations are frustrated by the defective product." *Id.*

[166] *See supra* note 151 and accompanying text.

We *still* live in an industrial society of mass production and mass marketing. Thus courts must persist in deterring production and/or design of dangerous products.[167] Courts *still* deem placement of a product on the market as a representation by the manufacturer of the product's fitness for safe use as intended or as reasonably foreseeable.[168] Additionally, courts *still* hold such manufacturers liable for making these "representations."

As aptly stated in *Larsen v. Pacesetter Systems, Inc.*,[169] the "rules defining and governing . . . [a] tort products liability action for personal injuries must serve the purposes for which products liability is imposed."[170] Because none of the justifications for strict liability have become outdated, there is no reason to change this rule. Hawai'i courts have no reason to require further proof from plaintiffs than that the defendant produced or sold a defective product which caused harm. The rule that a plaintiff must prove that a product is defective, but not unreasonably so, best serves the purposes for which products liability is imposed.

C. The Current Trend is to Reject the "Unreasonably Dangerous" Terminology

Hawai'i courts chose to follow California courts when they created and adopted strict products liability as a cause of action.[171] Hawai'i courts also chose to follow California courts in rejecting the "unreasonably dangerous" requirement, based on persuasive reasoning provided by the California Supreme Court.[172] Hawai'i's courts should not now diverge from the clear and well reasoned path forged by the California Supreme Court without strong reasons for doing so. Furthermore, other courts are beginning to reject the

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[167] In fact, one might posit that there is even more incentive to hold manufacturers and those down the line of distribution strictly liable for defective products in the era of phone orders and internet purchasing than there was when strict products liability first emerged. Because modern companies have the ability to sell to such a large range of people, there is a correspondingly large risk of widespread harm stemming from defective products.

[168] *See* Leong v. Sears Roebuck & Co., 89 Hawai'i 204, 205, 970 P.2d 972, 973 (1998) (citing the proposition that "by placing the goods on the market the maker and those in the chain of distribution represent to the public that the products are suitable and safe for use" (quoting Stewart v. Budget Rent-A-Car Corp., 52 Haw. 71, 74-75, 470 P.2d 240, 243 (1970))). *See also id.* at 210, 970 P.2d at 978 (discussing the implied representations that manufacturers make by placing goods in the stream of commerce and implying that this policy continues to have validity in 1998) (citing *Armstrong*, 69 Haw. 176, 183-85, 738 P.2d 79, 83-85 (1987)).

[169] 74 Haw. 1, 837 P.2d 1273 (1992).

[170] *Id.* at 22, 837 P.2d at 1285.

[171] *See generally Stewart*, 52 Haw. 71, 470 P.2d 240; discussion *supra* Part II.C; discussion *infra* Part III.C.1.

[172] *See* Ontai v. Straub Clinic & Hosp., Inc., 66 Haw. 237, 659 P.2d 734 (1983); discussion *supra* Part II.C; discussion *infra* Part III.C.1.

"unreasonably dangerous" language indirectly as they adopt the Third Restatement which expunged the unnecessary and confusing "unreasonably dangerous" language.[173] This section therefore discusses the trend of rejecting the "unreasonably dangerous" terminology.

1. California courts have rejected the "unreasonably dangerous" language

Since their creation of strict products liability in 1963, California courts have continually rejected adoption of the "unreasonably dangerous" requirement. The Hawai'i Supreme Court chose to follow California courts in almost every step taken in this area, from adoption of the *Greenman* rule,[174] to rejection of the "unreasonably dangerous" language in *Cronin* and *Barker*,[175] to approving a "latent danger" jury instruction which closely resembles that in BAJI, the California Civil Jury Instructions.[176] Thus, the Hawai'i Supreme Court should continue to follow California's lead.

The California Supreme Court, in pioneering this area of tort law, explicitly rejected the Second Restatement's use of the term "unreasonably dangerous" in jury instructions. The Second Restatement's language: (1) burdened the plaintiff with an element which "rings of negligence;" (2) placed a dual burden on plaintiffs to prove both defectiveness and unreasonable dangerousness; (3) placed a ceiling on the manufacturer's liability; and (4) could have potentially misled a jury into thinking that the plaintiff was required to prove that the product was "ultrahazardous."[177] These four problems with the Second Restatement's language prompted the California Supreme Court to instead create their own strict products liability standard. By directly adopting

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[173] *See* RESTATEMENT (THIRD) OF TORTS: PROD. LIAB. §§ 1, 2 (1998); Michael D. Weisman, MASS. SUP. CT. CIV. JURY INSTR., *Product Liability Volume I Chapter 11* (Massachusetts Continuing Legal Education, Inc., eds., 2001).

[174] *See generally Stewart*, 52 Haw. 71, 470 P.2d 240.

[175] *See generally Ontai*, 66 Haw. 237, 659 P.2d 734.

[176] *Compare* California Jury Instructions, Civil: Book of Approved Jury Instructions, 9th ed., BAJI 9.0 at 320. "Duty to Warn: A product although faultlessly made, may be defective if it is unreasonably dangerous to place it in the hands of a user without a suitable warning. There is no duty to warn against the use of a product that is not reasonably foreseeable." *Id.* (citation omitted), *with* Masaki v. General Motors Corp., 71 Haw. 1, 22 n.10, 780 P.2d 566, 578 n.10 (1989). The *Masaki* court approved the following jury instruction:

> The third test is that the product is defective in design even if faultlessly made, if the use of the product in a manner that is intended or reasonably foreseeable including reasonably foreseeable misuses, involves a substantial danger that would not be readily recognized by the ordinary user of the product and the manufacturer fails to give adequate warnings of the danger.

Id.

[177] *See supra* notes 54-62, 147-48 and accompanying text.

Greenman, *Cronin*, and *Barker* from California, the Hawai'i Supreme Court has likewise shown justifiable concern regarding use of the "unreasonably dangerous" terminology.

Hawai'i's courts should exclude the term "unreasonably" from the strict products liability requirement rather than placing burdensome and confusing language into jury instructions. If there is concern about liability for "products with inherent possibilities for danger,"[178] it would be less confusing to address these products via the definition of "dangerous." California and Hawai'i courts have both adopted the consumer-expectation test.[179] Under this test, a product with inherent possibilities for danger could not be found defective.[180] Therefore, it is unnecessary for the Hawai'i Supreme Court to amend its strict products liability rule to include the "unreasonably dangerous" language.

2. The Third Restatement has omitted the "unreasonably dangerous" language

The Third Restatement, the current pioneer in this area, has revamped and reorganized products liability, including omitting the "unreasonably dangerous" terminology.[181] Section one, entitled *Liability Of Commercial Seller or Distributor For Harm Caused by Defective Products*, lays out the new basic rule that: "One engaged in the business of selling or otherwise distributing products who sells or distributes a *defective* product is subject to liability for harm to persons or property caused by the defect."[182] Section two then sets out the three categories under which a product might be found defective: "when, at the time of sale or distribution, it contains a manufacturing defect, is defective in design, or is defective because of inadequate instructions or warnings."[183] Notably, the liability and definitions in the Third Restatement

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[178] *See supra* notes 48-50 and accompanying text.

[179] *See generally* Cronin v. J.B.E. Olson Corp., 501 P.2d 1153 (Cal. 1972); *Ontai*, 66 Haw. 237, 659 P.2d 734.

[180] *See Cronin*, 501 P.2d at 1161.

[181] RESTATEMENT (THIRD) OF TORTS: PROD. LIAB. §§ 1, 2 (1998).

[182] RESTATEMENT (THIRD) OF TORTS: PROD. LIAB. § 1 (1998) (emphasis added).

[183] RESTATEMENT (THIRD) OF TORTS: PROD. LIAB. § 2 (1998). The Third Restatement provides that a product:

> (a) contains a *manufacturing defect* when the product departs from its intended design even though all possible care was exercised in the preparation and marketing of the product;
>
> (b) is *defective in design* when the foreseeable risks of harm posed by the product could have been reduced or avoided by the adoption of a reasonable alternative design by the seller or other distributor, or a predecessor in the commercial chain of distribution, and the omission of the alternative design renders the product not reasonably safe;

all lack reference to the "unreasonably dangerous" language contained in the Second Restatement.[184]

Arguably, the Third Restatement is following the progression of the California courts, and indeed, Hawai'i's pre-*Wagatsuma* rules. Hawai'i currently recognizes all three of the definitions and tests (manufacturing defects, design defects, and defects due to insufficient warning) referred to in Section two of the Third Restatement.[185] Comment (c) utilizes the equivalent of Hawai'i's "consumer expectation test" for a manufacturing defect,[186] and comment (d) utilizes the equivalent of Hawai'i's "risk-utility test" for design defects.[187] Comment (i) of the Third Restatement defines when a product may

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(c) is *defective because of inadequate instructions or warnings* when the foreseeable risks of harm posed by the product could have been reduced or avoided by the provision of reasonable instructions or warnings by the seller or other distributor, or a predecessor in the commercial chain of distribution, and the omission of the instructions or warnings renders the product not reasonably safe.

Id. (emphasis added).

[184] *See id.*; RESTATEMENT (SECOND) OF TORTS § 402A (1965).

[185] *See generally* Ontai v. Straub Clinic & Hosp., Inc., 66 Haw. 237, 659 P.2d 734 (1983) (referring to all three products liability tests); *infra* notes 187-88 and accompanying text.

[186] RESTATEMENT (THIRD) OF TORTS: PROD. LIAB. § 2 cmt. c (1998).

[187] RESTATEMENT (THIRD) OF TORTS: PROD. LIAB. § 2 cmt. d (1998).

Comment (f) of the Third Restatement lays out the "risk-utility factors" that the Hawai'i Supreme Court recognized in Larsen v. Pacesetter Sys., Inc., 74 Haw. 1, 837 P.2d 1273 (1992). *Compare* RESTATEMENT (THIRD) OF TORTS: PROD. LIAB. § 2 cmt. f (1998):

> The factors include, among others, the magnitude and probability of the foreseeable risks of harm, the instructions and warnings accompanying the product, and the nature and strength of consumer expectations regarding the product, including expectations arising from product portrayal and marketing . . . relative advantages and disadvantages of the product as designed and as it alternatively could have been designed . . . the likely effects of the alternative design on production costs; the effects of the alternative design on product longevity, maintenance, repair, and esthetics; and the range of consumer choice among products are factors that may be taken into account.

with Larsen, 74 Haw. at 23 n.6, 837 P.2d at 1285 n.6. The following factors were cited as relevant to determine whether a product is defective under the risk-utility test:

> (1) The usefulness and desirability of the product – its utility to the user and to the public as a whole.
>
> (2) The safety aspects of the product – the likelihood that it will cause injury, and the probable seriousness of the injury.
>
> (3) The availability of a substitute product which would meet the same need and not be as unsafe.
>
> (4) The manufacturer's ability to eliminate the unsafe character of the product without impairing its usefulness or making it too expensive to maintain its utility.
>
> (5) The user's ability to avoid danger by the exercise of care in the use of the product.
>
> (6) The user's anticipated awareness of the dangers inherent in the product and their avoidability, because of general public knowledge of the obvious condition of the product, or of the existence of suitable warnings or instructions.
>
> (7) The feasibility, on the part of the manufacturer, of spreading the loss by setting the

be considered defective for inadequate instructions or warnings, which is a modified and elaborated version of Hawai'i's current rule.[188] Furthermore, in the five years since its publication, courts in fifteen states have already either adopted the Third Restatement's section one and/or section two or have cited one or both of these provisions with approval.[189] The Third Restatement therefore indicates the current trend that the nation is taking in the area of products liability.[190] Because so many jurisdictions have been persuaded that these provisions are well reasoned, the Hawai'i Supreme Court should consider adoption of sections one and two of the Third Restatement.

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price of the product or carrying liability insurance.

Id. (citing J. Wade, *On the Nature of Strict Tort Liability for Products*, 44 MISS. L.J. 825, 837-38 (1973)).

[188] RESTATEMENT (THIRD) OF TORTS: PROD. LIAB. § 2 cmt. i (1998).

Compare comment (i) (stating that "plaintiff must prove that adequate instructions or warnings were not provided," and as to the adequacy of warnings, "courts must focus on various factors, such as content and comprehensibility, intensity of expression, and the characteristics of expected user groups") *with Ontai*, 66 Haw. at 248, 659 P.2d at 743 (stating that a duty to warn consists of both the duty to "give adequate instructions for safe use; and the other is to give a warning as to dangers inherent in improper use.") *and* Tabieros v. Clark Equip. Co., 85 Hawai'i 336, 364-78, 944 P.2d 1279, 1307-21 (1997) (holding that there is a duty to warn of latent defects "where the supplier of a dangerous good 'has no reason to believe that those for whose use the chattel is supplied will realize its dangerous condition' [also known as latent defects]." (quoting RESTATEMENT (SECOND) OF TORTS § 388)).

The Third Restatement appears to give more guidance than the Hawai'i cases because it provides factors for the court to consider as to the adequacy of warnings.

[189] *E.g.*, Bell v. Precision Airmotive Corp., 42 P.3d 1071 (Alaska 2002); Golonka v. General Motors Corp., 65 P.3d 956 (Ariz. Ct. App. 2003); Morson v. Superior Court, 109 Cal.Rptr.2d 343 (Cal. App. 2001); Beattie v. Beattie, 786 A.2d 549 (Del. Super. Ct. 2001); Scheman-Gonzalez v. Saber Mfg. Co., 816 So.2d 1133 (Fla. Dist. Ct. App. 2002); Banks v. ICI Americas, Inc., 450 S.E.2d 671 (Ga. 1994) (adopting what became the Third Restatement); Wright v. Brooke Group Ltd., 652 N.W.2d 159 (Iowa 2002); Vassallo v. Baxter Healthcare Corp., 696 N.E.2d 909 (Mass. 1998); Rodriguez v. Suzuki Motor Corp., 996 S.W.2d 47 (Mo. 1999); Freeman v. Hoffman-La Roche, Inc., 618 N.W.2d 827 (Neb. 2000); Cavanaugh v. Skil Corp., 751 A.2d 518 (N.J. 2000); Scarangella v. Thomas Built Buses, Inc., 717 N.E.2d 679 (N.Y. 1999); Hernandez v. Tokai Corp., 2 S.W.3d 251 (Tex. 1999); Bishop v. GenTec Inc., 48 P.3d 218 (Utah 2002); Ruiz-Guzman v. Amvac Chem. Corp., 7 P.3d 795 (Wash. 2000).

Contra Delaney v. Deere & Co., 999 P.2d 930 (Kan. 2000) (explicitly rejecting the Restatement (Third) of Torts: Products Liability § 2); Halliday v. Sturm, Ruger & Co., Inc., 792 A.2d 1145 (Md. 2002); Vautour v. Body Masters Sports Indus., Inc., 784 A.2d 1178 (N.H. 2001); Green v. Smith & Nephew AHP, Inc., 629 N.W.2d 727 (Wis. 2001).

[190] *See* WEISMAN, *supra* note 173 (characterizing the Third Restatement as the "clear judicial trend").

IV. REMEDIES

Every jurisdiction in the United States applies some form of strict liability for defective products.[191] Consequently, holding manufacturers responsible for defective products has universally been recognized as a good idea. To chip away at this liability, by adding the words "unreasonably dangerous" to the plaintiff's prima facie burden, would be to take a "step backwards" in the area. Hawai'i courts should not diminish strict products liability because products are just as dangerous and consumers are just as unable to protect themselves as when products liability first arose. The Hawai'i Supreme Court has several options as to the direction it will take in this area. If the Hawai'i courts wish to continue protecting those who are innocently injured, two of these alternatives will best achieve this goal.

First, the Hawai'i Supreme Court could stay within its own common law jurisprudence by creating an *Ontai-Tabieros* hybrid. This would entail holding manufacturers liable for manufacturing defects with the consumer-expectation test from *Ontai*, for design defects with the risk-utility test from *Ontai*, and adding liability for insufficient warnings with the latent-danger test adopted in *Tabieros*. This hybrid best addresses the policy concerns behind products liability by providing injured plaintiffs with all three of the recognized claims against manufacturers of defective products without the unnecessary and confusing "unreasonably dangerous" language. These tests were adopted by the Hawai'i Supreme Court because they represent the most appropriate tests under Hawai'i's jurisprudence.[192]

Second, the Hawai'i Supreme Court should consider adopting the Third Restatement. Adoption would result in essentially the same rule as an *Ontai-Tabieros* hybrid because it recognizes the same three kinds of defects that Hawai'i courts recognize, and utilizes the same three tests that Hawai'i courts utilize in their strict products liability jurisprudence.[193] Basically, the Third Restatement also "restates" the law adopted in Hawai'i thus far, without the unnecessary and confusing "unreasonably dangerous" language. The judicial trend across the country has also been to adopt the Third Restatement,[194] and at least one Hawai'i court has cited it thus far.[195] It would be advantageous to adopt the Third Restatement because it is well organized, clear, and has been

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[191] *See* PROSSER, *supra* note 30, at 1100.

[192] *See* discussion *supra* Part II.A.

[193] *See supra* note 188 and accompanying text.

[194] *See supra* notes 189-90 and accompanying text.

[195] *See* Nielsen v. Am. Honda Motor Co., Inc., 92 Hawai'i 180, 190 n.14, 989 P.2d 264, 274 n.14 (1999) (citing section one of the Third Restatement for the proposition that a plaintiff is required to show that "the seller or distributor of the defective product is engaged in the business of selling or distributing such product").

promulgated by the ALI as their best-effort at a current products liability standard.

Either of these remedies represent the "modern trend and the better reasoned view," in light of the current uncertainty in Hawai'i's strict products liability rule.[196] As such, the of Hawai'i Supreme Court should consider announcing either the *Ontai-Tabieros* hybrid or the Third Restatement as the strict products liability rule in Hawai'i.

V. CONCLUSION

Hawai'i's common law tends to favor injured plaintiffs. Burdening the plaintiff with having to prove unreasonable dangerousness would defeat strict products liability's goal of relieving plaintiffs of proof of "an element which rings of negligence." Likewise, weighing down plaintiffs with a "dual burden" of having to prove first that a product is defective and second that a product is "unreasonably dangerous" would place a harsh requirement on the very people who most need the court's protection, innocently injured users. Applying the Second Restatement's "unreasonably dangerous" standard would unduly restrict the ways in which a plaintiff could demonstrate a product's defectiveness. The Second Restatement inserted the "unreasonably dangerous" language to limit plaintiffs solely to the consumer-expectation test.[197] Yet, the Hawai'i Supreme Court has patently rejected such a limitation because it has accepted three tests for plaintiffs to utilize to prove the existence of a product defect.[198] To regress by allowing only the consumer-expectation test would be against the established common law of the State of Hawai'i.

Finally, it would be unfair to injured plaintiffs for Hawai'i courts to allow potentially misleading terminology into jury instructions. There can be no justice if jurors are confused or deceived into thinking that plaintiffs had to prove an element which is not actually required. Exclusion of the "unreasonably dangerous" terminology is the well-reasoned trend in courts of other jurisdictions, and comports with Hawai'i's common law and public policies.[199]

Real people are injured and/or killed by defective products and often their only viable remedy is for courts to hold the manufacturers and sellers of such products liable for the harm those products cause. Another injured plaintiff like Mr. Ray Barker should not be prejudiced by the confusing and unnecessary "unreasonably dangerous" terminology. The Hawai'i Supreme Court

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[196] *See* discussion *supra* Part II.C (citing Stewart v. Budget Rent-A-Car Corp., 52 Haw. 71, 74, 470 P.2d 240, 243 (1970)).

[197] *See supra* notes 57-62 and accompanying text.

[198] *See supra* note 185 and accompanying text.

[199] *See* discussion *supra* Part III.

should therefore purge this language from its common law, and should do so in a manner which clearly conveys its desire to protect the public from dangerously defective products.

Malia S. Lee[200]

[200] Class of 2004, William S. Richardson School of Law, University of Hawai'i at Manoa. I wish to express my sincere appreciation to the entire membership of the 2003-2004 University of Hawai'i Law Review, especially Chenise Kanemoto who spent countless hours editing this article, and Lori Amano for her technical expertise. I would also like to thank Elizabeth Paek and University of Hawai'i Professors Beh and Caratto for their input. My deepest gratitude goes to Scott W. Young, my soul mate, for his undying love and support. Last, but certainly not least, thank you to my parents, family, and friends for all the Aloha that has sustained me through the years.

Hiner v. Hoffman: An Analysis Of The Hawai'i Supreme Court's Decision And Its Impact On Hawai'i's Common Interest Communities

> Every man may justly consider his home his castle and himself as the king thereof; nonetheless his sovereign fiat to use his property as he pleases must yield, at least in degree, where ownership is in common or cooperation with others. The benefits of condominium living and ownership demand no less. The individual ought not be permitted to disrupt the integrity of the common scheme through his desire for change, however laudable that change might be.[1]

I. INTRODUCTION

The law of community associations is a relatively new and rapidly growing body of law.[2] Its importance stems from the recent increase in common interest communities across America.[3] In Hawai'i, virtually all new real estate developments consist of common interest communities.[4] In fact, with an estimated twenty-five percent[5] of its housing units in condominium

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[1] Sterling Vill. Condo., Inc. v. Brietenbach, 251 So. 2d 685, 688 (Fla. Dist. Ct. App. 1971) (discussing a restrictive covenant which restricted condominium unit owners from altering or replacing the exterior portion of their building without the condominium association's consent).

[2] "The law governing residential common-interest communities has only recently received recognition as a separate body of law . . . after the Housing Act of 1961 . . . ." RESTATEMENT (THIRD) OF PROP: SERVITUDES ch. 6, introductory note (2000).

[3] HAW. REAL ESTATE COMM'N, DEP'T OF COMMERCE AND CONSUMER AFFAIRS, PROGRESS REPORT TO THE LEGISLATURE, RECODIFICATION OF CHAPTER 514A, HAWAII REVISED STATUTES, at 2 (Haw. 2002), http://www.state.hi.us/dcca/reports, *also available at* http://www.state.hi.us/hirec/. *See also* Helen E. Roland, Residential Common Interest Developments: An Overview, California Research Bureau, California State Library, 1 (March 1998) ("Approximately 2,500 new [common interest developments] are built each year [in California] and they make up the majority of new housing being constructed in some counties." (quoting Dana Young)), http://www.library.ca.gov/CRB/98/06/98006.pdf. *See* Julia Lave Johnston & Kimberly Johnston-Dodds, *Common Interest Developments: Housing at Risk?* CALIFORNIA RESEARCH BUREAU, CALIFORNIA STATE LIBRARY, 1 (Feb. 2002), http://www.library.ca.gov/crb/02/12/02-012.pdf [hereinafter Johnston & Johnston-Dodds, *Common Interest Developments*].

[4] HAW. REAL ESTATE COMM'N, DEP'T OF COMMERCE AND CONSUMER AFFAIRS, PROGRESS REPORT TO THE LEGISLATURE, RECODIFICATION OF CHAPTER 514A, HAWAII REVISED STATUTES, at 3 (Haw. 2002), http://www.state.hi.us/dcca/reports, *also available at* http://www.state.hi.us/hirec/.

[5] *Id.* at 2 (citing CLIFFORD J. TREESE, COMMUNITY ASSOCIATIONS FACTBOOK 18 (1999)). This figure does not take into account Hawai'i's other forms of common interest ownership. *Id.* at 3.

ownership,[6] the State of Hawai'i has the highest percentage of condominium units across the nation, indicating that community association law has broad ability to affect the majority of Hawai'i's residential developments.[7]

Common interest communities are favored by homeowners for their ability to provide a mechanism for spreading the costs of services among the members.[8] Additionally, buyers are often attracted to such communities for their protective bylaws.[9] When purchasing a common interest ownership, such homeowners expect they are buying into the stability and security that its private covenants, conditions and restrictions provide.[10] Their financial investment reflects an underlying trust that their expectations will not be disappointed.[11]

When a member violates a restriction and fails to cooperate with objecting community members, the petitioning neighbors may require the court's assistance to enforce the rule.[12] The Hawai'i courts have traditionally taken an active role in enforcing these conditions.[13] Recently, however, the Hawai'i courts' role in enforcing restrictive covenants has been problematic.[14] By applying an archaic doctrine of strict construction and rejecting traditional intent-seeking rules,[15] the Hawai'i Supreme Court's holding in *Hiner v.*

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[6] WAYNE S. HYATT, CONDOMINIUM AND HOMEOWNER ASSOCIATION PRACTICE: COMMUNITY ASSOCIATION LAW § 1.06(a)(1) (3d ed. 2000). A condominium is one type of a common interest community. *Id.*

[7] Joyce Y. Neeley & M. Anne Anderson, *Recent Decisions of the Hawai'i Supreme Court and Community Associations*, KA NU HOU (Haw. State Bar Ass'n, Real Prop. & Fin. Services Section, Honolulu, Haw.), May 2000, at 6-7. [hereinafter Neeley & Anderson, *Recent Decisions*]. The authors suggest Hawai'i has a greater stake than any other jurisdiction in the future viability of community associations because it is the state with the highest percentage of condominiums comprising total housing units. *Id.* The authors note that if Hawai'i is following the national trend in condominium growth, over half of the housing units in Hawai'i may be part of a community association. *Id.*

[8] RESTATEMENT (THIRD) OF PROP: SERVITUDES ch. 6, introductory note (2000).

[9] *Id.*

[10] *Id. See also* Johnston & Johnston-Dodds, *Common Interest Developments*, *supra* note 3, at 7.

[11] RESTATEMENT (THIRD) OF PROP: SERVITUDES ch. 6, introductory note (2000).

[12] *Id.* at § 6.8. Using legal proceedings to enforce compliance with the community's bylaws should be the last resort because of their hostile nature and cost. *Id.*

[13] *See* Collins v. Goetsch, 59 Haw. 481, 583 P.2d 353 (1978); Pelosi v. Wailea Ranch Estates, 10 Haw. App. 424, 876 P.2d 1320 (1994); Sandstrom v. Larsen, 59 Haw. 491, 583 P.2d 971 (1978). *See* Neeley & Anderson, *Recent Decisions*, *supra* note 7, at 11. "[C]ommunity associations have generally met with much success in covenant enforcement actions." Neeley & Anderson, *Recent Decisions*, *supra* note 7, at 11.

[14] *See* Hiner v. Hoffman, 90 Hawai'i 188, 977 P.2d 878 (1999); Fong v. Hashimoto, 92 Hawai'i 568, 994 P.2d 500 (2000).

[15] HAW. REAL ESTATE COMM'N, DEP'T OF COMMERCE AND CONSUMER AFFAIRS, PROGRESS REPORT TO THE LEGISLATURE, RECODIFICATION OF CHAPTER 514A, HAWAII REVISED STATUTES,

Hoffman[16] has left Hawai'i with precedent that simply invalidates ambiguous covenants, thereby eliminating the very interest that binds a common interest community together.

This comment examines the *Hiner* court's analysis and its impact on Hawai'i's common interest communities. Part II provides background on common interest communities and discusses the *Hiner* and *Fong v. Hashimoto*[17] decisions. Part III reveals the *Hiner* court's flawed reasoning. Part IV explores the impact of *Hiner* on Hawai'i's common interest developments. Part V examines the new Restatement of Servitudes and suggests the court include a constructive obligation of good faith and fair dealing in restrictive covenants. Part VI recommends the Hawai'i Supreme Court adopt the new Restatement of Servitudes.

II. BACKGROUND

A. Common Interest Communities and Restrictive Covenants

A common interest community[18] is a residential development where the homeowners are required to contribute to the maintenance of commonly held property or pay dues to an association that in turn provides services.[19] The "common interest" that binds a community includes the sharing of tangible property,[20] as well as the right to enforce a covenant.[21]

Restrictive covenants[22] play a vital role in preserving the legal structure within these communities.[23] For example, where homeowners have panoramic views from their property, restrictions are often used to preserve the property

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at 11 (Haw. 2002), http://www.state.hi.us/dcca/reports, *also available at* http://www.state.hi.us/hirec. The report describes the Hawai'i Supreme Court's choice of case law for the *Hiner* and *Fong* decisions as an "archaic body of servitudes." *Id.*

[16] 90 Hawai'i 188, 977 P.2d 878 (1999).

[17] 92 Hawai'i 568, 994 P.2d 500 (2000).

[18] WAYNE S. HYATT, CONDOMINIUM AND HOMEOWNER ASSOCIATION PRACTICES: COMMUNITY ASSOCIATION LAW § 1.06(a) (3d ed. 2000). Forms of common interest communities include condominiums, cooperatives, planned unit developments, townhouses, or standard subdivisions. *Id.*

[19] *Id.* at § 1.05.

[20] *Id.* Examples of shared tangible property in common interest communities include swimming pools, parking areas, roofs, and elevators. *Id.*

[21] *Id.*

[22] RESTATEMENT (THIRD) OF PROP: SERVITUDES § 1.3(3) (2000). A restrictive covenant is a negative covenant that limits certain uses of land. *Id.*

[23] Gerald Korngold, *The Emergence of Private Land Use Controls in Large-Scale Subdivisions: The Companion Story to Village of Euclid v. Ambler Realty Co.*, 51 CASE W. RES. L. REV. 617, 620 (2001). Professor Korngold refers to restrictive covenants as a community developer's "key vehicle . . . to achieve their vision of beauty and value." *Id.*

owners' view planes.[24] To ensure this uniformity and preserve the value of homes,[25] community members rely on the judicial system to enforce such covenants when one member is in breach.[26] However, the court may deny the complaint if the court finds that the covenant is poorly drafted,[27] thereby resulting in hardship and frustrated expectations.[28] Thus, it is imperative to understand the court's definition of a well-drafted covenant.

B. The Hawai'i Supreme Court's Traditional Construction of Restrictive Covenants

In 1978, the Hawai'i Supreme Court interpreted its first case involving a restrictive covenant in *Collins v. Goetsch*.[29] The *Collins* court ruled that a duplex with an outward appearance of a single-family dwelling did not violate a restrictive covenant.[30] The *Collins* court held that restrictive covenants should be liberally construed in favor of the grantee and against the grantor, and that substantial doubt or ambiguity should be resolved in favor of the free and unrestricted use of property.[31] The court reasoned that "[t]he limitations and prohibitions [restrictive covenants] impose may be felt over a very long period of time [and therefore it] is not too much to insist that [conditions] be carefully drafted to state exactly what is intended - no more and no less."[32]

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[24] *See* WAYNE S. HYATT, CONDOMINIUM AND HOMEOWNER ASSOCIATION PRACTICES: COMMUNITY ASSOCIATION LAW § 7.04 (3d ed. 2000); Sandstrom v. Larsen, 59 Haw. 491, 583 P.2d 971 (1978); Lakes at Mercer Island Homeowners Ass'n v. Witrak, 810 P.2d 27 (Wash. Ct. App. 1991).

[25] Neeley & Anderson, *Recent Decisions*, *supra* note 7, at 6. Lack of covenant enforcement may depress property values, thereby decreasing property tax revenues as well as the wealth of the property owners. *Id.*

[26] RESTATEMENT (THIRD) OF PROP: SERVITUDES §§ 6.8, 6.11 (2000).

[27] *See* Hiner v. Hoffman, 90 Hawai'i 188, 977 P.2d 878 (1999); Fong v. Hashimoto, 92 Hawai'i 568, 994 P.2d 500 (2000).

[28] Susan F. French, *Professor French Discusses* Hiner *and* Fong, KA NU HOU (Haw. State Bar Ass'n, Real Prop. & Fin. Services Section, Honolulu, Haw.), May 2000, at 5 [hereinafter French, Hiner *and* Fong].

[29] 59 Haw. 481, 583 P.2d 353 (1978).

[30] *Id.* at 489, 583 P.2d at 359. Paragraph 1 of the Restrictive Covenants and Conditions provides:

> [The] lot shall contain no more than one single-family dwelling, except, where a second living unit is legally permitted, any such second unit shall be a part of and annexed to the main dwelling, and maintain an outward appearance of a single-family dwelling rather than of a duplex.

Id. at 483, 583 P.2d at 356.

[31] *Id.* at 485, 583 P.2d at 356-57.

[32] *Id.* at 485, 583 P.2d at 357 (quoting Berger v. State, 364 A.2d 993, 997 (N.J. 1976)).

When construing an ambiguous covenant, the court found that "the controlling factor is expressed intent."[33] In determining the covenant's meaning, the court "will first look to the plain, ordinary, and popular meaning of the words used in the covenant [and the court] may consider the general plan and appearance of existing structures established in the tract . . . ."[34]

On the same day *Collins* was decided, the Hawai'i Supreme Court also considered *Sandstrom v. Larsen*,[35] a case involving a covenant that prohibited buildings from exceeding one and one-half stories in height.[36] The defendant homeowners claimed that the covenant had been abandoned.[37] To address the issue of abandonment, the court construed the covenant's language in its ordinary and popular meaning to determine that its purpose was to protect view planes.[38] It then looked to the subdivision to observe that although some houses in the *Sandstrom* neighborhood exceeded the one and one-half story limitation, the defendant's property was the only structure obstructing view planes.[39] The supreme court concluded that the covenant was not abandoned by anyone other than the defendant and therefore issued a mandatory injunction to remove the top story of defendant's residence.[40]

In *Pelosi v. Wailea Ranch Estates*,[41] the Hawai'i Intermediate Court of Appeals considered whether the construction of a tennis court and adjoining roadway violated a restrictive covenant restricting nonresidential uses.[42] In its analysis, the court upheld the cardinal rules that the intent of the parties governs and that unambiguous covenants are interpreted according to their ordinary meaning.[43] The court examined the common meaning of "residential" by looking to the definition under the New Webster Encyclopedic Dictionary and other jurisdictions, and concluded that the term did not include a tennis court and road.[44] Thus, the court held the covenant unambiguous and

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[33] *Id.* at 487, 583 P.2d at 358.

[34] *Id.* at 488 n.3, 583 P.2d at 358 n.3 (citing King v. Kugler, 17 Cal. Rptr. 504, 506 (Cal. Ct. App. 1961)).

[35] 59 Haw. 491, 583 P.2d 971 (1978).

[36] *Id.*

[37] *Id.* at 492, 583 P.2d at 974. The declaration included the following restriction: "1. No building . . . shall be erected, altered, placed or permitted to remain on any lot other than one detached single-family dwelling not to exceed one and one-half stories in height . . . ." *Id.* at 492-93, 583 P.2d at 974.

[38] *Id.* at 496, 583 P.2d at 976.

[39] *Id.* at 497-98, 583 P.2d at 976-77.

[40] *Id.* at 500-01, 583 P.2d at 978-79.

[41] 10 Haw. App. 424, 876 P.2d 1320 (1994).

[42] *Id.* at 426, 876 P.2d at 1323.

[43] *Id.* at 436, 876 P.2d at 1327.

[44] *Id.* at 437-41, 876 P.2d at 1327-29.

in breach because the covenant intended to preclude construction of the tennis court and adjoining road.[45]

Together, *Collins*, *Sandstrom*, and *Pelosi* reflect Hawai'i courts' traditional response to and framework for interpreting restrictive covenants.[46] In construing ambiguous restrictions, Hawai'i courts consistently looked to the parties' expressed intent and interpreted unambiguous terms according to their ordinary and popular meaning.[47] When helpful, courts surveyed the land and surrounding structures and considered how other jurisdictions interpreted similar restrictions.[48] These prevailing rules established the legal landscape for Hawai'i's landmark case, *Hiner*.[49]

C. Hiner v. Hoffman

Despite these well-established rules of construction, the Hawai'i Supreme Court, in *Hiner*, completely disregarded its own precedent when it decided that a restrictive covenant that protected view planes was unenforceable because it failed to define the measurable height of a "story."[50]

1. The facts in Hiner v. Hoffman

Hiner took place in the subdivision of Pacific Palisades in Pearl City, Hawai'i.[51] A 1966 restrictive covenant which preserved the views of individual lot owners by prohibiting construction of any dwelling "which exceeds two stories in height" applied to 119 lots in the subdivision.[52]

In 1988, the defendant Hoffmans purchased a lot subject to the height limitation.[53] Five years later, however, they submitted a permit application to the County Building Department to construct a three-story residence.[54] After receiving the city's approval, they built their house as planned.[55] The third story, however, obstructed the view of surrounding neighbors.[56] The Pacific

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[45] *Id.* at 445, 876 P.2d at 1330-31.

[46] *See supra* notes 29-45 and accompanying text.

[47] *See supra* notes 29-45 and accompanying text.

[48] *See supra* notes 29-45 and accompanying text.

[49] 90 Hawai'i 188, 977 P.2d 878 (1999).

[50] *See id.*

[51] *Id.* at 189, 977 P.2d at 879.

[52] *Id.*

[53] *Id.* The *Hiner* court found that "[t]he Hoffmans' lot . . . is subject to [the] restrictive covenant filed in 1966." *Id.*

[54] *Id.*

[55] *Id.*

[56] *Id.* "The third story of the house partially blocks the makai view from the lot owned by Dukes and Hollman." *Id.*

Palisades community association and its members made numerous complaints to the defendants that their building plans violated the 1966 covenant and obstructed homeowners' view planes.[57] Yet, the Hoffmans ignored their warnings.[58]

The association and neighboring landowners filed a lawsuit seeking judicial enforcement of the 1966 covenant and moved for a temporary restraining order.[59] At the trial court level, the judge held that the covenant was unambiguous and therefore the Hoffman residence violated the two-story height limitation.[60] The circuit court issued a mandatory injunction ordering the defendants to remove the third story of their home.[61]

2. The Hawai'i Supreme Court's majority opinion

In their appeal to the Hawai'i Supreme Court, the Hoffmans argued that the language of the covenant, "two stories in height," was ambiguous.[62] Although the majority recognized the rule that the parties' intentions control and that ambiguity is resolved against the party seeking enforcement of the covenant, its analysis ended without examining the parties' intentions.[63] Instead, the court voided the restriction because it failed to prescribe a specific measurement for the maximum "height" of a "story."[64] The court based its decision on the long-standing policy of resolving ambiguity in favor of the unrestricted use of property.[65]

3. The dissenting opinion

In a vigorous dissent, Justice Nakayama, joined by Justice Ramil, chastised the majority for its "labors to create ambiguity where none existed before-certainly not in the perception of the Hoffmans' community, and apparently not in the Hoffmans until the present appeal."[66] According to Justice

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[57] *Id.*

[58] *Id.*

[59] *Id.*

[60] *Id.* at 190, 977 P.2d at 880.

[61] *Id.*

[62] *Id.*

[63] *Id.* (citing Waikiki Malia Hotel, Inc. v. Kinkai Props. Ltd. P'ship, 75 Hawai'i 370, 384, 862 P.2d 1048, 1057 (1993)).

[64] *Id.*

[65] *Id.* at 195, 977 P.2d at 885.

[66] *Id.* at 196, 977 P.2d at 886 (Nakayama, J., dissenting). "This eleventh-hour change demonstrates that the 'ambiguity' in this case stems less from bona fide doubt in the meaning of the covenant terms than from creative, if somewhat disingenuous, appellate advocacy." *Id.* at 197, 977 P.2d at 887 (Nakayama, J., dissenting).

Nakayama, the court must construe a restriction according to the parties' intent and consider the plain meaning of the covenant.[67]

Justice Nakayama stated that "stories in height" is a stock expression, and thus a plain reading of the height limitation manifested the purpose of restricting the Hoffman's three-tiered structure.[68] Justice Nakayama criticized the majority's emphasis on the covenant's purpose of protecting views when there was clear evidence that the neighbors' views were in fact impaired by the Hoffman's home.[69] Finally, Justice Nakayama asserted that "[t]he majority thus does not merely rewrite the covenant, it eviscerates it,"[70] and cautioned that the effect of the majority's ruling in *Hiner* will increase litigation and create uncertainty for other plainly worded covenants.[71]

D. The Hawai'i Supreme Court Applies Hiner's *Strict Rules of Construction in* Fong v. Hashimoto

Eight months after *Hiner*, the Hawai'i Supreme Court reviewed another height limitation dispute in *Fong*.[72] In February of 1998, prior to the *Hiner* decision, the Intermediate Court of Appeals held that a two-tiered home violated a "one-story in height" restriction.[73] After *Hiner* was decided, however, the defendants appealed to the supreme court, amending their issue on appeal to whether the restrictive covenant was ambiguous.[74] Following its own reasoning in *Hiner*, the court held that the restriction was ambiguous and therefore unenforceable.[75]

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[67] *Id.* at 196, 977 P.2d at 886 (Nakayama, J., dissenting).

[68] *Id.* (Nakayama, J., dissenting).

[69] *Id.* at 198, 977 P.2d at 888 (Nakayama, J., dissenting). "[T]he Hoffman's house in fact impairs the views of their neighbors." *Id.* (Nakayama, J., dissenting). The Hoffman's neighbors submitted affidavits and photographs illustrating the actual visual interference. *Id.* at 198 n.2, 977 P.2d at 888 n.2. (Nakayama, J., dissenting).

[70] *Id.* at 198, 977 P.2d at 888 (Nakayama, J., dissenting).

[71] *Id.* (Nakayama, J., dissenting). "One would hope that this decision does not serve to nullify the effect of existing restrictive covenants across this state." *Id.* (Nakayama, J., dissenting).

[72] 92 Hawai'i 568, 994 P.2d 500 (2000).

[73] *See* Fong v. Hashimoto, 92 Hawai'i 637, 994 P.2d 569 (1998).

[74] Fong v. Hashimoto, 92 Hawai'i 568, 576-77, 994 P.2d 500, 508-09 (Nakayama, J., dissenting). "I . . . note that the Hashimotos never disputed that their house was anything but two-stories in height and never raised the issue of ambiguity until, during the pendency of this appeal, this court issued the Hiner decision." *Id.* (Nakayama, J., dissenting).

[75] *Id.* at 569, 994 P.2d at 501. The Hawai'i Supreme Court held that "[b]ecause of this court's recent decision in Hiner v. Hoffman (holding that a 'two-story in height' restriction was ambiguous and therefore unenforceable), the restriction over the Hashimotos' Lot 11, worded as a 'one-story in height' restriction, is likewise ambiguous, and therefore unenforceable." *Id.* at 573, 994 P.2d at 505.

In a dissenting opinion in *Fong*, Justices Nakayama and Ramil again expressed their rejection of *Hiner*'s strict rules of construction.[76] The majority opinion failed to refer to Hawai'i's traditional rules of construction,[77] thus demonstrating the majority's adherence to the rules established in *Hiner*.

E. Criticism on Hiner v. Hoffman's *Strict Rules of Construction*

The Hawai'i Supreme Court's decisions in *Hiner* and *Fong* raised public outcry[78] and were criticized for disregarding the new Restatement of Servitudes.[79] Shortly after the decisions, Professor Susan French, Restatement Reporter and Law Professor at the University of California Los Angeles[80] visited Hawai'i to discuss her views on the *Hiner* doctrine.[81] Professor French explained that wills "should be interpreted to carry out what you intended, rather than a strict construction that says: if you don't say it just right, your heirs will suffer."[82]

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[76] *Id.* at 576, 994 P.2d at 508 (citation omitted). (Nakayama, J., dissenting). "[F]or the reasons expressed in my dissent in Hiner v. Hoffman, I do not agree that the restrictive language in this case is ambiguous and unenforceable." *Id.* (Nakayama, J., dissenting) (citation omitted).

[77] *See generally* Collins v. Goetsch, 59 Haw. 481, 487, 583 P.2d 353, 357 (1978) (holding that ambiguous covenants are to be construed according to the parties' intent); Sandstrom v. Larsen, 59 Haw. 491, 496, 583 P.2d 971, 976 (1978) (construing a height limitation according to its ordinary and popular meaning); Pelosi v. Wailea Ranch Estates, 10 Haw. App. 424, 437-41, 876 P.2d 1320, 1327-29 (1994) (examining extrinsic evidence to construe a land use restriction).

[78] Trudy Burns Stone, *Editorial Disclosure*, KA NU HOU (Haw. State Bar Ass'n, Real Prop. & Fin. Services Section, Honolulu, Haw.), May 2000, at 2 [hereinafter Stone, *Editorial Disclosure*]. Trudy Burns Stone, council for the plaintiff Fongs, described the *Fong* decision as an "unmitigated disaster" where her clients lost the spectacular view of the ocean, the value of their homes, and the peace of their community. *Id.*

[79] Patrick A. Randolph, Jr., *Servitudes; Covenants; Use Restrictions*, (Sept. 19, 2000) (stating that the *Fong* court should have paid closer attention to the new RESTATEMENT), http://www.umkc.edu/dirt/dd2000/DD09192000.htm (last modified Sept. 19, 2000). *Cf.* Neeley & Anderson, *Recent Decisions*, *supra* note 1, at 11 (stating that the Hawai'i Supreme Court in *Fong* and *Hiner* applied a constructional doctrine which has no place in the law governing modern land development).

[80] Gail Ayabe & Lorrin Hirano, *Overview of March RESTATEMENT Seminar*, KA NU HOU (Haw. State Bar Ass'n, Real Prop. & Fin. Services Section, Honolulu, Haw.), May 2000, at 3 [hereinafter Ayabe & Hirano, *Overview*]. As of May 2000, Professor French was the Reporter for the American Law Institute committee on the RESTATEMENT (THIRD) OF PROP: SERVITUDES (2000) for fourteen years. *Id.*

[81] *Id.* On March 24, 2000, Susan Fletcher French, UCLA Law Professor and Reporter for the new RESTATEMENT came to Hawai'i to discuss the Hawai'i Supreme Court's judicial construction of restrictive covenants with the Hawai'i State Bar Association. *Id.*

[82] French, Hiner *and* Fong, *supra* note 28, at 5.

Professor French clearly disagrees with the Hawai'i Supreme Court's majority opinion. The Restatement Reporter expressed that "I gather that the *Hiner* court was concerned that the word 'story' had so little content that it was as if the covenant had used the word 'Bfstplk' and nobody could possibly impose a covenant that said one couldn't do 'Bfstplk.'"[83]

Hiner's critics suggest that the Hawai'i Supreme Court has parted ways with general rules of construction and Hawai'i precedent.[84] Disapproval was expressed over the court's disregard for the condition's purpose as well as the court's failure to apply intent-seeking rules,[85] while invoking strict rules of construction on "a thinly supported finding of ambiguity" in "a premature rush toward application of the rule."[86] Opponents contend that *Hiner* "actually lowers the bar for application of the rule and thus signals a new round of skepticism toward private land use restrictions."[87]

The general discontentment with the holdings in *Hiner* and *Fong* have also led to efforts to recodify Hawai'i's common interest community law.[88] In its December 2002 Progress Report, the Hawai'i Real Estate Commission discussed its legislative proposals to modify Hawai'i's condominium law.[89] The authors of the Report voiced disapproval of the *Hiner* and *Fong* decisions, explaining that the laws must support the fair and efficient functioning of common interest communities.[90] Finally, the Hawai'i Real Estate Commission suggested the Hawai'i legislature incorporate the new Restatement in Hawai'i's condominium law.[91]

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[83] *Id.* "Joe Bfstplk was a character in the "L'ilAbner" comic strip created by Al Capp. *Id.* n.1. He always travels with a dark cloud over his head." *Id.* n.1.

[84] J. David Breemer, Note, Hiner v. Hoffman: *Strict Construction of a Common Restrictive Covenant*, 22 U. HAW. L. REV. 621, 643-44 (2000).

[85] *Id.* at 643.

[86] *Id.* at 643-44.

[87] *Id.* at 644.

[88] *See* HAW. REAL ESTATE COMM'N, DEP'T OF COMMERCE AND CONSUMER AFFAIRS, PROGRESS REPORT TO THE LEGISLATURE, RECODIFICATION OF CHAPTER 514A, HAWAII REVISED STATUTES, at 2 (Haw. 2002), http://www.state.hi.us/dcca/reports, *also available at* http://www.state.hi.us/hirec.

[89] *Id.*

[90] *Id.* at 9-11.

[91] *Id.* at 11 (citing RESTATEMENT (THIRD) OF PROP: SERVITUDES ch. 6, introductory note (2000)). As stated in the RESTATEMENT's introductory note to Chapter 6 - Common-Interest Communities:

> The primary assumption underlying Chapter 6 [of the new RESTATEMENT] is that common-interest communities provide a socially valuable means of providing housing opportunities in the United States. The law should facilitate the operation of common-interest communities at the same time as it protects their long-term attractiveness by protecting the legitimate expectations of their members.

Id.

III. *HINER V. HOFFMAN*: A DICHOTOMY

The *Hiner* majority opinion rejects well-established Hawai'i case law and cites to decisions from other jurisdictions to support its position.[92] A close examination of the opinion, however, reveals a selective and misleading use of case law by the *Hiner* majority, whereby the court abandons traditional intent-seeking rules in exchange for strict rules of construction for restrictive covenants.[93]

A. The Majority Opinion's Discussion of Hawai'i Case Law

The *Hiner* majority court cobbles together an opinion that completely disregards Hawai'i precedent and misconstrues well-settled rules of construction for restrictive covenants.[94] Although the *Hiner* court began its discussion by correctly stating the fundamental rule that restrictions must be construed according to the parties' intentions as determined by the language of the covenant,[95] the majority opinion failed to properly apply this intent-seeking rule but instead based its decision on the principle that restrictive covenants should be liberally construed in favor of the grantee.[96]

1. The Hiner *court abandoned intent-seeking rules established in* Collins

Had the majority correctly followed its own precedent, the court would have construed the covenant to achieve a result consistent with the parties' intent. This principle, first established in *Collins*, requires vaguely-worded restrictions to be construed according to the parties' intent.[97] Although the *Hiner* court repeatedly acknowledged that the Pacific Palisades covenant was designed to protect view planes, its decision to void the covenant for its lack

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[92] *See* discussion *infra* Part III.A-B.

[93] *See* discussion *infra* Part III.A-B.

[94] *See* Collins v. Goetsch, 59 Haw. 481, 583 P.2d 353 (1978). "In interpreting ambiguous covenants, the controlling factor is expressed intent." *Id.* at 487, 583 P.2d at 358. "In so determining the meaning of the language used in a covenant, a court . . . will first look to the plain, ordinary, and popular meaning of the words used in the covenant." *Id.* at 488, 583 P.2d at 358 (citing King v. Kugler, 17 Cal. Rptr. 504, 506 (Cal. Ct. App. 1961)). "[W]here it may be of assistance, the court may consider the general plan and appearance of existing structures established in the tract in order to ascertain the proper meaning to be accorded the covenant." *Id.*

[95] Hiner v. Hoffman, 90 Hawai'i 188, 190, 977 P.2d 878, 880 (1999).

[96] *Id.* at 195, 977 P.2d at 885. "[O]ur decision today comports with the long-standing policy favoring the unrestricted use of property." *Id.*

[97] *Collins*, 59 Haw. at 485, 583 P.2d at 356.

of concrete dimensions shows a clear disregard for the parties' intentions and the *Collins* precedent.[98]

2. The majority opinion rejects rules of construction established in Pelosi

The majority opinion also expressly rejected the plaintiffs' reliance on *Pelosi*.[99] The court distinguished *Pelosi* from *Hiner* because the purpose of the *Pelosi* covenant was to establish a subdivision for residential use, while the *Hiner* covenant's purpose was to limit the height of homes and protect views.[100] The court also noted that the Hoffman's violation of the limitation was less obvious than the violation in *Pelosi*.[101] The court, however, did not explain why such factual differences are relevant when *Pelosi* stands for the proposition that covenants should be interpreted to meet the parties' intent.[102] Furthermore, if the majority had properly applied Hawai'i precedent, it would have followed *Pelosi*'s rules of construction by examining secondary sources to understand the common meaning of "story"[103] and "height." *Pelosi* established that a court may look to secondary sources to construe the plain meaning of a term.[104] The *Hiner* court, however, made no effort to consult a dictionary or other secondary source to understand what the parties intended by "story in height," and thereby abandoned *Pelosi*'s rules of construction.[105]

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[98] The majority expressly recognized five times in its opinion that the covenant's purpose was to protect view planes. "[W]e note that the parties are in absolute agreement as to the 'purpose' of the covenant at issue." *Hiner*, 90 Hawai'i at 191, 977 P.2d at 881. "Thus, all parties agree that the purpose of the covenant is to establish concrete height restrictions. Such emphasis on 'height' implies that the object of the covenant was to protect view planes . . . Clearly, the protection of view planes of homeowners 'along the ridge line' was the Association's chief concern." *Id.* "[T]he language 'two stories in height' is inherently ambiguous, particularly where the parties agree that the purpose of the covenant is to restrict the height of homes in the neighborhood in order to protect view planes." *Id.* at 192, 977 P.2d at 882. "[T]here were other unambiguous and effective methods to achieve the purpose of limiting building height to protect view planes." *Id.* at 194, 977 P.2d at 884. "Unlike in Pelosi, the parties here agree that the purpose of the 1966 covenant is to limit the height of homes and, by implication, protect view planes." *Id.* at 195, 977 P.2d at 885.

[99] *Id.* at 194, 977 P.2d at 884.

[100] *Id.* at 194-95, 977 P.2d at 884-85.

[101] *Id.* at 195, 977 P.2d at 885.

[102] Pelosi v. Wailea Ranch Estates, 10 Haw. App. 424, 436, 876 P.2d 1320, 1327 (1994).

[103] *See, e.g.*, *Hiner*, 90 Hawai'i 188, 197, 977 P.2d 878, 887 (Nakayama, J., dissenting). Justice Nakayama referred to the Webster's New International Dictionary, Second Edition (Unabridged) for the definition of "story:" A set of rooms on the same floor or level; a floor, or the habitable space between two floors. *Id.* (Nakayama, J., dissenting).

[104] *Pelosi*, 10 Haw. App. at 437, 876 P.2d at 1327-28.

[105] *See Hiner*, 90 Hawai'i 188, 977 P.2d 878.

3. The Hiner *majority overlooks traditional rules of construction established in* Sandstrom

The *Hiner* majority also stated that the rules of construction from *Sandstrom* did not apply to *Hiner* because *Sandstrom* addressed the issue of abandonment whereas *Hiner* involved an ambiguous covenant.[106] In distinguishing the cases for dissimilar issues, the court failed to note that the core of the *Sandstrom* analysis centered on whether a building violated a height limitation that protected view planes.[107] *Sandstrom* applied traditional intent-seeking rules to determine whether the height condition was, in fact, abandoned.[108] The *Hiner* majority should have followed *Sandstrom*'s rules of construction in interpreting the 1966 restriction because the covenants in both cases shared the identical purpose of preserving views.[109]

Had the *Hiner* court properly applied Hawai'i precedent, it would have considered extrinsic evidence because *Sandstrom* established that the land and surrounding structures may be examined to determine whether a height limitation is in breach.[110] In *Hiner*, a survey of the subdivision reveals that the Hoffman's home blocked their neighbors' views[111] and that their residence was the only Pacific Palisades structure to exceed one-story in height.[112] Yet, the court did not take these essential facts into consideration, thereby neglecting *Sandstrom*'s intent-seeking rules.[113]

Not only did the Hawai'i Supreme Court overlook its traditional rules established in *Collins*, it provided tenuous support for distinguishing *Sandstrom* and *Pelosi*, Hawai'i's leading cases on judicial construction of restrictive covenants.[114] The court's flawed reasoning, however, does not end on its interpretation of Hawai'i case law. The court also misconstrued cases from other jurisdictions.

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[106] *Hiner* at 195, 977 P.2d at 885; Sandstrom v. Larsen, 59 Haw. 491, 492, 583 P.2d 971, 974 (1978). In *Sandstrom*, the issue on appeal was whether the covenant was abandoned. *Sandstrom*, 59 Haw. at 492, 583 P.2d at 974.

[107] *See Sandstrom* 59 Haw. at 496-98, 583 P.2d at 976-77.

[108] *Id.*

[109] *Id.* at 496, 583 P.2d at 976; *see Hiner*, 90 Hawai'i at 189, 977 P.2d at 879.

[110] *Sandstrom*, 59 Haw. at 497-98, 583 P.2d at 976-77.

[111] *Hiner*, 90 Hawai'i at 189, 977 P.2d at 879. "The third story of the [Hoffman's] house partially blocks the makai view from the lot owned by Dukes and Hollman." *Id.* "The Hoffmans' neighbors submitted affidavits and photographs attesting to actual visual interference." *Id.* at 198 n.2, 977 P.2d at 889 n.2 (Nakayama, J., dissenting).

[112] *Id.* at 197, 977 P.2d at 887. "[T]he structures [in the Pacific Palisades community], including garages and out buildings . . . are all only one story high." *Id.*

[113] *See generally Hiner*, 90 Hawai'i 188, 977 P.2d 878.

[114] *See supra* notes 94-113 and accompanying text.

B. The Majority Opinion Misconstrues Persuasive Case Law

The Hawai'i Supreme Court supported its position by citing to case law from other jurisdictions that found ambiguity in the language, "stories in height."[115] In doing so, the Hawai'i court failed to note that these courts ultimately did not void the covenants on the basis of ambiguity.[116] Instead, the other jurisdictions applied intent-seeking rules to reach a judicial solution consistent with the restriction's purpose.[117] In fact, a second reading of these cases reveals further inconsistencies in the *Hiner* majority's analysis.

For example, the Washington Court of Appeals in *Foster v. Nehls*[118] considered additional testimony to decide the intent of an ambiguous one-half story height limitation was to protect the neighbors' view planes.[119] Subsequently, the court looked at the surroundings of the Washington subdivision and observed that the defendant's home breached the covenant because the home obstructed plaintiff's view plane.[120] By examining the land and surrounding structures to discover the parties' intent, the *Foster* court's analysis is similar to *Collins* and *Sandstrom*.[121] The *Hiner* court, however, rejected *Sandstrom* and incorrectly claimed that *Foster* supported its position, thereby revealing another flaw in the majority opinion.[122]

Further, in *Metius v. Julio*,[123] a Maryland Court of Special Appeals case, ambiguity stemmed from two differing interpretations of a "three-stor[y] height" limitation that protected view planes.[124] The restriction led to different results depending on if the owner used the county zoning regulations' definition of "story" or the building code's definition of "height."[125] The *Metius* court employed the code's definition because the code's definition was premised on determining height, while the zoning regulation concerned the actual use of a story and was therefore unrelated to the covenant's purpose.[126]

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[115] *Hiner*, 90 Hawai'i at 193, 977 P.2d at 883. "Courts from other jurisdictions have similarly concluded that language such as that found in the covenant here is ambiguous." *Id.* (citing Foster v. Nehls, 551 P.2d 768, 771 (Wash. Ct. App. 1976); Metius v. Julio, 342 A.2d 348, 353 (Md. Ct. Spec. App. 1975); Johnson v. Linton, 491 S.W.2d 189, 196-97 (Tex. Civ. App. 1973)).

[116] *See infra* notes 118-141 and accompanying text.

[117] *See infra* notes 118-141 and accompanying text.

[118] 551 P.2d 768 (Wash. Ct. App. 1976).

[119] *Id.* at 771-72.

[120] *Id.* at 772.

[121] *Id. See generally* Collins v. Goetsch, 59 Haw. 481, 583 P.2d 353 (1978); Sandstrom v. Larsen, 59 Haw. 491, 583 P.2d 971 (1978).

[122] Hiner v. Hoffman, 90 Hawai'i 188, 193-95, 977 P.2d 878, 883-85 (1999).

[123] 342 A.2d 348 (Md. Ct. Spec. App. 1975).

[124] *Id.* at 353-54.

[125] *Id.* at 351-52.

[126] *Id.* at 354-55.

Thus, the *Metius* court opted to use a definition most consistent with the parties' intention to enjoy their view planes.[127] In citing to *Metius*, the *Hiner* court narrowly focused on the Maryland court's finding of ambiguity in "three stories in height" and did not recognize the court's intent-seeking analysis.[128] *Metius* illustrates how the Hawai'i Supreme Court should have construed the Pacific Palisades covenant.

In *Johnson v. Linton*,[129] the Texas Civil Court of Appeals found the language "shall not exceed one and one-half story in height" to be ambiguous.[130] Factually, there are two important differences between *Johnson* and *Hiner*. In *Johnson*, ambiguity arose from the conflicting testimony of experts in the field of architectural design, each of whom had his own idea of its meaning.[131] There, the homeowner's association approved the disputed home's building plans.[132] In contrast, the association in *Hiner* was a party to the lawsuit.[133] Furthermore, the facts indicate that the Pacific Palisades community in *Hiner* shared a common understanding of the 1966 covenant.[134] Additionally, in *Johnson*, the court did not discuss the covenant's purpose, providing no evidence that the restriction's purpose was in fact violated.[135] *Hiner*, on the other hand, repeatedly acknowledged the condition's purpose[136] and stated that the Hoffman's home obstructed neighbors' views.[137] Thus, a proper analysis of *Hiner* and *Johnson* demonstrates that *Johnson* provides a thin sheet of support for the majority.

Finally, in one critical sentence, the Hawai'i Supreme Court disregarded a series of cases that found similar language to be unambiguous and labeled them as "unpersuasive," without providing support for these finding.[138] In

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[127] *Id.*

[128] Hiner v. Hoffman, 90 Hawai'i 188, 193, 977 P.2d 878, 883 (1999).

[129] 491 S.W.2d 189 (Tex. Civ. App. 1973).

[130] *Id.* at 196.

[131] *Id.* at 197.

[132] *Id.* at 191.

[133] *See Hiner*, 90 Hawai'i 188, 977 P.2d 878.

[134] Id. at 196, 977 P.2d at 886 (Nakayama, J., dissenting). "The majority labors to create ambiguity where none existed before - certainly not in the perception of the Hoffmans' community . . . and . . . thus . . . betrays years of reliance by the Hoffmans' neighbors and the larger Pacific Palisades community." *Id.* (Nakayama, J., dissenting). "[T]he grantor [of the Declaration] originally constructed no building outside of the restrictions, and today the structures, including garages and out buildings . . . are all only one story high." *Id.* at 197, 977 P.2d at 887 (Nakayama, J., dissenting).

[135] *See Johnson*, 491 S.W.2d 189.

[136] *See supra* note 98 and accompanying text.

[137] *Hiner*, 90 Hawai'i at 189, 977 P.2d at 879.

[138] *Id.* at 193, 977 P.2d at 883. "To the extent that other courts have found such language to be unambiguous, or sufficiently clear to support injunctive relief, we do not find them persuasive." *Id.* (citing Dickstein v. Williams, 571 P.2d 1169, 1171 (Nev. 1977); Pool v.

actuality, *King v. Kugler* is key to Hawai'i's development of property law. *King* is the very case that guided the *Collins* court when it first established Hawai'i's intent-seeking rules.[139] There, the California Court of Appeals rejected the same argument that *Hiner* endorsed, explaining "there was nothing vague or uncertain in the meaning of the restrictive phrase, 'one story in height.'"[140] Moreover, the court reasoned that "[defendants] merely argue that to control the height the grantor 'should' have inserted a limit in feet and inches or other language from which the intended maximum height could have been inferred exactly."[141]

The court's reasoning in *Hiner* is unsatisfying because the court fails to apply intent-seeking rules, cites case law that weakens its position, and overrules or distinguishes cases that share identical issues.[142] Also, *Hiner* adopts rigid rules of strict construction that have severe negative implications for Hawai'i's common interest communities.[143]

IV. THE IMPORTANCE OF *HINER V. HOFFMAN* FOR HAWAI'I'S COMMON INTEREST COMMUNITIES

The Hawai'i Supreme Court's holdings in *Hiner* and *Fong* demonstrate the challenges facing Hawai'i's common interest communities in enforcing a restrictive covenant through the judicial system.[144] In every case, the defendants who have breached covenants will argue that the restriction is ambiguous and that the ambiguity must be resolved against the person seeking

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Denbeck, 241 N.W.2d 503, 506 (Neb. 1976); King v. Kugler, 17 Cal. Rptr. 504, 507 (Cal. Ct. App. 1961)).

[139] Collins v. Goetsch, 59 Haw. 481, 488, 583 P.2d 353, 358 (1978) (citing *King*, 17 Cal. Rptr. at 506).

[140] *King*, 17 Cal. Rptr. at 507.

[141] *Id.*

[142] *See* discussion *supra* Part III.A-B.

[143] M. Anne Anderson, *Covenant Enforcement – Recent Hawaii Decisions*, HAWAII CONDOMINIUM BULLETIN, Vol. 8 No.1, September 1999, at 3. *available at*: http://www.state.hi.us/hirec/bull/cb26.pdf. "The decision [in *Hiner* is] important and will undoubtedly affect the way the Hawai'i courts will view covenant enforcement in the future." *Id.*

[144] Hiner v. Hoffman, 90 Hawai'i 188, 198, 977 P.2d 878, 888 (1999) (Nakayama, J., dissenting). Justice Nakayama warns that the "majority opinion will have the negative impact of encouraging uncertainty, litigation, opportunistic non-compliance, and 'unneighborly' relations in general." *Id.* (Nakayama, J., dissenting). *See also* Stone, *Editorial Disclosure*, *supra* note 78, at 2. "Counsel for some title insurers are also reported to be wrestling with the fallout from [*Hiner*] and [*Fong*], in particular, their perceived potential for increased litigation." *Id.*

its enforcement.[145] As Justice Nakayama cautioned, "almost any plainly worded covenant could become ambiguous under the majority's approach."[146] Moreover, *Hiner* creates an uncertainty as to whether Hawai'i's courts will use its strict rules in reading other types of covenants.[147]

To address these dangers, members of common interest communities should review their covenants to determine whether amendments are necessary to prevent litigation over their language.[148] Predicting what the courts *may* declare as ambiguous, however, is a challenging task. Prior to *Hiner*, "story in height" was considered unambiguous[149] and no judicial opinions forewarned the Pacific Palisades community of the supreme court's decision to follow strict rules of construction.

Equally frustrating is the supreme court's notion that its decision reinforces the policy favoring careful drafting of covenants to reduce litigation.[150] The association does not draft the documents. Rather, the developer's attorney performs this function.[151] Thus, the court's policy ultimately punishes the association members while providing no recourse against the attorney who

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[145] *Hiner*, 90 Hawai'i at 198, 977 P.2d at 888 (Nakayama, J., dissenting). *See also* Michael Lilly, Hiner *and* Fong: *A View From Both Sides*, KA NU HOU (Haw. State Bar Ass'n, Real Prop. & Fin. Services Section, Honolulu, Haw.), May 2000, at 14 [hereinafter Lilly, *Hiner and Fong*]. Michael Lilly, counsel for the defendants in *Fong*, cautions that the *Fong* and *Hiner* cases make it much more difficult for community associations to enforce their restrictive covenants because defendants now have a "strong arsenal with which to defend the unrestricted use of their real property." *Id.*

[146] *Hiner*, 90 Hawai'i at 198 n.4, 977 P.2d at 888 n.4 (Nakayama, J., dissenting).

[147] Stone, *Editorial Disclosure*, *supra* note 78, at 2. "It would appear [*Hiner*] and [*Fong*] have left [the] area of [restrictive covenants and equitable servitudes] up in the air." *Id.*

[148] M. Anne Anderson, *Covenant Enforcement – Recent Hawaii Decisions*, HAWAII CONDOMINIUM BULLETIN, Vol. 8 No.1, September 1999, at 2-3. *available at*: http://www.state.hi.us/hirec/bull/cb26.pdf. M. Anne Anderson suggests boards of directors of community associations pay special attention to the wording of covenants to avoid ambiguities and consider having existing covenants and rules reviewed by the association's attorney to determine whether any changes should be made. *Id.*

[149] *See, e.g.*, King v. Kugler, 17 Cal. Rptr. 504, 507 (Cal. App. 1961) (holding that there is nothing vague, ambiguous or uncertain in the meaning of the restrictive phrase one story in height); Pool v. Denbeck, 241 N.W.2d 503 (Neb. 1976) (holding deed restriction limiting the height of structures to two stories was not ambiguous); Dickstein v. Williams, 571 P.2d 1169 (Nev. 1977) (finding no ambiguity in covenant using language "exceeding one story from ground level in height"); Holmesley v. Walk, 39 S.W.3d 463 (Ark. Ct. App. 2001) (holding there was nothing vague, ambiguous, or uncertain in the meaning of term "stories" to describe maximum height restrictions in covenants).

[150] *Hiner*, 90 Hawai'i at 193, 977 P.2d at 883.

[151] WAYNE S. HYATT, CONDOMINIUM AND HOMEOWNER ASSOCIATION PRACTICE: COMMUNITY ASSOCIATION LAW § 1.04 (3d ed. 2000).

drafted the documents.[152] Moreover, property owners generally lack the legal background to identify a poorly drafted covenant and are unaware of the *Hiner* and *Fong* decisions.[153] Irrespective of their legal awareness, Hawai'i's common interest communities may now have their restrictions "eviscerated" by the courts.[154]

V. A TIME FOR CHANGE: THE NEW RESTATEMENT OF SERVITUDES AND THE IMPLIED COVENANT OF GOOD FAITH AND FAIR DEALING

A. The New Restatement of Servitudes

Although *Hiner* represents a problematic[155] period because of the Hawai'i Supreme Court's divergence from the national trend of interpreting restrictions,[156] the new Restatement of The Law of Property, Third, Servitudes[157] brings hope to community associations.[158] Drafted by the highly regarded American Law Institute, the Restatement simplifies the law of servitudes by eliminating archaic rules to meet the needs of American society with four important principles.[159]

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[152] French, Hiner *and* Fong, *supra* note 25, at 5. Professor French stated that the *Hiner* court's rule of strict construction "punish[es] the people who are not in a very good position to protect themselves against sloppy drafting." *Id.*

[153] *Id.* Professor French explains that "[w]e should recognize that people buy into [common interest] communities without expert legal advice and that covenants are very often created by people who don't pay for the very best legal advice in order to create these covenants." *Id.*

[154] *Hiner*, 90 Hawai'i at 198, 977 P.2d at 888 (Nakayama, J., dissenting). "The majority thus does not merely rewrite the covenant, it eviscerates it." *Id.* (Nakayama, J., dissenting).

[155] HAW. REAL ESTATE COMM'N, DEP'T OF COMMERCE AND CONSUMER AFFAIRS, PROGRESS REPORT TO THE LEGISLATURE, RECODIFICATION OF CHAPTER 514A, HAWAII REVISED STATUTES, at 1 (Haw. 2002), http://www.state.hi.us/dcca/reports, *also available at* http://www.state.hi.us/hirec. In year 2000, the Hawai'i Legislature characterized the state's condominium property law as being "unorganized, inconsistent, and obsolete in some areas." *Id.* The Progress Report explains Hawai'i's need for fair and efficient functioning of common interest ownership communities and discusses the *Hiner* and *Fong* decisions, referring to them as "troubling." *Id.* at 9-11.

[156] Neeley & Anderson, *Recent Decisions*, *supra* note 1, at 6.

[157] RESTATEMENT (THIRD) OF PROP: SERVITUDES (2000).

[158] Susan F. French, *Highlights of the New RESTATEMENT (Third) of Property: Servitudes*, 35 REAL PROP. PROB. & TR. J. 225, 242 (Summer 2000) [hereinafter French, *Highlights*]. Professor French predicts the new RESTATEMENT will revolutionize the ways that we use servitudes law and the ways that judges analyze servitudes cases and write opinions explaining their decisions. *Id.*

[159] RESTATEMENT (THIRD) OF PROP: SERVITUDES, Introduction (2000). "The analytical restructuring reflected in this RESTATEMENT is part of the long, continuing evolution of the law of servitudes . . . to meet the needs of American society in the first part of the 21st century." *Id.*

First, according to Restatement's jurisprudence, a servitude is valid unless it is illegal, unconstitutional, or violates public policy.[160] This rule allows innovative land use practices using servitudes without imposing artificial constraints as to form.[161] At the same time, the Restatement "preserves the judiciary's traditional role of protecting the public interest in maintaining the social utility of land resources."[162]

Second, the new Restatement departs from the traditional view that servitudes should be narrowly construed in favor of the free and unrestricted use of land[163] and adopts a modern approach which requires the courts to ascertain what a reasonable purchaser would have understood the covenant's terms to mean.[164] According to the Restatement, "[a] servitude should be interpreted to give effect to the intention of the parties ascertained from the language used in the instrument, or the circumstances surrounding creation of the servitude, and to carry out the purpose for which it was created."[165]

Third, and important to the decision in *Hiner*, the Restatement advises that courts should take the appropriate steps to construe an ambiguous condition and consider extrinsic evidence instead of invalidating it.[166] Most courts, regardless of whether they expressly agree with the new Restatement, follow this rule when examining ambiguous restrictions.[167]

Finally, instead of construing restrictions against the person seeking its enforcement, the Restatement proposes that there should not be any constructional preference because there is no basis for favoring one individual over another when both parties bought from the same developer.[168] Thus, the Restatement recognizes that community members, not the drafters, are punished for ambiguous documents.[169]

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[160] *Id.* at § 3.1. "In reformulating and restating the law of servitudes, the RESTATEMENT has removed all of the formal barriers to creation of servitudes other than compliance with the Statute of Frauds." French, *Highlights*, *supra* note 157, at 241.

[161] RESTATEMENT (THIRD) OF PROP: SERVITUDES, Introduction (2000).

[162] *Id.*

[163] *Id.* at § 4.1 cmt. a.

[164] *Id.* Professor French stresses the importance of ascertaining intent when construing covenants. "[I]f the intent to create a covenant is clear, the covenant should be interpreted by the courts to carry out its purposes." French, Hiner *and* Fong, *supra* note 28, at 4.

[165] RESTATEMENT (THIRD) OF PROP: SERVITUDES § 4.1 (2000).

[166] French, Hiner *and* Fong, *supra* note 28, at 4.

[167] *See infra* notes 176-79 and accompanying text.

[168] French, Hiner *and* Fong, *supra* note 28, at 4-5.

[169] *Id.* "Although the association has succeeded to rights of the developer, the association represents the property owners collectively, and they should not be penalized for the developer's drafting failures when they seek to further the development plan." *See* RESTATEMENT (THIRD) OF PROP: SERVITUDES § 4.1 cmt. d (2000).

The new Restatement provides an equitable solution to the issues raised by the *Hiner* decision.[170] In the future, the Hawai'i Supreme Court should not continue to ignore this persuasive authority.[171] The Restatement provides flexible rules that maintain social utility within Hawai'i's growing population of common interest communities.[172] To preserve the value and legal structure of such communities, the Hawai'i Supreme Court should abandon its archaic views in exchange for the Restatement's equitable model.[173]

1. The nationwide trend for state courts is to follow the Restatement

The recent trend in federal and state courts[174] is to refer to the third Restatement when discussing servitudes.[175] Moreover, a growing number of

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[170] *See* RESTATEMENT (THIRD) OF PROP: SERVITUDES (2000). *See also* discussion *supra* Parts II.E - IV.

[171] Trudy Burns Stone, Hiner *and* Fong: *A View From Both Sides*, KA NU HOU (Haw. State Bar Ass'n, Real Prop. & Fin. Services Section, Honolulu, Haw.), May 2000, at 13. "[T]he [Fong c]ourt declined to follow the recommendations of the [American Law Institute]." *Id.* The author also criticized the *Fong* court for "embrac[ing an] archaic notion[] of property law to arrive at a result that strains common sense." *See also* HAW. REAL ESTATE COMM'N, DEP'T OF COMMERCE AND CONSUMER AFFAIRS, PROGRESS REPORT TO THE LEGISLATURE, RECODIFICATION OF CHAPTER 514A, HAWAII REVISED STATUTES, at 11 (Haw. 2002), http://www.state.hi.us/dcca/reports, *also available at* http://www.state.hi.us/hirec. The Hawai'i Real Estate Commission proposed that the Hawai'i Legislature incorporate the RESTATEMENT's position on servitudes into its recodification of Hawai'i's condominium law. *Id.*

[172] French, *Highlights*, *supra* note 157, at 241-42. "[T]he RESTATEMENT provides a body of law that allows property owners maximum freedom to create servitudes while providing balancing safeguards to protect the public interest in socially useful land resources." *Id.*

[173] HAW. REAL ESTATE COMM'N, DEP'T OF COMMERCE AND CONSUMER AFFAIRS, PROGRESS REPORT TO THE LEGISLATURE, RECODIFICATION OF CHAPTER 514A, HAWAII REVISED STATUTES, at 9-11 (Haw. 2002), http://www.state.hi.us/dcca/reports, *also available at* http://www.state.hi.us/hirec. To ensure fair and efficient functioning of condominium communities, the Hawai'i Real Estate Commission proposes that the Hawai'i Legislature incorporate the RESTATEMENT's position on servitudes into its recodification of Hawai'i's condominium law. *Id.*

[174] Hawai'i courts have a history of relying upon RESTATEMENTS of Law in various subject areas. Neeley & Anderson, *Recent Decisions*, *supra* note 7, at 11. *See, e.g.*, Small v. Baldenhop, 67 Haw. 626, 701 P.2d 647 (1985) (citing RESTATEMENT OF RESTITUTION (1937)); *In re* Trust Estate of Kanoa, 47 Haw. 610, 393 P.2d 753 (1964) (citing RESTATEMENT OF PROPERTY); SGM P'ship v. Nelson, 5 Haw. App. 526, 705 P.2d 49 (1985) (citing RESTATEMENT OF CONTRACTS (1932)); Taylor-Rice v. State, 91 Hawai'i 60, 979 P.2d 1086 (1999) (citing RESTATEMENT, TORTS). Hawai'i attorneys are already referring to the new RESTATEMENT when attempting to enforce restrictions. Stone, *Editorial Disclosure*, *supra* note 78, at 2.

[175] For recent decisions that have referred to the new RESTATEMENT, see the following cases: First Unitarian Church of Salt Lake City v. Salt Lake City Corp., 308 F.3d 1114 (10th Cir. 2002); Refinery Holding Co., LP v. TRMI Holdings, Inc., 302 F.3d 343 (5th Cir. 2002); Peter Bay Homeowners Ass'n, Inc. v. Stillman, 294 F.3d 524 (3d Cir. 2002); Fairhurst Family Ass'n,

jurisdictions refer to the Restatement when construing restrictive covenants.[176] By citing to the Restatement, these courts place more weight on protecting the purchasers' investments by carrying out the intent of the parties than on

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LLC v. United States Forest Serv., 172 F.Supp. 2d 1328 (D. Colo. 2001); Goldberg v. 400 E. Ohio Condo. Ass'n, 12 F.Supp. 2d 820 (N.D. Ill. 1998); *In re* Eno, 269 B.R. 319 (Bankr. M.D. Penn. 2001); Price v. Eastham, 75 P.3d 1051 (Alaska 2003); Ahwatukee Custom Estates Mgmt. Ass'n, Inc. v. Turner, 2 P.3d 1276 (Ariz. Ct. App. 2000); Doug's Elec. Serv., Inc. v. Miller, 83 S.W.3d 425 (Ark. Ct. App. 2002); Evergreen Highlands Ass'n v. West, 73 P.3d 1 (Colo. 2003); City of Waterbury v. Town of Washington, 800 A.2d 1102 (Conn. 2002); Carrollsburg v. Anderson, 791 A.2d 54 (D.C. 2002); Tusi v. Mruz, 2002 Del. Ch. LEXIS 128 (Del. Ch. 2002); Licker v. Harkleroad, 558 S.E.2d 31 (Ga. Ct. App. 2001); Seiler v. Zeigler Coal Holding Co., 782 N.E.2d 316 (Ill. App. Ct. 2002); Skow v. Goforth, 618 N.W.2d 275 (Iowa 2000); Schovee v. Mikolasko, 737 A.2d 578 (Md. 1999); Twomey v. Comm'r of Food & Agric., 759 N.E.2d 691 (Mass. 2001); Pergament v. Loring Props., Ltd., 599 N.W.2d 146 (Minn. 1999); Bivens v. Mobley, 724 So. 2d 458 (Miss. Ct. App. 1998); Chesus v. Watts, 967 S.W.2d 97 (Mo. Ct. App. 1998); Taylor v. Mont. Power Co., 58 P.3d 162 (Mont. 2002); Spanish Oaks, Inc. v. Hy-Vee, Inc., 655 N.W.2d 390 (Neb. 2003); Heartz v. City of Concord, 808 A.2d 76 (N.H. 2002); Fox v. Kings Grant Maint. Ass'n, Inc., 770 A.2d 707 (N.J. 2001); Algermissen v. Sutin, 61 P.3d 176 (N.M. 2002); Lewis v. Young, 705 N.E.2d 649 (N.Y. 1998); Beattie v. State *ex rel.* Grand River Dam Auth., 41 P.3d 377 (Okla. 2002); PARC Holdings, Inc. v. Killian, 785 A.2d 106 (Pa. 2001); Ridgewood Homeowners Ass'n v. Mignacca, 813 A.2d 965 (R.I. 2003); Burkhart v. Lillehaug, 664 N.W.2d 41 (S.D. 2003); Wilson v. Woodland Presbyterian Sch., 2002 Tenn. App. LEXIS 462 (Tenn. Ct. App. 2002); Marcus Cable Assocs., L.P. v. Krohn, 90 S.W.3d 697 (Tex. 2002); Smith v. Osguthorpe, 58 P.3d 854 (Utah Ct. App. 2002); Myers v. LaCasse, 2003 Vt. 86 (Vt. 2003); 1515-1519 Lakeview Blvd. Condo. Ass'n v. Apt. Sales Corp., 43 P.3d 1233 (Wash. 2002); Gojmerac v. Mahn, 640 N.W.2d 178 (Wis. Ct. App. 2001); White v. Allen, 65 P.3d 395 (Wyo. 2003); Hodge v. Bluebeard's Castle, Inc., 44 V.I. 242 (V.I. 2002). The RESTATEMENT follows the lead of courts that have recognized the important role servitudes play in modern real estate development. RESTATEMENT (THIRD) OF PROP: SERVITUDES § 4, introductory note (2000).

[176] For examples of the growing number of jurisdictions that have referred to third RESTATEMENT when construing restrictive covenants, see: Ahwatukee Custom Estates Mgmt. Ass'n, Inc. v. Turner, 2 P.3d 1276, 1280 (Ariz. Ct. App. 2000); Tusi v. Mruz, 2002 Del. Ch. LEXIS 128, *12 (Del. Ch. 2002); Stop & Shop Supermarket Co. v. Urstadt Biddle Props., Inc., 740 N.E.2d 1286, 1290 (Mass. 2001); Mikolasko v. Schovee, 720 A.2d 1214, 1217, 1220-21 (Md. Ct. Spec. App. 1998); Schovee v. Mikolasko, 737 A.2d 578, 586 (Md. 1999); Spanish Oaks, Inc. v. Hy-Vee, Inc., 655 N.W.2d 390, 399 (Neb. 2003); Bubis v. Kassin, 803 A.2d 146, 152-53 (N.J. Super. Ct. App. Div. 2002); Cafeteria Operators, LP v. Coronado-Santa Fe Assocs., LP, 952 P.2d 435, 441-42 (N.M. Ct. App. 1997); Ridgewood Homeowners Ass'n v. Mignacca, 813 A.2d 965, 972 (R.I. 2003); Canyon Meadows Home Owners Ass'n v. Wasatch County, 40 P.3d 1148, 1152 (Utah Ct. App. 2001); Sonoma Dev., Inc. v. Miller, 515 S.E.2d 577, 579 (Va. 1999). *See generally* Evergreen Highlands Ass'n v. West, 73 P.3d 1 (Colo. 2003); Licker v. Harkleroad, 558 S.E.2d 31, 33-35 (Ga. Ct. App. 2001); Wilson v. Woodland Presbyterian Sch., 2002 Tenn. App. LEXIS 462 (Tenn Ct. App. 2002); Pertzsch v. Upper Oconomowoc Lake Ass'n, 635 N.W.2d 829 (Wis. Ct. App. 2001) (Anderson, J., concurring); Beattie v. State *ex rel.* Grand River Dam Auth., 41 P.3d 377 (Okla. 2002) (Opala, J., concurring).

unfettered development.[177] In fact, except for a small minority,[178] the majority of courts apply intent-seeking rules and allow extrinsic evidence to determine the parties' intent when interpreting ambiguous restrictive covenants.[179] The

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[177] *Id.*

[178] *See, e.g.*, Hiner v. Hoffman, 90 Hawai'i 188, 977 P.2d 878 (1999); Fong v. Hashimoto, 92 Hawai'i 568, 994 P.2d 500 (2000).

[179] Regardless of whether the court takes a strict or liberal approach to interpreting restrictive covenants, the vast majority of courts apply intent-seeking rules to decide on the ambiguous language of a restriction. For examples, *see* discussion *supra* Part III.B., King, 17 Cal. Rptr. 504, 507 (Cal. Ct. App. 1961) (California appellate court held "we see nothing vague, ambiguous or uncertain in the meaning of the restrictive phrase 'one story in height.'"); *see* discussion *supra* Part III.B. on Metius v. Julio, 342 A.2d 348 (Md. Ct. Spec. App. 1975); *see* discussion *supra* Part III.B on Foster v. Nehls, 551 P.2d 768 (Wash. Ct. App. 1976) (allowing additional testimony to determine that it was not the intent of the parties to reduce the height restriction to a numerical definition, but to protect the view enjoyed by other neighbors regardless of the actual height of the obstructing structure); Mayo v. Andress, 373 So. 2d 620 (Ala. 1979); Jones v. Brown, 748 P.2d 747 (Alaska 1988) (allowing testimony of architects to conclude that defendant's house was not a split-level structure and therefore did not violate view protecting covenant that restricted construction of split-level buildings); Riley v. Stoves, 526 P.2d 747 (Ariz. 1974) (construing a lot restricted to persons 21 years of age and older according to its ordinary and popular meaning and allowing plaintiff testimony to ascertain its meaning); Moss Dev. Co. v. Geary, 115 Cal. Rptr. 736 (Cal. Ct. App. 1974) (stating that if a covenant is ambiguous, it is the duty of the trial court to resolve the ambiguity after considering all facts, circumstances and conditions surrounding its execution and holding that it is not the court's role to alter or rewrite a covenant, but to give the contract an interpretation that is lawful and reasonable, without violating the intention of the parties); Ezer v. Fuchsloch, 160 Cal. Rptr. 486 (Cal. Ct. App. 1979); Wilson v. Goldman, 699 P.2d 420 (Colo. Ct. App. 1985) (rejecting defendant's argument that the restrictive covenant was vague because it failed to define "yard" with mathematical precision); Castonguay v. Plourde, 699 A.2d 226 (Conn. App. Ct. 1997); Barrett v. Leiher, 355 So. 2d 222 (Fla. Dist. Ct. App. 1978) (holding that it is not necessary to specifically define each term within a covenant to draft an enforceable restriction and stating that an ambiguous term is construed in accordance with the parties' intentions); Imperial Golf Club, Inc. v. Monaco, 752 So. 2d 653 (Fla. Dist. Ct. App. 2000); Yates v. Dublin Sir Shop, Inc., 579 S.E.2d 796 (Ga. Ct. App. 2003); Gabriel v. Cazier, 938 P.2d 1209 (Idaho 1997) (considering evidence by the writer of the declaration and prior conduct of the parties to determine intent where the term "business" in restrictive covenant was ambiguous); Amoco Realty Co. v. Montalbano, 478 N.E.2d 860 (Ill. App. Ct. 1985) (stating that the rule of strict construction in favor of the free use of property will not be used to defeat the obvious purpose of a restriction, even if not precisely expressed, and holding that courts will have recourse to every rule of construction to ascertain the parties' intentions); Crawley v. Oak Bend Estates Homeowners Ass'n, Inc., 753 N.E.2d 740 (Ind. Ct. App. 2001); Sky View Fin., Inc. v. Bellinger, 554 N.W.2d 694 (Iowa 1996); Richardson v. Northwest Cent. Pipeline Corp., 740 P.2d 1083 (Kan. 1987); McFarland v. Hanley, 258 S.W.2d 3 (Ky. Ct. App. 1953); Whitaker Constr. Co., Inc. v. Larkin Dev. Corp., 775 So. 2d 571 (La. Ct. App. 2000); Sylvan Props. Co. v. State Planning Office, 711 A.2d 138 (Me. 1998); Clerico v. Great Road Floors, Inc., 1999 WL 1260273 (Mass. Super. Ct. 1999) (stating that an ambiguous restrictive covenant must be resolved by the court relying upon the purposes of the underlying transaction, the conduct and understanding of the parties, and a construction that carries out the parties' intentions in light

Restatement and its growing popularity with other courts is another compelling reason for the Hawai'i Supreme Court to adopt the American Law Institute's model rules.[180]

B. The Constructive Obligation of Good Faith and Fair Dealing

The Hawai'i Supreme Court should include a constructive obligation of good faith and fair dealing when interpreting restrictive covenants as an

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of the agreement as a whole); Smith v. First United Presbyterian Church, 52 N.W.2d 568 (Mich. 1952); Snyder's Drug Stores, Inc. v. Sheehy Props., Inc., 266 N.W.2d 882 (Minn. 1978); Daniel v. Galloway, 861 S.W.2d 759 (Mo. Ct. App. 1993); Fox Farm Estates Landowners Ass'n v. Kreisch, 947 P.2d 79 (Mont. 1997); Ross v. Newman, 291 N.W.2d 228 (Neb. 1980); Pool v. Denbeck, 241 N.W.2d 503 (Neb. 1976); Dickstein v. Williams, 571 P.2d 1169 (Nev. 1977) (finding no ambiguity in the phrase "one story from ground level" and deciding the phrase should be construed according to its common meaning); New Hampshire v. Rattee, 761 A.2d 1076 (N.H. 2000); Cooper River Plaza East, LLC v. Briad Group, 820 A.2d 690 (N.J. Super. Ct. App. Div. 2003); Hill v. Cmty. of Damien of Molokai, 911 P.2d 861 (N.M. 1996); Freedman v. Kittle, 262 A.D.2d 909 (N.Y. App. Div. 1999) (looking to Black's Law Dictionary to interpret the term "structure" in a restrictive covenant that prohibited the erection of a fence); Claremont Prop. Owners Ass'n, Inc. v. Gilboy, 542 S.E.2d 324 (N.C. Ct. App. 2001); Dan's Super Market, Inc. v. Wal-Mart Stores, Inc., 38 F.3d 1003 (8th Cir. 1994) (applying North Dakota law) (examining differing interpretations of a poorly drafted covenant and selecting the interpretation most consistent with the covenantor's intent); McBride v. Behrman, 272 N.E.2d 181 (Ohio C.P. Highland County 1971); *In re* Wallace's Fourth Southmoor Addition to the City of Enid, 874 P.2d 818 (Okla. Ct. App. 1994); Yogman v. Parrott, 937 P.2d 1019 (Or. 1997) (examining "residential" under the Webster's Third New International Dictionary and looking to how the parties and their successors conducted themselves in relation to the restrictive covenant to determine intent of restriction); Oakwood Park Townhouse Ass'n v. Wideman, 19 Pa. D & C.3d 263 (Pa. Ct. C.P 1981) (declaring that imprecision is not fatal to a covenant in a deed and finding that ambiguous covenants should be interpreted in light of the subject matter, the apparent object or purpose of the parties, and the conditions existing when it was made); Emma v. Silvestri, 227 A.2d 480 (R.I. 1967); Hamilton v. CCM, Inc., 263 S.E.2d 378 (S.C. 1980); Lien v. Northwestern Eng'g Co., 39 N.W.2d 483 (S.D. 1949); Waller v. Thomas, 545 S.W.2d 745 (Tenn. Ct. App. 1976); Hodas v. Scenic Oaks Prop. Ass'n, 21 S.W.3d 524 (Tex. App. 2000) (holding that the words in a restriction may not be changed or extended by construction but construed according to their commonly accepted meaning, and referring to Webster's Third New International Dictionary to confirm the court's interpretation of "levy" was consistent with the term's popular meaning); Cecala v. Thorley, 764 P.2d 643 (Utah Ct. App. 1988); McDonough v. W. W. Snow Constr. Co., 306 A.2d 119 (Vt. 1973) (enforcing a restriction limiting houses to "one story" in height against defendant's two-story home to protect the obstruction of plaintiffs' view planes); Chesterfield Meadows Shopping Ctr. Assocs. v. Smith, 568 S.E.2d 676 (Va. 2002); Riss v. Angel, 934 P.2d 669 (Wash. 1997) (holding that courts should place special emphasis on arriving at an interpretation that protects the homeowners' collective interests); Wallace v. St.Clair, 127 S.E.2d 742 (W. Va. 1962); Zinda v. Krause, 528 N.W.2d 55 (Wis. Ct. App. 1995); Knadler v. Adams, 661 P.2d 1052 (Wyo. 1983).

[180] *See supra* notes 175-76.

alternative to adopting the new Restatement.[181] As explained by Professor Arthur Linton Corbin, "good faith in contracting is the obligation to preserve the spirit of the bargain rather than the letter, the adherence to substance rather than form."[182] Professor Corbin further explains that the duty of good faith is actually a constructive duty because it is imposed by law, either by statute or by common law.[183] Similarly, Hawai'i courts hold that "every contract contains an implied covenant of good faith and fair dealing that neither party will do anything that will deprive the other of the benefits of the agreement."[184]

Moreover, it is well-settled under Hawai'i law that restrictive covenants are to be construed under the same rules applicable to the construction of contracts.[185] Thus, the constructive duty of good faith naturally attaches to parties taking property subject to a covenant. Regardless of the ambiguity in the language of the restrictive covenant, the parties have a good faith obligation to effectuate the purpose of the limitation.[186]

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[181] Hawai'i attorneys Dennis Niles, William M. McKeon and Tom Pierce raised this legal argument in a circuit court case where a one and one-half story height limitation was challenged as ambiguous. Plaintiff's Memorandum in Support of Motion at 16, Hart v. Boettner (Hawai'i Cir. Ct. 2002) (Civil No. 02-1-0023(2)).

[182] *Id.* (citing CORBIN, CORBIN ON CONTRACTS § 654A(A) (Supp. 1999)).

[183] *Id.*

[184] *Id.* at 16-17 (citing Best Place, Inc. v. Penn America Ins. Co., 82 Hawai'i 120, 123-24, 920 P.2d 334, 337-38 (1996)). *See also* Cobb v. Willis, 7 Haw. App. 238, 245, 752 P.2d 106, 111 (1988) (holding that the law will impose an obligation on one party to an agreement when the obligation was within the parties' contemplation or is required to effectuate their intentions); Hawai'i Leasing v. Klein, 5 Haw. App. 450, 456, 698 P.2d 309, 313 (1985) (declaring that each contract imposes upon the parties a duty of good faith and fair dealing in its performance and its enforcement); CORBIN, CORBIN ON CONTRACTS § 5.27 (2003) (stating that every contract contains an implied obligation of good faith and fair dealing in its performance and enforcement).

[185] Plaintiff's Memorandum in Support of Motion at 16, Hart v. Boettner (Hawai'i Cir. Ct. 2002) (Civil No. 02-1-0023(2)); Pelosi v. Wailea Ranch Estates, 10 Haw. App. 424, 435-36, 876 P.2d 1320, 1326 (1994). "In construing restrictive covenants governing the use of land, we are guided by the same rules that are applicable to the construction of contracts." *Pelosi*, 10 Haw. App. at 435-36, 876 P.2d at 1326. *See also* DeMund v. Lum, 5 Haw. App. 336, 343 n.7, 690 P.2d 1316, 1322 n.7 (1984) (holding that the construction of covenants in deeds to property is not unlike construction of contracts).

Imposing a constructive obligation of good faith and fair dealing on the parties when construing restrictions is also consistent with the new RESTATEMENT. RESTATEMENT (THIRD) OF PROP: SERVITUDES ch. 4.1, introductory note (2000). "The general principles governing servitude interpretation [in the RESTATEMENT] adopt the model of interpretation used in contract law. *Id.*

[186] Plaintiff's Memorandum in Support of Motion at 17, Hart v. Boettner (Hawai'i Cir. Ct. 2002) (Civil No. 02-1-0023(2)). "Every contract imposes upon each party a duty of good faith and fair dealing in its performance and its enforcement." *Id.* (quoting Best Place, Inc. v. Penn America Ins. Co., 82 Hawai'i 120, 123-24, 920 P.2d 334, 337-38 (1996) (citing RESTATEMENT (SECOND) CONTRACTS § 205 (1979)).

Professor Corbin stipulates that courts should impose a duty of good faith if "imposing the good faith obligation is necessary to protect the reasonable expectations of the parties."[187] The Hawai'i Supreme Court, in *Hawai'i Leasing*, formulated a similar standard for contract law in Hawai'i: "Good faith performance 'emphasizes faithfulness to an agreed common purpose and consistency with the justified expectations of the other party.'"[188]

Applying these principles to cases raising the issue of an ambiguous covenant prevents property owners from knowingly violating a requirement. Where the parties have knowledge of the restriction's purpose but ignore it by arguing vagueness, they are in breach of this constructive duty because they are not acting in good faith to carry out the covenant's purpose.[189] To protect the expectations of Hawai'i's common interest community members, the supreme court should include the constructive duty of good faith and fair dealing into restrictive covenants as prescribed by contract law.

VI. CONCLUSION

The law governing common interest communities serves important public interests.[190] The home is considered a haven of security and a major financial investment.[191] Hawai'i, in particular, has a large stake in the future viability of community associations because of its many common interest developments.[192] However, Hawai'i courts have insisted on rejecting intent-seeking precedent and have thereby undermined the effectiveness and enforceability of common interest communities.[193]

The *Hiner* and *Fong* outcomes represent the potential horror stories facing all community members[194] and set precedent that encourages noncompliance with a community's regulations.[195] Courts are no longer required to apply

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[187] Plaintiff's Memorandum in Support of Motion at 18, Hart v. Boettner (Hawai'i Cir. Ct. 2002) (Civil No. 02-1-0023(2)) (citing CORBIN, CORBIN ON CONTRACTS § 654A(D) (Supp. 1999)).

[188] *Id.* (citing Hawai'i Leasing v. Klein, 5 Haw. App. 450, 456, 698 P.2d 309, 313 (1985) (citing RESTATEMENT (2D) CONTRACTS § 205 cmt. a (1981))).

[189] *See* Hiner v. Hoffman, 90 Hawai'i 188, 977 P.2d 878 (1999); Fong v. Hashimoto, 92 Hawai'i 568, 994 P.2d 500 (2000).

[190] RESTATEMENT (THIRD) OF PROP: SERVITUDES ch. 6, introductory note (2000).

[191] *Id.*

[192] *See* discussion *supra* Part I.

[193] *See Hiner*, 90 Hawai'i 188, 977 P.2d 878; *Fong*, 92 Hawai'i 568, 994 P.2d 500.

[194] Stone, *Editorial Disclosure*, *supra* note 78, at 2. Trudy Burns Stone, council for the plaintiff Fongs, labeled the *Fong* decision as an "unmitigated disaster," where her clients lost the spectacular view of the ocean, the value of their homes, and the peace of their community. Stone, *Editorial Disclosure*, *supra* note 78, at 2.

[195] *Hiner*, 90 Hawai'i at 198, 977 P.2d at 888 (Nakayama, J., dissenting). "[T]he majority opinion will have the negative impact of encouraging uncertainty, litigation, opportunistic non-

intent-seeking rules in construing restrictive covenants; they can simply invalidate them.[196] Furthermore, defendants can now justify their actions by arguing the prevailing rule that restrictive covenants are to be strictly construed in favor of the grantee[197] and scrutinize the condition to argue it is ambiguous.[198] After all, substantial doubt is resolved against the person seeking enforcement.[199]

The Hawai'i Supreme Court has become another barrier for communities trying to enforce their restrictions. As instructed by Professor French, the court "should recognize that people buy into these communities without expert legal advice and that covenants are very often created by people who don't pay for the very best legal advice . . ."[200] Most importantly, the Restatement Reporter highlighted during her March 2000 Hawai'i lecture that "*[t]he court's job should be to make these covenants work.*"[201]

The Restatement provides a more equitable and flexible solution for all forms of common interest ownership.[202] In Hawai'i, there is no question that property owners would welcome the Restatement's policies into their communities.[203] The real question, then, is whether in light of these issues, the Hawai'i Supreme Court will reconsider its position, thereby recognizing its holding in *Hiner* has no place in the law governing Hawai'i's common interest communities.

Tannaz Simyar[204]

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compliance, and "unneighborly" relations in general." *Id.* (Nakayama, J., dissenting).

[196] *See, e.g., Hiner*, 90 Hawai'i 188, 977 P.2d 878; *Fong*, 92 Hawai'i 568, 994 P.2d 500.

[197] *Hiner*, 90 Hawai'i at 195, 977 P.2d at 885.

[198] *See* Lilly, Hiner *and* Fong, *supra* note 145, at 14. Michael Lilly, counsel for the defendants in Fong, cautions that the *Fong* and *Hiner* cases make it much more difficult for community associations to enforce their restrictive covenants because defendants now have a "strong arsenal with which to defend the unrestricted use of their real property." *Id. Cf. Hiner*, 90 Hawai'i at 198 n.4, 977 P.2d at 888 n.4 (Nakayama, J., dissenting) (noting that any plainly worded covenant could become ambiguous under the majority's approach).

[199] *Hiner*, 90 Hawai'i at 190, 195, 977 P.2d at 880, 885.

[200] French, Hiner *and* Fong, *supra* note 28, at 5.

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

[202] French, *Highlights*, *supra* note 157, at 241-42. "[T]he RESTATEMENT provides a body of law that allows property owners maximum freedom to create servitudes while providing balancing safeguards to protect the public interest in socially useful land resources." *Id.*

[203] *See* discussion *supra* Part V.A.

[204] William S. Richardson School of Law, University of Hawai'i at Manoa, J.D. 2004. I would like to thank Professor David Callies for his continued guidance and support. I would also like to thank Dennis Niles for sharing his legal expertise. Special thanks to Van Luong for her patience and inspiration.

Preserving the Religious Freedom and Autonomy of Religious Institutions After *Equal Employment Opportunity Commission v. Kamehameha Schools/Bishop Estate*

I. INTRODUCTION

Within the last decade, the will of Princess Bernice Pauahi Bishop and the provisions that established the Kamehameha Schools have been subjected to increased scrutiny and controversy.[1] One such controversy centers around the will's Thirteenth Provision, which states in pertinent part: "I [Pauahi] also direct that the teachers of said schools shall forever be persons of the Protestant religion, but I do not intend that the choice should be restricted to persons of any particular sect of Protestants."[2]

This provision led to a longstanding policy expressly delineating that only teachers of the Protestant faith be hired to teach at the Kamehameha Schools. The policy began in 1887 and lasted over a century until its curtailment in 1993.

In 1993, the United States Court of Appeals for the Ninth Circuit struck down the Kamehameha Schools' century-long policy of exclusively hiring teachers of the Protestant faith in *Equal Employment Opportunity Commission v. Kamehameha Schools/Bishop Estate* ("*Kamehameha Schools II*").[3] The rationale for this decision was based on the recognition that the Kamehameha Schools directly violated Title VII of the 1964 Civil Rights Act by using

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[1] Jennifer Hiller, *Hawaiians' Concerns Go Beyond School*, THE HONOLULU ADVERTISER, July 21, 2002, at A1 (explaining the controversy surrounding the Kamehameha Schools' Hawaiian-Only admission policy); Yasmin Anwar, *"Hawaiian Only" Rule By School Under Fire*, THE HONOLULU ADVERTISER, May 26, 2001, at B1 (discussing the Hawaiian-Only policy at Kamehameha); Mary Adamski, *State Asks Court Ruling On Protestant-Only Trustee Restriction*, HONOLULU STAR BULLETIN, October 28, 2000, http://starbulletin.com/2000/10/28/news/story2.html (discussing the controversy surrounding the provision of Princess Pauahi's will requiring Protestant trustees).

[2] THE TRUSTEES, KAMEHAMEHA SCHOOLS/BISHOP ESTATE, EXCERPTS FROM THE WILL AND CODICILS OF PRINCESS BERNICE PAUAHI BISHOP AND FACTS ABOUT THE KAMEHAMEHA SCHOOLS/BISHOP ESTATE 3-4 (1976).

[3] 990 F.2d 458 (9th Cir. 1993). For clarity purposes, the district court opinion, Equal Employment Opportunity Comm'n v. Kamehameha Schools/Bishop Estate, 780 F. Supp. 1317 (D. Haw. 1991), will be referred to as "*Kamehameha I*" and the Ninth Circuit Court's opinion, Equal Employment Opportunity Comm'n v. Kamehameha Schools/Bishop Estate, 990 F.2d 458 (9th Cir. 1993), will be referred to as "*Kamehameha II*".

religion as a decisive factor in its employment decisions.[4] Kamehameha Schools attempted to justify the validity of the policy by arguing that their status as a "religious educational institution" entitles them to an exemption under Section 702 of Title VII.[5] Section 702, the Religious Educational Institution Exemption ("REI Exemption"), allows a religious educational institution to hire individuals of a particular religion as long as that individual performs work that advances the religious educational institution's activities.[6]

While the REI Exemption appears straightforward, the courts have interpreted the exemption in a confusing and complicated manner. Part of the difficulty stems from the use of an ambiguous standard to determine whether an institution qualifies for an exemption under Section 702 of Title VII. This standard set forth in *Equal Employment Opportunity Commission v. Townley Engineering & Manufacturing Co.*[7] requires that a court weigh all the "significant religious and secular characteristics . . . to determine whether the corporation's purpose and character are primarily religious."[8] The *Townley* test, however, does not allow for an accurate interpretation of Title VII's REI Exemption because the test: (1) greatly downplays a religious educational institution's religious background; (2) does not set a minimum threshold of requirements; and (3) provides no notice to those who want to qualify for the exemption.

The *Kamehameha Schools II* decision is a perfect example to showcase the difficulties of the *Townley* test. The inadequacy of the *Townley* test invites Congress to create clear, concrete rules to ensure religious freedom and prevent vague, unfair, and inequitable rulings. More specifically, if Congress would define (1) exactly what a "religious educational institution" is and (2) the minimum threshold needed to qualify for the exemption, it would eliminate many of the difficulties illustrated in the *Kamehameha Schools II* decision.

Part II of this paper examines Title VII and its exemptions, the 1972 amendments, and the Ninth Circuit's pronouncement of the *Townley* test. Part III analyzes the Ninth Circuit's *Kamehameha Schools II* decision and the problems that emerged from the court's application of the *Townley* test. This section also poses a solution to the shortcomings of the *Townley* test, calling for Congress to draw bright lines by implementing concrete language to better

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[4] *Kamehameha Schools II*, 990 F.2d at 459. *See* Civil Rights Act of 1964, Title VII, § 703, 42 U.S.C. § 2000e (1964) [hereinafter "1964 Title VII"].

[5] *Kamehameha Schools II*, 990 F.2d at 459. *See* Equal Employment Opportunity Act of 1972, 78 Stat. 253 (1964) (codified as amended at 42 U.S.C. §§ 2000e (1972)) [hereinafter "1972 Title VII"].

[6] *See infra* Parts II.A-B.

[7] 859 F.2d 610 (9th Cir. 1988).

[8] *Id.* at 618.

guide the use of Title VII's REI Exemption. Part IV concludes that the *Townley* test should be abandoned and a clearly delineated Congressional standard established in its place.

II. BACKGROUND

A. 1964 Civil Rights Act: Title VII and Its Exemptions

Title VII of the 1964 Civil Rights Act requires that employers in both the public and private sector "[e]liminate all forms of unjustified [religious] discrimination in employment . . . [and protect every] individuals' right to be free from discrimination in the workplace."[9] More specifically, Section 703 of Title VII provides that:

> It shall be an unlawful employment practice for an employer to fail or to refuse to hire or discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin . . . .[10]

The purpose behind Section 703 evidences a national commitment to protect individuals from unjustified discrimination.[11] In fact, the original Civil Rights Act of 1866 expressly recognized the right of an individual to be free from discrimination.[12] Congress, therefore, logically extended this policy to the employment sector by incorporating the policy into the 1964 Civil Rights Act.

Moreover, even though Congress recognized the right to be free from discrimination, it also acknowledged that other rights are in serious need of protection.[13] For example, Congress was also "sensitive to the needs and rights of a religious organization regarding its freedom of religion" and thereby recognized that certain instances would arise where the blanket prohibitions contained in Title VII would clearly frustrate the freedom of religious institutions to promote their religion.[14] Consequently, Congress enacted three specific exemptions to provide the necessary protection to religious institutions.

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[9] Duane E. Okamoto, *Religious Discrimination and the Title VII Exemption For Religious Organizations: A Basic Values Analysis for the Proper Allocation of Conflicting Rights*, 60 S. CAL. L. REV. 1375, 1376 (1987).

[10] *See* 1964 Title VII, § 703(a)(1).

[11] Okamoto, *supra* note 9, at 1376.

[12] *Id.* at 1427 n.6.

[13] *Id.* at 1376 (acknowledging the religious autonomy of religious groups).

[14] Okamoto, *supra* note 9, at 1382.

Congress, first, expressly inserted two exemptions within Section 703 itself. These two exemptions are the Bona Fide Occupational Qualification Exemption ("BFOQ Exemption") and the Religious Curriculum Exemption ("Curriculum Exemption").[15] Furthermore, as a supplement to these two statutory exemptions in Section 703, Congress also created a third exemption, entitled the REI Exemption, in Section 702, to further protect the autonomy and freedom of religion in religious educational institutions.[16] The relevant portion of this exemption, as amended, provides:

> This title [Title VII] shall not apply to an employer with respect to the employment of aliens outside any State, or to a religious corporation, association, educational institution or society with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, educational institution or society of its activities.[17]

This last exemption is by far the most contentious and confusing exemption under Title VII, and is, therefore, the focal point of this paper. Before an in-depth analysis of the REI Exemption can commence,[18] however, it is first necessary to review the legislative evolution of the exemption.

B. 1972 Amendments: Equal Employment Opportunity Act

In 1972, Congress made two noteworthy changes to Title VII by enacting the Equal Employment Opportunity Act.[19] As originally enacted in 1964, the REI Exemption (Section 702) read:

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[15] 1964 Title VII, § 703(e)(1)-(e)(2). The relevant portions of these exemptions are as follows:

> (1) it shall not be an unlawful employment practice for an employer to hire and employ employees . . . on the basis of [their] religion, sex, or national origin in those certain instances where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operations of that particular business or enterprise, and (2) it shall not be an unlawful employment practice for a school, college, university, or other educational institution or institution of learning to hire and employ employees of a particular religion if such school, college, university, or other educational institution or institution of learning is, in whole or in substantial part, owned, supported, controlled, or managed by a particular religion or by a particular religious corporation, association or society, or if the curriculum of such school . . . is directed toward the propagation of a particular religion.

Id.

[16] 1972 Title VII, § 702.

[17] *Id.*

[18] *See infra* Part II.C.

[19] 1972 Title VII, § 702; *see* Okamoto, *supra* note 9, at 1383 (describing the noteworthy changes to Tile VII).

> This title shall not apply . . . to a religious corporation, association, or society with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, or society of its *religious* activities *or to an educational institution with respect to the employment of individuals to perform work connected with the educational activities of such institution.*[20]

The original exemption excused only certain religious organizations, such as religious corporations, religious associations, and religious societies. In fact, there was no mention of a "religious educational institution" and the ambiguous reference to "educational activities of such institution" at the end of the original REI Exemption caused confusion. Thus, Congress first modified the structure of the exemption to include "religious educational institution" among the list of religious entities exempted under Title VII.[21]

Secondly, Congress deleted the word "religious" before "activities."[22] A literal reading of this amendment suggests that Congress broadened the scope of the Title VII exemptions to include not only those activities that are religious in nature, but all activities of religious organizations, even secular activities.[23]

Senator Ervin, a co-sponsor of the amendments, explained one rationale for this decision:

> [U]nder [the 1964 exemption], if a religious educational institution wanted to employ a professor of mathematics it could be compelled by the Commission to employ an infidel as professor of mathematics . . . . As a matter of policy, I think people who establish a religious institution and people who establish a church should be allowed to select a janitor or a secretary who is a member of the church in preference to some infidel or nonmember. However, they could not do that under [the original 1964 exemption]. My amendment would exempt religious organizations from the control of the State. If that is not in line with the letter of

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[20] Senate Subcom. on Labor of the Comm. on Labor and Public Welfare, 92d Cong., 2d Sess., Legislative History of the Equal Employment Opportunity Act of 1972 95 (Comm. Print 1972) (emphasis added); *see* 1964 Title VII, § 702; Okamoto, *supra* note 9, at 1376 n.9.

[21] *See* Senate Subcom. on Labor of the Comm. on Labor and Public Welfare, 92d Cong., 2d Sess., Legislative History of the Equal Employment Opportunity Act of 1972 458 (Comm. Print 1972); Okamoto, *supra* note 9, at 1383.

[22] *See* Senate Subcom. on Labor of the Comm. on Labor and Public Welfare, 92d Cong., 2d Sess., Legislative History of the Equal Employment Opportunity Act of 1972 882, 1645 (Comm. Print 1972); Okamoto, *supra* note 9, at 1383.

[23] *See* Senate Subcom. on Labor of the Comm. on Labor and Public Welfare, 92d Cong., 2d Sess., Legislative History of the Equal Employment Opportunity Act of 1972 844-45 (Comm. Print 1972); 1972 Title VII, § 702; Okamoto, *supra* note 9, at 1377, 1384.

> the law, it certainly is in line with the spirit of the law. I hope all those who believe in religious freedom will support the amendment.[24]

Several commentators have suggested that these changes illustrate Congress's clear intention to make the scope of the Title VII exemption "broad enough to avoid any trespass upon the First Amendment's guarantee of the free exercise of religion."[25] Consequently, the REI Exemption should be broadly construed.[26]

C. The REI Exemption: A Closer Look at the Case Law and Interpretation of the REI Exemption

At the outset, in interpreting the current REI Exemption, some courts have added an "ownership/affiliation" requirement not found in the language of the exemption itself, apparently confusing the REI Exemption (Section 702) with the Curriculum Exemption (Section 703(e)(2)).[27] The Curriculum Exemption specifically states that the Curriculum Exemption is available to a school,

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[24] *See* S. 2453, 91st Cong., 2d Sess., 116 Cong. Rec. 34, 565 (1970); Scott Klundt, *Permitting Religious Employers to Discriminate on the Basis of Religion: Application to For-Profit Activities*, 1988 BYU L. REV. 221, 239 n.22 (1988) (arguing that the REI Exemption applies to for-profit religious activities).

[25] Ralph D. Mawdsley, *Employment Discrimination on the Basis of Religion: Where Should the Line Be Drawn?*, 111 ED. LAW REP. 1077, 1080 (1996) [hereinafter Mawdsley, *Employment Discrimination*]. *See* Klundt, *supra* note 24, at 228 (stating that "it is clear that Congress intended that religious organizations be able to make employment decisions based on religious grounds in all activities, including profit-making activities").

[26] James D. Gordon III & W. Cole Durham, Jr., *Toward Diverse Diversity: The Legal Legitimacy of Ex Corde Ecclesiae*, 25 J.C. & U.L. 704 (1999). *But see* Robert L. Sands, *Civil Rights Killinger v. Samford University: Religious Educational Institutions' Exemptions From Title VII Suits*, 23 AM. J. TRIAL ADVOC. 409 (1999) (arguing that the exemption is more narrowly construed for religious schools than a church); Stacey M. Brandenburg, *Alternatives to Employment Discrimination at Private Religious Schools*, 1999 ANN. SURV. AM. L. 358 (1999) (arguing that exemptions should be either construed narrowly or repealed altogether). Commentators who maintain a narrow interpretation of the Title VII exemptions argue that the exemptions created in the 1964 Civil Rights Act resulted from the House creating a "blanket exemption" and then the Senate imposing restrictions to limit the exemption to an "institution's religious activities only." Brandenburg, *supra* note 26, at 339. While this may be true, the 1972 Amendments then broadened the exemptions by allowing an institution the exemption for all of its activities and not merely religious ones. *See* Okamoto, *supra* note 9, at 1377-80.

[27] *See* 1972 Title VII, § 702; 1964 Title VII, § 703(e)(2). *See also* Mawdsley, *Employment Discrimination*, *supra* note 25, at 1084 (acknowledging that control by a parent religious organization is not mentioned in the REI Exemption). However, Mawdsley does not emphasize this distinction because he argues that Title VII exemptions in general should apply only to those institutions owned or controlled by a religious organization. Ralph Mawdsley, *Issues Facing Religious Educational Institutions that Discriminate on the Basis of Religion*, 97 ED. LAW REP. 15, 27 (1995) [hereinafter Mawdsley, *Basis of Religion*].

college, university, or other educational institution when such institution is, "in whole or in substantial part, owned, supported, controlled, or managed by a particular religion or by a particular religious corporation, association, or society."[28]

Although the Curriculum Exemption has an "ownership/affiliation requirement," the REI Exemption has no similar language. Nevertheless, some courts have added an ownership/affiliation requirement to the qualifications for a REI Exemption. For example, in *Killinger v. Samford University*,[29] the Eleventh Circuit found that, because Samford University received seven percent of its budget from the Alabama Baptist State Convention, the University was sufficiently affiliated and supported by a religious organization to qualify for the REI Exemption.[30] The court also based its reasoning on the facts that: (1) members of the Board of Trustees had to be Baptist; (2) Samford requires all faculty members to subscribe to the 1963 Baptist Statement of Faith and Message; and (3) Samford compels students to attend mandatory chapel services.[31]

Killinger does not represent the only decision to apply the REI Exemption to a school owned, affiliated, or controlled by a religious organization. In *Boyd v. Harding Academy of Memphis, Inc.*,[32] the Sixth Circuit held that a Christian school's close affiliation with a religious organization afforded it a Title VII exemption and allowed it to fire a faculty member for sexual activity outside of marriage.[33] Similarly, in *Little v. Wuerl*,[34] the Third Circuit held that a Catholic educational institution could refuse to rehire a teacher who remarried after a divorce because the institution was directly supported by the Catholic Church.[35]

Furthermore, because some courts have interpreted the REI Exemption to include an "ownership/affiliation" requirement, the natural conclusion would

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[28] *See* 1972 Title VII, § 702; 1964 Title VII, § 703(e)(2).

[29] 113 F.3d 196 (11th Cir. 1997).

[30] *Id.* at 200.

[31] *Id.* at 196, 199.

[32] 88 F.3d 410 (6th Cir. 1996). Harding Academy of Memphis is religiously affiliated with the Church of Christ. *Id.* at 411. The school has a code of conduct stating that "Christian character . . . is the basis for hiring teachers at Harding Academy. Each teacher at Harding is expected in all actions to be a Christian example for the students . . . ." *Id.* The court held that Harding was allowed to terminate a teacher because that teacher engaged in sex outside the marriage in violation of the schools code of conduct. *Id.* at 414.

[33] *Id.*

[34] 929 F.2d 944 (3d Cir. 1991).

[35] *Id.* at 951. *See also* Feldstein v. Christian Science Monitor, 555 F. Supp. 974, 977 (D.C. Mass. 1983) (holding that the Christian Science Monitor newspaper was entitled to a Title VII exemption because it was published by an organ of the Christian Science Church); Hall v. Baptist Memorial Health Care Corp., 27 F. Supp. 2d 1029 (W.D. Tenn. 1998) (holding that a nursing college qualified for the exemption because it had many ties to the Baptist Church).

be to preclude all non-owned or non-affiliated institutions from receiving a REI Exemption.[36] In fact, however, the *Kamehameha Schools II* decision has been read to suggest that the court left the door open to allow a non-owned or non-affiliated religious institution the benefit of receiving the REI Exemption.[37] These institutions would still have a difficult time qualifying for the exemption because they must meet the *Townley* test.

D. Townley: The Birth of the Townley Test

Jake and Helen Townley founded Townley Manufacturing Company ("Townley Co.") in 1963 to manufacture mining equipment.[38] The Townleys were "born again believers in the Lord Jesus Christ" and "made a covenant with God that their business would be a Christian, faith-operated business."[39] Accordingly, Townley Co. held devotional services during work hours, printed Bible verses on all company documents, and gave financial support to various churches and missionaries.[40]

Employees at Townley Co. favorably received the company's religious practices for over twenty years, but that acceptance ceased when an employee, Louis Pelvas ("Pelvas"), directly challenged the practices in October 1984.[41] The Equal Employment Opportunity Commission ("EEOC") brought suit on behalf of Pelvas, claiming that Townley Co. engaged in religious discrimination in direct violation of Title VII of the 1964 Civil Rights Act.[42] In response, the Townleys argued that they were exempt under the REI Exemption because Townley Co. was a religious corporation.[43]

The Ninth Circuit Court held that "Congress did not intend [the REI Exemption] for religious corporations to shield corporations such as Townley."[44] The court reasoned that a REI Exemption would apply only if the corporation's purpose and character were "primarily religious."[45] To ascertain whether the corporation was "primarily secular" or "primarily religious" the court weighed all significant religious and secular characteristics.[46]

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[36] Mawdsley, *Basis of Religion*, *supra* note 27, at 27.

[37] Mawdsley, *Employment Discrimination*, *supra* note 25, at 1085.

[38] Equal Employment Opportunity Comm'n v. Townley Eng'g & Mfg. Co., 859 F.2d 611 (9th Cir. 1988).

[39] *Id.* at 612.

[40] *Id.*

[41] *Id.*

[42] *Id. See* 1964 Title VII.

[43] *Townley*, 859 F.2d at 617.

[44] *Id.* at 613.

[45] *Id.* at 618.

[46] *Id.*

These factors included: (1) the secular for-profit status of the company; (2) the lack of religious objectives/purposes in the company's articles of incorporation; (3) the "discipleship [of] Jake and Helen Townley . . . for the Lord Jesus Christ;" and (4) the amount of financial support the company gave to churches and missionaries.[47] The court found that when all of these characteristics were viewed together, Townley Co. appeared to be primarily secular.[48] Therefore, Title VII did not exempt Townley Co. from its prohibition against religious discrimination.[49] The court would later apply the same test many years later in *Kamehameha Schools II*.[50]

E. Kamehameha Schools II: The Application of the Townley Test to Religious Educational Institutions

On November 4, 1887, the Kamehameha Schools opened its doors to the first students, bringing to life a princess's dream to help educate children in Hawai'i.[51] The Schools were a direct establishment of Princess Bernice Pauahi Bishop ("Pauahi") by the provisions of her will.[52]

Pauahi descended from some of the most prominent and high-ranking Hawaiian nobility, which included names such as Keawe, Keōua, Ka'ōleiokū, and Kamehameha the Great.[53] It was through this illustrious bloodline that Pauahi became the sole heir to some 353,000 acres of land upon the death of her cousin Ruth Ke'elikōlani.[54] Because Pauahi was one of the last descendents of the Kamehameha line and did not have any children of her own, she chose to use the land to help educate the children of Hawai'i.[55]

Following Pauahi's death in 1884, her will created a private charitable trust to manage both her vast estate and the schools that she envisioned.[56] The trust created what is now known as the Kamehameha Schools, one of the wealthiest organizations in America, owning more than 431,378 acres of land and

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[47] *Id.* at 619.

[48] *Id.*

[49] *Id.*

[50] 990 F.2d 458 (9th Cir. 1993).

[51] COBEY BLACK & KATHLEEN DICKENSON MELLEN, PRINCESS PAUAHI BISHOP AND HER LEGACY, 99, 111 (1965). This date marks the opening of the Kamehameha Schools for Boys. *Id.* at 99. The Kamehameha Schools for Girls was opened later on December 19, 1894. *Id.* at 111.

[52] The will was dated October 31, 1883. THE TRUSTEES, *supra* note 2, at 3-4.

[53] GEORGE S. KANAHELE, PAUAHI: THE KAMEHAMEHA LEGACY 9 (Kamehameha Schools Press, 1986).

[54] *Id.* at 165.

[55] *Id.* at 152-53, 165-72.

[56] *Id.* at 189.

controlling over $4 billion in assets.[57] The Thirteenth Provision of Pauahi's will provided for the establishment of two schools, one for boys and one for girls, called the Kamehameha Schools, to educate Hawaiian children.[58] This provision of the will also specifically stated that teachers should be of the Protestant faith.[59]

The Kamehameha Schools' Protestant-only teaching provision was challenged by Carole Edgerton, a non-Protestant, who had answered an advertisement for a substitute French teacher position at the Schools.[60] After being informed that there was a Protestant hiring requirement for teachers, she filed a charge of religious discrimination with the EEOC.[61] The EEOC undertook an investigation and tried to resolve the matter with the Schools.[62] When the Kamehameha Schools affirmed that it could not hire a non-Protestant teacher because doing so would violate the will of Princess Pauahi, the EEOC filed suit alleging that the Kamehameha Schools' policy violated Title VII of the Civil Rights Act of 1964.[63]

1. The district court's decision

In *Equal Employment Opportunity Commission v. Kamehameha Schools/ Bishop Estate* ("*Kamehameha Schools I*"),[64] the United States District Court for the District of Hawai'i held that the Kamehameha Schools did not violate Title VII because the Schools qualified for exemptions under Section 702 and 703 of Title VII.[65] The court found that the Kamehameha Schools qualified for: (1) a BFOQ Exemption, which allows employers to consider religion when hiring if it is "reasonably necessary to the normal operations" of that particular business or enterprise;[66] (2) a Curriculum Exemption, which allows an educational institution whose curriculum is directed toward the propagation

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[57] KAMEHAMEHA SCHOOLS BISHOP ESTATE, 2001 ANNUAL REPORT, http://www.ksbe.edu (reporting the exact amount of assets for the year 2001 at $4,415,250,000.00).

[58] THE TRUSTEES, *supra* note 2, at 3. Pauahi's will established two schools, a school for boys and a school for girls. BLACK, *supra* note 51, at 99, 111.

[59] THE TRUSTEES, *supra* note 2, at 4.

[60] Equal Employment Opportunity Comm'n v. Kamehameha Schools/Bishop Estate, 990 F.2d 459 (9th Cir. 1993).

[61] *Id.*

[62] *Id.*

[63] *Id. See* 1964 Title VII, § 703(a)(1).

[64] 780 F. Supp. 1317 (D. Haw. 1991). *See supra* text accompanying note 3.

[65] *Kamehameha Schools I*, 780 F. Supp. at 1326; *see* 1964 Title VII, § 703(e)(1)-(e)(2); 1972 Title VII, § 702.

[66] *Kamehameha Schools I*, 780 F. Supp. at 1323; *see* 1964 Title VII, § 703(e)(1).

of a particular religion to hire employees of a particular religion;[67] and (3) a REI Exemption.[68]

The district court reasoned that because Pauahi's will called for a "Protestant presence" in the Schools, the Protestant-only teacher policy related to the teachers' ability to perform their jobs and, as such, was a valid BFOQ under Title VII.[69] Additionally, the court noted that the Protestant presence was significant to the educational tradition and normal operation of the Kamehameha Schools.[70] Moreover, the court found that the Kamehameha Schools could qualify for the Curriculum Exemption because religion was an "integral part of the child's daily life."[71] The court determined that religious education classes, weekly chapel attendance, and prayer before meals all signified that religion was part of the daily life and curriculum at the Schools.[72]

Finally, the district court reasoned that the Kamehameha Schools qualified for the REI Exemption under the *Townley* test by weighing all the "significant religious and secular characteristics . . . to determine whether the corporation's purpose and character [were] primarily religious."[73] The court determined that the Kamehameha Schools was similar to a typical religious organization because the Schools supported the Bishop Memorial Church[74] and had "an unbroken chain of over 100 years of mandatory devotional services, religious education requirements, and prayers."[75] The court concluded that these factors evidenced that the Kamehameha Schools had an overall religious purpose and character, and that it was eligible for the REI Exemption.[76]

2. *The Ninth Circuit's decision*

The United States Court of Appeals for the Ninth Circuit overruled the district court's decision by striking down the Kamehameha Schools

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[67] *Kamehameha Schools I*, 780 F. Supp. at 1328; *see also* 1964 Title VII, § 703(e)(2).

[68] *Kamehameha Schools I*, 780 F. Supp. at 1326; *see also* 1972 Title VII, § 702.

[69] *Kamehameha Schools I*, 780 F. Supp. at 1320, 1323.

[70] *Id.* at 1321.

[71] *Id.* at 1327.

[72] *Id.*

[73] *Id.* at 1324 (citing Equal Employment Opportunity Comm'n v. Townley Eng'g & Mfg. Co., 859 F.2d 610, 618 (9th Cir. 1988)).

[74] *See* Murray v. Kobayashi, 50 Haw. 104, 105, 431 P.2d 940, 942 (1967) (finding that the Kamehameha Schools is operated in connection with the Bishop Memorial Church).

[75] *Kamehameha Schools I*, 780 F. Supp. at 1325.

[76] *Id.* at 1326.

Protestant-only policy.[77] Although the court also applied the *Townley* test, it construed all three of the exemptions narrowly and, in doing so, came to an entirely opposite conclusion than the district court.[78] The appellate court also placed the burden of proving each of the exemptions directly upon the Kamehameha Schools.[79]

The court first held that the Kamehameha Schools was not eligible for the Curriculum Exemption because the curriculum had "little to do with propagating Protestantism."[80] In addition, the court stated that the Kamehameha Schools did not qualify for a BFOQ Exemption because "teachers at the Schools provide instruction in traditional secular subjects in the traditional secular way."[81] The court left open the possibility that a teacher who taught religious education classes or was employed as a minister may fall within the scope of the BFOQ Exemption.[82]

The court next held that the Kamehameha Schools could not qualify for a REI Exemption because the "general picture" of the Schools is "primarily secular" and not "primarily religious."[83] More specifically, the REI Exemption did not apply to the Kamehameha Schools because: (1) the Schools are not controlled by a religious organization or affiliated with any specific denomination of Protestants;[84] (2) the faculty is not required to maintain active membership in the church;[85] (3) the student body is not required to be Protestant;[86] and (4) the curriculum makes "no effort . . . to instruct the students in Protestant doctrine."[87] Thus, the court ruled that the Kamehameha Schools could not qualify for a REI exemption under Title VII. While the court's decision in *Kamehameha Schools II*[88] drew praise from some commentators,[89]

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[77] Equal Employment Opportunity Comm'n v. Kamehameha Schools/Bishop Estate, 990 F.2d 459, 460 (9th Cir. 1993).

[78] *See* Equal Employment Opportunity Comm'n v. Townley Eng'g & Mfg. Co., 859 F.2d 610, 618 (9th Cir. 1988).

[79] *Kamehameha Schools II*, 990 F.2d at 460.

[80] *Id.* at 465.

[81] *Id.* at 466.

[82] *Id.* at 465 n.15. The court reasoned that because religion and religious knowledge is a necessary qualification to teach religious education classes, being Protestant is a bona fide occupational qualification and religion can be used as a factor in hiring religious education teachers and chaplains. *Id.*

[83] *Id.* at 463-64.

[84] *Id.* at 461.

[85] *Id.* at 462.

[86] *Id.*

[87] *Id.* at 463.

[88] *Id.* at 458.

[89] Brandenburg, *supra* note 26, at 346; Mawdsley, *Basis of Religion*, *supra* note 27, at 27.

critics think that the *Townley* test does not allow for an accurate interpretation of Title VII's exemptions.[90]

III. ANALYSIS

A. The Problem: Flaws of the Townley Test

The *Townley* test fails because it does not accurately interpret Title VII's REI Exemption. The *Townley* test greatly downplays a religious educational institution's religious background and does not set a minimum threshold of requirements. Further, the test fails to provide notice to those who want to qualify for the exemption.

1. The Townley test downplays the religious background and history of an institution

In applying the *Townley* test to the Kamehameha Schools, the Ninth Circuit Court of Appeals failed to consider the religious background of the Kamehameha Schools.[91] A look into the life of the woman who established the Kamehameha Schools helps to better understand the mission of the Kamehameha Schools and why the Schools should be allowed to follow Pauahi's principles and wishes.

Born on December 19, 1831,[92] Bernice Pauahi Bishop was the great-granddaughter of Kamehameha I, also known as Kamehameha the Great.[93] One of

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[90] Rex E. Lee, *Symposium on Religiously Affiliated Law Schools: Today's Religious Law School: Challenges and Opportunities*, 78 MARQ. L. REV. 255 (1995) at 262-64. Lee posits:

> A particularly disturbing recent case is the Ninth Circuit's decision in EEOC v. Kamehameha Schools . . . [because] the Court of Appeals ruled that . . . section 702's religious educational institution exemption [is] to be construed narrowly. Since the court cited no support for this proposition, I do not believe it is the law . . . [and] the Ninth Circuit would appear to be in conflict with the Third and Fourth Circuits on the issue . . . . I find it troublesome that the Ninth Circuit, in direct contravention of both Hawaii's Supreme and district courts, made its own judgment that Kamehameha was not sufficiently religious."

Id.

[91] *Kamehameha Schools II*, 990 F.2d at 459. Although the *Kamehameha Schools II* decision notes that both the Kamehameha Schools and its Protestant teacher policy were established through Bernice Pauahi Bishop's will, the decision does not discuss the history of the Kamehameha Schools or the religious beliefs of its founder, Bernice Pauahi Bishop. *Id.*

[92] KANAHELE, *supra* note 53, at 1-2 (recognizing that the birth of Bernice Pauahi Bishop was one good thing amidst a year dubbed "Ka makahiki o ka pilikia nui" ("The year of heavy trouble") because many negative things occurred; Hawaiians died from syphilis and smallpox and the economy was down due to the fading sandalwood trade).

[93] *Id.* at 7, 9.

his wives, Queen Ka'ahumanu, became a staunch supporter of Protestant Christianity.[94] At one point, Ka'ahumanu "imposed new kapu regulating gambling, drinking, dancing and [protection for] the Sabbath."[95] Although Ka'ahumanu died when Pauahi was an infant, she had already established the foundation for Protestant Christianity in Hawai'i and directly influenced many others who had an important role in Pauahi's life.[96]

Pauahi's natural father, Abner Ka'ehu Pākī, converted to Protestant Christianity in the 1820s at the encouragement of Ka'ahumanu.[97] Pauahi's natural mother, Kanaholo Konia, also became a Protestant Christian.[98] Thus, both of Pauahi's natural birth parents were Protestant Christians. Following the Hawaiian custom of "hānai", Pauahi was given as an infant to a relative, Kaho'anokū Kīna'u, a daughter of Kamehameha I, to raise.[99]

Kīna'u was probably one of the greatest influences on young Pauahi's life, having raised her for eight years until 1839.[100] Kīna'u was also a strong supporter of the Protestant Christian faith.[101] Kīna'u married High Chief Mataio Kekūanaō'a who then became Pauahi's foster father.[102] Kekūanaō'a also joined the church and eventually became "one of its chief defenders."[103] In addition, the Protestant influence was everywhere young Pauahi resided, for even John Papa I'i, Kīna'u's private secretary, was "a stalwart [Protestant] Christian."[104] Thus, because both Kīna'u and Kekūanaō'a were Protestants and the environment in which she was raised was permeated with Protestant Christianity, it was logical that Pauahi also would become a Protestant Christian.[105]

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[94] *Id.* at 1. Protestantism is a subset of the Christian faith. For purposes of this paper the term "Protestant Christianity" shall hereinafter be used to clarify that Pauahi and those who influenced her were indeed of the Christian faith.

[95] *Id.*

[96] *Id.* at 1, 2, 11.

[97] *Id.* at 11.

[98] *Id.*

[99] *Id.* at 12. The word "hānai" means to adopt or raise. MARY KAWENA PŪKU'I AND SAMUEL ELBERT, HAWAIIAN DICTIONARY: Hawaiian-English, English-Hawaiian (1986) at 52.

[100] KANAHELE, *supra* note 53, at 12.

[101] *Id.* at 13.

[102] *Id.* at 13, 14, 220.

[103] *Id.* at 14.

[104] *Id.* at 15.

[105] *Id.* Many ali'i of Hawai'i were immersed in Protestant Christianity because missionaries and the Bible were present everywhere. *Id.* The Protestant Christian Church was also prominent in the community. *Id.* Thus, it is evident that even if Pauahi had not been taught Protestant Christian principles at home, she would have been exposed to them by the missionaries at church or around the community. *Id.*

Furthermore, during Pauahi's childhood, Protestant Christianity and Catholicism clashed in Hawai'i.[106] Both Kīna'u and Ka'ahumanu expressed displeasure that this conflict could "generate family disputes, cause dissension in society, and make more trouble for the government."[107] With the aim of keeping the Kingdom unified in the face of the political fighting and the immense changes occurring in Hawaiian society, Kīna'u fervently objected to the establishment of the Catholic mission in Hawai'i, declaring "that chief or commoner who turned to the Catholic Church was a traitor against the Hawaiian government."[108] Kīna'u's strong influence in Pauahi's life explains Pauahi's eventual desire to protect Protestant Christianity.[109]

Pauahi's faith would be strengthened even more during the next stage of her life, her school years.[110] During this period, Pauahi refined her beliefs and established a faith that would stay with her throughout her life.[111] Pauahi attended the Chief's Children's School under the tutelage of the missionary Amos Star Cooke and his wife Juliette.[112] Children attending the school attended Sunday services at Kawaiaha'o Church.[113] One commentator noted that Pauahi "must have enjoyed the spiritual, ritual and social content of [the] church, because she remained a church-goer for the rest of her life."[114] By the time Pauahi finished school, she had already formed a large part of her beliefs and became firmly grounded in Protestant Christianity. This religious commitment helped to characterize Pauahi as "deeply spiritual, but not

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[106] *Id.* at 16.

[107] *Id.*

[108] *Id.*

[109] *Id.*

[110] *Id.* at 20, 23. On June 13, 1839, Pauahi started school at the Chief's Children's School (also called the Royal School). *Id.*

[111] *See id.* at 21.

[112] *Id.* at 20, 23. Although the Cookes had "no extensive experience in teaching" before they began teaching at the children's school, they were admired for their qualities which "the chiefs deemed necessary . . . [such as] self discipline, faith, stick-to-it-iveness, courage, practicality and compassion, among others." *Id.* at 24. Moreover, the Cookes took the job because they were staunch Protestant Christian missionaries and "they wanted to convert people until Christ be formed in them." *Id.* The Cooke's desire to convert people to Protestant Christianity was directly reflected by the daily life at the Royal School. For example, Pauahi and the other students began the day with morning devotions at 6:30 a.m. before school and ended the day with evening prayers before bed. *Id.* at 27. Although officially "[t]he Royal School was not intended to be a religious seminary . . . it had many of the same trappings . . . . [R]eligion, often in the guise of character building, permeated the textbooks . . . so that much of the students' secular curriculum was loaded with [Protestant] Christian messages." *Id.* at 33.

[113] *Id.* at 27.

[114] *Id.* at 33.

fanatical; . . . a woman of faith, but not of blind, unquestioning, and unreasoning conformity."[115]

Despite the strength of Pauahi's religious convictions and beliefs, the Ninth Circuit's application of the *Townley* test completely ignores Pauahi's steadfast Protestant commitment.[116] The court's opinion does not mention Pauahi's Protestant Christian faith at all.[117] It is unclear why the Ninth Circuit, in *Kamehameha Schools II*, did not consider Pauahi's extensive religious history when the district court, in *Kamehameha Schools I*, openly acknowledged the history in its opinion.[118] The district court maintained that Pauahi:

> [e]arnestly intended and provided in her will that her adopted children as students at Kamehameha Schools would receive the same benefits of being taught by Protestant teachers with a Protestant perspective in their teachings as she had experienced herself in her school days at the Chief's Childrens School, where she received religious and moral training for some ten years under the tutelage of Protestant missionaries.[119]

The Ninth Circuit, on the other hand, only mentioned Pauahi as a member of the Hawaiian royal family and one of the largest landowners in Hawai'i.[120] Consequently, it is clear from *Kamehameha Schools II* that the *Townley* test has serious flaws because it ignores such a rich and devout religious tradition.

2. The Kamehameha Schools II decision demonstrates that the Townley test sets no minimum threshold

The *Kamehameha Schools II* decision also illustrates that the *Townley* test sets no minimum threshold for who will be able to qualify for the exemption.[121] The *Townley* test, which requires that a court weigh all the "significant religious and secular characteristics . . . to determine whether the corporation's purpose and character are primarily religious," by its very nature looks only at the "general picture" to determine if the educational institution's purpose and character are more religious than secular.[122] This ambiguous and

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[115] *Id.* at 35.

[116] *See* Equal Employment Opportunity Comm'n v. Kamehameha Schools/Bishop Estate, 990 F.2d 458, 460 (9th Cir. 1993).

[117] *Id.*

[118] Equal Employment Opportunity Comm'n v. Kamehameha Schools/Bishop Estate, 780 F. Supp. 1317, 1323 (D. Haw. 1991).

[119] *Id.* The district court noted that Pauahi had made the decision to "adopt the children of her people and make them her heirs . . . ." *Id.*

[120] *Kamehameha Schools II*, 990 F.2d at 459.

[121] *Id.* at 460.

[122] *Id.* (citing Equal Employment Opportunity Comm'n v. Townley Eng'g & Mfg. Co., 859 F.2d 610, 619 n.14 (9th Cir. 1988)).

confusing language represents an obstacle not only to the courts, but to educational institutions governed by the standard.

Moreover, the *Townley* test sheds little light on the minimum number of religious characteristics needed to receive a REI Exemption. The exact language of the *Kamehameha Schools II* decision merely requires that a court look at "all significant religious and secular characteristics."[123] The decision goes no further, however, to precisely enumerate what factors should be assessed and how much weight should be given to each factor.[124]

The confusion surrounding the *Townley* test is further amplified by the discrepancies between factors used in *Kamehameha Schools II* and the factors used in *Townley*. In *Kamehameha Schools II*, the Ninth Circuit Court looked at the ownership and affiliation of the school with a religious organization, the religious purpose of the school, and the day-to-day religious activities of the school; in *Townley*, the Ninth Circuit Court focused more on the secular for-profit status of the company, the lack of religious objectives in the company's articles of incorporation, and the amount of financial support the company gave to churches.[125] The court chose to look at different factors because the court had no real guidance from which to draw upon in the educational institution context.[126] Few courts are asked to interpret the REI Exemption and even fewer cases deal with organizations that are not owned or affiliated with a religious organization.[127] Consequently, the Ninth Circuit Court had little with which to accurately compare, explaining the court's creation of the inadequate *Townley* test.[128]

In addition, the court unevenly distributed the weight given to each of these factors. In *Kamehameha Schools II*, the court emphasized the fact that the Kamehameha Schools was not owned or affiliated with a religious organization, whereas the court in *Townley* stressed that Townley Co. was a

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[123] *Id.*

[124] *See id.* at 461-63.

[125] *Id.* at 461-62; Equal Employment Opportunity Comm'n v. Townley Eng'g & Mfg. Co., 859 F.2d 610, 619 (9th Cir. 1988).

[126] *See Kamehameha Schools II*, 990 F.2d at 461 n.7.

[127] *See* Robert Sands, *Civil Rights Killinger v. Samford University: Religious Educational Institutions' Exemptions From Title VII Suits*, 23 AM. J. TRIAL ADVOC. 411-12 (1999) (providing a synopsis of courts and cases that have discussed the REI Exemption).

[128] *Kamehameha Schools II*, 990 F.2d at 460. The court did have the option to look at the United States Supreme Court's ruling in *Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327 (1987) for guidance. Professor Jon M. Van Dyke notes that there are discrepancies between *Amos* and *Kamehameha Schools II*: "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 [did] qualify." Jon M. Van Dyke, *The Kamehameha Schools/Bishop Estate and the Constitution*, 17 U. HAW. L. REV. 413, 417 (1995).

for-profit corporation.[129] Thus, the cases provide no clear record of what factors enable an institution to qualify for a REI Exemption. The *Townley* test is therefore unmanageable and unsound.

3. The Kamehameha Schools II decision demonstrates that the Townley test produces unfair and inequitable rulings

Some commentators are perplexed by the outcome in *Kamehameha Schools II* and have questioned the ability of the *Townley* test to produce fair and equitable rulings.[130] Furthermore, it is unclear why the court in *Kamehameha Schools II* would put so much emphasis on ownership/affiliation with a church, when the REI Exemption contains no language that necessitates such an analysis.

The facts in *Kamehameha Schools I* demonstrate that the Kamehameha Schools is a deeply religious entity.[131] For example, the Schools have a direct and strong relationship with Bishop Memorial Church, a member of the United Church of Christ.[132] This fact sets the Kamehameha Schools apart from all public schools and most other private schools in Hawai'i. Whereas public schools are not able to have school prayers,[133] school sponsored Bible readings,[134] or post the Ten Commandments,[135] the Kamehameha Schools is openly free to print a Bible verse in the daily bulletin, have teams pray before athletic events,[136] and sing the word "God" in their school song.[137]

Even though the Kamehameha Schools does not exactly resemble a church-owned educational institution such as a Catholic school, the Kamehameha Schools is comparable because it has many of the same religious characteristics of a Catholic school. Examples of these religious elements include prayer before meals, weekly church services,[138] and mandatory

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[129] *Kamehameha Schools II*, 990 F.2d at 461; *Townley*, 859 F.2d at 619.

[130] *See* Van Dyke, *supra* note 128, at 416-17 (stating that "[t]his decision is somewhat troubling because the court has assumed the role of determining what is and what is not a bona fide religion . . . . It is troubling to have a court determine what a 'true' religious community is"); Lee, *supra* note 90. *See also supra* text accompanying note 87.

[131] Equal Employment Opportunity Comm'n v. Kamehameha Schools/Bishop Estate, 780 F. Supp. 1317, 1324-25 (D. Haw. 1991).

[132] *Kamehameha Schools I*, 780 F. Supp. at 1324 (citing Murray v. Kobayashi, 50 Haw. 104, 106, 431 P.2d 940, 942 (1967)).

[133] Engel v. Vitale, 370 U.S. 421 (1962).

[134] Abington Sch. Dist. v. Schempp, 374 U.S. 203 (1963).

[135] Stone v. Graham, 449 U.S. 39 (1980).

[136] Equal Employment Opportunity Comm'n v. Kamehameha Schools/Bishop Estate, 990 F.2d 458, 462 (9th Cir. 1993).

[137] *See generally* The Kamehameha Schools Alma Mater entitled "Sons of Hawai'i"; http://www2.ksbe.edu. (displaying the words "On God, the prop and pillar of your realm.")

[138] *Kamehameha Schools II*, 990 F.2d at 463.

religious education classes called "Ekalesia" as a prerequisite for graduation.[139] These similarities leads one to question whether the outcome under the *Townley* test did indeed produce a fair and equitable ruling.

B. The Solution: Clearly Delineated Congressionally Established Standards

Townley and *Kamehameha Schools II* illustrate the confusion surrounding the REI Exemption that necessitates a consistent policy to protect religious educational institutions and their religious practices.[140] Congress should accept the challenge and amend the language of the REI Exemption by (1) setting a clear definition of a religious educational institution and (2) setting a minimum threshold to signify what makes a religious educational institution eligible for the exemption.

1. Defining a religious educational institution and setting a minimum threshold

Title VII does not define a "religious educational institution".[141] In fact, the only guidance is Title VII's definition of the term "religion."[142] This definition is of little help because it is circular.[143] The definition states that "[t]he term 'religion' includes all aspects of religious observance and practice, as well as belief,"[144] but it does not address what qualifies as a religious observance, practice, or belief.[145] Thus, it is difficult to determine which institutions meet the criteria for religious educational institutions under Title VII's current definition section.

This confusion should compel Congress to establish a clear definition of a religious educational institution. A religious educational institution should not be defined narrowly to allow only for those institutions that are owned, supported, or controlled by a church. As many commentators have noted, "this [type of] legislation should be broadly construed."[146] Equity is not achieved by giving one institution an exemption and denying the same

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[139] *Id.*

[140] *See* Okamoto, *supra* note 9, at 1382.

[141] *Kamehameha Schools II*, 990 F.2d at 460 n.5.

[142] *See* 1972 Title VII, § 701(j).

[143] Barbara L. Kramer, *Reconciling Religious Rights & Responsibilities*, 30 LOY. U. CHI. L.J. 440 (1999).

[144] *See* 1972 Title VII, § 701(j).

[145] *Id.*

[146] *See supra* notes 25-26 and accompanying text.

exemption to another institution that has the same religious purpose, mission, and goals, but is not under the direction of a specific church.

Moreover, while most people would generally define a religious institution as either a church, synagogue, or mosque, religious institutions do not always take these forms.[147] One commentator suggests that whatever form the religious educational institution takes, it is "the teaching function [that] is absolutely central to the life and transmission of religious values, and religious communities should have broad latitude to structure various aspects of their teaching function in any way that seems appropriate in their community."[148]

Therefore, Congress should define a "religious educational institution" to encompass an educational institution whose religious mission was founded on a sincerely held religious belief and that actively continues to encourage the propagation of such religious tenets. This would not include an institution entirely funded by the government, such as a public school, because to do so would be a violation of the First Amendment's Establishment Clause.[149]

Furthermore, this definition alone cannot be the sole determinant of which institutions are entitled to a REI Exemption under Section 702. Congress should also define the minimum threshold needed to qualify for an exemption. In keeping with this notion, Congress should err on the side of promoting the religious freedom of institutions rather than suppressing religious freedom. Congress has already recognized that it must be "sensitive to the needs and rights of a religious organization regarding its freedom of religion."[150]

Therefore, the minimum criteria needed to qualify for a REI Exemption should be that the religious educational institution possess a mission that reflects the religious beliefs and principles on which the institution was founded. To determine whether an educational institution possesses such a mission, a number of specific factors should be considered. These factors include the religious history leading to the foundation of the educational institution, the purpose/objective of the educational institution, and the amount of religious activity that occurs on a daily basis at the educational institution.

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[147] *See* Gordon, *supra* note 26, at 704.

[148] *Id.*

[149] Dodge v. Salvation Army, 1989 U.S. Dist. LEXIS 4797 at 7-8, (S.D. Miss. 1989) (holding that because the Salvation Army's Victim Assistance Coordinator position was "substantially, if not entirely, [funded] by the federal, state and local government, [it] gives rise to constitutional considerations which effectively prohibit the application of the exemption to the facts of this case").

[150] Duane E. Okamoto, *Religious Discrimination and the Title VII Exemption For Religious Organizations: A Basic Values Analysis for the Proper Allocation of Conflicting Rights*, 60 S. CAL. L. REV. 1375, 1382 (1987).

The Kamehameha Schools is a good example of an institution that should qualify under these criteria because Pauahi founded the schools intending for students to learn from teachers of the Protestant faith as she did.[151] This is evidenced by prayer before meals, weekly church services,[152] and mandatory religious education classes called "Ekalesia" as a prerequisite for graduation.[153] Pauahi's main purpose was to educate children and give them the same benefits that she herself had growing up as a Protestant Christian.[154] Therefore, by setting the minimum threshold to require that a religious educational institution possess a mission reflecting the religious beliefs and principles on which the institution was founded, and not setting the minimum to require a finding of ownership or affiliation by a church, the interest of promoting religious freedom would be better served.

2. Congressional power to amend the REI Exemption

Critics challenge that Congress should not amend the REI Exemption because any expansion of the exemption exceeds Congress's authority.[155] These critics fail to recognize, however, that Congress eagerly expanded the exemption once before in 1972 to protect the religious autonomy of educational institutions.[156] In fact, Congress cognizantly recognized the countervailing fears of the amendments opponents, extensively deliberated over these fears, and ultimately concluded to pass the amendments.[157] Representative Perkins aptly noted that "among the conferences there were some very deeply felt differences. The resolution of those differences . . . as so often happens, has produced a legislative product which is substantially better than either of the [House or Senate] bills which the conferees considered."[158]

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[151] Equal Employment Opportunity Comm'n v. Kamehameha Schools/Bishop Estate, 780 F. Supp. 1317, 1323 (D. Haw. 1991).

[152] Equal Employment Opportunity Comm'n v. Kamehameha Schools/Bishop Estate, 990 F.2d 458, 463 (9th Cir. 1993).

[153] *Id.*

[154] *Kamehameha Schools I*, 780 F. Supp. at 1323.

[155] *See* Sands, *supra* note 26 and accompanying text.

[156] *See* Gordon, *supra* note 26 and accompanying text.

[157] *See* Senate Subcom. on Labor of the Comm. on Labor and Public Welfare, 92d Cong., 2d Sess., Legislative History of the Equal Employment Opportunity Act of 1972 1790 (Comm. Print 1972).

[158] *See* Senate Subcom. on Labor of the Comm. on Labor and Public Welfare, 92d Cong., 2d Sess., Legislative History of the Equal Employment Opportunity Act of 1972 1855 (Comm. Print 1972); *see also* Stacey M. Brandenburg, *Alternatives to Employment Discrimination at Private Religious Schools*, 1999 ANN. SURV. AM. L. 335 (1999), at n.36.

Moreover, it is also important to note that the REI Exemption will not be limitless. For example, the exemption allows only for employment decisions based on religion; and religious employers are still in violation of Title VII if they discriminate based on other grounds such as race, sex, or national origin.[159] This exemption showcases Congress's ability to make a rule allowing for religious freedom, yet limit that rule so that it does not expand too far. Legislative attempts to protect religious freedom, however, are sometimes at odds with other branches of government.[160]

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[159] *See* Equal Employment Opportunity Comm'n v. Miss. College, 626 F.2d 477 (5th Cir. 1980). In *Miss. College*, the EEOC filed a claim on behalf of a white, female, part-time faculty member who alleged that she was discriminated against under Title VII for being denied a full-time position in the psychology department. *Id.* at 479-80. The Fifth Circuit Court of Appeals remanded the case for clarification as to whether the college based its employment decision on religion or sex. *Id.* at 485-86. The court then stated that if the district court determines that the college based its employment decision on religion, the college could qualify for an exemption. However, if the college based its decision on either sex or race, and not religion, the college could not receive an exemption under Title VII. *Id.* at 484-86. *See also* Boyd v. Harding Acad., 88 F. Supp. 410, 413 (W.D. Tenn. 1995) (acknowledging that Title VII does not exempt religious educational institutions with respect to all discrimination, and that Title VII would still apply to a religious institution charged with sex discrimination).

[160] There is a dispute between Congress and the courts over religious regulation. In 1990, the United States Supreme Court issued Employment Division v. Smith, 494 U.S. 872, 879 (1990), where the Court held that "the right of free exercise [of religion] does not relieve an individual of the obligation to comply with a valid and neutral law of general applicability." *Id. See* Thomas C. Berg, *Religious Liberty in America at the End of the Century*, 16 J.L.& RELIGION 187, 192 (2001) (stating that the *Smith* decision limits the free exercise guarantee).

As a direct result of the Court's decision in *Smith*, Congress enacted the Religious Freedom Restoration Act of 1993 (RFRA), 107 Stat. 1488 (codified as 42 U.S.C. §§ 2000bb to bb-4 (2000)), to prohibit the government from "substantially burdening" a person's exercise of religion. *See* Mary L. Topliff, *Validity, construction, and Application of Religious Freedom Restoration Act*, 135 A.L.R. FED. 121 (1996). The rationale behind the enactment of RFRA stemmed from Congress's desire to protect the freedom and autonomy of an individual to engage in religious practices. *Id.* In *Equal Employment Opportunity Comm'n v. Catholic Univ. of Am.*, 83 F.3d 455 (D.C. Cir. 1996) an associate professor of theology at the Catholic University in the Cannon Law Department was denied a tenured position. *Id.* The court held that because the Roman Catholic Church was a religious body with a religious function, the Catholic university was protected from governmental interference by the RFRA. *Id.* at 470.

The story, however, does not end there. The United States Supreme Court in *City of Boerne v. Flores*, 521 U.S. 507 (1997) held that the Religious Freedom Restoration Act was an unconstitutional use of Congressional power. *Id.* at 511. The Court determined that Congress's power under Section 5 of the Fourteenth Amendment only allows for "remedial" and not "substantive" legislative power. *Id.* at 529-30.

The dispute between the Supreme Court and Congress continues with Congress's most recent enactment, the Religious Land Use and Institutionalized Person Act (RLUIPA), 114 Stat. 803 (codified as 42 U.S.C. §§ 2000cc to cc-5 (2001)). This act was designed to ameliorate the hardship that land regulations put on the ability of people to assemble and worship. *See* Roman R. Storzer & Anthony R. Picarello, Jr., *The Religious Land Use and Institutionalized Persons*

3. This solution is consistent with the First Amendment's Establishment Clause

Whenever Congress enacts legislation concerning religion, First Amendment Establishment Clause issues are frequently raised.[161] While the First Amendment plainly states the "Congress shall make no law respecting an Establishment of religion,"[162] the United States Supreme Court has not extensively interpreted how this clause affects the REI Exemption under Title VII.[163] Accordingly, the case law concerning the relationship between the exemption and the Establishment Clause is limited. In fact, the closest the Supreme Court has come to expounding on the issue was in *Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*.[164]

In *Amos*, the Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints ("CPB") fired an assistant building engineer employed at one of their gymnasiums because he lacked certification as a "temple recommend."[165] The discharged employee filed suit alleging that CPB violated Title VII's prohibition against religious discrimination and could not qualify for an exemption under Title VII because any exemption for religious employers violates the Establishment Clause of the First Amendment.[166] CPB countered by maintaining that, as a religious entity

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Act of 2000: A Constitutional Response to Unconstitutional Zoning Practices, 9 GEO. MASON L. REV. 929, 943 (2001). Moreover, one commentator has suggested that one of the main reasons the Act was passed was to counter the Court's decision in *Boerne*. *Id.* While RLUIPA does protect religion, its validity has yet to be completely tested and, thus far, has predominantly been used in instances where land use regulations encumber religion. Nevertheless, RLUIPA illustrates the friction between the legislative and the judicial branches of government in dealing with religious freedom issues.

This dispute between Congress and the Courts may be beneficial, however, because if Congress does amend Title VII, the Supreme Court may be prompted to put forth an opinion and finally rule on what a "religious educational institution" actually is and what minimum criteria are necessary to qualify for the REI Exemption.

[161] Although the *Kamehameha Schools II* decision did not address Title VII's validity under the Establishment Clause, the Title VII exemptions still raise Establishment Clause concerns in that Congress enacted legislation regarding religion.

[162] U.S. CONST. amend. I.

[163] *See* Brandenburg, *supra* note 26, at 343 (acknowledging that the REI Exemption has been challenged on Establishment grounds).

[164] 483 U.S. 327 (1987).

[165] *Id.* at 330. A "temple recommend" is a person who is certified as a member of the Mormon Church and is eligible to attend its temples and participate in religious ceremonies. *Id.*

[166] *Id.* at 331; *see* U.S. CONST. amend. I.

associated with the Church of Jesus Christ of Latter-Day Saints (or Mormon Church), it was entitled to an exemption from Title VII.[167]

The United States Supreme Court held that the Title VII exemptions did not violate the First Amendment's Establishment Clause and that the CPB could legitimately use religion as a basis for making employment decisions.[168] The Court reasoned that Title VII exemptions were valid under the Establishment Clause because they passed all three prongs of the test set out in *Lemon v. Kurtzman.*[169]

The *Lemon* test requires that the law: (1) serve a secular legislative purpose; (2) have a principal or primary effect that neither advances nor inhibits religion; and (3) not foster an excessive governmental entanglement with religion.[170] The *Amos* Court found that it is a permissible legislative purpose to allow religious institutions to define and carry out their religious missions without significant governmental interference, that it is a religious organization's very purpose to advance religion and its not the government that is doing the advancing, and that the Title VII exemptions do not entangle church and state because they attempt to do the opposite--separate the two.[171]

The solution posed by this paper, to have Congress define a religious educational institution and the minimum standards of exemption eligibility, is likewise consistent with the Establishment Clause. The solution passes all three prongs of the *Lemon* test. First, the solution serves a secular purpose by attempting to provide religious educational institutions with autonomy to carry out their activities. Second, the solution neither advances nor inhibits religion because a religious organization's very purpose is to advance religion. Finally, the solution does not entangle church and state but, in fact, draws a line between the two by specifying that too much funding by the government may prevent an institution from qualifying for the exemption.

4. Positive aspects of defined standards: clear standards and concrete language will lead to fair and equitable rulings

The first advantage of having Congress create definite standards is that it will eliminate many of the problems generated by the *Townley* test. New standards would compel consideration of the religious history of the educational institution, set a minimum threshold, and procure clear and consistent rulings.

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[167] *Amos*, 483 U.S. at 331.

[168] *Id.* at 339.

[169] *Id.* at 335-39; *see* Lemon v. Kurtzman, 403 U.S. 612 (1971).

[170] *Amos*, 483 U.S. at 335-39.

[171] *Id.*

Second, defined standards also put organizations on notice so that they know exactly which institutions are entitled to a REI Exemption. Numerous groups would benefit from knowing where the line is drawn. These groups include courts that are presented with the task of interpreting the exemption. Courts would benefit from clear standards because of their commitment to produce fair rulings and set solid precedent. In addition, a second group that would undoubtedly benefit from knowing where the line is drawn would be those institutions who want to qualify for the exemption. A third group that would want to be put on notice would consist of every religious educational institution that currently qualifies for the exemption. Logically, a religious educational institution would be afraid of losing the exemption in the future if the institution does not meet the exemption's current standards. In fact, eight Catholic and Protestant colleges joined in amicus curiae briefs in support of the Kamehameha Schools' petition for certiorari to the Ninth Circuit.[172] These schools were evidently fearful of having their exemptions revoked.

A number of commentators suggest that many religious educational institutions are not as "religious" as they used to be. These religious educational institutions may not currently have enough of a religious emphasis to maintain their exemption.[173] One commentator proposes that this is probably because the "religious emphasis in many of these institutions has diminished,"[174] and that "the pattern among American religious education institutions has been dilution and diminution of institutional religious mission."[175] Other commentators have proposed that some institutions, once controlled by churches, are either no longer church controlled or under a lesser amount of control by the church.[176] Whatever the case, having Congress promulgate

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[172] William Bentley Ball, *Supreme Court Review: Church/State Jurisprudence*, 36 CATH. LAW. 233, 244 (1996) (explaining that "if the Ninth Circuit's ruling were to stand, the government would be able to exercise virtually unlimited powers with respect to religion . . . [i]n essence, the Ninth Circuit was frustrating the intent of the decedent's will").

[173] Ralph D. Mawdsley, *Are Non-Church Controlled Educational Institutions Still Entitled To Title VII Religious Exemptions*, 87 ED. LAW REP. 1 (1994) [hereinafter Mawdsley, *Non-Church Controlled*]; Ralph D. Mawdsley, *Limiting the Right of Religious Educational Institutions to Discriminate on the Basis of Religion*, 94 ED. LAW REP. 1123 (1994) [hereinafter Mawdsley, *Limiting the Right*]; *Trustees Limit Baptist Control Over University*, NEW YORK TIMES, Oct. 21, 1990, at 47.

[174] Mawdsley, *Non-Church Controlled*, *supra* note 173, at 1.

[175] Mawdsley, *Limiting the Right*, *supra* note 173, at 1129.

[176] *Fundamentalists Lose Bid to Control Baylor*, WASHINGTON POST, Nov. 12, 1991, at A3; Andy Peters, *Mercer Faces Potential Fight*, MACON TELEGRAPH, May 19, 2003, at A1; *Trustees Limit Baptist Control Over University*, NEW YORK TIMES, Oct. 21, 1990, at 47 (explaining that these colleges have moved away from their affiliation with religious denominations because of the religious denominations' attempts to gain control over curriculum and implement faculty changes).

concrete language will facilitate clarity and be more of a benefit than a hindrance.

IV. CONCLUSION

The controversies surrounding the REI Exemption are difficult and confusing. Adding to the confusion is the use of an ambiguous standard called the *Townley* test. This test is flawed and should be abandoned because it: (1) greatly downplays an institution's religious background; (2) does not set a minimum threshold to determine who receives the exemption; and (3) provides no guidance to those who want to qualify for the exemption.

Therefore, Congress should establish clear standards to guide those who wish to use the REI exemption. More specifically, Congress should define a religious educational institution and the minimum threshold needed to qualify for the exemption. Doing so would eliminate the vagueness and uncertainty surrounding the REI Exemption. This solution would not only encourage clear and consistent rulings but also put religious educational institutions on notice. Further, it would be consistent with current modern principles under the First Amendment's Establishment Clause, and, as such, should be noted for its ability to promote, rather than repress, religious freedom.

Kaliko Warrington[177]

[177] J.D. Candidate, William S. Richardson School of Law, University of Hawaii at Mānoa, Class of 2004.

Punishment and Deterrence: Merely a Mantra; A Casenote on *State Farm v. Campbell*

I. INTRODUCTION

A Utah jury found that State Farm Mutual Automobile Insurance Company, unlike a "good neighbor," had a policy of defrauding its insureds in order to meet financial goals.[1] The jury awarded $145 million in punitive damages against State Farm.[2] The Utah Supreme Court affirmed the multi-million dollar award and State Farm appealed to the United States Supreme Court.[3] On appeal, the Court, in *State Farm Mutual Automobile Insurance Co. v. Campbell*,[4] struck down the punitive damages award, holding that the award was arbitrary and violated the Due Process Clause of the Fourteenth Amendment.[5] The Court advised that the award should be reduced to an amount at or near the $1 million compensatory award.[6] This note asserts that the Supreme Court incorrectly reversed the award because the Court failed to recognize the degree of reprehensibility of State Farm's fraudulent conduct and the amount necessary for the punitive damages award to effectively punish and deter such conduct.

The Restatement (Second) of Torts articulates the purpose of punitive damages as the punishment of outrageous, malicious, and wanton conduct and the deterrence of similar conduct in the future.[7] These twin goals have been recited countless times by the United States Supreme Court,[8] including in *State Farm*, in which the Court stated that "[p]unitive damages may properly be imposed to further a State's legitimate interests in punishing unlawful

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[1] Campbell v. State Farm Mut. Auto. Ins. Co., 65 P.3d 1134, 1148 (Utah 2001), *rev'd*, 538 U.S. 408 (2003).

[2] *Id.* at 1143.

[3] State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, ___, 123 S. Ct. 1513, 1519 (2003).

[4] 538 U.S. 408.

[5] *Id.* at ___, 123 S. Ct. at 1526. The United States Supreme Court has held that the Due Process Clause of the Fourteenth Amendment prohibits the imposition of grossly excessive or arbitrary punishments on tortfeasors, based on the unfairness of arbitrarily depriving citizens of life, liberty, or property. *Id.* at ___, 123 S. Ct. at 1519-20.

[6] *Id.* at ___, 123 S. Ct. at 1526.

[7] RESTATEMENT (SECOND) OF TORTS § 908 (2003).

[8] *See, e.g.*, Pac. Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 19 (1991) (stating that "punitive damages are imposed for purposes of retribution and deterrence"); BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 568 (1996) ("Punitive damages may properly be imposed to further a State's legitimate interests in punishing unlawful conduct and deterring its repetition."); Cooper Indus. v. Leatherman Tool Group, 532 U.S. 424, 432 (2001) (stating that punitive damages are "intended to punish the defendant and to deter future wrongdoing").

conduct and deterring its repetition."[9] Despite reciting the twin goals mantra of punishing reprehensible behavior and deterring its repetition, however, in applying the three guideposts outlined by the Court in *BMW of North America, Inc. v. Gore*,[10] the majority trivialized the reprehensibility of State Farm's acts and disregarded the State's interest in deterring State Farm from continuing its fraudulent practices.

Section II describes the Court's prior holdings regarding punitive damages awards. Section III provides the factual background and a summary of the majority and dissenting opinions of the instant case. Section IV examines the Court's application of the *Gore* guideposts to *State Farm*, and finds that the majority failed to punish State Farm because the majority incorrectly assessed the reprehensibility of State Farm's acts and ignored the policy goal of deterrence.

II. BACKGROUND

State Farm and *Gore* signified the first two times the Supreme Court reversed punitive damages awards as being unconstitutionally excessive.[11] The Court has not always been so eager to overturn these awards.[12] Rather, prior to both *State Farm* and *Gore*, the Court hesitated to impose substantive constitutional limitations on punitive awards.[13]

A. *Before* Gore

In 1989, the Court, in *Browning-Ferris Industries of Vermont, Inc. v. Kelco Disposal, Inc.*,[14] discussed the idea that the Due Process Clause imposed some limits on punitive damages. At that time, however, it did not address the issue because the defendant did not timely raise the constitutional argument.[15] In 1991, the Court had the opportunity to consider the constitutionality of punitive damages in *Pacific Mutual Life Insurance Co. v. Haslip*.[16] In *Haslip*, the Court upheld a punitive damages award as constitutional because it

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[9] *State Farm*, 538 U.S. at ___, 123 S. Ct. at 1519 (quoting *Gore*, 517 U.S. at 568).

[10] 517 U.S. 559.

[11] *State Farm*, 538 U.S. at ___, 123 S. Ct. at 1526; *Gore*, 517 U.S. at 585-86; *see State Farm*, 538 U.S. at ___, 123 S. Ct. at 1527 (Ginsburg, J., dissenting) (citing *Gore*, 517 U.S. at 599 (Scalia, J., dissenting)).

[12] *See* discussion *infra* section II.A.

[13] *See* discussion *infra* section II.A.

[14] 492 U.S. 257 (1989).

[15] *Id.* at 276.

[16] 499 U.S. 1 (1991).

comported with procedural due process.[17] A few years later, in *TXO Production Corp. v. Alliance Resources Corp.*,[18] the Court affirmed a state court punitive damages award that was 526 times greater than the actual damages awarded by the jury,[19] reasoning that the award did not violate procedural[20] or substantive due process.[21]

B. BMW of North America, Inc. v. Gore

In 1996, three years after *TXO*, the Court decided *Gore*, and for the first time struck down a punitive damages award as grossly excessive.[22] In *Gore*, Dr. Gore purchased what he believed to be a brand new BMW from an authorized dealer in Alabama, which he later discovered had been repainted.[23] Dr. Gore brought suit against BMW alleging that the failure to disclose that the car had been repainted constituted suppression of a material fact.[24] At trial, BMW acknowledged that it did not make the disclosure because of its nationwide policy of selling a repaired car as new, without informing the dealer that repairs had been made, if the cost of repairing the damage did not exceed three percent of the suggested retail price.[25]

The jury returned a verdict against BMW for compensatory damages of $4,000 and punitive damages of $4 million.[26] Consequently, BMW changed its national policy to one of "full disclosure of all repairs, no matter how minor."[27] BMW then filed a post-trial motion to set aside the punitive damages award, which the court denied.[28] BMW appealed to the Alabama Supreme Court, which held that the jury improperly computed the amount of punitive damages by taking into consideration similar sales in other jurisdictions, and ordered a remittitur of $2 million.[29]

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[17] *Id.* at 23. The Court held that Pacific Mutual "had the benefit of the full panoply of Alabama's procedural protections," which included adequate jury instructions and sufficient post-trial judicial review. *Id.*

[18] 509 U.S. 443 (1993).

[19] *Id.* at 451.

[20] *Id.* at 463.

[21] *Id.* at 462.

[22] BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 585-86 (1996); *see* State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, ___, 123 S. Ct. 1513, 1527 (2003) (Ginsburg, J., dissenting) (citing *Gore*, 517 U.S. at 599 (Scalia, J., dissenting)).

[23] *Id.* at 563.

[24] *Id.*

[25] *Id.* at 563-64.

[26] *Id.* at 565.

[27] *Id.* at 566.

[28] *Id.*

[29] *Id.* at 567.

1. The majority opinion: The three Gore guideposts

The United States Supreme Court granted certiorari.[30] The majority[31] agreed with the Alabama Supreme Court's holding that the $4 million award impermissibly reflected a desire to punish out-of-state conduct.[32] Nevertheless, the majority reversed and remanded,[33] holding that the $2 million award remained grossly excessive.[34] The Court announced three guideposts for reviewing courts to follow in determining whether a punitive damages award is grossly excessive and thus, substantively unconstitutional: reprehensibility, ratio, and comparable liability.[35]

The first and "[p]erhaps the most important indicium of the reasonableness of a punitive damages award is the degree of reprehensibility of the defendant's conduct."[36] The Court enumerated five factors that must be considered in determining the degree of reprehensibility: (1) whether the conduct caused physical as opposed to economic harm; (2) whether the tortious conduct evinced an indifference to or a reckless disregard of the health or safety of others; (3) whether the target of the conduct had financial vulnerability; (4) whether the conduct involved an isolated incident or repeated actions; and (5) whether intentional malice, trickery or deceit, or mere accident caused the harm.[37] Applying these factors, the Court held that BMW's conduct was not egregiously improper.[38]

The second indicium of an unreasonable or excessive punitive damages award is its ratio to the compensatory award.[39] The Court noted that it has "consistently rejected the notion that the constitutional line is marked by a

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[30] BMW of N. Am., Inc. v. Gore, 513 U.S. 1125 (1995).

[31] Justice Stevens wrote the opinion of the Court, in which Justices O'Connor, Kennedy, Souter, and Breyer joined.

[32] *Gore*, 517 U.S. at 573.

[33] *Id.* at 586.

[34] *Id.* at 585-86. Justice Breyer, joined by Justice O'Connor and Justice Souter, wrote a concurring opinion. In addition to finding that the award was grossly excessive, Justice Breyer asserted that because the standards and procedures of the Alabama Supreme Court provided no significant protections against an arbitrary punitive damages award, the award did not comport with procedural due process. *Id.* at 586-98 (Breyer, J., concurring). This concept will not be discussed further as it is beyond the scope of this note.

[35] *Id.* at 575.

[36] *Id.*

[37] *See id.* at 576-77.

[38] *Id.* at 576. The *Gore* Court noted that a defendant who has repeatedly engaged in prohibited conduct (i.e. a recidivist) may be punished more severely than a first offender. *Id.* at 577. The Court, however, found that the harm was economic and did not endanger health or safety, that Dr. Gore was not financially vulnerable, and that there was "no evidence that BMW acted in bad faith." *Id.* at 579.

[39] *Id.* at 580.

simple mathematical formula."[40] It concluded, however, that the $2 million award of punitive damages, which was 500 times the amount of Dr. Gore's actual harm, "must surely 'raise a suspicious judicial eyebrow.'"[41]

The third guidepost instructs courts to compare the punitive damages award to the civil or criminal penalties that could be imposed for comparable malfeasance.[42] The $2 million sanction was substantially larger than the statutory fines available for similar misconduct.[43] Furthermore, the Court concluded that even though the $2 million punitive damages award caused BMW to change its policy, there existed "no basis for assuming that a more modest sanction would not have been sufficient to motivate full compliance with the disclosure requirement imposed by the Alabama Supreme Court in this case."[44]

2. Dissenting opinions

In his dissenting opinion, Justice Scalia, joined by Justice Thomas, asserted that "punitive damages represent the assessment by the jury, as the voice of the community, of the measure of punishment the defendant deserved."[45] Justice Scalia concluded that the Court's "decision, though dressed up as a legal opinion, is really no more than a disagreement with the community's sense of indignation or outrage expressed in the punitive award of the Alabama jury, as reduced by the state supreme court."[46] Justice Scalia thus described the Court's ruling as an "unjustified incursion into the province of state governments."[47]

Justice Scalia further disagreed with the majority's holding that Alabama could not consider conduct outside of the state for the purpose of assessing the reprehensibility of an actor.[48] Justice Scalia stated that "if a person has been held subject to punishment because he committed an unlawful act, the degree of his punishment assuredly can be increased on the basis of any other conduct of his that displays his wickedness, unlawful or not."[49] Justice Scalia asserted

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[40] *Id.* at 582.

[41] *Id.* at 583 (quoting TXO Prod. Corp. v. Alliance Res. Corp., 509 U.S. 443, 481 (1993) (O'Connor, J., dissenting)).

[42] *Id.*

[43] *Id.* at 584. "The maximum civil penalty authorized by the Alabama Legislature for a violation of its Deceptive Trade Practices Act is $2,000 . . . ." *Id.*

[44] *Id.* at 585.

[45] *Id.* at 600 (Scalia, J., dissenting).

[46] *Id.* (Scalia, J., dissenting).

[47] *Id.* at 598 (Scalia, J., dissenting).

[48] *Id.* at 603 (Scalia, J., dissenting).

[49] *Id.* (Scalia, J., dissenting).

that the majority lacked authority for its proposition that out-of-state conduct could not be considered.[50]

Justice Ginsburg, in her dissenting opinion in which Chief Justice Rehnquist joined, reprimanded the majority for "unnecessarily and unwisely ventur[ing] into territory traditionally within the States' domain."[51] Justice Ginsburg asserted that the Court "ha[d] only a vague concept of substantive due process, a 'raised eyebrow' test as its ultimate guide."[52] She thus concluded that the "Court is not well equipped" to correct the errors of state courts regarding whether or not an award comports with substantive due process.[53]

III. STATEMENT OF THE CASE

In apparent response to Justice Ginsburg's assertion that the Court was ill-equipped to determine whether a punitive damages award was substantively constitutional, the Court decided *State Farm.* In *State Farm,* the Court clarified the *Gore* guideposts to such an extent that Justice Ginsburg no longer described the Court as being ill-equipped.[54] Instead, she likened the majority's guideposts to "marching orders."[55]

A. Factual and Procedural Background

In 1981, Curtis Campbell was driving with his wife on a two-lane highway in Utah.[56] In order to pass the six vehicles traveling in front of them, Campbell drove into oncoming traffic.[57] To avoid a head-on collision, Todd Ospital, driving a small car heading in the opposite direction, swerved onto the shoulder, lost control of his car, and collided with an automobile driven by Robert G. Slusher.[58] The crash killed Ospital and permanently disabled Slusher.[59]

A wrongful death and tort action followed.[60] Although the investigators and witnesses reached a consensus early on that Mr. Campbell's unsafe pass had

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[50] *Id.* (Scalia, J., dissenting).

[51] *Id.* at 607 (Ginsburg, J., dissenting).

[52] *Id.* at 613 (Ginsburg, J., dissenting) (citation omitted).

[53] *See id.* at 612 (Ginsburg, J., dissenting).

[54] State Farm Mut. Auto. Ins. Co., v. Campbell, 538 U.S. 408, ___, 123 S. Ct. 1513, 1531 (2003) (Ginsburg, J., dissenting).

[55] *Id.* (Ginsburg, J., dissenting).

[56] *Id.* at ___, 123 S. Ct. at 1517.

[57] *Id.*

[58] *Id.*

[59] *Id.*

[60] *Id.*

caused the accident, Campbell's insurance company, State Farm, decided to contest liability and refused Ospital's estate ("Ospital") and Slusher's invitation to settle the case for the policy limit of $50,000.[61] The litigation proceeded to trial, and State Farm assured the Campbells that their assets were safe, that they had no liability for the accident, and that they need not obtain separate counsel.[62] The jury found Mr. Campbell 100 percent at fault and the trial court entered judgment against the Campbells for $185,849.[63] State Farm refused to cover the liability in excess of the $50,000 policy limit and advised the Campbells to sell their property to pay the judgment.[64] State Farm also refused to post a supersedeas bond to allow the Campbells to appeal the decision.[65] The Campbells procured their own counsel and appealed the verdict.[66]

In 1989, the Utah Supreme Court affirmed the verdict against Mr. Campbell in the wrongful death and tort actions.[67] State Farm then paid the entire judgment.[68] Subsequently, the Campbells pursued an action against State Farm alleging bad faith, fraud, and intentional infliction of emotional distress.[69] The trial court granted State Farm's motion for summary judgment, reasoning that because State Farm had paid the excess verdict, there had been no bad faith as a matter of law.[70] The Campbells appealed this decision and the Utah Court of Appeals reversed and remanded, stating that although State Farm had paid the verdict, "the Campbells had the right to pursue their claim that there had been bad faith in previous dealings."[71]

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[61] *Id.* at ___, 123 S. Ct. at 1517-18.

[62] Campbell v. State Farm Mut. Auto. Ins. Co., 65 P.3d 1134, 1142 (Utah 2001), *rev'd*, 538 U.S. 408 (2003).

[63] *Id.* The court entered judgment in favor of Slusher for $135,000 and in favor of Ospital's estate for $50,849. Slusher v. Ospital, 777 P.2d 437, 439 (Utah 1989).

[64] *Campbell*, 65 P.3d at 1142.

[65] *Id.*

[66] *State Farm*, 538 U.S. at ___, 123 S. Ct. at 1518. In 1984, Mr. Campbell entered into an agreement with Slusher and Ospital, in which Mr. Campbell agreed to pursue a bad faith action against State Farm, and to be represented by Slusher's and Ospital's attorneys. *Campbell*, 65 P.3d at 1142. Mr. Campbell agreed that Slusher and Ospital would have the right to all major decisions relating to that action, no settlement could be concluded without Slusher's and Ospital's approvals, and Slusher and Ospital would receive ninety percent of any verdict against State Farm. *Id.* In exchange, Slusher and Ospital agreed to not seek satisfaction of their judgment from Mr. Campbell. *Id.*

[67] *Slusher*, 777 P.2d at 445.

[68] *State Farm*, 538 U.S. at ___, 123 S. Ct. at 1518.

[69] *Id.*

[70] *Campbell*, 65 P.3d at 1142.

[71] *Id.*

On remand, the trial court granted State Farm's request to bifurcate the trial.[72] During the second phase of the trial, which addressed the compensatory and punitive damages of the Campbells's claims, State Farm argued that it had made an honest mistake.[73] The Campbells, however, introduced evidence that State Farm's refusal to settle, despite the consensus that Mr. Campbell caused the accident, resulted from State Farm's national scheme to meet corporate financial goals by deliberately deceiving and cheating its customers.[74] State Farm referred to this scheme as its "Performance, Planning and Review," or PP & R, policy.[75] To prove the existence of this scheme, the trial court, over State Farm's objections, allowed evidence of State Farm's nation-wide fraudulent practices.[76]

The jury awarded the Campbells $2.6 million in compensatory damages and $145 million in punitive damages, which the trial court reduced to $1 million and $25 million, respectively.[77] Both parties appealed.[78] The Utah Supreme Court, applying both state law and federal law as determined by the three guideposts in *Gore*, affirmed the $1 million compensatory damages and reinstated the $145 million award of punitive damages.[79] The United States Supreme Court granted certiorari.[80]

B. The Majority Opinion

The majority[81] began its discussion of punitive damages by reciting the twin goals mantra of punishment and deterrence.[82] In beginning its analysis, the majority stated that "[u]nder the principles outlined in *BMW of North America, Inc. v. Gore*, this case is neither close nor difficult," and concluded that the Utah Supreme Court erred in reinstating the jury's $145 million

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[72] *State Farm*, 538 U.S. at ___, 123 S. Ct. at 1518. In the first phase of the trial, the jury found that State Farm had acted in bad faith in deciding not to settle because there was a substantial likelihood of an excess judgment against Mr. Campbell. *Id.*

[73] *Campbell*, 65 P.3d at 1143.

[74] *Id.* at 1148.

[75] *Id.* at 1143.

[76] *Id.*

[77] *Id.*

[78] *Id.*

[79] *See generally Campbell*, 65 P.3d 1134.

[80] State Farm Mut. Auto. Ins. Co. v. Campbell, 535 U.S. 1111 (2002).

[81] Justice Kennedy wrote the opinion of the Court, in which Chief Justice Rehnquist, Justice Stevens, Justice O'Connor, Justice Souter, and Justice Breyer joined. Justice Scalia, Justice Thomas, and Justice Ginsburg filed dissenting opinions.

[82] State Farm Mut. Auto. Ins. Co., v. Campbell, 538 U.S. 408, ___, 123 S. Ct. 1513, 1519 (2003).

punitive damages award.[83] The Court reversed and remanded, holding that the Utah Supreme Court incorrectly applied the three guideposts in *Gore*.[84]

1. Guidepost #1: Reprehensibility

First, the State Farm Court addressed the reprehensibility guidepost, citing the five factors specified in *Gore* that determine the degree of reprehensibility of the defendant's misconduct.[85] The Court held that "a more modest punishment for this reprehensible conduct could have satisfied the State's legitimate objectives."[86] The Court added that the excessive award resulted from the jury's and the Utah Supreme Court's desire to inappropriately use this case "as a platform to expose, and punish, the perceived deficiencies of State Farm's operations throughout the country."[87] The Court reasoned that the Utah Supreme Court erred in using evidence of the nationwide PP & R policy to condemn State Farm.[88] The Court asserted that "[a] State cannot punish a defendant for conduct that may have been lawful where it occurred .... Nor, as a general rule, does a State have a legitimate concern in imposing punitive damages to punish a defendant for unlawful acts committed outside of the State's jurisdiction."[89] The Court conceded that "[l]awful out-of-state conduct may be probative when it demonstrates the deliberateness and culpability of the defendant's action in the State where it is tortious, but that conduct must have a nexus to the specific harm suffered by the plaintiff."[90] The Court found no nexus.[91]

The Court further determined that the Utah courts "awarded punitive damages to punish and deter conduct that bore no relation to the Campbell's harm,"[92] stating that "[a] defendant should be punished for the conduct that harmed the plaintiff, not for being an unsavory individual or business."[93] Because the Court determined that much of the evidence introduced by the Campbells "had nothing to do with"[94] the Campbells's claim, the Court also rejected the assertion that State Farm's actions constituted recidivism, and thus did not accept recidivism as an explanation of the large punitive damages

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[83] *Id.* at ___, 123 S. Ct. at 1521.
[84] *Id.* at ___, 123 S. Ct. at 1526.
[85] *Id.* at ___, 123 S. Ct. at 1521; *see also supra* note 37 and accompanying text.
[86] *State Farm*, 538 U.S. at ___, 123 S. Ct. at 1521.
[87] *Id.*
[88] *Id.* at ___, 123 S. Ct. at 1521-22.
[89] *Id.* at ___, 123 S. Ct. at 1522.
[90] *Id.*
[91] *See id.*
[92] *Id.* at ___, 123 S. Ct. at 1523.
[93] *Id.*
[94] *Id.*

award.[95] The Court, therefore, concluded that State Farm's actions towards the Campbells were not sufficiently reprehensible to justify the punitive damages award.

2. Guidepost #2: Ratio

In discussing the second guidepost, the ratio between the actual or potential harm suffered by the plaintiff and the punitive damages award, the Court reiterated its reluctance to identify a bright-line ratio that a punitive damages award cannot exceed.[96] The Court then held that "[s]ingle-digit multipliers are more likely to comport with due process."[97] The Court, however, conceded that a higher ratio may be necessary where "the injury is hard to detect or the monetary value of noneconomic harm might have been difficult to determine."[98] Nevertheless, the Court stated that this case justified "a punitive damages award at or near the amount of compensatory damages."[99]

The Court rejected the Utah Supreme Court's justification of the award that State Farm had failed to report a prior $100 million punitive damages award to its headquarters.[100] The Court held that this conduct occurred outside the state of Utah and "was dissimilar, and of such marginal relevance that it should have been accorded little or no weight."[101] The Court further determined that "the adverse effect on the State's general population was in fact minor,"[102] reasoning that no testimony demonstrated harm to the people of Utah other than the Campbells, and therefore, this too did not justify the large ratio.[103]

The Court also rejected the justifications that State Farm will only be punished in one out of 50,000 cases and that State Farm has extreme wealth.[104] The Court stated that the wealth of State Farm could not "justify an otherwise unconstitutional punitive damages award."[105] The Court also dismissed State Farm's wealth as a justification because of the policy reason that its wealth is "what other insured parties in Utah and other States must rely upon for

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[95] *Id.* The Court defines recidivism as repeated misconduct that replicates prior transgressions, noting that the past misconduct "need not be identical" to the present misconduct. *See id.*

[96] *Id.* at ___, 123 S. Ct. at 1524.

[97] *Id.*

[98] *Id.* (quoting BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 582 (1996)).

[99] *Id.* at ___, 123 S. Ct. at 1526.

[100] *Id.* at ___, 123 S. Ct. at 1525.

[101] *Id.*

[102] *Id.*

[103] *Id.*

[104] *Id.*

[105] *Id.*

payment of claims."[106] Rejecting all of the Utah Supreme Court's justifications for the high ratio, the Court advised that, on remand, the punitive damages award should be reduced to approximately a one to one ratio to comport with due process.[107]

3. Guidepost #3: Comparable liability

The third *Gore* guidepost requires courts to compare the difference between the punitive damages awarded by the jury and the penalties authorized in comparable cases.[108] Departing from *Gore*, the Court held that the possible criminal sanctions should no longer be considered in determining the punitive damages award, and that only civil penalties should be considered.[109] Thus, because the only relevant civil sanction under Utah law for the wrong done to the Campbells appeared to be a $10,000 fine for an act of fraud, the Court concluded that the $145 million award was greatly excessive.[110]

C. Dissenting Opinions

Three Justices filed dissenting opinions. Justice Scalia reiterated his dissent in *Gore* that "the Due Process Clause provides no substantive protections against 'excessive' or 'unreasonable' awards of punitive damages."[111] Similarly, Justice Thomas maintained that "the Constitution does not constrain the size of punitive damages awards."[112]

In Justice Ginsburg's dissenting opinion, she restated her dissent from *Gore* that the Court should resist questioning state courts' determinations of punitive damages awards because this act intrudes upon "'territory traditionally within the States' domain.'"[113] Justice Ginsburg contended that legislation may be proper to control punitive damages, but "[n]either the amount of the award nor the trial record . . . justifie[d] this Court's substitution of its judgment for that of Utah's competent decisionmakers."[114] She further examined the majority's rulings on the three *Gore* guideposts.

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[106] *Id.*

[107] *Id.* at ___, 123 S. Ct. at 1526.

[108] *Id.*

[109] *Id.*

[110] *Id.*

[111] *Id.* (Scalia, J., dissenting) (quotations omitted).

[112] *Id.* (Thomas, J., dissenting).

[113] *Id.* at ___, 123 S. Ct. at 1527 (Ginsburg, J., dissenting) (quoting BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 612 (1996) (Ginsburg, J., dissenting)).

[114] *Id.* (Ginsburg, J., dissenting).

1. Guidepost #1: Reprehensibility

In addressing the reprehensibility guidepost, Justice Ginsburg asserted that the majority failed to consider the vast amount of evidence describing the fraudulent and reprehensive nature of State Farm's PP & R policy because the majority improperly concluded that such evidence bore "no relation to the Campbells's harm."[115] She described some of the evidence illustrating the adverse effects of State Farm's PP & R policy, and questioned the majority's dismissal of this evidence.[116] She also questioned the majority's statements that, contrary to the findings of the Utah trial courts, the Campbells had not shown any "conduct by State Farm similar to that which harmed them,"[117] and "the adverse effect on the State's general population was in fact minor."[118] Justice Ginsburg, furthermore, rejected the majority's reasoning that there existed no "nexus" between State Farm's out-of-state conduct and the harm suffered by the Campbells.[119] She therefore asserted that evidence of out-of-state conduct illustrating the PP & R policy should have been considered probative to demonstrate the deliberateness and culpability of State Farm's actions in Utah.[120]

2. Guidepost #2: Ratio

In criticizing the ratio guidepost, Justice Ginsburg expressed her wariness of the Court setting ratios.[121] She asserted that such specificity should be handled by state legislatures, not by "judicial decree imposed on the States by this Court under the banner of substantive due process."[122] Justice Ginsburg concluded by characterizing the majority's ruling in this case as a "swift conversion of [the *Gore*] guides into instructions that begin to resemble marching orders."[123]

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[115] *Id.* at ___, 123 S. Ct. at 1530 (Ginsburg, J., dissenting) (quoting *State Farm*, 538 U.S. at ___, 123 S. Ct. at 1523).

[116] *Id.* at ___, 123 S. Ct. at 1528-30 (Ginsburg, J., dissenting).

[117] *Id.* at ___, 123 S. Ct. at 1530 (Ginsburg, J., dissenting) (quoting *State Farm*, 538 U.S. at ___, 123 S. Ct. at 1525).

[118] *Id.* (Ginsburg, J., dissenting) (quoting *State Farm*, 538 U.S. at ___, 123 S. Ct. at 1525).

[119] *Id.* at ___, 123 S. Ct. at 1531 (Ginsburg, J., dissenting).

[120] *See id.* at ___, 123 S. Ct. at 1530-31 (Ginsburg, J., dissenting).

[121] *Id.* at ___, 123 S. Ct. at 1531 (Ginsburg, J., dissenting).

[122] *Id.* (Ginsburg, J., dissenting).

[123] *Id.* (Ginsburg, J., dissenting).

IV. ANALYSIS

Upon commencing its analysis of these "marching orders," the majority inappropriately characterized this case as "neither close nor difficult."[124] The majority rationalized this conclusion by trivializing the reprehensibility of State Farm's acts and recommending a one to one punitive to compensatory damages ratio,[125] thus ignoring the state's legitimate interest in deterring such fraudulent conduct. The majority's brief treatment of State Farm's reprehensibility and its recommendation of a one to one ratio led to an improper outcome. State Farm's acts were far more reprehensible than the majority contended and the policy objective of deterrence justified a larger ratio.

A. Reprehensibility

While the trial court took twenty-eight pages to catalog State Farm's reprehensible acts,[126] the majority dismissed State Farm's misconduct in one short paragraph by acknowledging only three instances of misconduct.[127] The majority explained that most of the evidence had no relevance to the reprehensibility analysis.[128] The majority erred in holding that evidence documenting State Farm's PP & R policy was irrelevant to the reprehensibility analysis because the majority incorrectly reasoned that the policy "bore no relation to the Campbells' harm."[129] Substantial evidence illustrated that the Campbells's harm directly resulted from this policy.[130] Thus, contrary to the majority's holding, a sufficient nexus existed between the out-of-state conduct caused by the PP & R policy and the Campbells's harm. Such evidence could therefore have been used to prove State Farm's deliberateness and

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[124] *Id.* at ___, 123 S. Ct. at 1521.

[125] *Id.* at ___, 123 S. Ct. at 1526.

[126] Campbell v. State Farm Mut. Auto. Ins. Co., 65 P.3d 1134, 1147 (Utah 2001), *rev'd*, 538 U.S. 408 (2003).

[127] The Court acknowledged merely three instances of State Farm's misconduct:

> State Farm's employees altered the company's records to make Campbell appear less culpable. State Farm disregarded the overwhelming likelihood of liability and the near-certain probability that, by taking the case to trial, a judgment in excess of the policy limits would be awarded. State Farm amplified the harm by at first assuring the Campbells their assets would be safe from any verdict and by later telling them, postjudgment, to put a for-sale sign on their house.

State Farm, 538 U.S. at ___, 123 S. Ct. at 1521.

[128] *See State Farm*, 538 U.S. at ___, 123 S. Ct. at 1521-24.

[129] *Id.* at ___, 123 S. Ct. at 1523.

[130] *See infra* text accompanying notes 134-41.

culpability.[131] Further, the evidence documenting the PP & R policy provided substantial evidence of repeated misconduct, and State Farm could be punished more severely as a recidivist.[132] Considering all of the factors that determine reprehensibility, it is evident that the majority incorrectly gauged the reprehensibility of State Farm's conduct. State Farm's egregious behavior necessitated a correspondingly high punitive damages award.

1. There was a nexus between State Farm's out-of-state conduct and the Campbells's harm because both the conduct and their harm resulted from the PP & R policy

The majority asserted that evidence of out-of-state conduct is only probative to demonstrate the deliberateness and culpability of the defendant's action in states where tortious conduct has a "nexus to the specific harm suffered by the plaintiff."[133] The majority incorrectly asserted that no nexus existed between the out-of-state conduct dictated by the PP & R policy and the Campbells's harm. Substantial evidence indicated that a sufficient nexus existed.

First, the trial court recited expert testimony that the Campbells's case "was a classic example of State Farm's application of the improper practices taught in the [handbook used to train Utah State Farm employees]."[134] For example, a State Farm employee who handled the Campbells's case testified that his divisional superintendent ordered him to change the portions of his report indicating that Mr. Campbell's fault caused the accident and that the case had a high settlement value.[135] A State Farm manager also instructed the employee to add false facts to the Campbells's file that Ospital sped because he raced to see his pregnant girlfriend.[136] The additional facts served only to distort the assessment of the value of Ospital's claims.[137] The employee testified that the use of this tactic constituted one of several methods used by State Farm to deny claimants fair benefits pursuant to its PP & R scheme.[138]

Furthermore, while the Campbells's case was pending, an in-house attorney, sent by top State Farm management, met with Utah claims personnel and instructed them to destroy a wide range of material that had in the past proved

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[131] *See State Farm*, 538 U.S. at ___, 123 S. Ct. at 1522.

[132] *See id.* at ___, 123 S. Ct. at 1523.

[133] *Id.* at ___, 123 S. Ct. at 1522.

[134] *Id.* at ___, 123 S. Ct. at 1528-29 (Ginsburg, J., dissenting) (quoting App. to Pet. for Cert. at 128a, *State Farm*, 538 U.S. 408 (No. 01-1289)).

[135] *Id.* at ___, 123 S. Ct. at 1528 (Ginsburg, J., dissenting).

[136] *Id.* (Ginsburg, J., dissenting).

[137] Campbell v. State Farm Mut. Auto. Ins. Co., 65 P.3d 1134, 1148 (Utah 2001), *rev'd*, 538 U.S. 408 (2003).

[138] *State Farm*, 538 U.S. at ___, 123 S. Ct. at 1528 (Ginsburg, J., dissenting).

damaging in bad-faith litigation against State Farm.[139] These orders were followed even though at least one meeting participant personally knew that these kinds of materials had been requested by the Campbells in this case.[140] Trial evidence indicated that State Farm routinely destroyed internal company documents that might reveal its PP & R scheme, in order to further insulate itself from liability.[141]

The majority, therefore, incorrectly classified State Farm's PP & R policy as "dissimilar acts, independent from the acts upon which liability was premised"[142] and "conduct that bore no relation to the Campbells' harm."[143] To the contrary, a strong relationship and a sufficient nexus existed between the PP & R policy and the harm that its implementation caused to the Campbells. Accordingly, evidence of the PP & R policy is highly relevant to prove State Farm's deliberateness and culpability.

2. State Farm's PP & R policy caused harm similar to that of the Campbells to other Utah residents, thus evincing repeated misconduct

The majority acknowledged that "repeated misconduct is more reprehensible than an individual instance of malfeasance."[144] The majority, nevertheless, incorrectly reasoned that the amount of the punitive damages award could not be justified by State Farm's recidivism. The majority asserted that evidence of the PP & R policy pertaining to first-party claims "had nothing to do with a third-party lawsuit,"[145] and was thus, not evidence of conduct "similar to that which harmed [the Campbells]."[146] As the trial court and Justice Ginsburg observed, however, State Farm's PP & R policy "applied equally to the handling of both third-party and first-party claims."[147] The PP & R policy promulgated fraud and deceit regardless of the type of claim.

Indeed, substantial evidence showed that the PP & R policy permeated all of State Farm's claims handling, irregardless of the type of claim, and produced repeated misconduct similar to that which harmed the Campbells. For example, the handbook used to train Utah State Farm employees

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[139] *Id.* at ___, 123 S. Ct. at 1529 (Ginsburg, J., dissenting).

[140] *Id.* (Ginsburg, J., dissenting).

[141] *Id.* (Ginsburg, J., dissenting).

[142] *Id.* at ___, 123 S. Ct. at 1523.

[143] *Id.*

[144] *Id.* (quoting BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 577 (1996)).

[145] *Id.*

[146] *Id.* at ___, 123 S. Ct. at 1524.

[147] *Id.* at ___, 123 S. Ct. at 1528 (Ginsburg, J., dissenting) (quoting App. to Pet. for Cert. at 119a, *State Farm*, 538 U.S. 408 (No. 01-1289)).

instructed adjusters to leave critical items out of files.[148] Furthermore, two former State Farm employees both testified about the "intolerable" and "recurrent" pressure of the PP & R policy to reduce payouts below fair value.[149] Moreover, the trial court stated that "the PP & R program . . . has functioned, and continues to function, as an unlawful scheme . . . to deny benefits owed consumers by paying out less than fair value in order to meet preset, arbitrary pay out targets designed to enhance corporate profits."[150] Accordingly, the scheme not only harmed the Campbells, but also others similarly situated.[151] As the Court stated in *Gore*, "evidence that a defendant has repeatedly engaged in prohibited conduct while knowing or suspecting that it was unlawful would provide relevant support for an argument that strong medicine is required to cure the defendant's disrespect for the law."[152] Therefore, State Farm's repeated unlawful and fraudulent practices, which adversely affected the Campbells and other Utah residents, called for a large punitive damages award.

3. *Conclusions on reprehensibility*

Although the Court may have correctly held that the Utah jury and supreme court impermissibly considered the out-of-state conduct to determine the amount of the award,[153] the amount of the award is nevertheless justifiable. Although two factors weighed in favor of State Farm,[154] three factors weighed in favor of a high punitive damages award. First, the Campbells appeared to be "economically vulnerable and emotionally fragile"[155] targets. Second, the harm did not result from an accident, but rather from deliberate trickery and

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[148] *Id.* (Ginsburg, J., dissenting).

[149] *Id.* (Ginsburg, J., dissenting).

[150] *Id.* (Ginsburg, J., dissenting) (quoting App. to Pet. for Cert. at 118a-19a, *State Farm*, 538 U.S. 408 (No. 01-1289)).

[151] *See supra* notes 134, 138, 141 and accompanying text.

[152] BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 576-77 (1996).

[153] An argument has been made that it is, in fact, permissible to consider out-of-state conduct when determining the amount of an award. Justice Scalia, joined by Justice Thomas, asserts in his dissenting opinion in *Gore* that a state court should be able to "consider lawful (but disreputable) conduct, both inside and outside [the state], for the purpose of assessing just how bad an actor [the defendant] was." *Id.* at 603 (Scalia, J., dissenting). The dissenting justices argue that "if a person has been held subject to punishment because he committed an *un*lawful act, the *degree* of his punishment assuredly *can* be increased on the basis of any other conduct of his that displays his wickedness, unlawful or not." *Id.*

[154] The harm caused to the Campbells did not deal with health or safety issues and it was economic, as opposed to physical. *See supra* text accompanying notes 37 and 69.

[155] *State Farm*, 538 U.S. at ___, 123 S. Ct. at 1529 (citing App. to Order Den. State Farm's Mot. for J. Notwithstanding the Verdict and New Trial Regarding Intentional Infliction of Emotional Distress at 3360a-61a, *State Farm*, 538 U.S. 408 (No. 01-1289)).

deceit compelled by the PP & R policy.[156] Third, the conduct involved repeated actions, not merely an isolated incident.[157] Because the majority did not consider these last two factors in favor of the Campbells, the majority incorrectly gauged State Farm's reprehensibility. State Farm's conduct was far more reprehensible than the majority contended.

Even if an award of less than $145 million would have been sufficient punishment for State Farm's misconduct, it may not have been sufficient to deter State Farm from continuing its national policies in Utah. The size of the award can be justified on the basis that this case was used to expose, punish, and deter, *not* State Farm's operations throughout the nation, but throughout the state of Utah.[158]

B. Ratio

Because the Court once again refused to announce a bright-line ratio rule, a large ratio may be justifiable.[159] In this case, however, the majority incorrectly advised that a ratio of larger than one to one could not be justified.[160] To the contrary, the ratio in this case is justifiably large based, not only on State Farm's reprehensibility, but also on Utah's desire to deter State Farm from continuing to implement its PP & R policy in the state and the difficulty in detecting injury caused by the policy.

1. The ratio is justifiably large to serve the policy goal of deterrence

The majority's decision "gives only lip service to the deterrence function of punitive damages."[161] The opinion mentioned deterrence as one of the

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[156] *See supra* section IV.A.1 (discussing examples of State Farm's willfully fraudulent and deceitful conduct).

[157] *See* discussion *supra* section IV.A.2.

[158] *See* discussion *infra* section IV.B.

[159] *State Farm*, 538 U.S. at ___, 123 S. Ct. at 1524. The majority did not appear to overrule TXO Prod. Corp. v. Alliance Res. Corp., which upheld a punitive to compensatory ratio of 526 to one as constitutional. 509 U.S. 443 (1993). In *TXO*, the Court stated:

> [W]e do not consider the dramatic disparity between the actual damages and the punitive award controlling in a case of this character . . . . The punitive damages award in this case is certainly large, but in light of the amount of money potentially at stake, the bad faith of petitioner, the fact that the scheme employed in this case was part of a larger pattern of fraud, trickery, and deceit, and petitioner's wealth, we are not persuaded that the award was so 'grossly excessive' as to be beyond the power of the State to allow.

Id. at 462.

[160] *State Farm*, 538 U.S. at ___, 123 S. Ct. at 1524.

[161] James E. Wilson, Jr., *The U.S. Supreme Court's* State Farm v. Campbell *Decision: What About Deterrence?*, NEV. LAW., September 11, 2003, at 9, 11.

policy objectives of punitive damages,[162] but then stated that "a more modest punishment for this reprehensible conduct could have satisfied the State's legitimate objectives."[163] Justice Kennedy could not have been referring to both objectives of punitive damages when he made this comment because a more modest punishment would not have satisfied the state's legitimate objective to deter future misconduct.

To satisfy the deterrence objective, a larger punitive to compensatory ratio was necessary. The Utah Supreme Court justified the large ratio by the fact that State Farm's policies had affected numerous Utah consumers, by State Farm's enormous wealth, and by State Farm's failure to report a prior $100 million award of punitive damages in Texas to its corporate headquarters.[164] The majority, however, rejected these justifications.[165]

Contrary to the majority's opinion, ample evidence depicted that the PP & R policy not only harmed the Campbells, but also regularly and adversely affected other Utah residents.[166] Thus, although a State may not be able to impose punishment for acts committed in other states,[167] it does have the right to deter national corporations from acting in ways that will harm its citizens.[168] A corporation that deals with different states should act according to the laws of each state. If one state in the nation wants a corporation to refrain from certain actions while conducting business in that state, it should have a means to deter that corporation from acting in that manner.[169] If the Supreme Court's decision is followed, a state court can no longer deter a corporation from acting unlawfully within its borders by awarding punitive damages.

To have a valuable deterring effect, the ratio of compensatory to punitive damages in this case needed to contemplate State Farm's wealth.[170] The

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[162] *State Farm*, 538 U.S. at ___, ___, 123 S. Ct. at 1519, 1521.

[163] *Id.* at ___, 123 S. Ct. at 1521.

[164] Campbell v. State Farm Mut. Auto. Ins. Co., 65 P.3d 1134, 1153 (Utah 2001), *rev'd*, 538 U.S. 408 (2003).

[165] *State Farm*, 538 U.S. at ___, 123 S. Ct. at 1521.

[166] *See supra* notes 134, 138, 141 and accompanying text.

[167] *See supra* notes 32, 89 and accompanying text; *but c.f.* text accompanying notes 48-50 and note 153.

[168] "Punitive Damages may properly be imposed to further a *State's legitimate interests* in punishing unlawful conduct and *deterring its repetition*." State Farm, 538 U.S. at ___, 123 S. Ct. at 1519 (quoting *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 568 (1996)) (emphasis added).

[169] *Id.*

[170] An ongoing debate persists as to whether a defendant's wealth may or must be a factor in determining an appropriate amount of punitive damages. *See, e.g.*, Annotation, *Punitive Damages: Relationship to Defendant's Wealth as Factor in Determining Propriety of Award*, 87 A.L.R.4th 141 (1991). While some courts have held that wealth must be considered, most courts have held that wealth may be considered. *Id.* This last view appears to be the one adopted by the United States Supreme Court, *see, e.g.*, TXO Prod. Corp. v. Alliance Res. Corp., 509 U.S. 443, 462 (1993), as well as the Utah state courts, *see, e.g.*, Campbell v. State Farm Mut. Auto. Ins. Co., 65 P.3d 1134, 1146 (Utah 2001), *rev'd*, 538 U.S. 408 (2003).

majority, however, failed to consider this, stating that "the wealth of a defendant cannot justify an otherwise unconstitutional award."[171] Because State Farm's PP & R policy caused egregiously reprehensible conduct, consideration of State Farm's enormous wealth would not be justifying an otherwise unconstitutional award. Rather, it would be further justifying a constitutional award.[172] Not allowing a larger ratio based on the defendant's wealth allows wealthy national corporations to succeed in utilizing these types of national schemes and defeats the deterrence policy.

This is evidenced by the fact that State Farm failed to report a prior award of $100 million in punitive damages to its corporate headquarters.[173] If $100 million did not warn State Farm that its actions needed to be changed, only a larger award could possibly force State Farm to change its ways in Utah. As one commentator noted, the majority's opinion "severely limits [the] effective use [of punitive damage awards] against wealthy defendants who profit in billions of dollars from reprehensible conduct. [Justice Kennedy's] decision ignores economic reality. No amount, no matter how large, will deter reprehensible fraudulent conduct if it does not take the profit out of the conduct."[174] The $145 million award is 0.26 of one percent of State Farm's wealth, as computed by the trial court.[175] Reducing the award as drastically as the majority recommended, would likely have no effect on State Farm's business policies.

2. *The difficulty of detecting the injury caused by State Farm's PP & R policy justified a higher ratio*

The majority conceded that a higher ratio might be necessary where "the injury is hard to detect."[176] The injury in this case is hard to detect. First, the trial court held that as a matter of statistical probability, State Farm will only get caught in one out of every 50,000 cases because of the clandestine nature of its conduct.[177] Second, the policy trained State Farm employees to target the "weakest of the herd," described as "the elderly, the poor, and other consumers who are least knowledgeable about their rights and thus most vulnerable to trickery or deceit, or who have little money and hence no real

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[171] *State Farm*, 538 U.S. at ___, 123 S. Ct. at 1525.

[172] *See supra* section IV.A. (discussing how State Farm's egregiously reprehensible conduct warranted a high punitive damages award).

[173] *Campbell*, 65 P.3d at 1153.

[174] Wilson, *supra* note 161, at 11.

[175] *Campbell*, 65 P.3d at 1147.

[176] *State Farm*, 538 U.S. at ___, 123 S. Ct. at 1524 (quoting BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 582 (1996)).

[177] *Campbell*, 65 P.3d at 1153.

alternative but to accept an inadequate offer to settle a claim at much less than fair value."[178] Thus, the policy preyed on consumers who would be the least likely to challenge it. Finally, the policy required the destruction of documents that evidenced the PP & R policy.[179] These practices, therefore, made it extremely difficult to detect the harm caused by the PP & R scheme.

Accordingly, the majority's opinion that the punitive damages award in this case should not be much more than the compensatory award does not support the twin goals of punishment and deterrence. The difficulty of detecting the injury caused by the scheme combined with Utah's interest in effectively deterring State Farm's egregiously reprehensible conduct, present significant justifications for a larger ratio in this case.

C. Comparable Liability

In addressing the final guidepost, the disparity between the punitive damages award and comparable penalties, the Courts application of the facts appears satisfactory. The Court declared that the "most relevant civil sanction under Utah state law for the wrong done to the Campbells appears to be a $10,000 fine for an act of fraud."[180] Nevertheless, the majority's recommended award of "at or near the amount of compensatory damages," is an amount 100 to 200 times the relevant civil sanction identified.[181] Thus, this guidepost does not appear to have been a decisive factor in the Court's decision.

VI. CONCLUSION

The Fourteenth Amendment allows the Court to protect parties against grossly excessive punitive damages awards, and guideposts assist courts in determining appropriate boundaries. In this case, however, the award was not arbitrary or excessive in amount. Rather, this award furthered the legitimate purpose of punishing State Farm for its reprehensible PP & R policy, as well as deterring State Farm from continuing to practice such fraudulent acts in the State of Utah. The majority's refusal to acknowledge the interdependency of the Campbells's harm and State Farm's nation-wide PP & R policy proved fatal to its analysis. While advocating Federalism, the Supreme Court itself trod on the right of a State to punish and deter its wrongdoers. Justice

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[178] *State Farm*, 538 U.S. at ___, 123 S. Ct. at 1528-29 (Ginsburg, J., dissenting).

[179] *See supra* text accompanying note 141.

[180] *State Farm*, 538 U.S. at ___, 123 S. Ct. at 1526.

[181] *Id.*

Ginsburg perceptively commented that these guides quickly converted into "instructions that begin to resemble marching orders."[182]

Dayna H. Kamimura[183]

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[182] *Id.* at ___, 123 S. Ct. at 1531 (Ginsburg, J. dissenting).

[183] Juris Doctor Candidate 2005, William S. Richardson School of Law, University of Hawai'i. Bachelor of Arts 2002, Claremont McKenna College.

Lingerie Wars: The Unreasonably High Actual Dilution Hurdle Imposed on Victoria's Secret Catalogue by the Supreme Court in *Moseley v. V Secret Catalogue, Inc.*

I. INTRODUCTION

What is in a name? Apparently a lot, especially if you are a company such as Victoria's Secret, Nike, or Banana Republic. Consumers associate certain types of goods or products with their respective brand names. The value of such products diminishes, along with the impact of their brand names, if another improperly uses their names in association with similar or dissimilar products. Trademark dilution law aims to prevent the harms that result from improper uses of famous marks.[1]

In *Moseley v. V Secret Catalogue, Inc.*,[2] the United States Supreme Court held that the Federal Trademark Dilution Act[3] ("FTDA") "unambiguously requires a showing of actual dilution, rather than the likelihood of dilution."[4] The Court additionally held that V Secret Catalogue's ("VSC") lack of requisite evidence "of any lessening of the capacity of the Victoria's Secret mark to identify and distinguish goods or services sold in Victoria's Secret stores or advertised in its catalogs"[5] failed to support VSC's dilution claim. This casenote contends that because the Court misinterpreted the FTDA as requiring actual dilution, it incorrectly decided against VSC, in light of existing statutory and case law. The *Moseley* Court erroneously interpreted the definition of the term "dilution," as articulated in 15 U.S.C. § 1127.[6] The Court extended the notion that "[t]he contrast between the initial reference to an actual 'lessening of the capacity' of the mark, and the later reference to a 'likelihood of confusion, mistake, or deception' in the second caveat confirms the conclusion that actual dilution must be established."[7]

On the other hand, Congress likened dilution to "an infection, which if allowed to spread, will inevitably destroy the advertising value of the mark."[8] This suggests that actual dilution would cause the destruction of a famous

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[1] *See infra* notes 33, 38-39 and accompanying text.

[2] 537 U.S. 418 (2003).

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

[4] *Moseley*, 537 U.S. at 433.

[5] *Id.* at 434; *see infra* Part II.B.

[6] *Moseley*, 537 U.S. at 433.

[7] *Id.*

[8] H.R. REP. NO. 104-374, at 3 (1995).

mark. The FTDA intended to *prevent* injury to senior mark holders, rather than having actual injury occur. By requiring a showing of actual dilution to obtain injunctive relief, however, the Court's action suggests that senior mark holders must first suffer an injury before their claim is actionable.[9] Because legislative history does not require actual dilution, the *Moseley* Court rendered a flawed interpretation of the FTDA.

Part II briefly describes the history and purpose of the FTDA as well as the background of *Moseley*. Part III analyzes the Court's interpretation of the FTDA and the Court's views on *Ringling Bros.-Barnum & Bailey Combined Shows, Inc. v. Utah Division of Travel Development*[10] and *Nabisco, Inc. v. PF Brands, Inc.*.[11] In addition, Part III discusses statutory interpretation and explains how the Court erred in its decision. Part IV formulates a solution by which dilution claims under the FTDA should be assessed. Lastly, Part V concludes with a brief discussion on the need for the Court to create a test to assess FTDA claims, thereby promoting fairness and uniformity across the circuits.

II. BACKGROUND

A. Dilution is Born

Trademark dilution law is a relatively new concept. In fact, Congress did not recognize a cause of action for dilution until it enacted the FTDA in 1995.[12] Prior to the inception of the FTDA, however, states adopted dilution statutes.[13] Because of the differing dilution statutes, Congress sought to create uniformity across the states by enacting the FTDA.[14] The notion of trademark dilution can be attributed to Frank Schechter.[15]

1. Frank Schechter

Trademark dilution did not surface until Frank Schechter proposed the idea in his oft-cited 1927 article *The Rational Basis of Trademark Protection*.[16]

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[9] *Moseley*, 537 U.S. at 433.

[10] 170 F.3d 449 (4th Cir. 1999).

[11] 191 F.3d 208 (2d Cir. 1999).

[12] *See infra* text accompanying notes 31-32.

[13] *See infra* Part II.A.3.

[14] H.R. REP. NO. 104-374, at 3 (1995).

[15] Frank Schechter was a New York City attorney, serving as corporate counsel for BVD, an underwear company. *See* Sara Stadler Nelson, *The Wages of Ubiquity in Trademark Law*, 88 IOWA L. REV. 731, 736 n.20 (2003).

[16] Frank I. Schechter, *The Rational Basis of Trademark Protection*, 40 HARV. L. REV. 813 (1927).

Notably, Schechter defined dilution as "the gradual whittling away or dispersion of the identity and hold upon the public mind of the mark or name by its use upon non-competing goods."[17] He concluded that "the preservation of the uniqueness of a trademark should constitute the only rational basis for its protection . . . ."[18] Schechter cited the German case, "Odol",[19] to illustrate the potential for damage to a famous mark when another mark capitalizes on the famous mark's selling power. Essentially, Schechter voiced his concern for the losses owners of famous marks suffered due to uses by junior mark holders.[20] This concern stemmed from the possibility that the public would perceive such junior uses to be of equal or similar quality as their senior counterparts.[21] Trademark law protects against the damages (to famous mark holders) addressed by Schechter. It has evolved from traditional infringement law to dilution, affording greater protection to famous mark holders.

2. *The Lanham Act*

Trademark infringement law primarily derives from English common law and is codified in the Trademark Act of 1946, otherwise known as the Lanham Act.[22] The Lanham Act "broadly prohibits uses of trademarks, trade names, and trade dress that are likely to cause confusion about the source of a product or service."[23] Infringement law protects both consumers and producers.[24] It prevents consumers from being misled by infringing marks and producers from unfair practices by an "imitating competitor."[25]

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[17] *Id.* at 825.

[18] *Id.* at 831.

[19] *Id.* The owners of the mark, Odol, sought the cancellation of the registration for the use of Odol for steel products. *Id.*

[20] *Id.* at 832.

[21] *Id.*

[22] Moseley v. V Secret Catalogue, 537 U.S. 418, 428 (2003).

[23] *Id.*; *see* 15 U.S.C. § 1125(a)(1)(A) (2003) which states:

> Any person who, on or in connection with any goods or services, or any container for goods, uses in commerce any word, term, name, symbol, or device, or any combination hereof, or any false designation of origin, false or misleading description of fact, or false or misleading representation of fact, which is likely to cause confusion, or to cause mistake, or to deceive as to the affiliation, connection, or association of such person with another person, or as to the origin sponsorship, or approval of his or her goods, services, or commercial activities by another person shall be liable in a civil action by any person who believes that he or she is likely to be damaged by such act.

Id.

[24] *Moseley*, 537 U.S. at 428 (citing Qualitex Co. v. Jacobson Products Co., 514 U.S. 159, 163-64 (1995)).

[25] *Id.*

3. State dilution statutes

In 1947, one year after the legislature enacted the Lanham Act, Massachusetts adopted the first state antidilution statute.[26] This provided that the "[l]ikelihood of injury to business reputation or of dilution of the distinctive quality of a trade name or trade-mark shall be a ground for injunctive relief . . . notwithstanding the absence of competition between the parties or of confusion as to the source of goods or services."[27] Prior to the inception of the FTDA, approximately 25 states passed antidilution statutes similar to the Massachusetts statute.[28] Currently, more than half the states have antidilution laws.[29] New York, among others, continues to use the likelihood of dilution standard, as in the earlier statutes.[30]

B. The FTDA

In 1995, Congress enacted the FTDA as an amendment to the Trademark Act of 1964.[31] On January 16, 1996, President Clinton signed the FTDA into law.[32] A need for uniformity and consistency motivated Congress to create this federal act.[33]

1. Legislative intent

The FTDA's purpose is to protect famous marks from later uses that tarnish or blur their distinctiveness even in the absence of a likelihood of confusion.[34] Trademark dilution law differs from traditional infringement law in that "the prohibitions against trademark dilution are not the product of common-law development, and are not motivated by an interest in protecting consumers."[35]

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[26] Robert N. Klieger, *Trademark Dilution: The Whittling Away of the Rational Basis for Trademark Protection*, 58 U. PITT. L. REV. 789, 811 (1997).

[27] *Id.* at n.119 (quotations omitted).

[28] *Moseley*, 537 U.S. at 430.

[29] *Id.*

[30] Dickerson M. Downing, *Patents, Copyrights, Trademarks, and Literary Property Course Handbook Series: From Odol(r) to Lingerie: Dilution and the "Victoria's Secret" Decision*, 744 PRACTICING LAW INSTITUTE PATENTS, COPYRIGHTS, TRADEMARKS, AND LITERARY PROPERTY COURSE HANDBOOK SERIES 288-89 (2003).

[31] Paul Edward Kim, *Preventing Dilution of the Federal Trademark Dilution Act: Why the FTDA Requires Actual Economic Harm*, 150 U. PA. L. REV. 719, 728 (2001).

[32] Klieger, *supra* note 26, at 811.

[33] H.R. REP. NO. 104-374, at 3 (1995).

[34] *Id.* at 2.

[35] J. Thomas McCarthy, McCarthy on Trademarks and Unfair Competition § 24:90 n.1 (4th ed. 2003).

Additionally, dilution differs materially from trademark infringement, which arises out of confusion.[36] Congress noted that "[e]ven in the absence of confusion, the potency of a mark may be debilitated by another's use."[37] Most importantly, Congress asserted that "[c]onfusion leads to immediate injury, while dilution is an infection, which if allowed to spread, will inevitably destroy the advertising value of the mark."[38]

2. FTDA statutory language

The FTDA entitles famous mark holders to protect their marks "against another person's commercial use . . . if such use begins after the mark has become famous and causes dilution of the distinctive quality of the mark . . . ."[39] It defines dilution as "the lessening of the capacity of a famous mark to identify and distinguish goods or services, regardless of the presence or absence of (1) competition between the owner of the famous mark and other parties, or (2) the likelihood of confusion, mistake, or deception."[40] To establish a dilution claim: (1) the senior mark must be famous; (2) it must be distinctive; (3) the junior use must be a commercial use in commerce; (4) it must begin after the senior mark has become famous; and (5) it must cause dilution of the distinctive quality of the senior mark.[41]

The FTDA generally limits remedies for dilution claims to injunctive relief.[42] Where willful dilution of the famous mark occurs, however, additional relief may be awarded.[43] Moreover, to determine whether a mark

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[36] H.R. REP. NO. 104-374, at 3.

[37] *Id.*

[38] *Id.* at n.1.

[39] 15 U.S.C. § 1125(c)(1) (2003).

[40] *See id.* § 1127 (2003). Examples of marks with actionable dilution claims include: DUPONT shoes, BUICK aspirin, and KODAK pianos. H.R. REP. NO. 104-374, at 3.

[41] Nabisco, Inc. v. PF Brands, Inc., 191 F.3d 208, 215 (2d Cir. 1999)(quotations omitted).

[42] 15 U.S.C. § 1125(c)(2).

[43] *See id.* § 1117(a) (2003), which provides that:

> When . . . a willful violation under section 1125(c) of this title, shall have been established in any civil action arising under this chapter, the plaintiff shall be entitled, subject to the provisions of sections 1111 and 1114 of this title, and subject to the principles of equity, to recover (1) defendant's profits, (2) any damages sustained by the plaintiff, and (3) the costs of the action.

Id.

See id. § 1118 (2003). When a willful violation under section 1125(c) is established:

> the court may order that all labels, signs, prints, packages, wrappers, receptacles, and advertisements in the possession of the defendant, bearing the registered mark or, in the case of . . . willful violation under section 1125(c) of this title, the word, term, name, symbol, device, combination thereof, designation, description, or reproduction counterfeit, copy, or colorable imitation thereof, and all plates, molds, matrices, and other

is distinctive and famous, the FTDA allows courts to consider: (1) the degree of inherent or acquired distinctiveness of the mark; (2) the duration and extent of the use of the mark in connection with the goods or services with which the mark is used; (3) the duration and extent of advertising and publicity of the mark; (4) the geographical extent of the trading area in which the mark is used; (5) the channels of trade for the goods or services with which the mark is used; (6) the degree of recognition of the mark in the trading areas and channels of trade used by the marks' owner and the person against whom the injunction is sought; (7) the nature and extent of use of the same or similar marks by third parties; and (8) whether the mark was registered under the Act of March 3, 1881, or the Act of February 20, 1905, or on the principal register.[44] Courts are not required to strictly apply the factors.[45]

3. Types of dilution

The FTDA recognizes three types of dilution: tarnishment, blurring, and cybersquatting.[46] Seeking to prevent these types of dilution, the FTDA "protect[s] the trademark owner from the erosion of the distinctiveness and prestige of a trademark caused by . . . a proliferation of borrowings, that while not degrading the original seller's mark, are so numerous as to deprive the mark of its distinctiveness and hence impact."[47] Rather than the likelihood of confusion standard employed by trademark infringement law, protection from dilution "applies when the unauthorized use of a famous mark reduces the public's perception that the mark signifies something unique, singular, or particular."[48]

The first type of dilution, tarnishment, "occurs when a junior mark's similarity to a famous mark causes consumers to mistakenly associate the famous mark with the defendant's inferior or offensive product."[49] The Second Circuit stated that "[t]he *sine qua non* of tarnishment is a finding that the plaintiff's mark will suffer negative associations through defendant's

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means of making the same, shall be delivered up and destroyed.

Id.

[44] *See id.* § 1125(c)(1) (quotations omitted).

[45] Times Mirror Magazines, Inc. v. Las Vegas Sporting News, LLC., 212 F.3d 157, 166 (3d Cir. 2000).

[46] Kim, *supra* note 31, at 729.

[47] Eli Lilly & Co. v. Natural Answers, Inc., 233 F.3d 456, 466 (7th Cir. 2000) (quoting Illinois High School Ass'n v. GTE Vantage, Inc., 99 F.3d 244, 247 (7th Cir. 1996)) (quotations omitted).

[48] H.R. REP. NO. 104-374, at 3 (1995).

[49] *Eli*, 233 F.3d at 466 (citing Panavision Int'l, L.P. v. Toeppen, 141 F.3d 1316, 1326 n.7 (9th Cir. 1998)).

use."[50] To prove a tarnishment claim, the plaintiff must show that the junior use attempts to associate the plaintiff's famous mark with "products of shoddy quality, or is portrayed in an unwholesome or unsavory context."[51]

Blurring, the second type of dilution, is equally as damaging to famous marks. Blurring occurs when consumers "see the plaintiff's mark used on a plethora of different goods and services . . . raising the possibility that the mark will lose its ability to serve as a unique identifier of the plaintiff's product."[52] As a result, the mark becomes less distinctive. The FTDA requires that famous mark holders prove blurring by showing that their mark's continuing fame and strength "would be endangered by the defendant's use of its mark."[53] Additionally, "the marks must at least be similar enough that a significant segment of the target group of customers sees the two marks as essentially the same."[54]

The newest form of dilution is cybersquatting, or "the diminishment of 'the capacity of the [plaintiff's] marks to identify and distinguish [the plaintiff's] goods and services on the internet.'"[55] This form of dilution occurs when individuals register various famous trademarks as domain names then offer said domain names to the trademark owners at exorbitant costs.[56] By owning the rights to these domain names, cybersquatters create frustration for consumers who search for trademark names on the internet.[57] Regarding dilution on the internet, Vermont Senator Patrick Leahy said, "[I]t is my hope that this anti-dilution statute can help stem the use of deceptive Internet addresses taken by those who are choosing marks that are associated with the products and reputations of others."[58] As with the other types of dilution, Congress aims to protect famous mark holders from predatory defendants who capitalize on those famous marks via the internet. In light of the ever-

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[50] MCCARTHY, *supra* note 35, at § 24:95 n.2 (quotations omitted).

[51] Kim, *supra* note 31, at 729-30 n.63 (quotations omitted).

[52] *Eli*, 233 F.3d at 466 (quoting Hormel Foods Corp. v. Jim Henson Prod., Inc., 73 F.3d 497, 506 (2d Cir. 1996) (quoting 3 McCarthy on Trademarks and Unfair Competition § 24.13[1][a][i] (3d ed. 1995)) (quotations omitted).

[53] Times Mirror Magazines, Inc. v. Las Vegas Sporting News, L.L.C., 212 F.3d 157, 168 (3d Cir. 2000) (citing 4 MCCARTHY, § 29:94).

[54] Luigino's, Inc. v. Stouffers Corp., 170 F.3d 827, 832 (8th Cir. 1999) (quoting MCCARTHY, § 24:90.1 at 24-145) (quotations omitted).

[55] Kim, *supra* note 31, at 729-30 n.49.

[56] *See, e.g.*, Panavision Int'l, L.P. v. Toeppen, 141 F.3d 1316 (9th Cir. 1998).

[57] *Id.* at 1327.

[58] *Id.* at 1326 (citing 141 Cong. Rec. § 19312-01 (daily ed. Dec. 29, 1995) (statement of Sen. Leahy)). To address concerns about dilution and the internet, Congress enacted the Anticybersquatting Consumer Protection Act ("ACPA") on November 29, 1999. Kim, *supra* note 31, at 729-30 n.55. The ACPA "prohibit[s] the bad-faith and abusive registration of distinctive marks as Internet domain names with the intent to profit from the goodwill associated with such marks." *Id.* at n.56.

increasing types of dilution suffered by famous mark holders, it is not surprising that the United States Supreme Court recently addressed the level of dilution required under the FTDA.[59]

C. Moseley Requires Actual Dilution For Relief Under The FTDA

The United States Supreme Court granted certiorari in *Moseley v. V Secret Catalogue* to determine the FTDA's requisite standard for dilution claims.[60] While the lower courts employed a likelihood of dilution standard,[61] the Supreme Court ultimately decided that the FTDA requires actual dilution.[62] This more stringent standard imposes a greater burden on famous mark holders, who now have to meet a higher level of proof to possess a ripe claim.

1. Factual background

In *Moseley*, an army Colonel alerted VSC to the grand opening of a store called Victor's Secret in a strip mall in Elizabethtown, Kentucky.[63] VSC's counsel then sent a letter to Cathy and Victor Moseley ("Moseleys"), owners and operators of the store, requesting that they change the name of the store to prevent confusion and dilution of VSC's mark.[64] In response, the Moseleys changed the name of the adult novelty/lingerie store to Victor's Little Secret.[65] Unsatisfied with the change, VSC filed suit.[66]

VSC filed four claims against the Moseleys: (1) trademark infringement; (2) unfair competition; (3) dilution under the FTDA; and (4) trademark infringement and unfair competition under the common law of Kentucky.[67] VSC primarily alleged that the Moseleys' conduct would blur the distinctiveness of Victoria's Secret's mark and tarnish Victoria's Secret's reputation.[68] The United States District Court for the Western District of

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[59] Moseley v. V. Secret Catalogue, Inc., 537 U.S. 418 (2003).

[60] *Id.* at 421-22.

[61] *Id.* at 425-27 n.6.

[62] *Id.* at 433.

[63] *Id.* at 423.

[64] *Id.* VSC "own[s] the VICTORIA'S SECRET trademark, and operate[s] over 750 Victoria's Secret stores, two of which are in Louisville, Kentucky, a short drive from Elizabethtown. In 1998, they spent over $55 million [in] advertising . . . They distribute 400 million copies of the Victoria's Secret catalogue each year, including 39,000 in Elizabethtown." *Id.* at 422-23.

[65] *Id.* at 423. Moseleys "sell a wide variety of items, including adult videos, 'adult novelties', and lingerie." *Id.* at 424.

[66] *Id.* at 423.

[67] *Id.* at 423-24.

[68] *Id.* at 424.

Kentucky entered summary judgment for the Moseleys with respect to VSC's unfair competition and trademark infringement claims.[69] The court, however, ruled for VSC on VSC's FTDA claim. Concluding that the marks' similarity caused dilution, the court then found that the Moseleys' mark tarnished and therefore diluted VSC's mark.[70]

The Sixth Circuit affirmed the district court ruling, finding in favor of VSC on VSC's FTDA dilution claim.[71] It held that the Moseleys' store name, Victor's Little Secret, was "a classic instance of dilution by tarnishing (associating the Victoria's Secret name with sex toys and lewd coffee mugs) and by blurring (linking the chain with a single, unauthorized establishment)."[72] It reasoned that in light of the above conclusion, VSC would prevail even without consideration of the *Nabisco* factors.[73] The Sixth Circuit adopted the standards enunciated by the *Nabisco* court,[74] thereby necessitating the discussion of "whether respondents' mark is 'distinctive,' and whether relief could be granted before dilution has actually occurred."[75] With regard to the first issue, the court classified VSC's mark as "'arbitrary and fanciful' and therefore deserving of a high level of trademark protection."[76] As to the second issue, the court relied on the FTDA's legislative history[77] and the difficulty of proving actual harm.[78] Consequently, it determined that "the evidence in this case sufficiently established 'dilution.'"[79]

2. *United States Supreme Court's opinion*

Subsequently, the United States Supreme Court granted the Moseleys' petition for certiorari to resolve the issue of "whether objective proof of actual

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[69] *Id.* at 425.

[70] *Id.*

[71] *Id.* "The District Court's decision rested on the conclusion that the name of petitioners' store 'tarnished' the reputation of respondents' mark." *Id.* at 432.

[72] *Id.* at 427.

[73] *Id.* The factors are as follows: distinctiveness; similarity of the marks; proximity of the products and the likelihood of bridging the gap; interrelationship among the distinctiveness of the senior mark, the similarity of the junior mark, and the proximity of the products; shared consumers and geographic limitations; sophistication of consumers; actual confusion; adjectival or referential quality of the junior use; harm to the junior user and delay by the senior user; effect of senior's prior laxity in protecting the mark. Nabisco, Inc. v. PF Brands, Inc., 191 F.3d 208, 217-22 (2d Cir. 1999).

[74] *Moseley*, 537 U.S at 425. The *Nabisco* court did not believe that "actual dilution" was required. *Id.* at 426 n.6.

[75] *Id.* at 426 (footnote omitted).

[76] *Id.* (citing V Secret Catalogue, Inc. v. Moseley, 259 F.3d 464, 470 (6th Cir. 2001)).

[77] *See supra* text accompanying note 38.

[78] *Moseley*, 537 U.S. at 427.

[79] *Id.* (citing *V Secret*, 259 F.3d at 475-77).

injury to the economic value of a famous mark (as opposed to a presumption of harm arising from a subjective 'likelihood of dilution' standard) [was] a requisite for relief under the FTDA."[80] In an opinion authored by Justice Stevens, the Court reversed and remanded the case, holding that the FTDA requires actual dilution, rather than a likelihood of dilution.[81] In its analysis, the Court first discussed the history of trademark law, noting Schechter's "seminal discussion"[82] of trademark dilution. The Court continued its discussion with the progression from the state dilution statutes to the inception of the FTDA.[83]

The statutory language of the FTDA, according to the Court, contrasts from state dilution statues in that it only refers to "dilution of the distinctive quality of a trade name or trademark,"[84] while the state statutes also consider "injury to business reputation."[85] Further, the state statutes "repeatedly refer to a 'likelihood' of harm, rather than to a completed harm."[86] Citing to the FTDA, the Court highlighted the phrase, "causes dilution of the distinctive quality"[87] of the famous mark to support its interpretation of the FTDA to require actual dilution.[88] The Court additionally focused on the definition of dilution.[89] It said that "[t]he contrast between the initial reference to an actual 'lessening of the capacity' of the mark, and the later reference to a 'likelihood of confusion, mistake, or deception' in the second caveat confirms the conclusion that actual dilution must be established."[90]

After completing its interpretation of the FTDA, the Court interestingly noted that its interpretation did not require the actual consequences of dilution to be proven, such as loss of sales or profits.[91] On the other hand, however, it decided that difficulties of proof "are not an acceptable reason for dispensing with proof of an essential element of a statutory violation."[92] The Court offered one example of a non actionable dilution claim; "where the marks at issue are not identical, the mere fact that consumers mentally associate the junior user's mark with a famous mark is not sufficient to

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[80] *Id.* at 422.
[81] *Id.* at 432-34.
[82] *Id.* at 429; *see supra* Part II.A.1.
[83] *Id.* at 430-31.
[84] *Id.* at 432.
[85] *Id.*
[86] *Id.*
[87] *Id.* at 433 (quoting 15 U.S.C. § 1125(c)(1)).
[88] *Id.*
[89] *See supra* text accompanying note 40.
[90] *Moseley*, 537 U.S. at 433.
[91] *Id.*
[92] *Id.* at 434.

establish actionable dilution."[93] The Court, however, failed to establish a method for proving a claim. On remand, VSC has the burden of establishing a prima facie case under an actual dilution standard with no guidance from the Court.[94]

In his concurring opinion, Justice Kennedy's advanced the notion that potential harm may also establish dilution.[95] He focused on the word "capacity" in the definition of dilution, as articulated in 15 U.S.C. § 1127.[96] By doing so, he left open the possibility that VSC may still obtain injunctive relief upon remand if they are able to produce evidence to support their claim.[97] Furthermore, his opinion emphasized the "role of injunctive relief . . . to 'prevent future wrong, although no right has yet been violated.'"[98]

In sum, Justice Kennedy extended the principle that "[a] holder of a famous mark threatened with diminishment of the mark's capacity to serve its purpose should not be forced to wait until the damage is done and the distinctiveness of the mark has been eroded."[99] Justice Kennedy's rationale suggests a broader reading of the FTDA, despite his concurrence with the majority. His concern for the consequences of waiting until senior mark holders suffer injury supports a likelihood of dilution standard.

III. FTDA ANALYSIS

In its analysis of the FTDA, the *Moseley* Court incorrectly interpreted the definition of dilution.[100] Consequently, the Court's conclusion that the FTDA requires a showing of actual dilution was flawed.[101] Despite this narrow reading of the FTDA, the Court failed to articulate a standard for proving actual dilution. Instead, the Court specified that "consequences of dilution, such as an actual loss of sales or profits,"[102] need not be proved. It is illogical, however, to first require actual dilution, then fail to include economic proof as an essential element of the claim. Thus, rather than reconciling the split

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[93] *Id.* at 433.

[94] *See generally id.* at 436 (Kennedy, J. concurring) "The Court's opinion does not foreclose injunctive relief if respondents on remand present sufficient evidence of either blurring or tarnishment." *Id.* (Kennedy, J. concurring).

[95] *Id.* at 435-36.

[96] *Id.* at 435; *see supra* text accompanying note 40.

[97] *Moseley*, 537 U.S. at 436 (Kennedy, J. concurring).

[98] *Id.* (quoting Swift & Co. v. United States, 276 U.S. 311, 326 (1928)).

[99] *Id.*

[100] *See supra* text accompanying note 40.

[101] *See Moseley*, 537 U.S. at 433.

[102] *Id.*

between the circuits about the standard of proof required under the FTDA,[103] the *Moseley* Court adopted a strict standard without offering a method to assess dilution claims. Senior mark holders are accordingly left with little remedy and no guidance as to what constitutes a claim under the FTDA.

A. The Moseley Court Incorrectly Interpreted the FTDA

The *Moseley* Court contended that the FTDA text[104] "unambiguously requires a showing of actual dilution, rather than a likelihood of dilution."[105] The circuits' split over the FTDA's meaning, however, reflects the inherent ambiguity of the statute's language. Furthermore, the only type of relief available in the absence of a showing of willfulness is injunctive relief.[106] This suggests that Congress employed a broader standard than the Court; Congress intended to protect senior mark holders from a likelihood of dilution.[107]

In their brief, the Moseleys highlighted the Supreme Court's plain meaning rule, which provides that "[i]f words convey a definite meaning, which involves no absurdity, nor any contradiction of other parts of the instrument, then that meaning, apparent on the face of the instrument, must be accepted."[108] The Moseleys further noted that prior to the FTDA's enactment, the Court applied the plain meaning rule to the Lanham Act because "[s]tatutory construction must begin with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose."[109] The Moseleys maintained that Congress's use of present tense language departed from the likelihood standard employed by trademark infringement law and state anti-dilution statutes.[110] Furthermore, the brief noted that "where Congress includes particular

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[103] The Second, Third, Sixth, and Seventh Circuits require a likelihood of dilution standard. The Fourth and Fifth Circuits require an actual dilution standard.

[104] 15 U.S.C. § 1125(c)(1). "The owner of a famous mark shall be entitled . . . to an injunction against another person's commercial use in commerce of a mark or trade name, if such use begins after the mark has become famous and causes dilution of the distinctive quality of the mark . . . ." *Id.*

[105] *Moseley*, 537 U.S. at 433.

[106] 15 U.S.C. § 1125(c)(2); *see supra* text accompanying notes 42-43.

[107] "The essential role of injunctive relief is to 'prevent future wrong, although no right has yet been violated.'" *Moseley*, 537 U.S. at 436 (Kennedy, J., concurring) (quoting Swift & Co. v. United States, 276 U.S. 311, 326 (1928)).

[108] Petitioners' Brief on the Merits at 21, *Moseley*, 537 U.S. 418 (No. 01-1015) (quoting Lake County v. Rollins, 130 U.S. 662, 670 (1889)) (quotations omitted).

[109] *Id.* at 21-22 (quoting Park 'N Fly, Inc. v. Dollar Park & Fly, Inc., 469 U.S. 189, 194 (1985)) (quotations omitted).

[110] *See id.* at 24-28.

language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion."[111] The Moseleys instructed that for these reasons, the FTDA requires a showing of actual dilution.[112]

While the Court may justify their actual dilution standard with the plain reading of the statute, legislative history suggests otherwise.[113] Congress characterized dilution as "an infection, which if allowed to spread, will inevitably destroy the advertising value of the mark."[114] This clearly recognizes a need to protect senior marks from a likelihood of dilution as opposed to actual dilution. If senior mark holders must wait until they possess the requisite evidence to prove actual dilution, the junior mark may have already destroyed the original mark.

In furtherance of senior mark holder protection, "[t]he Trademark Amendment Act, adopted in 1999, was enacted to provide stronger and more efficient protection for trademark owners by allowing a means to prevent trademark dilution before it occurred."[115] Under the Trademark Amendment Act, the Trademark Trial and Appeals Board may "consider dilution as grounds for refusing to register a mark or for cancellation of a registered mark."[116] The Act's purpose suggests that Congress did not intend to preclude trademark holders from bringing a claim under the FTDA until they suffered an injury.[117]

Nabisco, which interpreted the FTDA to require a likelihood of dilution, correctly asserted that reading the statute to mean actual dilution "depends on excessive literalism to defeat the intent of the statute."[118] Reasoning along the same lines, Justice Kennedy, in his concurring opinion in *Moseley*, insightfully focused on the word "capacity" in the definition of dilution. He

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[111] *Id.* at 27 (quoting Duncan v. Walker, 533 U.S. 167, 173 (2001) (quoting Bates v. United States, 522 U.S. 23, 29-30 (1997))) (quotations omitted).

[112] *See id.* at 21-22.

[113] *See* H.R. REP. NO. 104-374 (1995). "The object of construction . . . is to give effect to the intent of its framers, and of the people in adopting it." *Lake County*, 130 U.S. at 670.

[114] H.R. REP. NO. 104-374, at 3.

[115] Perry K. Viscounty, Morris Thurston & Nikolaus V. Manthey, *Questions Unanswered: The Supreme Court's Ruling in the Victoria's Secret Case*, 9 No. 25 ANDREWS INTELL. PROP. LITIG. REP. 15, __ (2003).

[116] *Id.*

[117] *Id.*

[118] Nabisco, Inc. v. PF Brands, Inc., 191 F.3d 208, 224 (2d Cir. 1999). The court in *Ringling Bros.* relied on literalism in its interpretation of the FTDA. It adopted the statutory construction rule that "[i]f the words convey a definite meaning, which involves no absurdity, nor any contradiction of other parts of the instrument, then that meaning, apparent on the face of the instrument must be accepted . . ." Ringling Bros.-Barnum & Bailey Combined Shows, Inc. v. Utah Div. of Travel Dev., 170 F.3d 449, 461 (4th Cir. 1999) (quoting *Lake County*, 130 U.S. at 670) (quotations omitted).

opined that "'capacity' imports into the dilution inquiry both the present and the potential power of the famous mark to identify and distinguish goods, and in some cases the fact that this power will be diminished could suffice to show dilution."[119] This opinion is consistent with the legislative intent to provide relief in the case of potential (likelihood of) harm. Justice Stevens, on the other hand, analyzed prominent court of appeals cases to support the Court's actual dilution standard.[120]

B. Moseley Court Rejected Ringling Bros.

Interestingly, the Fourth Circuit in *Ringling Bros.*, like the *Moseley* Court, also imposed an actual dilution standard, and further required proof of economic harm.[121] The *Moseley* Court rejected this higher standard.[122] In *Ringling Bros.*, plaintiff Ringling Brothers ("RB") sought injunctive and monetary relief for Utah's use of a GREATEST SNOW mark to promote Utah tourism.[123] RB asserted that Utah's GREATEST SNOW mark diluted their own GREATEST SHOW mark, which they relied upon to advertise their circus.[124] RB's mark enjoyed trademark protection from 1961 while Utah's mark only received federal registration on January 21, 1997.[125]

The Fourth Circuit affirmed the United States District Court for the Eastern District of Virginia at Alexandria, granting summary judgment to Utah.[126] Both courts deemed RB's use of a consumer survey (to prove dilution) insufficient because the survey failed to establish that consumers form a mental association between the marks.[127] The *Moseley* Court disagreed with the Fourth Circuit's interpretation of the FTDA, requiring "proof that (1) defendant has made use of a junior mark sufficiently similar to the famous mark to evoke in a relevant universe of consumers a mental association of the two that (2) has caused (3) actual economic harm to the famous mark's

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[119] Moseley v. V Secret Catalogue, Inc., 537 U.S. 418, 435 (2003) (Kennedy, J., concurring).

[120] *See infra* Part III.B-C.

[121] *Ringling Bros.*, 170 F.3d at 461.

[122] *Moseley*, 537 U.S. at 433.

[123] *Ringling Bros.*, 170 F.3d at 451-52. The mark is primarily used on motor vehicle license plates. *Id.* at 451.

[124] *Id.* at 451-52. "More than 70 million people each year are exposed to the GREATEST SHOW mark in connection with the circus. Revenues derived from goods and services bearing or using the mark are substantial and exceeded $103 million . . . ." *Id.* at 451.

[125] *Id.* at 451-52. RB has used their mark since 1872. Utah first used their mark as early as 1962. *Id.* at 451.

[126] *Id.* at 466.

[127] *Id.* at 462-63. Consumers were given a "fill-in-the-blank phrase, 'The Greatest [blank] on Earth' then asked "with whom or what they associated the completed phrase 'the Greatest Show on Earth.'" *Id.* at 462.

economic value by lessening its former selling power as an advertising agent for its goods or services."[128]

The *Moseley* Court specifically disagreed with the third requirement of actual economic harm, opting to reject that level of proof.[129] This is especially problematic, however, because while the *Moseley* Court took the time to dismiss *Ringling Bros.*, it did not offer reasonable alternatives for proving actual dilution. The Court contradicted itself by requiring proof of actual dilution but not proof of actual economic harm. The Court's silence as to why it would not require proof further confused the issue. In fact, the Court acknowledged the difficulty of obtaining proof but countered by saying that difficulty is "not an acceptable reason for dispensing with proof of an essential element of a statutory violation."[130] Yet, the Court failed to offer a solution for these proof difficulties. Rejecting other courts' holdings in the absence of reconciliation does not establish any reliable method for assessing future claims.

C. Moseley Court Ignored Factors Laid Out in Nabisco

The *Moseley* Court ignored factors laid out by the Second Circuit in *Nabisco*.[131] The Court failed to consider the factors proposed in earlier opinions when it determined that VSC did not provide a showing of dilution of VSC's mark by Moseleys' junior mark.[132] In *Nabisco*, Pepperidge Farm ("PF") sought an injunction to enjoin Nabisco from distributing a goldfish-shaped cracker that was part of the CatDog snack that Nabisco created for Nickelodeon.[133] PF disapproved of the product because of its similarity to PF's own goldfish cracker snack. Subsequently, PF filed its dilution claim under the FTDA.[134]

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[128] Moseley v. V Secret Catalogue, Inc., 537 U.S. 418, 428 (2003) (quoting *Ringling Bros.*, 170 F.3d at 461) (quotations omitted).

[129] *Id.* at 433.

[130] *Id.* at 434.

[131] Nabisco, Inc. v. PF Brands, Inc., 191 F.3d 208 (2d Cir. 1999).

[132] *See Moseley*, 537 U.S. 418. The Sixth Circuit adopted the *Nabisco* court's interpretation of dilution under the FTDA. *Id.* at 425. It concluded that "Victoria's Secret would prevail in a dilution analysis even without an exhaustive consideration of all ten of the *Nabisco* factors." *Id.* at 427.

[133] *Nabisco*, 191 F.3d at 213.

[134] *Id.* "The fish-shaped cracker closely resembles Pepperidge Farm's Goldfish cracker in color, shape, and size, and taste, although the CatDog fish is somewhat larger and flatter, and has marking on one side." *Id.* Both crackers are orange in color and cheese flavored. *Id.*

The United States District Court for the Southern District of New York, granted PF's request for a preliminary injunction.[135] The Second Circuit affirmed, holding that "Pepperidge Farm has demonstrated a likelihood of success in proving that Nabisco's use of its goldfish-shaped cheddar cheese cracker will dilute Pepperidge Farm's mark in its similar, famous, goldfish-shaped cheddar cheese cracker."[136] The court reached this conclusion by applying ten factors to the facts of the case.[137] The *Moseley* Court failed to apply any of the factors to VSC's claim. Because the Court offered no alternative method to prove actual dilution, it should have at least considered some of these factors in its analysis. Even though the Court does not owe deference to the lower courts, a consideration of any test would have been better than no test.

D. Moseley Court Erred

After assessing *Ringling Bros.* and *Nabisco*, it becomes apparent that the *Moseley* Court erred when it interpreted the FTDA to require proof of actual dilution. *Ringling* required a showing of "actual, consummated dilutive harm"[138] and *Nabisco* recommended a consideration of factors depending on the circumstances of a given case.[139] The varying results and interpretations of the FTDA reflects the difficulty and inherent ambiguity in statutory interpretation. Rather than clarifying already conflicting interpretations of the FTDA, the Court added to the confusion. The *Moseley* Court embraced an interpretation of actual dilution,[140] which likened its interpretation to *Ringling Bros.* Yet, the Court rejected the holding of *Ringling Bros.*, opting not to require the level of proof suggested by the *Ringling Bros.* court.[141] The

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[135] *Id.* The district court applied a six-factor test articulated in the concurring opinion of Mead Data Cent., Inc. v. Toyota Motor Sales, U.S.A., Inc., 875 F.2d 1026, 1035 (2d Cir. 1989) (Sweet, J., concurring) and found that they supported a finding of dilution. *Nabisco*, 191 F.3d at 214.

[136] *Id.* at 228-29.

[137] *Id.* at 217-22. The factors are as follows: distinctiveness; similarity of the marks; proximity of the products and the likelihood of bridging the gap; interrelationship among the distinctiveness of the senior mark, the similarity of the junior mark, and the proximity of the products; shared consumers and geographic limitations; sophistication of consumers; actual confusion; adjectival or referential quality of the junior use; harm to the junior user and delay by the senior user; and effect of senior's prior laxity in protecting the mark. *Id.*

[138] Ringling Bros.-Barnum & Bailey Combined Shows, Inc. v. Utah Div. of Travel Dev., 170 F.3d 449, 464 (4th Cir. 1999).

[139] *Nabisco*, 191 F.3d at 227.

[140] Moseley v. V Secret Catalogue, Inc., 537 U.S. 418, 433 (2003).

[141] *Ringling Bros.* 170 F.3d at 464.

Moseley Court left open the possibility, however, that evidence, such as consumer surveys, may be necessary to prove a senior mark holder's claim.[142]

Nabisco recognized that "the Fourth Circuit's 'actual, consummated' dilution element would require not only that dilution be proved by a showing of lost revenues or surveys but also that the junior be already established in the marketplace before the senior could seek an injunction."[143] In considering this assertion, the *Moseley* Court's rejection of *Ringling Bros.* seems contradictory. Although the Court clearly rejected the requirement of proof of actual economic harm, the fact that the Court still potentially requires "expensive and often unreliable"[144] forms of evidence, such as surveys, exemplifies the Court's fairly stringent interpretation of the FTDA. Therefore, the Court's refutation of *Ringling Bros.* was at odds with its reasoning, which instead indicated a semblance of agreement with *Ringling Bros.*

The *Moseley* Court briefly mentioned the possibility of proving actual dilution through the use of circumstantial evidence.[145] It, however, failed to articulate how circumstantial evidence could be used. *Nabisco* offered the promising proposition that circumstantial evidence could be used to make an inference of injury through the use of "contextual factors."[146] In the absence of any concrete solution, the *Moseley* Court should have either applied the *Nabisco* factors or created its own factors to demonstrate how to infer actual dilution from evidence other than economic loss.

E. The Courts of Appeals Deserve Deference

The likelihood of dilution standard adopted by the Second, Third, Sixth, and Seventh Circuits prior to *Moseley* properly afforded relief to plaintiffs with valid dilution claims. Although *Moseley* is controlling, cases decided in the above cited circuits prior to *Moseley* deserve deference. They offer reasonable methods to prove claims and are consistent with Congress' desire to protect senior mark holders.

The Seventh Circuit, in *Eli Lilly & Co. v. Natural Answers, Inc.*,[147] viewed the FTDA as requiring a likelihood of dilution standard.[148] By promoting this broader standard, the court, like the Sixth Circuit in *Moseley*, appreciated the

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[142] *Moseley*, 537 U.S. at 434.

[143] *Nabisco*, 191 F.3d at 224.

[144] *Moseley*, 537 U.S. at 434.

[145] *Id.*

[146] *Nabisco*, 191 F.3d at 224.

[147] 233 F.3d 456 (7th Cir. 2000). *See also* AM General Corp. v. DaimlerChyrsler Corp., 311 F.3d 796 (7th Cir. 2002) (using the likelihood of dilution standard under the FTDA, the front-end grille of the H2 does not dilute Jeep's similar looking grille on its SUVs).

[148] *See generally id.*

need to protect senior mark holders. Here, Eli Lilly ("Eli") sued Natural Answers ("Natural"), an internet start-up company.[149] Eli, famous for its drug PROZAC®,[150] sought to enjoin Natural from marketing HERBROZAC. Concerned with HERBROZAC's similarity to PROZAC®, a protected mark, Eli filed suit.[151] It claimed (1) trademark infringement (2) trademark dilution and (3) unfair competition.[152]

Finding that Eli demonstrated a likelihood of success on their dilution claim, the Seventh Circuit affirmed the district court's ruling which enjoined Natural from using the HERBROZAC name.[153] The Seventh Circuit rejected the actual dilution requirement of the FTDA.[154] It recognized the unreasonable burden placed upon senior mark holders were they forced to wait until dilution occurred to file suit.[155] The court could not believe that "Congress would create a right of action but at the same time render proof of the plaintiff's case all but impossible."[156]

Consistent with the *Nabisco* court, the *Eli* court utilized "*Mead Data* factors"[157] to assess the claims. Of the six factors outlined in *Mead Data Central, Inc. v. Toyota Motor Sales, U.S.A., Inc.*,[158] the court here opted to consider two: (1) the similarity between the marks; and (2) the renown of the PROAZAC® mark.[159] The court selected factors most relevant to its analysis and came to a logical conclusion as a result. The *Moseley* Court failed to apply factors assessed by many of the circuits, revealing its inability to evaluate dilution claims.

The Third Circuit also employed a likelihood of dilution standard in *Times Mirror Magazines, Inc. v. Las Vegas Sports News, L.L.C.*[160] There, plaintiff

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[149] *Eli*, 233 F.3d at 460.

[150] Prozac® is a prescription drug for clinical depression. Seventeen million Americans take Prozac®, which has been prescribed over 240 million times and has generated sales of more than $12 billion. "In 1999, *Fortune* magazine named it one of the top six 'health and grooming' products of the 20th Century." *Id.* at 459

[151] *Id.* at 460-61.

[152] *Id.*

[153] *Id.* at 469.

[154] *Id.* at 468.

[155] *Id.* at 467-68.

[156] *Id.* at 468.

[157] Mead Data Central, Inc. v. Toyota Motor Sales, U.S.A., Inc., 875 F.2d 1026, 1035 (2d Cir. 1989) (Sweet, J. concurring).

[158] *Id.* Mead, owner of Lexis, a legal research computer service, sued Toyota, manufacturer of luxury automobile Lexus, under New York's antidilution statute. The district court enjoined Toyota. *Id.* at 1027. Upon appeal to the Court of Appeals for the Second Circuit, Toyota prevailed. The court of appeals held that Toyota's use of the name Lexus did not dilute Mead's Lexis mark. *Id.* at 1028.

[159] *Eli*, 233 F.3d at 469.

[160] 212 F.3d 157 (3d Cir. 2000).

published *The Sporting News*, a sports publication containing information about baseball, basketball, football, and hockey.[161] Plaintiff filed suit against defendant, publisher of *Las Vegas Sporting News*,[162] a sports wagering publication, for: (1) infringement; (2) false designation of origin; (3) trademark dilution; and (4) common law unfair competition and infringement.[163]

The United States District Court for the Eastern District of Pennsylvania issued an injunction against defendant, prohibiting it from using the name *Las Vegas Sporting News*.[164] The court concluded that "Times Mirror was likely to succeed on the merits of its dilution claim against LVSN, because the mark was 'famous' in its niche market and LVSN's use of the title on its publication diluted Times Mirror's mark by blurring its distinctiveness."[165] Focusing its attention on the lower court's findings regarding plaintiff's fame and defendant's dilution, the Third Circuit affirmed.[166] It held that *The Sporting News* was famous in the sports periodicals market[167] and that "the district court did not err by finding that Times Mirror was likely to prevail on the merits of its dilution claim."[168]

The foregoing cases, along with others decided by various circuits within the United States courts of appeals, reflect the widespread support of a likelihood of dilution standard. Considering that many of the cases involve similar uses of names by two different companies, as seen in *Moseley*, it would be prudent to follow the standards offered by the courts of appeals,[169]

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[161] *Id.* at 161. The phrase "The Sporting News" received federal trademark protection in 1886. The publication has a weekly circulation of approximately 540,000 throughout the United States and Canada. Its advertising base includes television, direct mail solicitations, promotions, and radio. Each issue sells for $2.99, with the exception of nine special content issues that sell for $3.99. Plaintiff publisher invested millions of dollars in advertising for the publication over a period of several years. *Id.* at 160-61.

[162] The publication, whose name was changed from *Las Vegas Sports News* to *Las Vegas Sporting News* in 1997, is published 45 times a year with a circulation of 42,000. Up to 100,000 have been circulated for the special editions. Like *The Sporting News*, the sale price is $2.99. Gambling casinos, however, distribute copies free of charge. *Id.* at 161.

[163] *Id.* at 162.

[164] *Id.* at 160.

[165] *Id.*

[166] *Id.* at 170.

[167] *Id.* at 166.

[168] *Id.* at 169.

[169] *See generally*, New York Stock Exchange, Inc. v. New York, New York Hotel, L.L.C., 293 F.3d 550, 552, 557 (2d Cir. 2002) (finding that under the FTDA, a trier of fact might find NYSE's facade distinctive); I.P. Lund Trading v. Kohler Co., 163 F.3d 27 (1st Cir. 1998) (finding that under a likelihood of dilution standard, IP Lund's VOLA faucet is not famous enough to receive protection from Kohler's similar faucet); Panavision Int'l, L.P. v. Toeppen, 141 F.3d 1316 (9th Cir. 1998) (holding that Toeppen's registration of Panavision.com and subsequent attempt to sell said domain name to Panavision for $13,000 (1) constitutes a commercial use of the mark and (2) dilutes Panavision's mark).

rather than the actual dilution standard stipulated by the Supreme Court.[170] Under actual dilution, companies such as VSC are essentially punished for their success in creating and maintaining their reputations.

IV. SOLUTION

VSC is a famous, well established company. Its mark is arbitrary and fanciful.[171] Therefore, "[t]he rule that arbitrary, coined or fanciful marks or names should be given a much broader degree of protection than symbols, words or phrases in common use would appear to be entirely sound."[172] Because VSC's mark deserves a high degree of trademark protection, the *Moseley* Court should have affirmed the Sixth Circuit's decision.[173] Furthermore, it should have reconciled the split among the circuits and created a uniform test to be used in future cases.

A. Standard That Courts Should Use to Assess FTDA Claims

In the absence of a uniform standard to assess FTDA claims, this casenote proposes a solution to determine when a likelihood of dilution exists. As already established, courts should interpret the FTDA to require a likelihood of dilution, rather than actual dilution. Because of the difficulty associated with certain types of evidence, which are necessary to prove actual dilution,[174] the use of factors to analyze FTDA claims appears to be the most rational standard for courts to apply in dilution claims. [175]

The ten *Nabisco* factors offer the most promising assessment of dilution claims. Those factors include: (a) distinctiveness; (b) similarity of the marks; (c) proximity of the products and likelihood of bridging the gap; (d) interrelationship among the distinctiveness of the senior mark, the similarity of the junior mark, and the proximity of the products; (e) shared consumers and geographic limitations; (f) sophistication of consumers; (g) actual confusion; (h) adjectival or referential quality of the junior use; (i) harm to the junior user and delay by the senior user; and (j) effect of senior's prior laxity

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[170] *See supra* text accompanying note 4.

[171] Moseley v. V Secret Catalogue, Inc., 537 U.S. 418, 426 (2003) (citing V Secret Catalogue, Inc. v. Moseley, 259 F.3d 464, 470 (6th Cir. 2001)). Moseleys' store name, Victor's Little Secret, is not fanciful, for Mr. Moseley's first name is Victor. On the other hand, there is nothing "about the combination of . . . 'Victoria's' and 'secret' that automatically conjures thought of women's underwear-except, of course, in the context of [VSC's] line of products." *Id.* at 426-27 n.7 (quotations omitted).

[172] Schechter, *supra* note 16, at 828.

[173] *See Moseley*, 537 U.S. at 426-27 n.7.

[174] Examples include surveys and proof of actual loss of revenue.

[175] Nabisco, Inc. v. PF Brands, Inc., 191 F.3d 208, 224 (2d Cir. 1999).

in protecting the mark.[176] The Second Circuit wisely cautioned that its list of factors was not exhaustive; that "[n]ew fact patterns will inevitably suggest additional pertinent factors."[177] It further noted that "no court should, at least at this early stage, make or confine itself to a closed list of the factors pertinent to the analysis of rights under the new antidilution statute."[178]

Courts have also considered other factors. The district court in *Nabisco* relied on the "*Mead Data* factors,"[179] which consisted of: (1) similarity of the marks; (2) similarity of the products; (3) sophistication of consumers; (4) predatory intent; (5) renown of the senior mark; and (6) renown of the junior mark.[180] While there is some overlap between these factors and the *Nabisco* factors, the number of different factors indicates that courts take many relevant issues into consideration when dealing with trademark dilution.

Given existing case law, it is clear that the majority of claims filed under the FTDA fall into 3 categories: (1) dilution from the introduction of a product similar to that of the senior mark holder;[181] (2) dilution from the use of a mark similar or identical to the famous mark;[182] and (3) dilution from the registration of a famous mark as a domain name.[183] Perhaps, depending on the type of claim asserted, courts could apply mandatory sets of factors with the option to consider additional factors on a case-by-case basis. This allows courts to retain the degree of discretion necessary to assess the array of new fact patterns that dilution claims will inevitably introduce. Different claims require different analyses. One way to ensure consistency across the circuits is to establish factor groups for specific types of claims. This will guarantee that the most relevant issues are adjudicated, but still allow for flexibility to address the nuances of each case. Were this standard applied in *Moseley*, VSC could have been victorious. The facts of that case, when applied to relevant factors, could have established a likelihood of dilution.

B. The Proper Outcome of Moseley

The *Moseley* Court should have applied factors to VSC's dilution claim to ensure a fair and proper outcome. Additionally, the Court should have applied

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[176] *Id.* at 217-22.

[177] *Id.* at 228.

[178] *Id.*

[179] *Id.* at 227. "Upon the final trial on the merits, the district court should not limit itself to consideration of the factors listed in the Mead Data concurrence." *Id.* at 228.

[180] *Id.* at 227 (citing Mead Data Central, Inc. v. Toyota Motor Sales, U.S.A., Inc., 875 F.2d 1026, 1035 (2d Cir. 1989) (Sweet, J., concurring). *See also* Ringling Bros.-Barnum & Bailey Combined Shows, Inc. v. Utah Div. of Travel Dev., 170 F.3d 449, 463 (4th Cir. 1999).

[181] *See, e.g.*, *Nabisco*, 191 F.3d 208.

[182] *See, e.g.*, Moseley v. V Secret Catalogue, Inc., 537 U.S. 418 (2003).

[183] *See, e.g.*, Panavision Int'l, L.P. v. Toeppen, 141 F.3d 1316 (9th Cir. 1998).

a likelihood of dilution standard in light of the FTDA's legislative history.[184] The facts of the case clearly fall into the second category of claims generally filed under the FTDA: dilution from the use of a mark similar to that of the senior mark holder. As such, a court will likely find the majority of the *Nabisco* factors relevant. In particular: (1) distinctiveness; (2) similarity of the marks; (3) interrelationship among the distinctiveness of the senior mark, the similarity of the junior mark, and the proximity of the products; (4) harm to the junior user and delay by the senior user.[185] A court will likely rule in favor of VSC after an application of the above factors.

1. Distinctiveness

The FTDA requires that a mark be distinctive in order for a famous mark holder to have a valid dilution claim.[186] As the lower court in *Moseley* determined, VSC's mark is distinctive.[187] Were it not for VSC's success in marketing their brand name, the words 'victoria' or 'secret' would not evoke images of women's lingerie. On the other hand, Moseleys' store name, Victor's Little Secret is not distinctive in that it contains the name of Mr. Moseley. Arguably, the only reason the Moseleys decided to create that store name is because of its similarity to VSC's mark, which is famous and well recognized across the country.

2. Similarity of the marks

Here, there is little question that the Moseleys' mark (Victor's Little Secret) and VSC's mark (Victoria's Secret) are very similar. In fact, the two marks are nearly identical. Because the marks are so similar, the Moseleys will capitalize on VSC's mark.

3. Interrelationship among the distinctiveness of the senior mark, the similarity of the junior mark, and the proximity of the products

Given the above discussion regarding distinctiveness and similarity of the marks, it is clear that VSC's mark is distinctive and that the Moseleys' mark is strikingly similar to VSC's mark. As to the proximity of the products, VSC is particularly susceptible to dilution. Although the Moseleys would contend that they run a single store operation in a small town in Kentucky, VSC's

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[184] *See supra* Part II.B.1.

[185] *See supra* note 137.

[186] 15 U.S.C. § 1125 (c)(1).

[187] *Moseley*, 537 U.S. at 426-27 n.7.

mark is prominently advertised on a national level. VSC not only circulates 39,000 catalogues in Elizabethtown, Kentucky, but also has two stores in Louisville, Kentucky, a short distance away.[188] Therefore, the Moseleys' store arguably conflicts with VSC's already established market in women's lingerie.

4. Harm to the junior user and delay by the senior user

In this case, there is no harm suffered by the Moseleys. VSC immediately responded to its displeasure with the Moseleys' store name when an army colonel alerted VSC to the store's grand opening.[189] The Moseleys' mark is not famous or distinctive and they therefore would not suffer any injury if forced to change their store name. They have not spent the extraordinary amounts of money expended by VSC to promote their store.[190] The only harm present in this case is that suffered by VSC.

In considering the above four factors and their application to the facts of *Moseley*, a court will likely hold that Moseleys' mark dilutes VSC's mark. VSC's mark meets the distinctiveness requirement under the FTDA as well as other requirements such as fame and commercial use.[191] Given the circumstances of the case, the Moseleys capitalized on VSC's mark and thereby diluted the senior mark.

V. CONCLUSION

Congress enacted the FTDA to protect famous marks from dilution by junior marks.[192] Although seemingly well-intended, this has created a division between courts across the country, including the United States Supreme Court. The inherent vagueness in the FTDA's text has resulted in differing opinions as to what type of dilution (actual or likelihood) is required as well as what type of evidence will suffice to prove either type of dilution. The Supreme Court should reconcile this disparity by adopting a clear but flexible standard by which future claims may be assessed. The difficulty of uniformly applying existing standards is a challenge in and of itself. In the absence of a standard, disparate holdings will inevitably result. The *Moseley* Court failed to resolve the issue. The Supreme Court has the inherent authority to create standards. Thus, a flexible test that can accommodate a diverse range of dilution claims should be crafted.

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[188] *See supra* note 64.

[189] *Moseley*, 537 U.S. at 423.

[190] *See supra* note 64.

[191] 15 U.S.C. § 1125 (c)(1).

[192] *See supra* Part II.B.1.

In *Moseley*, the Court likely sought to clarify the conflict in prior court decisions when it opined that a showing of actual dilution is required under the FTDA.[193] It did not, however, properly interpret the statute nor did it offer a standard by which future claims could be evaluated. Had the Court read the statute as the legislature intended, it would have concluded that the FTDA requires only a showing of a likelihood of dilution. Accordingly, the *Moseley* Court should have affirmed the Sixth Circuit's judgment in favor of VSC.

The most appropriate test is one similar to *Nabisco*, where a number of factors are evaluated in order to establish a likelihood of dilution.[194] This seems to offer the most balanced and reasonable assessment of a range of situations. Different factors will come to light and others may become irrelevant. This, however, should not have precluded the *Moseley* Court from identifying a cogent solution for the lower courts to follow. Its actual dilution standard will cause economic harm to famous mark holders because this standard precludes them from filing claims until they possess proof of harm to their marks. Rather than protect famous marks, as the FTDA intended, the Supreme Court raised the standard that famous mark holders must meet to sustain a claim. Therefore, junior mark holders benefit, and the dilution wars will continue to rage on.

Aimee Jodoi Lum[195]

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[193] *See supra* note 4.

[194] *See supra* note 137.

[195] B.A. 2000, University of Michigan; J.D. Candidate 2005, William S. Richardson School of Law, University of Hawai'i at Manoa. Many thanks to my husband, parents, grandparents, family & friends for their continued support throughout the years.

Keeping the (Good) Faith: Hawai'i's Good Faith Settlement After HRS Section 15.5 and *Troyer v. Adams*

I. INTRODUCTION

Imagine you are a surgeon, one of a number of physicians who treated Patient after the internist ("Doctor") misdiagnosed Patient's condition. Patient suffered a personal injury and filed a medical malpractice complaint naming you and Doctor as joint tortfeasors. Before trial, Patient settled with Doctor for $100,000. Patient then executed a release, discharging Doctor—and only Doctor—from liability. Patient's case against you went to trial and the jury allocated seventy per cent (70%) of fault to settling Doctor and thirty per cent (30%) to you. The jury awarded Patient $1 million. If you paid the balance of $900,000, which is more than your proportionate share of fault, you accrued a right to contribution,[1] which entitles you to pursue a contribution claim against Doctor under Hawai'i Contribution Among Tortfeasors Act ("HCATA").[2] But since the Hawai'i Legislature's enactment of Act 300[3] in 2001, you would not be permitted to pursue your contribution claim against Doctor.

The HCATA gave non-settling tortfeasors the right to contribution[4] and the right to indemnification.[5] On June 28, 2001, the Hawai'i State Legislature enacted Act 300, codified as Hawai'i Revised Statutes ("HRS") section 663-15.5. HRS section 663-15.5 provides that a settlement "*given in good faith*" shields a settling tortfeasor from all contribution claims brought by any remaining tortfeasor.[6] It allows only a dollar-for-dollar (*pro tanto*) credit for

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[1] "Contribution is the right of a tortfeasor who pays more than his fair share of a plaintiff's damages to seek reimbursement from others also responsible for the injury." Michael K. Sugrue, *The Rights of Settling Tortfeasors Under the Massachusetts Contribution Among Tortfeasors Act*, 35 SUFFOLK U. L. REV. 571, 572 (2001) (citing Nelson v. Bennett, 662 F. Supp. 1324, 1327-28 (E.D. Cal. 1987) (defining remedy of contribution)).

[2] *See generally* HAW. REV. STAT. §§ 663-11 through 17 (2002).

[3] Act of June 28, 2001, No. 300, 21st Leg., Reg. Sess. (2001), *reprinted in* 2001 Haw. Sess. Laws 875 (codified as amended at HAW. REV. STAT. § 663-15.5 (2003 Supp.)).

[4] *See infra* note 30 and accompanying text.

[5] *See infra* note 22 and accompanying text.

[6] *See* HAW. REV. STAT. § 663-15.5 (2003 Supp.). HRS section 663-15.5 provides in relevant part:

> (a) A release, dismissal with or without prejudice, or a covenant not sue or not to enforce a judgment that is *given in good faith* under subsection (b) to one or more joint tortfeasors, or to one or more co-obligors who are mutually subject to contribution rights, *shall*:

the settlement against any judgment against that remaining tortfeasor.[7] HRS section 663-15.5, however, fails to clarify or define the standard Hawai'i courts must use in determining good faith settlements.

This article discusses the implications of HRS section 663-15.5, specifically addressing how the statute abrogates the non-settling tortfeasor's right to contribution and how it encourages settlements to the detriment of equitable financial sharing, the very purpose for the original HCATA.[8] Part II traces the development of Hawai'i's good faith settlement statute from Hawai'i's adoption of the Model Uniform Contribution Among Tortfeasors Act

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(1) Not discharge any other party not released from liability unless its terms so provide;
(2) *Reduce* the claims *against the other party not released* in the amount stipulated by the release, dismissal, or covenant, or in the amount of the consideration paid for it, whichever is greater; and
(3) *Discharge the party to whom it is given from all liability for any contribution to any other party.*
This subsection *shall not apply* to co-obligors who have expressly agreed in writing to an apportionment of liability or losses or claims among themselves.
(b) For purposes of subsection (a), a party shall petition the court for a hearing on the issue of good faith of a settlement entered into by the plaintiff or other claimant and one or more alleged tortfeasors or co-obligors, serving notice to all other known joint tortfeasors or co-obligors. . .
The petition shall indicate the settling parties and the basis, terms, and settlement amount. . . . [A] *nonsettling party may file an objection to contest the good faith of the settlement* . . .The party asserting the lack of good faith *shall have the burden of proof* on that issue.
. . .
(c) The court may determine the issue of good faith for purposes of subsection (a) on the basis of affidavits or declarations served with the petition under subsection (a) and any affidavits or declarations filed in response. In the alternative, the court, in its discretion, may receive other evidence at a hearing.
. . .
(e) A party aggrieved by a court determination on the issue of good faith may appeal the determination. The appeal shall be filed within twenty days after service of written notice of the determination, or within any additional time not exceeding twenty days as the court may allow.
. . .
(h) This section *shall not apply* to a release, dismissal with or without prejudice, or a covenant not to sue or not to enforce judgment given to a co-obligor on an alleged contract debt where the contract was made prior to January 1, 2002.
HAW. REV. STAT. § 663-15.5 (emphasis added).

[7] *See id.* Less than two years later, the Hawai'i Legislature amended HRS section 663-15.5 "to make clarifying and housekeeping amendments. . . [.]" SEN. STAND. COMM. REP. NO. 1205, 22nd Leg., Reg. Sess. (2003). *See also* Act of June 4, 2003, No. 146, 22nd Leg., Reg. Sess. (2003), *reprinted in* 2003 Haw. Sess. Laws 343 (codified as amended at HAW. REV. STAT. § 663-15.5 (2003 Supp.)).

[8] *See* Mitchell v. Branch, 45 Haw. 128, 363 P.2d 969 (1961). The court noted that the purpose of HCATA was that "the most culpable party should sustain that share of the loss which is commensurate with his degree of fault." *Id.* at 141, 363 P.2d at 978.

("UCATA"), and examines the relevant case law decided under the HCATA and the addition of HRS section 663-15.5. This section also discusses the recent Hawai'i Supreme Court's articulation in *Troyer v. Adams*[9] of the standard of good faith under HRS section 663-15.5.

Part III assesses the implications of HRS section 663-15.5, and how it implicitly repeals several HCATA statutory provisions to the detriment of the non-settling joint tortfeasor. Part III also proposes that, to ameliorate the harsh effects of HRS section 663-15.5 on the non-settling tortfeasor, the Hawai'i Legislature should revisit the issue of including an "empty chair"[10] provision in the statute. Because HRS section 663-15.5 denies non-settling joint tortfeasors their right to contribution, the trial court should allow the non-settling tortfeasor to introduce evidence of the settling tortfeasor's proportionate fault during the subsequent trial for the purpose of allowing the trier of fact to determine legal causation of the claimed damages. Part IV concludes that HRS section 663-15.5 enables plaintiffs and joint tortfeasors to settle at the expense of the rights of the non-settling tortfeasor. Part IV discusses the need for Hawai'i courts and the Hawai'i Legislature to accommodate the competing policies of favoring the settlement of litigation and equitable sharing of tort liability to fully effectuate the overall purpose of the HCATA, and presenting the truth of the dispute in issue from each adversaries' perspectives to preserve fairness, due process, and the right to a fair and impartial trial by jury.[11]

II. BACKGROUND

The tort system seeks to allocate the social burdens of wrongfully injured people with two competing restraints- "fairness" and "efficiency." Hawai'i's tort law has evolved to accommodate both of these restraints. In the process, the law shifted the burden from the injured plaintiff under the HCATA to the non-settling tortfeasor under HRS section 663-15.5.

A. The Hawai'i Contribution Among Tortfeasors Act

At common law, when a joint tortfeasor settled with a plaintiff, the settlement automatically released or discharged the liability of all other joint

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[9] 102 Hawai'i 399, 77 P.3d 83 (2003).

[10] "Empty chair" pertains to offering evidence of the negligence or other fault of absent non-parties. *See generally* Richard Miller, *Filling the "Empty Chair": Some Thoughts About Sugue*, 15 HAW. B.J. 69, 70 (1980).

[11] This article does not discuss how HRS section 663-15.5 interacts with the statutory scheme of Hawai'i's comparative negligence law under HRS section 663-31.

tortfeasors.[12] The common law release rule often resulted in unintended discharge of all tortfeasors, including those who were strangers to the release.[13] To ameliorate the effects of this harsh rule[14] and to encourage settlements, the National Conference of Commissioners of Uniform State Laws promulgated the 1939 UCATA.[15]

In 1941, the Hawai'i State Legislature adopted the 1939 Model UCATA,[16] codified as HRS sections 663-11 through 17.[17] The rationale underlying HCATA was that "[t]he most culpable party should sustain that share of the loss which is commensurate with his degree of fault."[18] The HCATA included a section defining "joint tortfeasor,"[19] and expressly abrogated the common law rule and its effect of automatically releasing a plaintiff's claims against all other tortfeasors when a plaintiff settled with or released one tortfeasor.[20] The HCATA provided for a right to contribution and explained when this right accrued,[21] expressly provided that it did not impair any right of indemnity,[22] and provided for a set-off in the amount of the settlement or in any proportion

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[12] Nobriga v. Raybestos-Manhattan, Inc., 67 Haw. 157, 163, 683 P.2d 389, 393 (1984), *recons. denied*, 67 Haw. 683, 744 P.2d 779 (1984).

[13] Saranillio v. Silva, 78 Hawai'i 1, 16, 889 P.2d 685, 700 (1995), *recons. denied*, 78 Hawai'i 421, 895 P.2d 172 (1995).

[14] *See id.* at 9, 889 P.2d at 693. The court noted that "[section] 4 of the 1939 UCATA was designed to abrogate the common law rule that the release of one tortfeasor released all other tortfeasors." *Id.* at 10, 889 P.2d at 694 (citing Smith v. Raparot, 225 A.2d 666, 667 (R.I. 1967) and Holve v. Draper, 505 P.2d 1265, 1268 (Idaho 1973)).

[15] *Nobriga*, 67 Haw. at 163, 683 P.2d at 393. The 1939 Uniform Contribution Among Tortfeasors Act (UCATA) is hereinafter referred to as "1939 Model UCATA."

[16] *Saranillio*, 78 Hawai'i at 9, 889 P.2d at 693.

[17] *Id.*

[18] Mitchell v. Branch, 45 Haw. 128, 141, 363 P.2d 969, 978 (1961).

[19] HRS section 663-11 defines joint tortfeasors as "two or more persons jointly and severally liable in tort for the same injury to person or property, *whether or not judgment has been recovered against all or some of them.*" HAW. REV. STAT. § 663-11 (2002) (emphasis added). "In other words, tortfeasors are 'joint [tortfeasors]' for purposes of the [HCATA] if they *individually or collectively cause the same injury*." Karasawa v. TIG Ins. Co., 88 Hawai'i 77, 81, 961 P.2d 1171, 1175 (1998) (emphasis added). Under joint and several liability, each defendant is "completely and fully liable toward the injured person" for the full amount of damages. Doe Parents v. Dept. of Education, 100 Hawai'i 34, 96, 58 P.3d 545, 607 (2002) (internal citation omitted). Note that joint and several liability for a tortfeasor as defined in HRS section 663-11 is abolished except in certain circumstances as defined in HRS section 663-10.9. *See infra* note 233 and accompanying text.

[20] *See* HAW. REV. STAT. § 663-13 (2002). "The recovery of a judgment by the injured person against one joint tortfeasor does not discharge the other joint tortfeasors." *Id.*

[21] *See infra* note 30 and accompanying text.

[22] *See* HAW. REV. STAT. § 663-16 (2002). "This part does not impair any right of indemnity under existing law." *Id.*

or amount as provided by the release, whichever was greater.[23] HCATA also addressed the enforcement of the right to contribution.[24]

1. HRS § 663-14: the non-settling tortfeasor's right to set-off under the HCATA

In HRS section 663-14,[25] Hawai'i's original HCATA provided that unless the release specifically so provided, the discharge of one joint tortfeasor did not result in the release of the injured plaintiff's claim against non-settling tortfeasors.[26] Instead, HRS section 663-14 of HCATA merely reduced the plaintiff's claims against the remaining joint tortfeasor *by the greater of* the amount paid for by the settlement[27] or the settling tortfeasor's proportionate share of liability.[28] Using the medical malpractice example above, under the original HCATA, Patient's settlement with Doctor would not have discharged Patient's claim against Surgeon. Because Doctor, however, paid $100,000 for his release, Patient's recovery against Surgeon would *either* have been off-set by $100,000 *or* reduced by more than $100,000 if settling Doctor's proportionate share of liability was found to be greater than Surgeon's liability.[29]

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[23] *See infra* note 25 and accompanying text.

[24] *See generally* HAW. REV. STAT. § 663-17 (2002).

[25] HRS section 663-14 provides:

> A release by the injured person of joint tortfeasors or one joint tortfeasor, whether before or after judgment, *shall not discharge* the other tortfeasors unless the releases or release so provide; but *reduces* the claim against the other tortfeasors in the *amount of the consideration paid for the releases* or release, *or in any amount or proportion* by which the releases or release provide that the total claim shall be reduced, *if greater than the consideration paid.*

HAW. REV. STAT. § 663-14 (2000) (emphasis added) (*repealed by* HAW. REV. STAT. § 663-15.5). *See* Act 300, § 3, 2001 Haw. Sess. Laws 875, 876.

[26] *See id.*

[27] HRS section 663-14 provided, in pertinent part:

> A release . . . of joint tortfeasors or one tortfeasor . . . *reduces* the claim against the other tortfeasors in the *amount of the consideration* paid for the release, or in any *amount or proportion* by which the release provides that the total claim shall be reduced, *if greater than the consideration paid.*

HAW. REV. STAT. § 663-14 (emphasis added).

[28] *Id.* The Hawai'i Supreme Court has also applied the HCATA statute to reduce the judgment by the amount of consideration paid even though there was no determination of the settling defendant's liability. Nobriga v. Raybestos-Manhattan, Inc., 67 Haw. 157, 163, 683 P.2d 389, 393 (1984) (citing Ginoza v. Takai Elec. Co., 40 Haw. 691 (1955)).

[29] Assuming that, in its discretion, the trial court allowed the settling Doctor to appear on the special verdict form submitted to the jury. *See* Gump v. Wal-Mart Stores, Inc., 93 Hawai'i 417, 422, 5 P.3d 407, 412 (2000) (noting that nonparties may be considered joint tortfeasors under the [HCATA] and, in the trial court's sound discretion, may be included on a special verdict form.) If the jury found that the Doctor was 70% at fault, while Surgeon was only 30%

2. *HRS § 663-12: the non-settling tortfeasor's right to contribution under the HCATA*

In HRS section 663-12,[30] the HCATA provided for a right of contribution among joint tortfeasors,[31] entitling a joint tortfeasor to contribution when he paid more than his pro rata[32] share of liability.[33] Thus, where Patient sued Doctor and Surgeon as joint tortfeasors, and only Doctor settled with Patient, Surgeon's right of contribution accrued *only after* he paid to Patient more than his pro rata share of the liability for damages.[34] The HCATA also entitled a

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at fault, Patient's recovery against Surgeon would be reduced by (Doctor's share) 70%. Note also that HRS section 663-10.9 abolished joint and several liability except in certain circumstances. *See generally* HAW. REV. STAT. § 663-10.9 (2002). In this example, Surgeon remained joint and severally liable for *economic* damages under HRS section 663-10.9(1), and also for *non-economic* damages under section 663-10.9(3). Assuming Surgeon was found less than 25% liable, then under HRS 663-10.9(3), his liability for non-economic damages will be proportionate to his fault.

[30] HRS section 663-12 provides:

> *The right of contribution exists among joint tortfeasors.*
>
> A joint tortfeasor is not entitled to a money judgment for contribution *until* the joint tortfeasor has *by payment discharged the common liability or has paid more than the joint tortfeasor's pro rata share* thereof.
>
> A joint tortfeasor who enters into a settlement with the injured person is not entitled to recover contribution from another joint tortfeasor whose liability to the injured person is not extinguished by the settlement.
>
> When there is such a *disproportion of fault* among joint tortfeasors as to render inequitable an equal distribution among them of the common liability by contribution, *the relative degrees of fault of the joint tortfeasors shall be considered in determining their pro rata shares*, subject to section 663-17.

HAW. REV. STAT. § 663-12 (emphasis added). HRS section 663-17(c) provides, in relevant part:

> As among joint tortfeasors *who in a single action* are adjudged to be such, *the last paragraph of section 663-12 applies only if* the issue of proportionate fault is litigated between them by pleading in that action.

HAW. REV. STAT. § 663-17 (emphasis added).

[31] *See* HAW. REV. STAT. § 663-12.

[32] Note that, "[i]n [the] contribution context, pro rata refers to an equal division of a plaintiff's recoverable damages among tortfeasors." Michael K. Sugrue, *The Rights of Settling Tortfeasors Under the Massachusetts Contribution Among Tortfeasors Act*, 35 SUFFOLK U. L. REV. 571, 579 (2001) (citation omitted); *see also infra note* 39 and accompanying text (discussing contribution scheme under HRS sections 663-12 and 663-17).

[33] Velazquez v. Nat'l Presto Indus., 884 F.2d 492, 495 (9th Cir. 1989) (citing HAW. REV. STAT. § 663-12 (1985)).

[34] *See* HAW. REV. STAT. § 663-12. Assuming after the trial of Patient's claim against Surgeon, Surgeon paid $1 million to Patient as a result of the judgment against Surgeon. If Surgeon's fault was only 30% for Patient's injury and Doctor was 70% at fault, Surgeon had paid more than his 30% proportionate share of liability, entitling Surgeon to a right of contribution against Doctor.

settling joint tortfeasor, whose payment for a settlement discharged the common liability to the injured plaintiff, the right to contribution against the other non-settling joint tortfeasors.[35]

The 1941 HCATA provided that *after* joint tortfeasors' joint liability to the plaintiff was determined, in the absence of a specific finding of the proportionate degree of fault of each joint tortfeasor, all joint tortfeasors shared equally in the common liability.[36] Where such disproportionate degrees of fault existed, HCATA purported to allow the determination of each tortfeasor's proportionate share of liability, such that his payment to the plaintiff reflected his relative degree of fault.[37] In a variation of the previous medical malpractice example, assume Doctor settled with Patient for $100,000 and instead of seeking only his release for that amount, Doctor sought *both* his and Surgeon's release. In this example, HCATA provided that unless otherwise determined, Doctor and Surgeon shared equally in the liability—Surgeon owed Doctor $50,000 (half of $100,000 settlement).[38]

While HRS section 663-17[39] provides that, when a judgment *in a single action* rendered both Doctor and Surgeon joint tortfeasors, the HCATA

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[35] *See id. See also Velazquez*, 884 F.2d at 495; *see also supra* note 30 and accompanying text (discussing HRS section 663-12).

[36] HRS section 663-12 acknowledges the rule by providing for the exception: When there is such a *disproportion of fault* among joint tortfeasors as to render inequitable an equal distribution among them of the common liability by contribution, the *relative degrees of fault of the joint tortfeasors shall be considered* in determining their pro rata shares, subject to section 663-17. HAW. REV. STAT. § 663-12. *See also infra* note 39 and accompanying text.

[37] *See id. See also Velazquez*, 884 F.2d at 495.

[38] Under this example, Surgeon's liability to Doctor for contribution purposes is based on the amount of the settlement paid by Doctor, i.e. $100,000. *See, e.g., Velazquez*, 884 F.2d at 497 (determining amount of contribution one tortfeasor owed to another based on the amount paid for the settlement).

[39] HRS section 663-17, provides, in relevant part:

> (b) A pleader may either (1) state as a cross-claim against a coparty any claim that the coparty is or may be liable to the cross-claimant for all or part of a claim asserted in the action against the cross-claimant; or (2) move for judgment for contribution against any other joint judgment debtor, *where in a single action a judgment has been entered against joint tortfeasors* one of whom has discharged the judgment by payment or has paid more than the joint tortfeasor's pro rata share thereof. If relief can be obtained as provided in this paragraph no independent action shall be maintained to enforce the claim for contribution.
>
> (c) As among joint tortfeasors *who in a single action* are adjudged to be such, *the last paragraph of section 663-12 applies only if* the issue of proportionate fault is litigated between them by pleading in that action.

HAW. REV. STAT. § 663-17 (emphasis added). The last paragraph of section 663-12 provides:

> When there is such a *disproportion of fault* among joint tortfeasors as to render inequitable an equal distribution among them of the common liability by contribution, the *relative degrees of fault of the joint tortfeasors shall be considered* in determining their pro rata shares, subject to section 663-17.

HAW. REV. STAT. § 663-12.

required that Doctor and Surgeon litigate the issue of proportionate fault to adjust their contribution and reflect their relative degrees of fault.[40] By failing to bring a cross-claim and force adjudication in a single action, joint tortfeasors risked losing their right to contribution, as in *Gump v. Wal-Mart Stores, Inc.*[41] In *Gump*, Plaintiff Gump sustained injuries when she slipped and fell on a French fry that was on the floor of a Wal-Mart.[42] McDonald's was located inside Wal-Mart.[43] Prior to trial, plaintiff Gump reached a settlement with McDonald's, pursuant to which Gump released McDonald's from further liability in exchange for $5,000.[44] Wal-Mart did not file a cross-claim against McDonald's.[45] Upon Gump's motion in limine regarding the dismissal of McDonald's, the trial court ruled that the issue of McDonald's liability would not be included on the *special verdict form.*[46] The Hawai'i Supreme Court opined that Wal-Mart, as the party in control of the premises where the incident occurred, and McDonald's, the party that made and sold the french fry, were joint tortfeasors under HRS section 663-11.[47] The court noted that the right of contribution was "separate and distinct" from the right to set-off.[48] The Hawai'i Supreme Court reversed in part, but affirmed the Hawai'i Intermediate Court of Appeals' ("ICA")[49] holding based on HCATA's contribution provisions[50] — because Wal-Mart did not file a cross-claim against McDonald's, it did not have a right of contribution from

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[40] *See* Gump v. Wal-Mart Stores, Inc., 93 Hawai'i 417, 422, 5 P.3d 407, 412 (2000) (finding waiver of right to apportion fault by inclusion of the settled defendant on verdict form and noting that adjustment of contribution to reflect joint tortfeasors' relative degrees of fault applied "only if the issue of proportionate fault is litigated between them by pleading in that [single] action."). *Id. See also* HAW. REV. STAT. § 663-17, *supra* note 39.

[41] 93 Hawai'i 417, 5 P.3d 407 (2000).

[42] *Id.* at 422, 5 P.3d at 412.

[43] *Id.* at 419, 5 P.3d at 409.

[44] *Id.*

[45] *Id.* at 422, 5 P.3d at 412.

[46] *Id.* at 419, 5 P.3d at 409.

[47] *See id.* at 422, 5 P.3d at 412 (relying on the *statutory* definition of "joint tortfeasors" and citing HAW. REV. STAT. § 663-11 and Karasawa v. TIG Ins. Co., 88 Hawai'i 77, 81, 961 P.2d 1171, 1175 (Ct.App. 1998) ("Joint tortfeasors are jointly and severally liable for the injury they caused to an injured party . . . and the injured party is entitled to collect his or her entire damages from either tortfeasor.")).

[48] *Id.* at 423, 5 P.3d at 413.

[49] Gump v. Wal-Mart Stores, Inc., 93 Hawai'i 428, 5 P.3d 418 (Ct.App. 1999), *reversed in part*, Gump v. Wal-Mart Stores, Inc., 93 Hawai'i 417, 5 P.3d 407 (2000). The Hawai'i Supreme Court reversed the ICA's *Gump* opinion insofar as the ICA affirmed the amount of damages entered against Wal-Mart. *Gump*, 93 Hawai'i at 424, 5 P.3d at 414. The court noted that Gump's release of McDonald's in exchange for $5,000 reduced [plaintiff's] claim against Wal-Mart by that amount by operation of law. *Id.*

[50] *Gump*, 93 Hawai'i at 422, 5 P.2d at 413 (applying HAW. REV. STAT. §§ 663-12 and 663-17).

McDonald's.[51] *Gump* thereby mandated that joint tortfeasors *must* file cross-claims against other joint tortfeasors (i.e., litigate in a single action) to preserve their right to contribution.

Where a judgment in a single action rendered two defendants joint tortfeasors, however, HCATA allowed either tortfeasor to discharge the judgment by payment (or pay more than his proportionate share), and subsequently bring a cross-claim or contribution claim against the other joint tortfeasor.[52] Conversely, a settlement between the plaintiff and one joint tortfeasor barred a non-settling joint tortfeasor's contribution claim if the settlement transpired *before* the non-settling tortfeasor's right to contribution accrued,[53] a right which, pursuant to HRS section 663-12, accrued only after the non-settling tortfeasor paid more than his pro rata share of liability.[54]

3. HRS § 663-16 and the non-settling tortfeasor's right of indemnity under HCATA

The HCATA did not impair any right of indemnity[55] under existing law.[56] In *Saranillio v. Silva*,[57] the Hawai'i Supreme Court held that an employee and a vicariously liable employer fell within the definition of joint tortfeasors

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[51] *Id.*

[52] *See generally* HAW. REV. STAT. § 663-17(b) (2002).

[53] HRS section 663-15 provided:

> A release by the injured person of one joint tortfeasor does not relieve the joint tortfeasors from liability to make contribution unless the release is given before the right of the other tortfeasors to secure a money judgment for contribution has accrued, and *provides for a reduction, to the extent of the pro rata share of the released tortfeasors, of the injured person's damages recoverable against all the other tortfeasors.*

HAW. REV. STAT. § 663-15 (2000) (emphasis added) (*repealed by* HAW. REV. STAT. § 663-15.5 (2003 Supp.)).

[54] *See generally* HAW. REV. STAT. § 663-12. The right to contribution is inchoate, and the cause of action "does not accrue until a tortfeasor pays more than his pro rata share." Troyer v. Adams, 102 Hawai'i 399, 433, 77 P.3d 83, 117 (2003) (citing Snoddy v. Teepak, Inc., 556 N.E.2d 682, 685 (Ill. App. Ct. 1990)). Note that although the non-settling tortfeasor's right to contribution is *inchoate* and accrues *after* payment, the Hawai'i Supreme Court nevertheless held that the non-settling tortfeasor waived this right if not litigated by cross-claim. *See Gump*, 93 Hawai'i at 422, 5 P.2d at 413.

[55] "Indemnity differs from contribution. While contribution contemplates that two defendants will share in the ultimate liability, indemnity contemplates that one will fully repay the other." DOBBS, THE LAW OF TORTS, § 386 (2000)[hereinafter "DOBBS"]. "Indemnity *shifts the entire loss* from one who, although *without* active negligence or fault, has been obligated to pay, because of some vicarious, constructive, derivative, or technical liability, to another who should bear the costs because it was the latter's wrongdoing for which the former is held liable." Houdaille Indus., Inc. v. Edwards, 374 So. 2d 490, 493 (Fla. 1979) (emphasis added).

[56] HAW. REV. STAT. § 663-16.

[57] 78 Hawai'i 1, 889 P.2d 685 (1995).

within HRS section 663-11.[58] Because HCATA released the employer only if the release so provided,[59] the court held that the employer remained vicariously liable just as if there had been no release.[60] The court added:

> The employer is not without means to *limit or offset* its remaining liability to the plaintiff.[61] First, through the operation of HRS section 663-14,[62] the claim against the employer is reduced by at least the amount of the consideration the employee paid for the release.[63] Second, *the employer retains the right to seek indemnification from its employee.*[64]

In other words, if an employer's liability was vicarious, constructive, derivative or technical, the employer had non-contractual indemnity rights.[65] An employer not personally chargeable with tort but held vicariously liable has a theoretical right to indemnity from the tortfeasor employee upon satisfaction of the judgment for the employee's tort.[66]

The non-settling tortfeasor's rights to contribution and indemnity have dissipated with the Hawai'i Legislature's enactment of HRS section 663-15.5. In June 2001, the Hawai'i State Legislature replaced the contribution-among-tortfeasors scheme of the 1941 HCATA by passing Act 300,[67] codified as HRS section 663-15.5.[68]

B. HRS section 663-15.5 Changed Hawai'i's Settlement Law

HRS section 663-15.5 significantly changed HCATA by repealing HRS sections 663-14 (release's effects on injured person's claims)[69] and 663-15

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[58] *Id.* at 12, 889 P.2d at 696.

[59] *Id.* at 14, 889 P.2d at 698.

[60] *Id.*

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

[62] Note that HRS section 663-15.5 repealed HRS section 663-14; thus, this avenue is no longer available to a vicariously liable tortfeasor.

[63] *Saranillio*, 78 Hawai'i at 14, 889 P.2d at 698.

[64] *Id.* at 13, 14, 889 P.2d at 697, 698 (emphasis added) (citing HRS section 663-16 [right to indemnity] and Ah Sing v. McIntyre, 7 Haw. 196, 198 (1887) (holding that an employer held liable under respondeat superior was entitled to indemnification from its employee)).

[65] *See* Houdaille Indus., Inc. v. Edwards, 374 So. 2d 490, 495 (Fla. 1979).

[66] *See generally* DOBBS, *supra* note 55, § 333, at 907. Thus, if the employer is not personally chargeable for affirmative misfeasance, e.g., wrongful hiring, failure to control, or negligent entrustment, employer has a non-contractual right to indemnification from employee.

[67] *See generally* Act of June 28, 2001, No. 300, *reprinted in* 2001 Haw. Sess. Laws 875.

[68] *See* Troyer v. Adams, 102 Hawai'i 399, 414, 77 P.3d 83, 98 (2003) (noting that HRS section 663-15.5 established the contribution scheme promulgated by section 4 of the 1955 Model UCATA.)

[69] *See* Act 300, § 3, 2001 Haw. Sess. Laws 875, 876 (repealing HAW. REV. STAT. § 663-14).

(release's effect on right to contribution).[70] HRS section 663-15.5 provides that a settlement[71] "*given in good faith*" shall: (1) not discharge the liability of the non-settling joint tortfeasors, unless its terms so provide;[72] but (2) *reduce* the claims against the non-settling joint tortfeasors in the amount stipulated in the settlement or in the amount of the consideration paid for it, *whichever is greater*;[73] and (3) discharge the settling tortfeasor from all liability for any contribution[74] to the non-settling joint tortfeasors. For the settling parties to benefit from HRS section 663-15.5, the court must first determine that the release, dismissal, or covenant was "given in good faith."[75] HRS section 663-15.5 obligates "a party" to petition the court for a hearing on the issue of good faith,[76] and to indicate in the petition the settling parties, the basis, terms, and settlement amount.[77] For confidential agreements, HRS section 663-15.5 permits the disclosure of sufficient information to allow the non-settling joint tortfeasor to object to the settlement.[78] The timing of the settlement becomes irrelevant; HRS section 663-15.5's procedures, rights, and obligations apply to settlement agreements given *before* and *after* a plaintiff filed a lawsuit,[79] and does not require the existence of a lawsuit.[80]

HRS section 663-15.5 does not provide any guidelines on what constitutes "good faith."[81] It merely provides that a court may determine the "good faith"

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[70] *See* Act 300, § 4, 2001 Haw. Sess. Laws 875, 877 (repealing HAW. REV. STAT. § 663-15).

[71] A settlement agreement may be in the form of: a release, dismissal with or without prejudice, or a covenant not to sue or not to enforce judgment given in good faith. *See* HAW. REV. STAT. § 663-15.5(a).

[72] HAW. REV. STAT. § 663-15.5(a)(1).

[73] *See id.* § 663-15.5(a)(2) (emphasis added).

[74] *See id.* § 663-15.5(a) and (d).

[75] *See id.* § 663-15.5(b).

[76] *See id.* § 663-15.5(b). "For purposes of subsection (a), a party shall petition the court for a hearing on the issue of good faith of a settlement entered into by the plaintiff or other claimant and one or more alleged tortfeasors or co-obligors, serving notice to all other known joint tortfeasors or co-obligors." *Id.*

[77] *See id.*

[78] *See id.* "Where a confidentiality agreement has been entered into regarding the claim or settlement terms, the court shall hear the matter in a manner consistent with preventing public disclosure of the agreement while providing other joint tortfeasors and co-obligors sufficient information to object on the proposed settlement." *Id.*

[79] *Cf.* HAW. REV. STAT. § 663-15, where the settling tortfeasor was released from liability for contribution only if the plaintiff gave the release *before* the right of the non-settling joint tortfeasors to secure a money judgment for contribution has accrued. *Id.* (*repealed by* Act of June 28, 2001, No.300, 21st Leg., Reg. Sess. (2001), *reprinted in* 2001 Haw. Sess. Laws 875 (codified as HAW. REV. STAT. § 663-15.5)). *See also* II.A.2 *supra*.

[80] HAW. REV. STAT. § 663-15(g).

[81] *See* Troyer v. Adams, 102 Hawai'i 399, 403, 417, 77 P.3d 83, 87, 97 (2003) (noting that the Hawai'i State Legislature had no occasion to "expressly define" the meaning of a settlement given in good faith.).

issue on the basis of affidavits or declarations served with the petition (for a good faith hearing),[82] any affidavits or declarations filed in response,[83] or, in the court's discretion, any "other evidence" received at a hearing.[84] HRS section 663-15.5 requires an aggrieved party to appeal the court's determination within twenty days after service of written notice of the good faith determination.[85] Finally, HRS section 663-15.5 provides for the tolling of any statute of limitation or other time limitation during the period of consideration by the court on the issue of good faith.[86]

In sum, HRS section 663-15.5 creates incentives for both plaintiffs and defendants to settle. A court's good faith determination of a settlement between a plaintiff and a joint tortfeasor bars any non-settling defendant from bringing *any* claims for contribution or indemnity against the settling joint tortfeasor.[87] If the non-settling tortfeasor wishes to object to the settlement, he has the burden of demonstrating that the settlement was not made in good faith.[88] Thus, in the medical malpractice example above, the Surgeon with only 30% of fault cannot pursue any contribution claims against the settling Doctor if the trial court determines that the settlement between Doctor and Plaintiff was "given in good faith." The Hawai'i Supreme Court recently interpreted the meaning of "good faith" as applied to a settlement in *Troyer v. Adams*.[89]

C. *Judicial Application of HRS section 663-15.5: Troyer v. Adams and Hawai'i's Good Faith Standard*

On September 25, 2003, the Hawai'i Supreme Court[90] addressed the issue of the standard of "good faith" applicable to a settlement under HRS section

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[82] HAW. REV. STAT. § 663-15.5(c).

[83] *Id.*

[84] *Id.*

[85] *See* HAW. REV. STAT. § 663-15.5(e). The appeal shall be filed within twenty days, "or within any additional time not exceeding twenty days as the court may allow." *Id.*

[86] *See id.* § 663-15.5(f).

[87] *See id.* § 663-15.5(d) (*except* pursuant to an indemnity agreement).

[88] *See id.* § 663-15.5(b). Within twenty-five days of the mailing of the notice, petition, and proposed order, a non-settling party may file an objection to contest the good faith of the settlement. If none of the nonsettling parties files an objection within the twenty-five days, the court may approve the settlement without a hearing. An objection by a nonsettling party shall be served upon all other parties. *The party asserting the lack of good faith shall have the burden of proof* on that issue. . . .
Id. (emphasis added).

[89] 102 Hawai'i 399, 77 P.3d 83 (2003).

[90] Justice Levinson wrote for the majority opinion (hereinafter "majority.").

663-15.5 in *Troyer*.[91] In *Troyer*, the plaintiff alleged medical malpractice on the part of Drs. Adams, Bellati, and Bailey who were named as defendants jointly and severally liable for plaintiff's injuries, which included, inter alia, the amputation of her right forefoot.[92] In the course of discovery, Troyer reached a settlement agreement with Drs. Bailey and Bellati.[93] Pursuant to HRS section 663-15.5, Troyer petitioned the circuit court for a determination that her settlement with Drs. Bailey and Bellati was in good faith under the statute.[94] Dr. Adams appealed the trial court's finding of good faith with respect to the settlement,[95] and argued that HRS section 663-15.5 violated his right to due process[96] under both the Hawai'i[97] and United States Constitutions.[98] Dr. Adams failed to meaningfully argue that HRS section 663-15.5 denied him his right to trial by jury as guaranteed by Article 1, section 13 of the Hawai'i Constitution; thus, the court did not address this issue.[99]

1. The meaning of a "settlement given in good faith" pursuant to HRS section 663-15.5

The Hawai'i Supreme Court acknowledged that HRS section 663-15.5 did not define the term "good faith."[100] The majority determined that HRS section 663-15.5 is less protective of non-settling joint tortfeasors than the 1941 HCATA because under HRS section 663-15.5, a non-settling joint tortfeasor "may ultimately be liable" for the difference between the settlement amount

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[91] 102 Hawai'i 399, 77 P.3d 83 (2003). The majority also addressed and held the following: (1) Act 300 [HRS section 663-15.5] applied to plaintiff Troyer's claims of medical malpractice because they did not arise from contracts, (2) the circuit court did not abuse its discretion in determining that the settlement agreement between Troyer and Drs. Bellati and Bailey was entered into in good faith, and (3) Dr. Adams' due process rights were not violated. *See* Troyer, 102 Hawai'i at 402, 77 P.3d at 86.

[92] *Id.* at 403-04, 77 P.3d at 87-88.

[93] *Id.* at 404, 77 P.3d at 88 (Dr. Bailey agreed to pay $15,000 and Dr. Bellati agreed to pay $50,000 to settle Troyer's claims).

[94] *Id.* at 404-05, 77 P.3d at 88-89.

[95] *Id.* at 409, 77 P.3d at 93.

[96] *Id.* at 431, 77 P.3d at 115. Dr. Adams contended that: (1) his cross-claims against Drs. Bailey and Bellati constitute significant property interests, (2) that "there was a severe risk of an erroneous deprivation of his contribution right through the defective hearing process," and (3) that his "due process rights outweigh the state's interest in encouraging settlements." *Id.*

[97] *Id.* at 402 n.2, 77 P.3d at 86 n.2 ("Article I, section 5 of the Hawai'i Constitution provides in relevant part that 'no person shall be deprived of life, liberty or property without due process of law[.]'"). *Id.*

[98] *Id.* at 402 n.3, 77 P.3d at 86 n.2 ("The fourteenth amendment to the United States Constitution provides in relevant part that 'no State shall . . . deprive any person of life, liberty, or property, without due process of law[.]'"). *Id.*

[99] *Id.* at 431 n.34, 77 P.3d at 115 n.34.

[100] *Id.* at 403, 77 P.3d at 87.

and his own proportionate share of liability.[101] Because *Troyer* was a case of first impression, the majority surveyed the three good faith standards adopted by other jurisdictions in interpreting their respective Contribution Among Tortfeasors Act ("CATA"):[102] (1) the *Tech-Bilt, Inc. v. Woodward-Clyde & Associates*[103] or "proportionate liability" standard,[104] (2) the "non-collusive" or "non-tortious conduct" standard,[105] and (3) the "totality of the circumstances" approach.[106]

The *Troyer* majority concluded that the Hawai'i Legislature's goals[107] were "best served by leaving the determination of whether a settlement was in good faith to the *sound discretion of the trial court* in light of the totality of the circumstances surrounding the settlement" and adopted the totality of circumstances approach.[108] The *Troyer* majority agreed with the "overwhelming majority" of jurisdictions' common conclusion that based on the [National Conference of] Commissioners' comment to section four of the 1955 UCATA,[109] the Commissioners intended the good faith provision

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[101] *Id.* at 414, 77 P.3d at 98.

[102] *See generally id.* at 416-25, 77 P.3d at 100-09.

[103] 698 P.2d 159 (Cal. 1985).

[104] *Troyer*, 102 Hawai'i at 416-20, 77 P.3d at 100-03.

[105] *Id.* at 422, 77 P.3d at 106. Under the "non-collusive" or "non-tortious conduct" standard, a settlement is in good faith absent collusion, fraud, dishonesty, or other wrongful conduct. *Id.*

[106] *Id.* at 422-23, 77 P.3d at 106-07. Under this approach, "the determination of good faith is left to the discretion of the trial court, based on all relevant facts available at the time of the settlement, and is not disturbed in the absence of an abuse thereof." *Id.*

[107] *Id.* at 427, 77 P.3d at 111 (noting the Hawai'i Legislature's goals of "simplifying the procedures and reducing the costs associated with claims involving joint tortfeasors, while providing courts with the opportunity to prevent *collusive settlements aimed at injuring non-settling tortfeasors' interests*. . . [.]"). *Id.* (emphasis added).

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

[109] *Id.* at 426 n.32, 77 P.3d at 110 n.32 (quoting relevant parts of the comment to section 4 of 1955 UCATA:

> The 1939 UCATA's requirement that the release or covenant be given in good faith *gives the court occasion to determine* whether the transaction is *collusive*, and if so there is no discharge.
>
> The idea underlying the 1939 provision was that the plaintiff should not be permitted to release one tortfeasor from his fair share of liability and mulct another instead, from *motives of sympathy or spite*, or because *it might be easier to collect from one than from the other*; and that the *release from contribution affords too much opportunity for collusion between the plaintiff and the released tortfeasor against the one not released.* Reports from the states where the Act is adopted appear to agree that it has accomplished nothing in preventing collusion. In most three-party cases two parties join hands even when the case goes to trial against both defendants. "Gentlemen's agreements" are still made among lawyers, and the formal release is not at all essential to them. *If the plaintiff wishes to discriminate as to the defendants, the 1939 provision does not prevent him from doing so.*
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> . . .

Id. (emphasis added).

"*merely* to provide the court with an opportunity to prevent *collusive settlements* aimed at injuring the interests of a non-settling tortfeasor."[110] The *Troyer* majority thereafter opined that the Commissioners clearly were more interested in encouraging settlements than making "an attempt of doubtful effectiveness to prevent" inequitable settlements.[111]

The *Troyer* majority recognized that the Hawai'i Legislature was mindful of the "system that has been in existence in California for over ten years,"[112] but added that the Hawai'i Legislature expressly declared its intent to "simplify the procedures and reduce the costs associated with claims involving joint tortfeasors."[113] The *Troyer* majority characterized the Hawai'i Legislature's reference to the California "system" as "merely an observation" that HRS section 663-15.5, like California Code of Civil Procedure (CCCP) section 877.6, "specifically provides for a good faith hearing, which afford[s] the court occasion to determine whether the transaction [was] aimed at injuring a non-settling party."[114] The *Troyer* majority relied on this characterization to reject the notion that the Hawai'i Legislature intended the Hawai'i courts to adopt the California courts' test to determine "good faith."[115]

The *Troyer* majority thereafter enumerated a *non-exclusive* list[116] of factors a trial court might consider to the extent that the information is available at the time of settlement.[117] These factors include: (1) the type of case and difficulty of proof at trial;[118] (2) the realistic approximation of total damages that the plaintiff seeks; (3) the strength of the plaintiff's claim and the realistic likelihood of his or her success at trial; (4) the predicted expense of litigation; (5) the relative degree of fault of the settling tortfeasors; (6) the amount of consideration paid to settle the claims; (7) the insurance policy limits and solvency of the joint tortfeasors; (8) the relationship among the parties and whether it was conducive to collusion or wrongful conduct; and (9) *any other evidence* that the settlement's aim was to injure the interests of a non-settling

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

[111] *Id.* (noting that the Commissioner's intent was persuasive in ascertaining the Hawai'i Legislature's intent, inasmuch as HRS section 663-15.5(a) appeared to be modeled after 1955 UCATA's section 4 and replaced HCATA modeled after the 1939 UCATA).

[112] *Id.* (citing H.R. STAND. COMM. REP. NO. 1230, 21st. Leg., Reg. Sess. (2001), *reprinted in* 2001 HAW. HOUSE J. 1599).

[113] *Id.* at 427, 77 P.3d at 111.

[114] *Id.*

[115] *Id.*

[116] *See id.* "The . . . list is not exclusive, and the court may consider any other factor that is relevant to whether a settlement has been given in good faith." *Id.*

[117] *Id.*

[118] *Id.* (listing "rear-end motor vehicle collision, medical malpractice, product liability, etc.").

tortfeasor or that other wrongful purpose motivated the settlement.[119] On an appeal of the trial court's good faith determination, the court declared that the abuse of discretion standard applied.[120]

2. The Troyer court held that HRS section 663-15.5 did not violate a non-settling joint tortfeasor's right to due process

The *Troyer* majority held that HRS section 663-15.5 adequately protected a non-settling joint tortfeasor's right to procedural due process[121] because it provided the trial court with the means of conducting the good faith hearing in a "meaningful manner,"[122] and that the trial court did not abuse its discretion in conducting the hearing in the case.[123] The *Troyer* majority reiterated that "due process. . . [was] relevant only if liberty or property is deprived;"[124] thus, the majority focused on the specific issue of whether the barring of a cross-claim for contribution pursuant to HRS section 663-15.5 deprived a non-settling joint tortfeasor of a protected property interest.[125] The *Troyer* majority, relying on several cases from other jurisdictions,[126] concluded that a joint tortfeasor's right of contribution did not constitute a property interest protected by constitutional due process principles, *unless* the non-settling tortfeasor had already secured his right of contribution by paying more than his share of a judgment pursuant to a relevant CATA and was otherwise entitled to compensation from joint tortfeasors.[127] Even assuming that an unaccrued right to contribution constituted a constitutionally protected property interest, the majority opined that HRS sections 663-15.5(b) and (c)[128] indisputably afforded a non-settling joint tortfeasor notice and an opportunity

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

[120] *Id.*

[121] *Id.* at 431, 434, 77 P.3d at 115, 118.

[122] *Id.* (referring to HAW. REV. STAT. § 663-15.5(b)).

[123] *Id.*

[124] *Id.* at 432, 77 P.3d at 116 (citing State v. Bani, 97 Hawai'i 285, 293, 36 P.3d 1255, 1263 (2002) (quoting *In re* Herrick, 82 Hawai'i 329, 342-43, 922 P.2d 942, 955-56 (1996) (quoting Int'l Bd. of Elec. Workers v. Hawaiian Tel. Co., 68 Haw. 316, 332, 713 P.2d 943, 956 (1986)))) (alteration in original).

[125] *Id.*

[126] *Id.* at 433, 77 P.3d at 117 (citing e.g., Williams v. White Mountain Const. Co., Inc., 749 P.2d 423, 429 (Colo. 1988) (holding that there was no property interest upon which to ground a due process claim because no right to contribution had accrued); Snoddy v. Teepak, Inc., 556 N.E.2d 682, 685 (Ill. App. Ct. 1990) (holding that although contribution among joint tortfeasors was an *inchoate* right at the time of the injury, the cause of action did not *accrue* until a tortfeasor paid more than his *pro rata* share) (emphasis in original)).

[127] *Id.*

[128] *Id.*

to be heard regarding the determination of the settlement's good faith,[129] which barred cross-claims for contribution against the settling tortfeasor.[130] The majority thus held that the good faith hearing itself sufficed to meet procedural due process requirements.

The only dissenting Justice, Justice Acoba, reasoned that the Hawai'i Legislature clearly intended that Hawai'i follow California law and adopt the *Tech-Bilt* standard.[131] He also cited potential due process[132] violations under the majority's "totality of circumstances" approach.[133] Justice Acoba focused on the lack of or absence of similar objections that followed *Tech-Bilt* standards when the Legislature enacted HRS section 663-15.5,[134] and emphasized the lack of a principled reason to depart from the court's general approach[135] when construing and applying Hawai'i laws adopted from another jurisdiction.[136]

Justice Acoba criticized the majority's good faith approach and its effect of inviting unjust results[137] because it failed to require parties and the courts to arrive at a *reasonable apportionment of liability* before the approval of a settlement.[138] At trial, the fact finder would not be apprised of any contribution by the settling joint tortfeasor.[139] Thus, the dissent argued that *unless* there was a *meaningful attempt* to arrive at a reasonable apportionment of the

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[129] *Id. See also* HAW. REV. STAT. § 663-15.5(b) and (c).

[130] *Troyer*, 102 Hawai'i at 433, 77 P.3d at 117.

[131] *See id.* at 434, 77 P.3d at 118 (Acoba, J., dissenting) (noting that Act 300 was *expressly* "based" on the California "system"; it thus appeared indisputable that the Hawai'i Legislature meant that Hawai'i courts should "essentially adhere to the body of law and judicial standards aggregated over the sixteen years the California statute had been in existence.").

[132] *See id.* at 438, 77 P.3d at 122 (Acoba, J., dissenting) ("[I]n the framework of Act 300, the right to contribution [was] a property interest protected by the due process clause."). *See also id.* at 437, 77 P.3d at 121 ("[S]ince a nonsettling tortfeasor loses his right to seek contribution . . . from a joint tortfeasor who settled if that settlement [was] adjudged to be in good faith, the nonsettling tortfeasor [stood] to be deprived of his property right to contribution or partial indemnity.") (citing Singer Co. v. Superior Court, 225 Cal. Rptr. 159, 169 (Cal. Ct. App. 1986)).

[133] *Id.* at 438, 77 P.3d at 122 (Acoba, J., dissenting) (relying on *Singer* to argue that under Act 300, the right to contribution was a property interest, and a non-settling tortfeasor risked losing this property right to contribution).

[134] *Id.* at 435, 77 P.3d at 119 (Acoba, J., dissenting). "The legislature had the opportunity to draft Act 300 in response to [concerns that followed in the wake of the *Tech-Bilt* standards], but obviously chose not to do so." *Id.*

[135] *Id.* (Acoba, J., dissenting).

[136] *Id.* (Acoba, J., dissenting).

[137] *Id.* at 437, 77 P.3d at 121 (Acoba, J., dissenting) (citing HRS section 663-15.5(d), which discharges the settling joint tortfeasor from all liability to any other party and bars the non-settling parties from asserting claims against settling parties at any subsequent trial).

[138] *Id.* (Acoba, J., dissenting).

[139] *Id. See also infra* Part III.C.

settling tortfeasor's liability prior to trial, the non-settling defendant faced a great risk he would pay more than his appropriate proportionate share of the damages owed to the plaintiff.[140] Further, Justice Acoba opined that the net result of the majority's test was "to encourage settlements to the detriment of equitable financial sharing,"[141] and thus was contrary to the Hawai'i Legislature's intent of protecting the rights of *all parties* involved.[142]

In addition, Justice Acoba reasoned that the majority's "totality of circumstances" test failed to protect the non-settling joint tortfeasor's right to due process.[143] Because the test did not compel the courts to inquire that the settling defendant's paid amount was *fairly related* to his proportionate liability,[144] the dissent found that the majority's test deprived the non-settling joint tortfeasor of the opportunity to be heard at a meaningful time and in a meaningful manner.[145]

In sum, *Troyer* interpreted the Hawai'i good faith statute as a discretionary assessment of any collusive conduct aimed at injuring the non-settling tortfeasors, made under the "totality of circumstances approach."[146] The *Troyer* majority declared that the question of whether a settlement was given in good faith was a matter best left to the court's discretion in light of all of the relevant circumstances available to the court at the time of settlement.[147] Moreover, *Troyer* held that the right to contribution was not a constitutionally protected right,[148] and thus, HRS section 663-15.5 did not violate the non-settling tortfeasor's right to due process.[149]

III. ANALYSIS

HRS section 663-15.5 provides a broad spectrum of benefits to the settling joint tortfeasor. A good faith settlement prohibits any non-settling joint tort-

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[140] *Id.* at 437, 77 P.3d at 121 (Acoba, J., dissenting).

[141] *Id.* (Acoba, J., dissenting).

[142] *Id.* "The [Hawai'i] legislature ha[d] declared that Act 300 'will achieve its stated purpose while still adequately protecting the rights of all parties involved.'" *Id.* (citing SEN. STAND. COMM. REP. NO. 828, 21st Leg., Reg. Sess. (2001), *reprinted in* 2001 HAW. SEN. J. 1252, 1253).

[143] *Id.* at 438, 77 P.3d at 122.

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

[145] *Id.*

[146] *See supra* Part II.C.

[147] *See supra* Part II.C.

[148] *See supra* Part II.C.

[149] *See supra* Part II.C.

feasor's claim for contribution[150] (*and* also *dismisses* any such claims[151] already filed against the settling tortfeasor).[152] While these benefits to the settling tortfeasors certainly encourage out-of-court settlements, HRS section 663-15.5 fails to accord protection to the non-settling tortfeasor or co-obligor, producing unjust results: (1) it abrogates *only* the non-settling tortfeasor's right to contribution; (2) it implicitly repeals implied indemnity rights; (3) the *Troyer* "totality of circumstances approach" to determining good faith poses a difficult challenge for the non-settling tortfeasor to successfully object to the settlement; and (4) it very likely denies the non-settling tortfeasors the right to argue that those tortfeasors *already so determined as a matter of law* before trial begins[153] are the legal cause of the plaintiff's damages.

A. Implications of HRS § 663-15.5

HRS section 663-15.5 clearly promotes settlement by both plaintiffs and defendants. A disproportionately guilty tortfeasor with limited financial resources will leap at a settlement on his behalf that extinguishes any rights of contribution against him. A plaintiff will likewise take advantage of the benefits of the statute that favors full recovery because it only reduces the plaintiff's remaining claims by a dollar-for-dollar amount paid by the settling tortfeasor—a welcome change from the old HCATA for plaintiffs.[154]

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[150] HAW. REV. STAT. § 663-15.5(d).

[151] *See id.* A good faith settlement agreement discharges the settling defendant from *all liability for any contribution* to the non-settling joint tortfeasor or co-obligor, except co-obligors who have expressly agreed in writing to an apportionment of liability for losses or claims among themselves. HAW. REV. STAT. § 663-15.5(d) (2003 Supp.) (emphasis added).

[152] *See id.*

[153] *See* Velazquez v. National Presto Industries, 884 F.2d 492 (9th Cir. 1989). The Ninth Circuit held that the settling defendants, by their settlement, established their joint liability to the plaintiffs, and that "such joint liability in turn established both the parties' status as joint tortfeasors within the meaning of HRS section 663-11." *Id.* at 496-97. Thus, a settling joint tortfeasor's act of *paying* for the settlement established his status as a joint tortfeasor as a matter of law. Note that the Ninth Circuit focused on Hawai'i's statutory definition of joint tortfeasor and relied on Petersen v. City and County of Honolulu, 51 Haw. 484, 462 P.2d 1007, 1008 (1969), *as amended*, (1970). *See also Gump* v. Wal-Mart Stores, Inc., 93 Hawai'i 417, 422, 5 P.3d 407, 412 (2000) (treating McDonald's (having settled) and Wal-Mart (having been adjudged liable) as "joint tortfeasors").

[154] *Cf.* HAW. REV. STAT. § 663-14. A release by the injured person of joint tortfeasors or one joint tortfeasor . . . *reduces* the claim against the other tortfeasors in the *amount of the consideration paid* for the releases or release, *or in any amount or proportion* by which the releases or release provide that the total claim shall be reduced, *if greater than the consideration paid. Id.* (*emphasis added*) (*repealed by* Act of June 28, 2001, No. 300, § 3, *reprinted in* 2001 Haw. Sess. Laws 877 (codified as HAW. REV. STAT. § 663-15.5)). *See also supra* Part II.A.

1. HRS section 663-15.5 abrogates only the non-settling tortfeasor's right to contribution under HRS § 663-12

The right of contribution affects the legal strategies of both plaintiffs and defendants in tort actions.[155] A defendant must know whether a settlement on his behalf will extinguish his right of contribution against other tortfeasors in order to determine what he should pay in the settlement.[156] HRS section 663-15.5 virtually automatically abrogates any right of contribution held by the non-settling tortfeasor under the original HCATA.[157] A good faith settlement under HRS section 663-15.5 bars[158] and discharges any contribution claims[159] by the *non-settling* joint tortfeasor(s) against the settling tortfeasor(s).[160] HRS section 663-15.5 also implicitly overrules significant practice and precedent under the original HCATA, to the detriment of the fair allocation of fault based upon proportionate liability.

In *Gump*,[161] the Hawai'i Supreme Court affirmed the ICA's holding[162] that because Wal-Mart failed to file a cross-claim against McDonald's,[163] Wal-Mart did not have a right of contribution from McDonald's.[164] *Gump* required that joint tortfeasors file cross-claims against co-defendants to preserve their right to contribution against settling co-defendants and potential third-party defendants. Under HRS section 663-15.5, however, even if diligent defendants do file cross-claims to preserve their rights to contribution, these efforts *do not guarantee* their right to contribution pursuant to HRS section 663-12,[165]

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[155] *See* Michael K. Sugrue, *The Rights of Settling Tortfeasors Under the Massachusetts Contribution Among Tortfeasors Act*, 35 SUFFOLK U. L. REV. 571, 572 n.1 (2001) (citing Larry S. Kaplan, *From Contribution to Good Faith Settlements: Equity Where Are You?*, 49 J. AIR L. & COM. 771, 772 n.3 (1984) (discussing importance of plaintiffs' and defendants' legal strategies in settlement of tort cases)).

[156] *Id.* at 572 (citation omitted).

[157] *See generally* HAW. REV. STAT. § 663-12 (discussing when contribution right accrues).

[158] HAW. REV. STAT. § 663-15.5(a)(3) and (d).

[159] *See id.* § 663-15.5(a)(3).

[160] *See id.*

[161] 93 Hawai'i 417, 5 P.3d 407 (2000). In this case, plaintiff Gump sustained injuries after she slipped on a french fry outside the McDonald's restaurant but inside defendant Wal-Mart's premises. *Id.* at 419, 5 P.3d at 409. *See also supra* Part II.A.2 (discussion of the case's background).

[162] Gump v. Wal-Mart Stores, Inc., 93 Hawai'i 428, 5 P.3d 418 (Ct.App. 1999), *rev'd on other grounds*, 93 Hawai'i 417, 5 P.3d 407 (2000).

[163] *Gump*, 93 Hawai'i at 419, 5 P.3d at 409. Prior to trial, plaintiff Gump reached a settlement with McDonald's, pursuant to which Gump released McDonald's in exchange for $5,000. *Id.* Upon Gump's motion in limine regarding the dismissal of McDonald's, the trial court ruled that the issue of McDonald's liability would not be included on the special verdict form. *Id.*

[164] *Id.* at 422, 5 P.2d at 413.

[165] *See supra* note 30 and accompanying text (discussing contribution under the HCATA).

because the court's good faith determination acts as the "magic wand" to discharge any and all further liability on the part of the settling tortfeasor.[166] Furthermore, in light of the Hawai'i Supreme Court's adoption of the "totality of circumstances approach" to good faith determination,[167] the courts are almost always likely to find settlements "given in good faith,"[168] because this approach allows the courts to give effect to the public policy favoring voluntary settlement of claims without requiring the court to consider a specific set of factors.

On the other hand, while abrogating the *non-settling* tortfeasor's right to contribution under HRS section 663-12, HRS section 663-15.5 continues to protect the settling tortfeasor's right to contribution under the same section.[169] HRS section 663-15.5 is silent about the settling tortfeasor who has discharged the common liability; it only *expressly bars the non-settling tortfeasor's contribution claims*.[170] Arguably HRS section 663-15.5 does not repeal the limitation upon the settling joint tortfeasor's right to contribution recognized in *Velasquez v. National Presto Industries*.[171]

In *Velasquez*, the Ninth Circuit held that a joint tortfeasor who settled with the injured person *must* secure for other joint tortfeasors a release of liability *before* seeking a contribution judgment against them.[172] In other words, if a settling tortfeasor paid for the release of the plaintiff's claims against *all* joint tortfeasors, HRS section 663-15.5 still allows this settling tortfeasor to collect contribution from the non-settling tortfeasors. Only in this narrow scheme can tortfeasors pursue their contribution claims under HRS section 663-15.5 because the statute explicitly bars the non-settling tortfeasors from filing claims for contribution against the settling tortfeasor where settlements were "made in good faith."[173] In the previous medical malpractice example, assume that Doctor's settlement with Patient also released Surgeon from liability. Under HRS section 663-15.5, Doctor would still be able to sue Surgeon for contribution.

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[166] *See supra* note 6 and accompanying text (listing effects of HRS section 663-15.5).

[167] *See generally supra* Part II.D.

[168] *See* Troyer v. Adams, 102 Hawai'i 399, 422, 77 P.3d 83, 106 (citing several cases from jurisdictions that have adopted the totality of circumstances standard of good faith, *e.g.*, Johnson v. United Airlines, 784 N.E.2d 812 (Ill. 2003); *In re* Guardianship of Babb, 642 N.E.2d 1195 (Ill. 1994); Ballweg v. City of Springfield, 499 N.E.2d 1373 (Ill. 1986); Velsicol Chemical Corp. v. Davidson, 811 P.2d 561 (Nev. 1991); Brooks v. Wal-Mart Stores, Inc., 535 S.E.2d 55 (N.C. Ct. App. 2000); and Mahathiraj v. Columbia Gas of Ohio, Inc., 617 N.E.2d 737 (Ohio Ct. App. 1992)).

[169] *See supra* note 30 and accompanying text.

[170] *See supra* note 6 and accompanying text (listing effects of HRS section 663-15.5).

[171] 884 F.2d 492 (9th Cir. 1989). *See also supra* note 30 and accompanying text.

[172] *Velazquez*, 884 F.2d at 495 (emphasis added).

[173] HAW. REV. STAT. § 663-15.5(d).

2. HRS § 663-15.5 implicitly repeals the implied right to indemnification

HCATA provided that it "does not impair any right of indemnity under existing law."[174] HRS section 663-15.5's *written indemnity* requirement,[175] however, implicitly overrules, for example, the vicariously liable employer's right to indemnification from a negligent employee. In *Saranillio v. Silva*,[176] the court held that an employee and a vicariously liable employer fell within HCATA's definition of joint tortfeasors.[177] The court, in holding that the employer remained vicariously liable just as if there had been no release, stated:

> The employer is not without means to limit or offset its remaining liability to the plaintiff[178] . . . *the employer retains the right to seek indemnification from its employee.*[179]

In other words, when an employer's liability is vicarious, constructive, derivative, a non-contractual, equitable right to indemnity existed under prior law.[180] Under HRS section 663-15.5, however, unless the employer had previously obtained a *written indemnity agreement* from its settling employee,[181] the employer's equitable claim for indemnification from the settling employee is

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[174] *See id.* § 663-16.

[175] *See generally id.* § 663-15.5(d).

[176] 78 Hawai'i 1, 889 P.2d 685, *recons. denied*, 78 Hawai'i 421, 895 P.2d 172 (1995).

[177] *Id.* at 15, 889 P.2d at 699 (citing HAW. REV. STAT. § 663-11).

[178] *Id.* at 14, 889 P.2d at 698.

[179] *Id.* at 13, 14, 889 P.2d at 697, 698 (citing HRS section 663-16 and Ah Sing v. McIntyre, 7 Haw. 196, 198 (1887). "An employer held liable under respondeat superior is entitled to indemnification from its employee." *Id.* (emphasis added). Because HRS section 663-15.5 repealed HRS section 663-14, the only means left for the employer to limit or offset its remaining liability is through a written indemnification agreement.

[180] *See* Houdaille Industries, Inc. v. Edwards, 374 So. 2d 490, 495 (Fla. 1979). "In such cases, the employer is held to answer for its employee's negligence merely because of its status and not because it participated in the tortious act—a normal incident of and the intended consequence of the doctrine of respondeat superior." Saranillio v. Silva, 78 Hawai'i 1, 14, 889 P.2d 685, 698 (1995).

[181] *See* HAW. REV. STAT. § 663-15.5(d). A determination by the court that a settlement was made in good faith shall:

> (1) Bar any other joint tortfeasor or co-obligor from any further claims against the settling tortfeasor or co-obligor *except those based on a written indemnity agreement*; and
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> (2) result in a dismissal of all cross-claims filed against the settling joint tortfeasor or co-obligor, *except those based on a written indemnity agreement.*

HAW. REV. STAT. § 663-15.5 (2003 Supp.) (emphasis added).

extinguished, and the non-settling employer has no other avenue to protect itself other than the gratuitous objection to the settlement.[182]

HRS section 663-15.5 abrogates the non-settling joint tortfeasor's right to contribution, for which the original provisions of the HCATA explicitly provided.[183] HRS section 663-15.5 also extinguishes a non-settling joint tortfeasor's right to contribution against known tortfeasors unnamed in the lawsuit because HRS section 663-15.5's good faith settlement procedures, rights, and obligations do not require the existence of a lawsuit.[184] To this effect, the Hawai'i Supreme court's construction of HRS section 663-15.5 is inconsistent with HCATA's "*design to allocate the burden* of recompensing an injured plaintiff *according to proportionate fault*,"[185] because it prevents the non-settling tortfeasor who is required to pay more than his proportionate share of liability from pursuing a contribution claim against the settling tortfeasor, and at the same time, presumably limits his right to have the trier of fact determine his proportionate share of fault with respect to the settling tortfeasors.

B. Hawai'i's Good Faith Standard Under HRS § 663-15.5: The "Totality of Circumstances Approach"

The Hawai'i Supreme Court adopted the "totality of circumstances" approach in *Troyer*.[186] Under this approach, the trial court's determination of good faith is discretionary both in terms of standard of review and in the sense that the trial court may consider *any relevant facts* available at the time of the settlement.[187] The *Troyer* majority declared that the totality of the circumstances approach allows trial courts to give effect to the strong public policy favoring the peaceful settlement of claims[188] and at the same time allows the trial courts to be on guard for any evidence of unfair dealing, collusion, or wrongful conduct by the settling parties.[189]

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[182] "On the other hand, even if the employer may retain its right to indemnity, it may be of little value in cases where the employee is judgment proof, or where the employer chooses not to pursue a claim against its employee." *Saranillio*, 78 Hawai'i at 14, 889 P.2d at 698.

[183] *See supra* note 30 and accompanying text.

[184] HAW. REV. STAT. § 663-15.5(f).

[185] *Saranillio*, 78 Hawai'i at 15, 889 P.2d at 699 (emphasis added).

[186] 102 Hawai'i 399, 427, 77 P.3d 83, 111 (2003). *See also supra* Part II.D (discussing court's adoption of totality of circumstances to determine good faith).

[187] *Troyer*, 102 Hawai'i at 427, 77 P.3d at 111.

[188] *Id.* (citing Dubina v. Mesirow Realty Development, 756 N.E.2d. 836, 840 (Ill. 2001)).

[189] *Id.*

1. The Troyer standard does not protect non-settling tortfeasor from unjust results

The majority explicitly found that through the enactment of HRS section 663-15.5, the Hawai'i Legislature "abandoned a statutory scheme that afforded the non-settling joint tortfeasor greater protection than in post-Act 300 [HRS section 663-15.5] environment,"[190] and was more interested in encouraging settlements than ensuring the equitable apportionment of liability.[191] The totality of circumstances approach enunciated in *Troyer* renders the good faith determination discretionary; the courts are now free to consider anything available at the time of the settlement, and their conclusion will only be overturned for a manifest abuse of discretion.[192] The abuse of discretion standard, and the limitation of "good faith" to a question of collusion or harmful intent, will surely encourage more settlements because courts will almost always find settlements given in good faith—a judge, conscious of the public policy favoring settlements, is not likely to challenge a settlement strongly supported by the plaintiff and one of the joint tortfeasors. Once the trial court determines that the settlement was in good faith, this determination bars all of the non-settling tortfeasors' contribution or equitable indemnity claims against the settling tortfeasor. The only time the non-settling tortfeasor can pursue a contribution claim is if he *successfully objects* to the settlement by proving it was given in bad faith (or if he is already protected by a written indemnity contract). Because, however, the totality of circumstances approach to good faith determination is of an "amorphous" nature,[193] this standard makes the non-settling tortfeasor's burden of proof more challenging. No guidelines exist for the objecting non-settling tortfeasor to prove "bad faith" under this approach. More importantly, if a settlement based on the availability of money ("deep pockets") is not considered collusion or in bad faith, then the only challenge is to settlements that are "collusive"—i.e., those "aimed at injuring non-settling tortfeasor's interests."[194]

The *Troyer* majority characterized California's *Tech-Bilt* standard of good faith, which requires an analysis of certain factors,[195] as requiring the trial

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[190] *Id.* at 426, 77 P.3d at 110.

[191] *Id.* "[T]he legislature's codification of Act 300 suggest[ed] that, like the drafters of the 1955 UCATA, it was more interested in encouraging settlements than ensuring the equitable apportionment of liability." *Id.*

[192] *See supra* Part II.D (discussing the *Troyer* majority's non-exclusive list of factors a court may consider under the totality of circumstances approach).

[193] *Troyer*, 102 Hawai'i at 434, 436, 77 P.3d at 118, 120 (Acoba, J., dissenting).

[194] *Id.* at 422-23, 77 P.3d at 106-07.

[195] Tech-Bilt, Inc. v. Woodward-Clyde & Assoc., 698 P.2d 159, 166-67 (Cal. 1985). The *Tech-Bilt* factors include:

[1] a *rough approximation* of plaintiff's total recovery and the settlor's *proportionate*

courts to conduct "mini-trials" to determine the settling party's proportionate liability.[196] Citing *Tech-Bilt*'s dissent, the *Troyer* majority held that the *Tech-Bilt* factors provided an "unworkable standard" and may lead to the clogging of the courts with unnecessary hearings, discourage settlement of legitimate claims, and severely strain the resources of the parties and of the trial and appellate courts.[197] Under the *Tech-Bilt* standard, however, the non-settling defendant knows his burden of proof is "to demonstrate . . . that the settlement is so far *'out of the ballpark'* in relation to the [*Tech-Bilt*] factors as to be inconsistent with the equitable objectives of the statute."[198] Under the non-collusive standard, the non-settling tortfeasor knows that "lack of good faith . . . certainly includes collusion, fraud, dishonesty, and other wrongful conduct."[199] In contrast, under the purported "approach" pursuant to *Troyer*, allowing the trial courts to consider "any other factor that is relevant"[200] leaves the term "good faith" without any discernible boundaries.[201]

As Justice Acoba summarized, the lack of guidance under the majority's approach to good faith determinations may lead to uncertainty:[202] (1) parties and counsel will be unsure of the type of information necessary to establish a good faith claim;[203] (2) trial courts will be uncertain of what evaluative factors should be dispositive;[204] (3) the undifferentiated approach inherent in the majority's test would fail to ensure a focused record for appellate review;[205] and (4) the result of such an approach will engender disparate results among the cases.[206]

The non-settling tortfeasor, faced with a good faith standard with no "discernible boundaries,"[207] also faces an even more difficult standard of

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liability, [2] the *amount paid in settlement*, the allocation of settlement proceeds among plaintiffs, and a recognition that a *settlor should pay less* in settlement than he would if he were found liable after a trial. Other relevant considerations include [3] the *financial conditions and insurance policy limits* of settling defendants, as well as [4] the existence of collusion, fraud, or tortious conduct aimed to injure the interests of non-settling defendants.

Id. (emphasis added).

196 *Troyer*, 102 Hawai'i at 426, 77 P.3d at 110.

197 *Id.* (citing *Tech-Bilt*, 698 P.2d at 168 (Bird, C.J., dissenting)).

198 *Tech-bilt*, 618 P.2d at 167 (emphasis added).

199 *Troyer*, 102 Hawai'i at 422, 77 P.3d at 106 (citing Noyes v. Raymond, 548 N.E.2d 196, 199 (Mass. App. Ct. 1990)).

200 *Id.* at 427, 77 P.3d at 111 (Acoba, J., dissenting).

201 *Id.* at 436, 77 P.3d at 120.

202 *Id.*

203 *Id.*

204 *Id.*

205 *Id.*

206 *Id.*

207 *Id.*

review to overcome. The *Troyer* majority applied the abuse of discretion[208] standard of review to good faith determinations under HRS section 663-15.5.[209] This high standard imposes the burden of establishing abuse of discretion *by a strong showing* on the appellant.[210] Thus, under HRS section 663-15.5, the likelihood that a non-settling tortfeasor will successfully challenge a settlement's good faith determination is low. As a result, a good faith settlement effectively abrogates a non-settling tortfeasor's right to equitable indemnity and/or contribution.

To compound the problems for the non-settling tortfeasor, the *Troyer* majority held that HRS section 663-15.5 did not violate a non-settling tortfeasor's right to due process.[211] The majority held that the right to contribution is inchoate, and that this right did not constitute a property interest protected by constitutional due process principles.[212] Even assuming that an unaccrued right of contribution constitutes a property interest, the *Troyer* majority held that HRS section 663-15.5 afforded the non-settling tortfeasor "notice and an opportunity to be heard"[213] regarding the determination whether a settlement was given in good faith. The majority apparently considered the trial court's hearing to determine good faith as a "meaningful manner."[214] The majority, however, failed to recognize the harsh effects of finding good faith under HRS section 663-15.5: the non-settling tortfeasor, left with no basis or guideline to successfully contest or object to the good faith settlement, stands to lose not only his right to contribution, but also his right to procedural due process.

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[208] Association of Apartment Owners of Wailea Elua v. Wailea Resort Co., Ltd., 100 Hawai'i 97, 119, 58 P.3d 608, 630 (2002). "An abuse of discretion occurs where the trial court has *clearly exceeded the bounds of reason or disregarded rules or principles of law or practice to the substantial detriment of a party litigant.*" *Id.* (emphasis added).

[209] *See generally Troyer*, 102 Hawai'i at 427, 77 P.3d at 111.

[210] Lepere v. United Pub. Workers, Local 646, 77 Hawai'i 471, 474 n.5, 887 P.2d 1029, 1032 n.5 (1995) (quoting State v. Estencion, 63 Haw. 264, 267, 625 P.2d 1040, 1043 (1981)).

[211] *See generally Troyer*, 102 Hawai'i at 431-34, 77 P.3d at 115-18.

[212] *See id.* at 432-33, 77 P.3d at 116-17 (citing Snoddy v. Teepak, Inc., 556 N.E.2d 682, 685 (Ill. App. Ct. 1990). "The protections of the fourteenth amendment apply to accrued causes of actions. While it is true that contribution among joint tortfeasors is an inchoate right at the time of the injury, the cause of action does not accrue until a tortfeasor pays more than his pro rata share." *Id.* Note the inherent contradiction with Gump v. Wal-Mart Stores, Inc. 93 Hawai'i 417, 5 P.3d 407 (2000), where the court held that defendant Wal-Mart waived this "inchoate" right of contribution by not filing a cross claim. *Gump* at 422, 5 P.3d at 412. *See also supra* Part III.A. Under HRS section 663-15.5 as interpreted by *Troyer*, the finder of fact will likely only decide whether the non-settling defendants are liable, without reference to the proportionate share of fault attributed to any settling tortfeasor.

[213] *Troyer*, 102 Hawai'i at 433, 77 P.3d at 117.

[214] *Id.* at 434, 77 P.3d at 118.

Justice Acoba correctly relied on California's *Singer Co. v. Superior Court*[215] as instructive[216] and reasoned that under HRS section 663-15.5, the right to contribution was a property interest.[217] The Hawai'i Legislature expressly stated that it modeled HRS section 663-15.5 after the California statute.[218] "California courts have held that a cross-claim for contribution asserted by one joint tortfeasor against another constitute[d] a property interest protected by due process although the right of contribution has not yet accrued."[219] The *Troyer* dissent correctly distinguished the majority's cited caselaw as non-instructive because those cases[220] interpreted joint tortfeasors statutes from other states, not California.[221] Since a non-settling tortfeasor loses his right to seek contribution from a joint tortfeasor who settled (if that settlement is adjudged to be in good faith), the non-settling tortfeasor stands to be deprived of his property right to contribution.[222] Justice Acoba correctly recognized that the net result of the majority's test was "*to encourage settlements to the detriment of equitable financial sharing*,"[223] and thus was contrary to the Hawai'i legislature's intent of *protecting the rights of all parties to the settlement*.[224]

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[215] 179 Cal. App. 3d 875, 225 Cal.Rptr. 159 (Cal. Ct. App. 1986).

[216] *Troyer*, 102 Hawai'i at 438, 77 P.3d at 122. "As Act 300 [was] based on [California statute, CCCP § 877], the *Singer* holding [was] instructive." *Id.*

[217] *Id.* at 438, 77 P.3d at 122. "[I]n the framework of Act 300, the right to contribution [was] a property interest protected by the due process clause." *Id.*

[218] *Id.* at 434, 77 P.3d at 118 (Acoba, J., dissenting) (citing HSE. STAND. COMM. REP. NO. 1230, 21st Leg., Reg. Sess. (2001), *reprinted in* 2001 HAW. HSE. J. 1599).

[219] *Id.* at 437, 77 P.3d at 120 (citing *Singer*, 225 Cal. Rptr. at 159, 161).

[220] *Id.* at 438 n.2, 77 P.3d at 121 n.2 ("Although other cases hold that the joint tortfeasors' right to contribution is not a property right protected under the Due Process Clause, these cases interpret other joint tortfeasor statutes."); (*E.g.*, Snoddy v. Teepak, Inc. 556 N.E.2d 682 (Ill. App. Ct. 1990); West v. Rollhaven Skating Arena (306 N.W.2d 408 (Mich. Ct. App. 1981)); Nelson v. Ptaszek, 505 A.2d 1141, 1143 (R.I. 1986) (interpreting release agreement, not a joint tortfeasor statute)).

[221] *Id.*

[222] *Id.* (citing *Singer*, 225 Cal. Rptr. at 168).

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

[224] *Id.* at 414 (citing SEN. STAND. COMM. REP. NO. 828, 21st Leg., Reg. Sess. (2001), *reprinted in* 2001 HAW. SEN. J. 1252, 1253). "The [Hawai'i] Legislature ha[d] declared that Act 300 'will achieve its stated purpose while still adequately protecting the rights of all parties involved.'" *Id.* (internal quotes in original) (emphasis added).

C. HRS § 663-15.5 Does Not Allow "Empty Chair."[225]

HRS section 663-15.5 provided no good faith guideline and abolished the non-settling tortfeasor's right to contribution and implied right to indemnification. The Hawai'i Legislature missed an opportunity to afford the non-settling tortfeasor *some protection*, to ensure a fair apportionment of liability in settlement, when it rejected a proposal to address the "empty chair" issue in amending HRS section 663-15.5 in 2003.[226] Empty chair pertains to offering evidence of the negligence or other fault of absent non-parties, including the settling defendant.[227] This is the key that determines what the jury hears about the tortfeasor's fault—admitted and contested—for the plaintiff's alleged injuries. The proposal not included in the amended HRS section 663-15.5 would have required the inclusion of the settling entity and any apportionment of fault of the settling entity in the verdict or judgment form at the request of any non-settling party.[228] HRS section 663-15.5's amendment ultimately made housekeeping changes.[229] Under HCATA caselaw, the issue of whether to include the settling joint tortfeasors on the special verdict form, *for purposes of apportionment of liability*, is within the trial court's discretion.[230] *Troyer*, however, dramatically changed this possibility that a trial court may even allow "empty chair" arguments by clarifying that a good faith settlement does not authorize apportionment of liability by the trier of fact.

The *Troyer* majority reiterated its reasoning in *Doe Parents v. State, Department of Education*,[231] that the "dismissal of a party with prejudice

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[225] "Empty chair" pertains to offering evidence of the negligence or other fault of absent non-parties. *See* Richard S. Miller, *Filling the "Empty Chair": Some Thoughts About Sugue*, 15 HAW. B.J. 69, 70 (1980) [hereinafter "Miller"].

[226] *See* H.R. CONF. COMM. REP. NO. 9, 22nd Leg., Reg. Sess. (Haw. 2003), *reprinted in* 2003 HAW. HSE. J. 1703 (noting the Legislature's rejection of the empty chair issue in the final form of Act 146, which amended HRS section 663-15.5).

[227] MILLER, *supra* note 225 at 70. It cannot be overemphasized that, under Hawai'i court's interpretation of joint tortfeasors under HRS section 663-11, a settling tortfeasor *by payment* becomes a "joint tortfeasor" with respect to plaintiff's claims as a matter of law. *See* Velazquez v. National Presto Industries, 884 F.2d 492 (9th Cir. 1989); *see also supra* note 30 and accompanying text.

[228] SEN. STAND. COMM. REP. NO. 1205, 22nd Leg., Reg. Sess. (Haw. 2003).

[229] *Id.*

[230] *See generally* Gump v. Wal-Mart Stores, 93 Hawai'i 417, 422-23, 5 P.3d 407, 412-13 (2000).

[231] 100 Hawai'i 34, 87, 58 P.3d 545, 598 n.50 (2002). Note that in *Doe Parents*, the circuit court dismissed with prejudice plaintiffs' claims against defendant Norton after he filed for voluntary bankruptcy, which *automatically stayed, by operation of statute*, plaintiffs' claims against Norton. *Id.* at 56 n.30, 58 P.3d at 567 n.30 (emphasis added). As a result, plaintiffs had no way of recovering any judgment from this bankrupt defendant. The Hawai'i Supreme Court

means that the party can no longer be a joint tortfeasor because he or she '*cannot be liable in tort to the plaintiffs.*'"[232] Therefore, the *Troyer* majority continued, "HRS section 663-10.9[233] [the joint and several liability statute] does not authorize apportionment of liability' in such circumstances."[234] This has a significant effect on joint tortfeasors who remain jointly and severally liable for economic damages in actions involving injury or death to persons.[235]

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held that because of defendant Norton's dismissal from the case, he "cannot be liable" in tort to the plaintiff and was thus not a joint tortfeasor. *Id.* at 87, n.50, 58 P.3d at 598 n.50. As Justice Acoba's concurrence accurately pointed out, the court's rationale held that a bankrupt or judgment-proof party could never be considered a joint tortfeasor. *Id.* at 95, 58 P.3d at 606 (Acoba, J., concurring). *But see* Karasawa v. TIG Insurance Co., 88 Hawai'i 77, 80-81, 961 P.2d 1171, 1174-75 (Ct.App. 1998) (omitting liability discussion, but holding that "tortfeasors are joint tortfeasors for purposes of [HCATA] if they *individually or collectively cause*[d] the same injury.") (emphasis added); Ginoza v. Takai, 40 Haw. 691, 691 (1955) (holding that judgment does not need to be recovered to constitute a [party as] a joint tortfeasor for purposes of the [HCATA]). The *Troyer* court thus contradicts itself and confuses the line between a "joint tortfeasor" for *liability* purposes and a "joint tortfeasor" for legal *causation* purposes.

[232] Troyer v. Adams, 102 Hawai'i 399, 402 n.1, 77 P.3d 83, 86 n.1 (2003).

[233] HRS section 663-10.9 provides, in relevant part:

> Joint and several liability for joint tortfeasors as defined in section 663-11 is *abolished except* in the following circumstances:
>
> (1) For the recovery of *economic damages* against joint tortfeasors in actions involving injury or death to persons;
>
> (2) For the recovery of *economic and noneconomic damages* against joint tortfeasors in actions involving:
>
> (A) Intentional torts;
>
> (B) Torts relating to environmental pollution;
>
> (C) Toxic and asbestos-related torts;
>
> (D) Torts relating to aircraft accidents;
>
> (E) Strict and products liability torts; or
>
> (F) Torts relating to motor vehicle accidents except as provided in paragraph (4);
>
> (3) For the recovery of *noneconomic damages* in actions, other than those enumerated in paragraph (2), involving injury or death to persons against those tortfeasors whose individual degree of negligence is found to be twenty-five per cent or more under section 663-31. Where a tortfeasor's degree of negligence is *less than twenty-five per cent*, then the amount recoverable against that tortfeasor for *noneconomic* damages shall be in direct proportion to the degree of negligence assigned;
>
> . . .

HAW. REV. STAT. § 663-10.9 (emphasis added).

[234] *Troyer*, 102 Hawai'i at 402 n.1, 77 P.3d at 86 n.1. Thus, as applied to Dr. Adams, he will be fully liable for *non-economic damages*, instead of being liable for only his proportionate fault if the jury were allowed to apportion liability and if the jury assigned him less than 25% at fault for plaintiff's injuries.

[235] *See* HAW. REV. STAT. § 663-10.9(1). Because joint tortfeasors in actions enumerated in section 663-10.9(2) remain jointly and severally liable for both economic and non-economic damages, only those joint tortfeasors under section 663-10.9(1) [joint tortfeasors in actions for death or injury to persons] have the potential of having limited liability for non-economic damages, i.e., a tortfeasor is liable only for his assigned proportionate share, if found less than

The effect of finding settlements "given in good faith" pursuant to HRS section 663-15.5 is dismissal of the settling tortfeasor *with prejudice*, because the settling tortfeasor will no longer be liable to either the releasing plaintiff[236] or the non-settling joint tortfeasors.[237] Thus, wherever HRS section 663-15.5 applies, *Troyer* effectively renders inapplicable HRS section 663-10.9(3), the provision that limits *non-economic* damages to assigned proportionate share for tortfeasors found less than twenty-five per cent negligent in actions for injury or death to persons[238] because no apportionment of liability is allowed. *Troyer* destroyed this potential for a lesser liability as provided in HRS section 663-10.9(3); the non-settling joint tortfeasor will ultimately be fully liable for *non-economic damages* as well.

HRS section 663-15.5 eliminated a non-settling tortfeasor's right to contribution and *Troyer* implied that the non-settling tortfeasor cannot expect proper apportionment of liability among all the tortfeasors during his subsequent trial.[239] Nevertheless, trial courts should allow the non-settling tortfeasor to introduce evidence of the negligence or other fault of absent non-parties and settling defendants for a different reason. The Legislature's rejection of the proposal to include an "empty chair" provision in amending HRS section 663-15.5 effectively *denies the finder of fact* the opportunity to determine "*legal causation*"—that is, to determine which party's act or omission was a "substantial factor"[240] in causing the plaintiff's injuries, a

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twenty-five per cent negligent.

Some view the entire HRS section 663-10.9 inapplicable in non-settling tortfeasor's subsequent trial where HRS section 663-15.5 applies and dismisses the settling tortfeasors from any further liability for the same case. If section 663-10.9 indeed is inapplicable, however, where more than one tortfeasor did not settle, there would be no basis for holding these remaining tortfeasors "jointly liable" for plaintiff's damages, because HRS section 10.9 provides the list of circumstances where a joint tortfeasor's joint and several liability is NOT abolished.

[236] By a good faith settlement, the plaintiff releases the settling tortfeasor from all claims for damages in exchange for a consideration. *See generally supra* Part III.

[237] *See generally supra* Part III.A; *see also* HAW. REV. STAT. § 663-15.5(d).

[238] *See* HAW. REV. STAT. § 663-10.9(3):

> For the recovery of *noneconomic damages* in actions, other than those enumerated in [§ 663-10.9(2)], involving injury or death to persons against those tortfeasors whose individual degree of negligence is found to be *less than twenty-five per cent* . . . then the amount recoverable against that tortfeasor for *noneconomic* damages shall be in direct proportion to the degree of negligence assigned.

Id. (emphasis added).

[239] *See* Troyer v. Adams, 102 Hawai'i 399, 77 P.3d 83 (2003). The *Troyer* majority noted that a party's dismissal with prejudice means that the party can no longer be a joint tortfeasor because he or she "cannot be liable in tort" to the plaintiff. *Id.* at 402 n.1, 77 P.3d at 86 n.1. Thus, the court held that "*HRS section 663-10.9 does not authorize the apportionment of liability* in such circumstances." *Id.* (emphasis added).

[240] *See* Mitchell v. Branch, 45 Haw. 128, 363 P.2d 969 (1961).

The best definition and the most workable test of proximate or legal cause so far

crucial element in determining liability in *any* tort cause of action. This is also crucial in the fairness of a system of civil fault; it should not simply be a means by which insured defendants bear disproportionate costs with a knowing wink by clever plaintiffs. Without evidence of negligence or other fault of the absent settling tortfeasors, the trier of fact only hears evidence related to the remaining tortfeasor.[241] By allowing the "empty chair" argument during the non–settling joint tortfeasor's trial, the court will "facilitate the determination of *causal negligence*, not liability,"[242] and "enable the trier of fact to decide the *degree of each actor's negligence or other fault.*"[243] This way, the "empty chair" argument lessens the likelihood of prejudice to the non-settling tortfeasor, who now stands to bear full liability for both economic and non-economic damages. The finder of fact must be allowed to hear all of the relevant evidence, "the whole picture," rather than just portions or slivers of information. The settlement must not serve to devalue a defendant's right to prove to the jury exactly what the legal causes of plaintiff's claimed damages are-including those who by voluntary payment become joint tortfeasors as a matter of law.

Allowing the non-settling tortfeasor to offer evidence, if any, of the settling tortfeasor's fault or negligence during a subsequent trial will still encourage settlements because this *does not* and *will not* expose the settling tortfeasor to more liability. The settling joint tortfeasor literally "buys his peace" through a good faith settlement pursuant to HRS section 663-15.5.[244] By settlement, the settling tortfeasor "intended to admit and to discharge [its] common liability as joint tortfeasor as the term is used in [HRS sections] 663-11 through 663-17."[245] Thus, the joint tortfeasor's settlement with the plaintiff *does not* change his status as a joint tortfeasor; it frees him from any future liability arising from the case. The sole purpose of the finder of fact's assessment of all the tortfeasors' fault is simply to determine the *legal cause* of the

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suggested seems to be this: [t]he actor's negligent conduct is a legal cause of harm to another if (a) his conduct is a substantial factor in bringing about the harm, and (b) there is no rule of law relieving the actor from liability because of the manner in which his negligence has resulted in the harm.

Id. at 132, 363 P.2d at 973 (internal citations omitted).

[241] *Troyer*, 102 Hawai'i at 437, 77 P.3d at 121 (Acoba, J., dissenting). "The fact finder at trial will not be apprised of any contribution by the settling joint tortfeasor." *Id.*

[242] *See* Espaniola v. Cawdrey Mars Joint Venture, 68 Haw. 171, 183, 707 P.2d 365, 373 (1985) (allowing the inclusion of the nonparty employer on the special verdict form to facilitate the determination of causal negligence, *not* liability.).

[243] *Id.* at 183, 707 P.2d at 373 (emphasis added).

[244] *See generally* HAW. REV. STAT. § 663-15.5(a) and (d). *See also supra* Part III.A.

[245] *See* Velazquez v. Nat'l Presto Indus., 884 F.2d 492, 497 (9th Cir. 1989). The court held that settling tortfeasor's settlement established his joint liability to the plaintiff, and such liability, in turn, established all defendants' status as joint tortfeasors. *Id.* at 495.

plaintiff's injuries and *not* to render the settling tortfeasor with greater liability. Indeed, in many cases the non-settling tortfeasors will remain jointly and severally liable for certain damages. While the settling tortfeasor understandably relies on not having his name "dragged into court" in a subsequent trial, this will not likely have a substantial negative effect on settlements. Plaintiffs enjoy a better opportunity for full recovery or compensation for their injuries; they can freely settle with a joint tortfeasor with limited resources and still pursue a claim against the non-settling tortfeasor for the rest of their claimed damages without the pitfalls under the now-repealed HRS section 663-14.[246] The benefit a settling tortfeasor reaps from HRS section 663-15.5's good faith determination outweighs any concerns[247] resulting from what the trier of fact finds during the non-settling tortfeasor's trial.

IV. CONCLUSION

HRS section 663-15.5 promises to encourage out-of-court settlements of litigation by literally allowing any joint tortfeasor (including one without "deep pockets") to "buy his peace" in good faith, and allowing the plaintiff to receive compensation for his injuries without the risks of recovering little or no compensation associated with the earlier HCATA. HRS section 663-15.5, however, leaves the non-settling joint tortfeasor with no right to contribution because it effectively abrogates contribution rights once a court determines a settlement was "given in good faith." HRS section 663-15.5's amorphous *Troyer* good faith standard leaves non-settling defendants with a high burden when objecting to the good faith settlement. At present, HRS section 663-15.5 and *Troyer* disregard the critical question "*which party caused the injury?*" Rather, the current law asks the trier of fact to ignore legal causation (i.e., who legally caused the injury) and simply to determine "*how much* [money] liability does the non-settling tortfeasor owe the plaintiff?" *Troyer* disregards the reality that the settling tortfeasor's payment for his release (i.e., settlement) established his status as a "joint tortfeasor" as a matter of law;[248] *Troyer* likely does not even allow the jury to apportion fault to this settling joint tortfeasor.

The Hawai'i State Legislature should examine the effects of HRS section 663-15.5, and seriously determine whether it achieved "its stated purpose

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[246] *See supra* Part II.A (discussing plaintiff's risks under HRS section 663-14 of HCATA).

[247] For example, in Troyer v. Adams, if during Dr. Adams' subsequent trial, the jury found both Drs. Bailey and Bellati negligent in causing Troyer's injuries, both Drs. Bailey and Bellati face the possibility that this finding may affect their reputation in the community.

[248] *See Velazquez*, 884 F.2d at 495; *see also supra* notes 19 and accompanying text (discussing "joint tortfeasors" as defined under the HCATA).

while still adequately protecting the rights of all parties involved."[249] The Legislature should revisit the empty chair provision for the sole purpose of allowing the trier of fact to determine legal causation and balance the non-settling joint tortfeasor's need for protection from unjust results.[250] In the meantime, trial courts should allow the non-settling joint tortfeasor to introduce evidence of fault or negligence of the absent settling tortfeasor, to offer some assurances to the non-settling tortfeasor that the trier of fact will truly determine the legal cause of the plaintiff's injuries.

Marion L. Reyes-Burke[251]

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[249] *Troyer*, 102 Hawai'i at 437, 77 P.3d at 121 (Acoba, J., dissenting) (citing SEN. STAND. COMM. REP. NO. 828, 21st Leg., Reg. Sess. (2001), *reprinted in* 2001 HAW. SEN. J. 1252, 1253).

[250] Justice Acoba, in his dissent in *Troyer*, recognized the need for the Hawai'i Legislature to amend HRS section 663-15.5. *See id.* Justice Acoba emphasized that "a determination of *proportionate liability* among the joint tortfeasors is crucial to ensuring that the rights of all parties are protected. The only remedy for such a digression would be to *amend the statute*." *Id.* (emphasis added).

[251] Class of 2004, William S. Richardson School of Law, University of Hawai'i at Manoa. The author thanks the following for their invaluable feedback on earlier drafts of this article: Professors Chris Iijima and Hazel Beh, Kim Chanbonpin, Alison Ito, and Summer Kupau (the brilliant editor). Special *mahalo* to J.N.Kekoa Reyes-Burke for the inspiration and the unwavering support.

Kamehameha's Hawaiians-Only Admissions Policy Under 42 U.S.C. § 1981: A Permissible Pursuit of Practical Freedom

I. INTRODUCTION

Classification on the basis of race has been a suspect practice in this country for nearly half a century.[1] Nevertheless, the Kamehameha Schools ("Kamehameha"), the multi-billion dollar trust[2] created by the will of Bernice Pauahi Bishop ("Princess Pauahi"),[3] prefers Hawaiians in its admissions policy.[4] Admission to Kamehameha is highly coveted, so in practice, this preference bars all non-Hawaiian applicants. This categorical exclusion of non-Hawaiians makes challenges to such race-conscious practices inevitable, and two such challenges have recently been litigated in federal court.[5] The attacks against Kamehameha's admissions policy, *Mohica-Cummings v. Kamehameha Schools*[6] and *Doe v. Kamehameha Schools*,[7] allege that "[Kamehameha's] self-described 'preference in its admissions policy for children of Hawaiian ancestry' constitutes discrimination on the basis of race in violation of 42 U.S.C. § 1981."[8] Unlike other challenges to an educational

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[1] *See* Brown v. Board of Educ., 347 U.S. 483 (1954) (holding that segregation in public schools solely on the basis of race deprives children of the equal protection of the laws).

[2] The Bernice Pauahi Bishop Estate established Kamehameha and provides its operating funds. For the fiscal year ending 2001, the Estate had assets of $4.282 billion, revenue of approximately $303.571 million, liabilities of $244.701 million, and expenses of $161.496 million. PHILANTHROPIC RESEARCH, INC., *GuidestarEZ: Bernice Pauahi Bishop Estate & Trust*, *at* http://www.guidestar.org/controller/searchResults.gs?action_gsReport=1&npoId=450406 (last visited Nov. 18, 2003).

[3] KAMEHAMEHA SCHOOLS, *Kamehameha Schools Legacy of a Princess*, *at* http://www.ksbe.edu/about/facts.pdf (last visited Nov. 18, 2003).

[4] *See* KAMEHAMEHA SCHOOLS, *Questions and Answers about KS Admissions Policies*, *at* http://www.ksbe.edu/services/admissions/policy.html (last visited Nov. 18, 2003).

[5] *See* Plaintiff's Complaint, Mohica-Cummings v. Kamehameha Schs. (D. Haw. Aug. 18, 2003) (Civil No. 03-00441) (alleging that Kamehameha's admissions policy violates 42 U.S.C. § 1981); *see also* Doe v. Kamehameha Schs. (D. Haw. Jul. 16, 2003) (Civil No. 03-00316).

[6] Mohica-Cummings v. Kamehameha Schs. (D. Haw. Aug. 18, 2003) (Civil No. 03-00441).

[7] Doe v. Kamehameha Schs. (D. Haw. Jul. 16, 2003) (Civil No. 03-00316). The legal arguments in *Mohica-Cummings* and *Doe* are virtually identical. *See* KAMEHAMEHA SCHOOLS, *Kamehameha Schools Admissions Lawsuits*, *at* http://www.ksbe.edu/newsroom/lawsuit/lawsuit_2.php (last visited Nov. 18, 2003) (noting that the reply brief for *Doe* is also applicable to the *Mohica-Cummings* case).

[8] *See* Plaintiff's Complaint at 1, Mohica-Cummings v. Kamehameha Schs. (D. Haw. Aug. 18, 2003) (Civil No. 03-00441). 42 U.S.C. § 1981(a) states:

All persons within the jurisdiction of the United States shall have the same right in every

institution's race-conscious admissions policy,[9] plaintiff in *Mohica-Cummings* bases his action solely upon 42 U.S.C. § 1981's right to contract provision, not upon Fourteenth Amendment Equal Protection or Due Process claims.[10] As such, this paper will confine discussion to Kamehameha's policy with respect to § 1981.

The viability of Kamehameha's Hawaiian-preference admissions policy rests on whether or not a court views Hawaiians as a racial group under § 1981's definition of race. If the court classifies Hawaiians solely as a racial group, the policy is probably impermissible racial discrimination in violation of § 1981. Conversely, if the court gives appropriate weight to Hawaiians' special relationship with the United States government and views Hawaiians as a substantially political group, it will likely find the policy permissible because Hawaiian is not within the meaning of race under § 1981.[11]

In deciding which path to take, a court must balance competing goals: preserving and advancing the heritage of a native people who were unlawfully overthrown, versus pursuing the longtime goal of breaking down racial barriers and eliminating invidious discrimination. Although these ideals appear to conflict, "practical freedom" provides a guide for defining race under § 1981 and allows the ideals to be reconciled. Practical freedom is the antithesis of formal "paper guarantees" that do nothing to actually enforce rights in reality.[12] It is a power, implemented by the Civil Rights Act of 1866, that translates the Thirteenth Amendment's prohibition against badges and incidents of slavery into an affirmative right to have the same opportunity as any other race to live, work, and become a productive member of society. Kamehameha's Hawaiian preference is a critical tool for Hawaiians's pursuit of equality, and as such, it does not offend § 1981. On the contrary, Kamehameha's admissions policy furthers the very same goal of practical freedom that § 1981 seeks to achieve.

State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

42 U.S.C. § 1981(a) (1991).

[9] *See, e.g.*, Gratz v. Bollinger, ___ U.S. ___, 123 S. Ct. 2411 (2003); Grutter v. Bollinger, ___ U.S. ___, 123 S. Ct. 2325 (2003).

[10] *See* Plaintiff's Complaint at 1, Mohica-Cummings v. Kamehameha Schs. (D. Haw. Aug. 18, 2003) (Civil No. 03-00441) (stating that Plaintiff's claim arises under 42 U.S.C. § 1981).

[11] *See generally* Morton v. Mancari, 417 U.S. 535 (1974) (upholding an Indian-preference policy because it was political rather than racial in nature and reasonably and directly related to a legitimate, nonracially based goal).

[12] *See* Jones v. Alfred H. Mayer Co., 392 U.S. 409, 433-34 (1968) (quoting Rep. Thayer, Pa.).

Part II of this paper begins with the history of the United States's relationship with Hawaiians and traces the background of civil rights jurisprudence under § 1981. Part III discusses how practical freedom helps reconcile the two apparently conflicting goals mentioned above. It explains practical freedom's effect on § 1981's interpretation of race and how that interpretation affects the validity of Kamehameha's admissions policy. Finally, Part IV asserts that justice requires a flexible interpretation of race, and concludes that "Hawaiian" is not an impermissible racial classification under § 1981. Any alternative reading would invalidate a legitimate preference that is consistent with § 1981's underlying purpose and would offend over two hundred years of Hawaiian *and* American history.

II. BACKGROUND ON HAWAIIAN HISTORY AND WESTERN CIVIL RIGHTS JURISPRUDENCE

The dilemma courts face today—Constitutional and statutory challenges to Hawaiian preference programs—have resulted from a collision between the dual ideals of equal opportunity and mitigation of injuries resulting from the unlawful overthrow of an indigenous people. The goal of equal opportunity has been most prominently adjudicated under the Fourteenth Amendment's Equal Protection Clause; however, the most recent attack on Kamehameha's admissions policy is a *statutory* challenge under § 1981,[13] which specifically targets allegedly *private* transgressors.[14] This section will trace Hawaiian history, then explain how § 1981's scope has evolved to reach purely private action.

A. A Brief History of the Hawaiian-American Relationship

Numerous cases, statutes, periodicals, and books have described in detail the history of Hawai'i's transformation from a sovereign kingdom to the fiftieth state. [15] This section will not reiterate what has previously been discussed, but provides sufficient background to understand how and why Congress has treated Hawaiians differently from other groups of indigenous people.

Before the first Europeans arrived in Hawai'i in 1778, "Native Hawaiian people lived in a highly organized, self-sufficient, subsistent social system based on communal land tenure with a sophisticated language, culture, and

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[13] *See* Plaintiff's Complaint at 7-10, Mohica-Cummings v. Kamehameha Schs. (D. Haw. Aug. 18, 2003) (Civil No. 03-00441).

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

[15] *See generally* RALPH S. KUYKENDALL, THE HAWAIIAN KINGDOM 1778-1854 (1979) (providing a more detailed history of Hawaii).

religion . . . ."[16] By 1810, King Kamehameha I had united the Hawaiian Islands under a single monarchy, which was recognized by the United States as a legitimate, independent nation from 1826 to 1893.[17] Hawaiian society was internationally recognized as an independent nation, and entered into treaties with not only the United States, but also with Britain, France, and Japan.[18]

The Kingdom of Hawai'i entered into separate treaties with the United States to govern "friendship, commerce, and navigation" in 1826, 1842, 1849, 1875, and 1887.[19] Despite this recognition, John L. Stevens, the United States Minister assigned to the Kingdom of Hawai'i, conspired to overthrow "the indigenous and lawful Government of Hawai'i" in 1893.[20] With the support of United States naval forces positioned to intimidate the Government of Hawai'i, the conspirators formed a provisional government to which the United States Minister extended diplomatic recognition.[21] Stevens acted "without the consent of the Native Hawaiian people or the lawful Government of Hawaii and in violation of treaties between the two nations and of international law."[22] Pressured by "the risk of bloodshed with resistance,"[23] Queen Lili'uokalani abdicated her throne, and on February 1, 1893, the Kingdom of Hawai'i became a United States protectorate.[24]

After this sequence of events, a "presidentially established investigation [into the events surrounding the overthrow] concluded that the United States diplomatic and military representatives had abused their authority . . . ."[25] President Grover Cleveland himself condemned the "illegal acts of the conspirators"[26] and declared that "a substantial wrong has thus been done . . . which [the United States] should endeavor to repair . . . ."[27] He then called for the restoration of the Hawaiian monarchy.[28] This never occurred, in large part

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[16] Overthrow of Hawaii (Apology Resolution), S.J. Res. 19, 103d Cong., 107 Stat. 1510 (1993); *see also* Native Hawaiian Education Act, 20 U.S.C. §§ 7901-12 (1994) (current version at 20 U.S.C.A. §§ 7511-17 (West Supp. 2003)); Native Hawaiian Health Care Improvement Act of 1992, 42 U.S.C. §§ 11701-714 (1992).

[17] *See* Apology Resolution, 107 Stat. at 1510; 20 U.S.C. § 7902(4); 42 U.S.C. § 11701(6).

[18] *See* 20 U.S.C. § 7902(1).

[19] *See* 20 U.S.C. § 7902(4); Apology Resolution, 107 Stat. at 1510; 42 U.S.C. § 11701(6).

[20] 42 U.S.C. § 11701(7). *See also* Apology Resolution, 107 Stat. at 1510; 20 U.S.C. § 7902(5).

[21] *See* 42 U.S.C. § 11701(8); Apology Resolution, 107 Stat. at 1510.

[22] Apology Resolution, 107 Stat. at 1510-11; *see* 42 U.S.C. § 11701(8).

[23] Apology Resolution, 107 Stat. at 1511.

[24] *Id.*

[25] *Id.*

[26] *Id.*

[27] *Id.* (quoting President Grover Cleveland in a message to Congress on December 18, 1893). *See* 42 U.S.C. § 11701(9).

[28] Apology Resolution, 107 Stat. at 1511.

because William McKinley, who supported annexation of Hawai'i, replaced Grover Cleveland as President in 1896.[29]

The United States annexed Hawai'i through the Newlands Resolution of 1898,[30] even though "the indigenous Hawaiian people never directly relinquished their claims to their inherent sovereignty as a people or over their national lands to the United States . . . ."[31] In 1900, President McKinley signed the Organic Act of 1900, which made Hawai'i a territory of the United States.[32]

By 1920 Hawaiians were "falling off rapidly in numbers and many of them [were] in poverty[,]"[33] so Congress enacted the Hawaiian Homes Commission Act ("HHCA").[34] The HHCA "set aside certain public lands . . . to be utilized in the rehabilitation of Native Hawaiians[,]"[35] thus indicating that Congress deemed it constitutionally permissible to establish special programs for Hawaiians. The Admissions Act[36] granted Hawai'i statehood in 1959 under the condition that the State of Hawai'i adopt the HHCA as part of its constitution.[37]

B. Judicial Interpretation of § 1981

While the United States pursued annexation of Hawai'i, the rest of the country dealt with the turmoil of racial conflict between whites and African Americans. This conflict spurred a very different line of statutes and case law than those that arose from the conflict between Americans and Hawaiians. Since the eradication of slavery following the Civil War, civil rights jurisprudence has carefully developed the cherished principle of equality for all Americans.[38] While courts tend to disallow overt and unnecessary

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[29] *Id.* at 1512.

[30] Joint Resolution to Provide for Annexing the Hawaiian Islands to the United States (Newlands Resolution), 30 Stat. 750 (1898) (omitted in view of the admission of Hawai'i into the Union).

[31] Apology Resolution, 107 Stat. at 1512.

[32] Hawai'i Organic Act, ch. 339, 31 Stat. 141 (1900).

[33] 20 U.S.C. § 7902(8) (1994) (current version at 20 U.S.C.A. § 7512(8) (West Supp. 2003)) (quoting Secretary of the Interior, Franklin K. Lane).

[34] Hawaiian Homes Commission Act, ch. 42, 42 Stat. 108 (1921). Hawai'i has adopted the Hawaiian Homes Commission Act as part of its constitution. *See* HAW. CONST. art. XII, §§ 1-3.

[35] Rice v. Cayetano, 963 F. Supp. 1547, 1551 (D. Haw. 1997), *rev'd on other grounds*, 528 U.S. 495 (2000).

[36] Hawai'i Statehood Admissions Act, Pub. L. No. 86-3, 73 Stat. 4 (1959).

[37] HAW. CONST. art. XII, § 2.

[38] *See* Saint Francis v. Al-Khazraji, 481 U.S. 604, 614 (1987) (Brennan, J., concurring). Justice Brennan emphasized that "[p]ernicious distinctions among individuals based solely on their ancestry are antithetical to the doctrine of equality upon which this Nation is founded." *Id.*

intrusion into citizens' private lives,[39] they show considerable deference to "society's deep commitment to the eradication of discrimination based on a person's race or the color of his or her skin."[40]

The Civil Rights Act of 1866 Act created the present-day 42 U.S.C. § 1981.[41] During the mid to late-1800s, the United States struggled to rebuild the nation and recover from civil war, but the biggest social change Americans faced was African-American slaves' freedom in the South. As "an expression of most Americans' sense of fundamental justice[,]"[42] "Congress sought . . . to establish and enforce in law the status and rights of blacks as freemen, a status Southern whites had refused to recognize."[43] In doing so, legislators, specifically Senator Lyman Trumbull,[44] wanted to secure for the newly-freed African-Americans "those inherent, fundamental rights which belong to free citizens or free men in all countries . . . ."[45]

In subsequent decisions, courts have agreed with post-Civil War legislative intent. The Thirteenth Amendment empowered Congress to pass the 1866 Act,[46] and no court has struck it down as unconstitutional. Instead, the 1866 Act's validity has been consistently reaffirmed throughout the past 137 years.[47] Although the 1866 Act's original principles did not specifically

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[39] *See* The Civil Rights Cases, 109 U.S. 3 (1883).

[40] Patterson v. McLean Credit Union, 491 U.S. 164, 174 (1989) (citing Bob Jones Univ. v. United States, 461 U.S. 574, 593 (1983)).

[41] *See* Runyon v. McCrary, 427 U.S. 160, 169 n.8 (1976).

[42] Robert J. Kaczorowski, *Revolutionary Constitutionalism in the Era of the Civil War and Reconstruction*, 61 N.Y.U. L. REV. 863, 883 (1986).

[43] *Id.*

[44] Senator Trumbull was the author and major proponent of the Civil Rights Act of 1866. *See* Robert J. Kaczorowski, *The Enforcement Provisions of the Civil Rights Act of 1866: A Legislative History in Light of* Runyon v. McCrary, 98 YALE L.J. 565, 565 (1988).

[45] John Hope Franklin, *The Civil Rights Act of 1866 Revisited*, 41 HASTINGS L.J. 1135, 1137 (1990) (quotations omitted).

[46] The Thirteenth Amendment states:

> Section 1. Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.
>
> Section 2. Congress shall have power to enforce this article by appropriate legislation. U.S. CONST. amend. XIII, §§ 1-2. The Enabling Clause of that amendment "clothes Congress with power to pass all laws necessary and proper for abolishing all badges and incidents of slavery in the United States . . . ." The Civil Rights Cases, 109 U.S. 3, 20 (1883). *See* Jones v. Alfred H. Mayer Co., 392 U.S. 409, 439 (1968).

[47] In *Jones*, 392 U.S. at 437-38, the Court quoted the United States Attorney General's statement from oral arguments: "The fact that the statute lay partially dormant for many years cannot be held to diminish its force today." *Id.* at 437. Citing the *Civil Rights Cases*, 109 U.S. at 23, the Court further stated that "the power vested in Congress to enforce the article by appropriate legislation" includes the power to enact laws "direct and primary, operating upon the acts of individuals, whether sanctioned by state legislation or not." *Id.* at 438. *See also*

extend to reach private conduct, twentieth-century judicial interpretation has so extended it.[48]

The 1866 Act enacted 42 U.S.C. § 1982 ("§ 1982") in addition to § 1981. Two early cases, *Jones v. Alfred H. Mayer Co.*[49] and *Sullivan v. Little Hunting Park, Inc.*,[50] illustrate how judicial interpretation first extended § 1982, then § 1981 to reach purely private acts. *Jones* held that "§ 1982 bars all racial discrimination, private as well as public, in the sale or rental of property . . . ."[51] *Sullivan*, which supported a broad reading of § 1982, reaffirmed *Jones*.[52] These cases "necessarily implied that the portion of § 1 of the 1866 Act presently codified as 42 U.S.C. § 1981 likewise reaches purely *private* acts of racial discrimination."[53] This prediction proved to be accurate. Seven years after *Jones*, the Supreme Court held in *Johnson v. Railway Express Agency, Inc.*[54] that § 1981 "affords a federal remedy against discrimination in *private* employment on the basis of race."[55] In 1976, the Supreme Court decided *Runyon v. McCrary*,[56] solidifying the proposition that § 1981 "prohibits racial discrimination in the making and enforcement of *private* contracts."[57] Specifically, the *Runyon* Court held that "[§ 1981] prohibits private, commercially operated, nonsectarian schools from denying admission to prospective students because they are Negroes . . . ."[58]

In *Runyon*, African-American children and their parents brought civil rights actions against a private school that allegedly denied the children admission solely on the basis of their race.[59] The United States District Court for the Eastern District of Virginia held in favor of the plaintiffs, and the United States Court of Appeals for the Fourth Circuit affirmed the decision.[60] The Supreme Court similarly affirmed, reasoning that "the racial exclusion

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Sanders v. Dobbs Houses, Inc., 431 F.2d 1097, 1098 n.1 (5th Cir. 1970); Runyon v. McCrary, 427 U.S. 160, 179 (1976).

[48] *See* discussion *infra* Part II.B.

[49] 392 U.S. 409 (1968).

[50] 396 U.S. 229 (1969).

[51] *Jones*, 392 U.S. at 413.

[52] *See Sullivan*, 396 U.S. at 237.

[53] *Runyon*, 427 U.S. at 170 (emphasis added).

[54] 421 U.S. 454 (1975).

[55] *Id.* at 460 (emphasis added).

[56] 427 U.S. 160 (1976).

[57] *Id.* at 168 (emphasis added).

[58] *Id.* Although *Runyon*'s holding stated that § 1981 was specifically applicable to discrimination against African-Americans, later cases determined that "[t]he Act was meant, by its broad terms, to proscribe discrimination in the making or enforcement of contracts against, or in favor of, any race." McDonald v. Santa Fe Trail Transp. Co., 427 U.S. 273, 295-96 (1976).

[59] *Runyon*, 427 U.S. at 164-66.

[60] *Id.* at 164-65.

practiced by [defendant schools] amounts to a classic violation of § 1981" because the "educational services of [defendant schools] were advertised and offered to members of the general public.[61] But neither school offered services on an equal basis to white and nonwhite students."[62]

While the majority concluded that "[t]here could hardly be a clearer indication of congressional agreement with the view that § 1981 does reach private acts of racial discrimination[,]"[63] Justices White and Rehnquist put forth a strong and lengthy dissent.[64] Refusing to accept the majority's excessively liberal construction of § 1981, Justice White declared, "[t]hey are wrong."[65] The dissenting Justices concluded that "the legislative history of § 1981 unequivocally confirms that Congress's purpose in enacting that statute was solely to grant to all persons equal capacity to contract as is enjoyed by whites and included no purpose to prevent private refusals to contract, however motivated."[66] Thus, under the dissenters' interpretation, § 1981 does not protect against discrimination by private parties in the making of contracts.[67] Though the dissenting Justices presented a valid argument, this viewpoint did not prevail.[68]

Many viewed the *Runyon* decision as a monumental step toward the eradication of the badges and incidents of slavery that still existed in the United States.[69] Admittedly, various analyses of § 1981's legislative history have yielded widely disparate conclusions. Notwithstanding those diverse views, the following statement by Justice Stevens summarized the Court's reasoning behind its conclusion that § 1981 *does* reach private acts: "For even if *Jones* did not accurately reflect the sentiments of the Reconstruction Congress, it surely accords with the prevailing sense of justice today."[70]

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[61] *Id.* at 172.

[62] *Id.* at 172-73.

[63] *Id.* at 174-75. The Court also opined that § 1981 and § 1982 are comparable because they derive from the same section of the Act. *Id.* at 170.

[64] *Id.* at 192-214 (White & Rehnquist, JJ., dissenting).

[65] *Id.* at 192 n.1 (White & Rehnquist, JJ., dissenting).

[66] *Id.* at 205 (White & Rehnquist, JJ., dissenting).

[67] *Id.* at 206 (White & Rehnquist, JJ., dissenting)..

[68] *See, e.g.*, Patterson v. McLean Credit Union, 491 U.S. 164, 171 (1988) (declining to overrule *Runyon*).

[69] *See generally* Karen Michele Blum, *Section 1981 Revisited: Looking Beyond* Runyon *and* Patterson, 32 How. L.J. 1 (1989) (arguing that difficulties posed by extension of liability under § 1981 may be resolved by invoking principles of limitation that will be consistent with *Runyon* and the concept that the court is committed to the elimination of invidious racial discrimination in this country); Lloyd Kenneth Thomas, Note, Runyon v. McCrary*: The Slayer of Race Discrimination in the Making and Enforcement of Private Contracts*, S.U. L. Rev. (1989) (urging the Supreme Court to leave the *Runyon* ruling undisturbed).

[70] *Runyon*, 427 U.S. at 191 (Stevens, J., concurring).

The Supreme Court uneasily reaffirmed the *Runyon* extension in the next notable decision, *Patterson v. McLean Credit Union*.[71] In that case, the Court caused an uproar in the legal community[72] when it requested, *sua sponte*, reargument on "[w]hether or not the interpretation of 42 U.S.C. § 1981 adopted by this Court in *Runyon v. McCrary* . . . should be reconsidered?"[73] Four Justices dissented to this request,[74] but ultimately, the Court "decline[d] to overrule *Runyon* and acknowledge[d] that its holding remains the governing law in this area."[75] Once again, the Court asserted that the *Runyon* extension "is not inconsistent with the prevailing sense of justice in this country . . . [but] is entirely consistent with our society's deep commitment to the eradication of discrimination based on a person's race or the color of his or her skin."[76]

As interpreted by the judiciary, the foregoing cases demonstrate that § 1981 reaches private individuals in an attempt to eradicate invidious racial discrimination and promote equality among all ethnicities. However, when confronted with novel circumstances, which exist in Kamehameha's case, courts should not adhere to an inflexible interpretation of § 1981. To do so would "ignore the overwhelming differences between the . . . case law on which [the Court] relies and the unique history of the State of Hawai'i."[77] A blind pursuit of racial equality ignores the basic concept of fairness that is its foundation. Instead, the only route to justice is an interpretation of § 1981 that

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[71] 485 U.S. 617 (1988).

[72] *See* Blum, *supra* note 69, at 2 (stating that the briefs of amici curiae filed with the Court include those of legislators, state attorneys general, civil rights groups, and historians, all urging the Court to adhere to the interpretation of § 1981 adopted in *Runyon*).

[73] *Patterson*, 485 U.S. at 617.

[74] Justice Stevens wrote:

> The Court's order today will, by itself, have a deleterious effect on the faith reposed by racial minorities in the continuing stability of a rule of law that guarantees them the "same right" as "white citizens." To recognize an equality right—a right that 12 years ago we thought "well established"—and then to declare unceremoniously that perhaps we were wrong and had better reconsider our prior judgment, is to replace what is ideally a sense of guaranteed right with the uneasiness of unsecured privilege. Time alone will tell whether the erosion in faith is unnecessarily precipitous, but in the meantime, some of the harm that will flow from today's order may never be completely undone.

Id. at 622 (Stevens, J., dissenting) (footnote omitted).

[75] Patterson v. McLean Credit Union, 491 U.S. 164, 175 (1989).

[76] *Id.* at 174.

[77] Rice v. Cayetano, 528 U.S. 495, 546 (2000) (Stevens, J., dissenting). A strict interpretation of § 1981 case law would, as in *Rice*, ignore the unique history of the State of Hawai'i. *See* Morton v. Mancari, 417 U.S. 535, 550 (1974). Although the issue in *Morton* was an Indian, not Hawaiian preference policy, the Court reasoned that "any other conclusion besides sustaining the Indian preference policy can be reached only by formalistic reasoning that ignores both the history and purposes of the preference and the unique legal relationship between the Federal Government and tribal Indians." *Id.*

adheres to its underlying goal of practical freedom. Here, a court should consider Hawaiian history, the purposes of Kamehameha's admissions policy, and the unique legal relationship between the federal government and Hawaiians when interpreting § 1981. Practical freedom will enable Hawaiians to preserve their native culture while allowing them "an equal chance to succeed in a Western society."[78]

III. KAMEHAMEHA'S HAWAIIAN PREFERENCE POLICY MAY BE RACE-CONSCIOUS, BUT IT DOES NOT CONSTITUTE AN IMPERMISSIBLE RACIAL CLASSIFICATION THAT VIOLATES § 1981.

The initially conflicting goals of cultural rehabilitation and eradication of racial discrimination may be resolved by examining the core objectives that motivated Congress to enact § 1981. While the Fourteenth and Fifth Amendments guarantee that no federal or state government shall deprive a citizen of "life, liberty, or property, without due process of law,"[79] they provide no such protection against the actions of a private individual. The Thirteenth Amendment, however, gives Congress the power to determine what constitutes badges and incidents of slavery.[80] Furthermore, Congress has the authority to pass legislation to eradicate those badges and incidents of slavery, even if that legislation regulates private conduct.[81] Thus, the primary purpose of the Thirteenth Amendment, and specifically the Civil Rights Act of 1866, is to ensure for *all* citizens *practical freedom.*[82] As enacted under Congress's Thirteenth Amendment power,[83] § 1981 shares this goal. Because practical freedom is an aim common to both Kamehameha's preference and western civil rights equality jurisprudence, understanding the motivation behind the Thirteenth Amendment helps reconcile these seemingly conflicting interests.

Section III explains the concept of practical freedom, and discusses how that concept supports a flexible interpretation of "race" under § 1981. Further, Section III illustrates a method for interpreting "race" that does not conflict with the objectives of the Thirteenth Amendment or § 1981. Lastly, Section III addresses Kamehameha's reasons for its Hawaiian preference policy and shows how that preference is, in fact, helping Hawaiians attain practical

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[78] Board of Trustees and Acting CEO of Kamehameha Schools, *Kamehameha Grateful for Support as it Defends Admissions Policy in Court*, HONOLULU ADVERTISER, Nov. 16, 2003, at B3.

[79] U.S. CONST. amends. V, XIV § 1.

[80] *See* U.S. CONST. amend. XIII, § 2 *supra* note 46.

[81] The Civil Rights Cases, 109 U.S. 3, 23 (1883). *See* Jones v. Alfred H. Mayer Co., 392 U.S. 409, 440 (1968).

[82] *See Jones*, 392 U.S. at 431.

[83] *See generally* Runyon v. McCrary, 427 U.S. 160 (1976).

freedom. All factual circumstances considered, this analysis leads to the conclusion that although Kamehameha's admissions policy may be race-conscious, it does not violate the meaning of "race" under § 1981.

A. Practical Freedom

Formal "paper guarantees" mean nothing if, in reality, those guarantees are not or cannot be enforced.[84] Practical freedom means that formal, theoretical rights are given functional effect in the "real world." It is, for example, the ability of all citizens, regardless of race, "to buy whatever a white man can buy . . . [and] to live wherever a white man can live."[85]

In the late 1800s, newly-freed former slaves did not have the same opportunity as whites to become productive members of society. The years immediately following the Civil War required major restructuring of the social order in the South.[86] This transition was not without obstacles, as "[S]outhern whites had refused to recognize" the former slaves' freedmen status.[87] Newly-freed African-Americans were free under the law, but not free in practice.[88] They did not have the same opportunity as whites to become productive members of society: there was widespread institutionalized discrimination against African-Americans that substantially impaired, if not completely deprived, them of practical civil, political, and social rights.[89] Without the combined effect of the Thirteenth Amendment and the 1866 Act, freedmen possessed only "paper" freedom.[90]

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[84] *Jones*, 392 U.S. at 433-34. In *Jones*, the Supreme Court relied on comments by Representative Thayer of Pennsylvania, who stated, "when I voted for the amendment to abolish slavery . . . I did not suppose that I was offering . . . a mere paper guarantee." *Id.*

[85] *Id.* at 443.

[86] *See* Barry Sullivan, Comment, *Historical Reconstruction, Reconstruction History, and the Proper Scope of Section 1981*, 98 YALE L.J. 541, 550 (1989) (arguing that the abolition of slavery, having destroyed the labor system that had existed for two centuries in the Southern states, necessarily called for the creation of a new labor system, for the formation of new civil arrangements). *See generally* Robert J. Kaczorowski, *Revolutionary Constitutionalism in the Era of the Civil War and Reconstruction*, 61 N.Y.U. L. REV. 863 (1986). The article describes the "heroic effort by federal judges and legal officers in the South to protect the civil rights of American citizens." *Id.* at 863.

[87] Kaczorowski, *supra* note 86, at 883.

[88] *Id.*

[89] *See id.* Congress "sought to protect Southern blacks (and whites) from corrupt law enforcement practices that allowed crimes against them to go unpunished, and subjected them to arrest, trial, and conviction of crimes by hostile and prejudiced sheriffs, judges, and juries." *Id.*

[90] *See Jones*, 392 U.S. at 430. In *Jones*, the Supreme Court relied on comments by Senator Trumbull, who stated, "it is idle to say that a man is free who cannot go and come at pleasure, who cannot buy and sell, who cannot enforce his rights." *Id.*

Whereas the Thirteenth Amendment granted formal "paper" guarantees, the 1866 Act gave those rights real content providing "practical effect and force."[91] Congress intended those formal rights to be more than "a dead letter upon the constitutional page of this country."[92] It thus created the 1866 Act "to give effect to that declaration and secure to *all persons* within the United States *practical freedom*."[93] The *Jones* court agreed with this goal:

> At the very least, the freedom that Congress is empowered to secure under the Thirteenth Amendment includes the freedom to buy whatever a white man can buy, the right to live wherever a white man can live. If Congress cannot say that being a free man means at least this much, then the Thirteenth Amendment made a promise the Nation cannot keep.[94]

Practical freedom allowed newly-freed former slaves an opportunity to become productive, economically independent members of society[95]—it enabled them to "be in fact freemen."[96]

B. Section 1981's Goal of Practical Freedom Requires a Flexible Interpretation of Race

Pursuit of practical freedom mandates a flexible standard for interpreting "race," because an inflexible standard cannot accommodate the nuances of reality. The word "race" is not explicitly contained in the language of § 1981, but the scope of § 1981 depends on a court's definition of race. Although § 1981 "is intended to provide equality between 'different races,'" courts have not found a pragmatic definition of the word "race."[97] Some courts believe

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[91] *Id.* at 433-34.

[92] *Id.* at 434. In *Jones*, the Court relied upon this statement by Representative Thayer of Pennsylvania.

[93] *Id.* at 431 (emphasis added). In *Jones*, the Court relied upon this statement by Senator Trumbull, which he made when introducing the Civil Rights bill to the Senate on January 5, 1866.

[94] *Id.* at 443.

[95] "[M]ost Northerners and black leaders saw the free labor contract as a key to *practical freedom*." Sullivan, *supra* note 86, at 550 (emphasis added). Basic economic rights granted to freedmen include the right to "make and enforce contracts, to sue and be sued, and to purchase and lease property. These rights would enable them to act as autonomous, productive workers, who could hope to accumulate some material wealth." *Id.*

[96] *Jones*, 392 U.S. at 434. In *Jones*, the Court relied upon this statement by Representative Thayer regarding the proposed Civil Rights Act of 1866.

[97] Ortiz v. Bank of America, 547 F. Supp. 550, 557 (E.D. Cal. 1982). Although *Ortiz*, written by Judge Karlton, is a district court case, it is "an exhaustive, scholarly review not only of the case law but of the historical and scientific literature." Goehring v. Wright, 858 F. Supp. 989, 999 (N.D. Cal. 1994). Judge Karlton's flexible interpretation of "race" has been validated by the Supreme Court. *See* Saint Francis College v. Al-Khazraji, 481 U.S. 604 (1987). Thus,

that humans can be separated into three distinct races.[98] Other jurisdictions take the view that such categorization and separation is futile because "no such immutable category exists."[99] However, the existence of immutable categories is irrelevant, because no commonly accepted method of separating people into those categories exists.

The Court in *Ortiz v. Bank of America*[100] thoroughly examined the case law addressing § 1981's race definition problem and concluded that the most appropriate classification of "race" under § 1981 is a flexible, dynamic one.[101] In *Oritz*, the plaintiff brought a § 1981 action against her employer, alleging discrimination based on her Puerto Rican descent.[102] The main issue was whether § 1981 protection is limited to "racial" as opposed to "national origin" discrimination.[103] That distinction is not at issue in the *Mohica-Cummings* case, but Judge Karlton's comprehensive race definition analysis is highly relevant to the overarching question of whether Kamehameha's policy is a *racial* classification in violation of § 1981.

1. Three alternative approaches to defining "race"

Judge Karlton examined three different approaches to defining "race."[104] Courts following the narrowest definition of race do not include "national origin" discrimination as a valid cause of action under § 1981, and simply dismiss such cases.[105] The moderate approach allows § 1981 cases to survive a motion to dismiss if plaintiffs produce evidence proving that the alleged discrimination was racial in character.[106] Finally, courts following the most

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Ortiz presently remains the most comprehensive discussion of the scope of § 1981's "race" definition. *See Ortiz*, 547 F. Supp. at 557.

[98] *Saint Francis College*, 481 U.S. at 609 n.4. The *Saint Francis* Court noted the "common popular understanding that there are three major human races—Caucasoid, Mongoloid, and Negroid." *Id.* However, the Court also recognized that "[c]lear-cut categories do not exist." *Id.*

[99] *Ortiz*, 547 F. Supp. at 565.

[100] 547 F. Supp. 550 (E.D. Cal. 1982).

[101] *Id.* at 568.

[102] *Id.* at 550.

[103] *Id.* at 553. The court held that § 1981 does not necessarily exclude claims based on national origin discrimination, "[b]ecause the issue of racial classification is dynamic and not static [so] no group is necessarily excluded." *Id.* at 568.

[104] *Id.* at 560. Judge Karlton remarked, "[r]ecognizing the dangers which arise from generalizing, I believe that three general approaches may be discerned from the opinions." *Id.*

[105] *Id.* at 560. *See, e.g.*, Hiduchenko v. Minneapolis Medical & Diagnostic Ctr., 467 F. Supp. 103, 106 (D. Minn. 1979); Vera v. Bethlehem Steel Corp., 448 F. Supp. 610, 613 (M.D. Pa. 1978).

[106] *Ortiz*, 547 F. Supp. at 561. *See, e.g.*, Bullard v. OMI Georgia, Inc., 640 F.2d 632, 634 (5th Cir. 1981); Khawaja v. Wyatt, 494 F. Supp. 302, 304-05 (W.D. N.Y. 1980).

flexible approach "have found that the scope of § 1981 cannot be limited by any strict notion of 'race.'"[107] The Tenth Circuit first proposed this approach in *Manzanares v. Safeway Stores, Inc.*,[108] where it held that § 1981 is not limited to a restrictive definition of "race."[109] The *Ortiz* court chose to follow the *Manzanares* approach because this view recognized and avoided the difficulty of defining race by considering "factual reality[.]"[110] In response to the dynamic nature of race, "these courts have looked to the '*practical needs and logical reasons*' underlying section 1981 in determining its appropriate scope . . . and attempt to determine the 'racial character' of the allegations in a more *practical* manner."[111] Such a flexible, functional approach to race is in harmony with the objective behind § 1981: to ensure practical freedom for those who have been deprived of rights that other citizens have enjoyed.[112]

2. Judge Karlton's test for determining "race" under § 1981

In his analysis, Judge Karlton noted that "at the heart of each of these cases is an unarticulated and suppressed definition of what the particular court believed 'race' to be."[113] As illustrated above, "race" is an inevitably dynamic, intangible concept.[114] "As such[,] section 1981's scope cannot be restricted to some fixed definition, because by incorporating a racial concept the Supreme Court has incorporated a flexible and changing concept."[115] Any conclusions based on a rigid definition of "race" would be "based on faulty if unexpressed premises," and therefore unsupportable.[116] The only way to build a solid foundation for race analysis under § 1981 is to acknowledge "the notion of 'race' [as] a dynamic concept which compels addressing the question in terms of the *reality* of *present day* group-to-group relations."[117]

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[107] *Ortiz*, 547 F. Supp. at 562. Judge Karlton also recognized that this approach has been gaining support in the federal courts. *Id.* at 563. *See also Saint Francis College v. Al-Kazraji*, 481 U.S. 604 (1987) (validating a broad view of race and holding that such discrimination against an identifiable class of persons based solely on their ancestry or ethnicity is racial discrimination that Congress intended § 1981 to forbid, whether or not it would be classified as racial in terms of modern scientific theory).

[108] 593 F.2d 968 (10th Cir. 1979).

[109] *Id.* at 971.

[110] *Ortiz*, 547 F. Supp. at 564.

[111] *Id.* at 562 (emphasis added).

[112] *See* Jones v. Alfred Mayer Co., 392 U.S. 409, 443-44 (1968). In *Jones*, the Court relied comments by Representative Wilson of Iowa, who stated, "[t]he end [of the Civil Rights Act of 1866] is the maintenance of freedom." *Id.*

[113] *Ortiz*, 547 F. Supp. at 560.

[114] *Id.*

[115] *Id.* at 567.

[116] *Id.* at 560.

[117] *Id.* at 556 n.7 (emphasis added).

Staying true to the spirit of a flexible *Manzanares* approach, the most appropriate real-world test for racial character must be attentive to factual reality. To determine what is meant by "race," one must articulate *why* one is classifying:[118] "the meaning of race turns on why the question is asked and when it is asked."[119] A flexible definition of "race" is the only way to accommodate its dynamic character. To determine whether Kamehameha has discriminated on the basis of race in violation of § 1981, one question must be answered: *Why* does Kamehameha institute a Hawaiian-preference admissions policy?

C. Application of a Flexible Standard to Kamehameha's Hawaiian-preference Admissions Policy

Kamehameha's Hawaiian-preference admissions policy "improve[s] the capability and well-being of the Hawaiian people, . . . the well-being of society as a whole, and contribute[s] to a better future for Hawai'i."[120] Far from being the invidious racial discrimination § 1981 was designed to eliminate, these are legitimate reasons behind Kamehameha's Hawaiian preference policy—reasons that Congress itself has cited in laws benefiting Hawaiians.[121] Under the flexible interpretation of race discussed above,[122] Kamehameha's Hawaiian preference, while race-conscious, does not violate § 1981's prohibition against racial discrimination.

1. Federal Congressional policy and case law demonstrate that defining Hawaiians purely as a "race" is a questionable classification

Because a precise definition of "race" is biologically, anthropologically, and legally impossible, the term "race" has become "encumbered with contradictory and imprecise meanings . . . . [Y]et, each time the term is applied,

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[118] *Id.* at 566. Judge Karlton wrote, "[t]o the degree that science has an answer to the question of what is meant by race, it is only in terms of the further question: tell me why you are classifying." *Id.*

[119] *Id.* at 567.

[120] KAMEHAMEHA SCHOOLS, *Admissions Lawsuits: Kamehameha Schools' Preference Policy Advocates Social Justice*, *available at* http://www.ksbe.edu/newsroom/lawsuit/statements_editorial1.php (last visited Nov. 30, 2003). According to this website, this editorial, which was written by the Trustees of Kamehameha Schools and Acting CEO Colleen Wong, was published in the Honolulu Advertiser on August 24, 2003.

[121] *See* 42 U.S.C. § 11701(3)(b) (1992). *See also* 20 U.S.C. § 7902(21) (1994) (current version at 20 U.S.C.A. § 7512(21) (West Supp. 2003)) (noting that the State of Hawaii reaffirms and protects the unique right of the Native Hawaiian people to practice and perpetuate their cultural and religious customs, beliefs, practices, and language).

[122] *See supra* Part III.B.

a definition must be provided so that the reader will know what concept it represents."[123] The United States's treatment of Hawaiians in federal legislation is a prime example of such "contradictory and imprecise meanings."[124] On the one hand, Congress has not formally recognized Hawaiians as a political group with a status similar to that of Indian tribes.[125] On the other hand, Congress has supported and approved numerous enactments that benefit Hawaiians,[126] and has confirmed that "Native Hawaiians [have a] unique status as the indigenous people . . . comparable to that of American Indians and Alaskan Natives[.]"[127] Statutes that benefit Native Americans,[128] a group of indigenous people who possess a special *political* relationship with the United States government,[129] also include Native Hawaiians. By including Native Hawaiians in such legislation, Congress recognized the striking similarities between the two groups. This further supports the conclusion that Hawaiians should be granted a political status similar to that of Native Americans.

The validity of Native Hawaiian entitlements rests on the assumption that Hawaiians have a special relationship with the United States, which makes their classification not strictly racial, but political. Various federal statutes

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[123] *Ortiz*, 547 F. Supp. at 560 n.18 (quoting S. Molnar, RACES, TYPES AND ETHNIC GROUPS 12 (1975)).

[124] *Id.*

[125] *See generally* Native Hawaiian Recognition Act of 2003 (Akaka Bill), S. 344, 108th Cong. (2003). *See also* Rice v. Cayetano, 528 U.S. 495, 518 (2000) (noting that it is a matter of some dispute, for instance, whether Congress may treat the Native Hawaiians as it does the Indian tribes).

[126] *See* 42 U.S.C. § 11701(20), which notes that:

> The United States has also recognized and reaffirmed the trust relationship to the Hawaiian people through legislation which authorizes the provision of services to Native Hawaiians, specifically, the Older Americans Act of 1965 [42 U.S.C.A. § 3001 et seq.], the Developmental Disabilities Assistance and Bill of Rights Act Amendments of 1987, the Veterans' Benefits and Services Act of 1988, the Rehabilitation Act of 1973 [29 U.S.C.A. § 701 et seq.], the Native Hawaiian Health Care Act of 1988, the Health Professions Reauthorization Act of 1988, the Nursing Shortage Reduction and Education Extension Act of 1988, the Handicapped Programs Technical Amendments Act of 1988, the Indian Health Care Amendments of 1988, and the Disadvantaged Minority Health Improvement Act of 1990.

Id.

[127] 20 U.S.C.A. § 7512 (12)(B),(D) (West Supp. 2003).

[128] *See* Jon M. Van Dyke, *The Political Status of the Native Hawaiian People*, 17 YALE L. & POL'Y REV. 95, 106 n.67 (1998) (providing a lengthy list of laws that classify Native Hawaiians as Native Americans and include them in Native American benefit programs).

[129] Morton v. Mancari, 417 U.S. 535, 554 (1974). The *Morton* Court recognized Native Americans' status as a political, not strictly a racial group. *Id.* The Court upheld an Indian-preference policy because it was political rather than racial in nature and reasonably and directly related to a legitimate, nonracially based goal. *Id.*

acknowledge this special status,[130] but the recent United States Supreme Court decision in *Rice v. Cayetano*[131] threatens this assumption. In *Rice*, the Court held that a provision in the Hawai'i Constitution, which limited voting for the Office of Hawaiian Affairs ("OHA")[132] to only Hawaiians, created an impermissible *racial* classification.[133] Harold Rice, a non-Hawaiian resident of Hawai'i brought suit against state officials and eventually won, alleging that the voting restriction violated the Fourteenth and Fifteenth Amendments.[134] The Court opted for a strict reading of the Fifteenth Amendment and refused to extend *Morton v. Mancari*[135] to Hawaiians in the voting context. The Court reasoned that "[a]ncestry can be a proxy for race . . . . The State, in enacting the [voting restriction,] has used ancestry as a racial definition for a racial purpose."[136] Thus, the Court struck down the OHA voting restriction. Most significantly, however, the *Rice* Court's declaration of "Hawaiian" as a racial classification left Hawaiians' political status in a state of uncertainty.

In contrast to the *Rice* Court's unprecedented holding, legislative treatment of Hawaiians, particularly the Joint Resolution that acknowledges the 100th anniversary of the January 17, 1893 overthrow of the Kingdom of Hawai'i ("Apology Resolution")[137] and the Native Hawaiian Education Act ("NHEA"),[138] indicates that Hawaiians are *not* a purely racial group. Far from being mere "recit[ations] [of] the purposes[,]"[139] the Apology Resolution is a joint resolution that has *the force of law*.[140] This resolution "acknowledges the

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[130] *See, e.g.*, 20 U.S.C.A. § 7512(12)(D) (stating that the political status of Native Hawaiians is comparable to that of American Indians and Alaskan Natives); 42 U.S.C. § 11701(19), (21) (noting the historical and unique legal relationship between the United States and the Hawaiian people).

[131] 528 U.S. 495 (2000).

[132] The Office of Hawaiian Affairs is a state-established office overseen by a board of trustees, and its general purpose is "[t]he betterment of conditions of Hawaiians [and native Hawaiians]." HAW. REV. STAT. § 10-3 (1993).

[133] *Rice*, 528 U.S. at 522 (remarking that a State may not deny or abridge the right to vote on account of race).

[134] *Id.* at 512. The Court interpreted the Fifteenth Amendment to prohibit the National Government and the States from denying or abridging the right to vote on account of race. *Id.*

[135] 417 U.S. 535 (1974). In *Mancari*, the Court upheld an Indian-preference policy because it was "political rather than racial in nature" and "reasonably and directly related to a legitimate, nonracially based goal." *Id.* at 554.

[136] *Rice*, 528 U.S. at 514-15.

[137] Overthrow of Hawaii (Apology Resolution), S.J. Res. 19, 103d Cong., 107 Stat. 1510 (1993).

[138] Native Hawaiian Education Act, 20 U.S.C. § 7901-7912 (1994) (current version at 20 U.S.C.A. § 7511-7517 (West Supp. 2003)).

[139] *Rice*, 528 U.S. at 518.

[140] *See* BLACK'S LAW DICTIONARY 1313 (7th ed. 1999). The term "joint resolution" is defined as "[a] legislative resolution passed by both houses. It has the force of law and is subject to executive veto." *Id.*

historical significance"[141] of the overthrow, and "expresses [Congress's] commitment to acknowledge the ramifications of the overthrow of the Kingdom of Hawai'i, in order to provide a proper foundation for reconciliation between the United States and the Native Hawaiian people . . . ."[142] As such, the resolution supports the decades-old assumption that there exists a special political—not necessarily racial—relationship between Hawaiians and the United States.

Congress passed the NHEA, which authorizes programs specifically for Native Hawaiians in the educational context, in 1994 and re-enacted it in 2002.[143] In the NHEA Findings section, Congress unequivocally treats Hawaiians as a group that is *not* strictly racial:

> Congress *does not extend services to Native Hawaiians because of their race*, but because of their unique status as the indigenous people of a once sovereign nation as to whom the United States has established a trust relationship; Congress has also delegated broad authority to administer a portion of the Federal trust responsibility to the State of Hawai'i; *the political status of Native Hawaiians is comparable to that of American Indians and Alaska Natives*[.][144]

Furthermore, the NHEA Findings also note that "[t]he *political relationship* between the United States and the Native Hawaiian people has been recognized and reaffirmed by the United States,"[145] as evidenced by the inclusion of Native Hawaiians in various federal programs and acts.[146] Such statements by Congress blur the already imprecise distinction between groups that should be considered racial and those that should not.

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[141] Apology Resolution, 107 Stat. at 1513 § 1(1).

[142] *Id.* at 1513 § 1(4).

[143] *See* 20 U.S.C. § 7903 (1994) (current version at 20 U.S.C.A. § 7513 (West Supp. 2003)), which states:

> It is the purpose of this part to—
>
> (1) authorize and develop supplemental educational programs to assist Native Hawaiians in reaching the Native Education Goals;
>
> (2) provide direction and guidance to appropriate Federal, State, and local agencies to focus resources, including resources made available under this part, on Native Hawaiian education . . . .

Id.

[144] 20 U.S.C.A. § 7512(12) (emphasis added).

[145] *Id.* at § 7512(13) (emphasis added).

[146] *See* 20 U.S.C. § 7902(13); 20 U.S.C.A. § 7512(13). *See, e.g.*, the Native American Programs Act of 1974 (42 U.S.C. 2991); the American Indian Religious Freedom Act (42 U.S.C. 1996); the National Museum of the American Indian Act (20 U.S.C. 80q); the Native American Graves Protection and Repatriation Act (25 U.S.C. 3001); the National Historic Preservation Act (16 U.S.C. 470); the Native American Languages Act (25 U.S.C. 2901); the American Indian, Alaska Native, and Native Hawaiian Culture and Art Development Act (20 U.S.C. 4401); the Workforce Investment Act of 1998 (29 U.S.C. 2801); the Older Americans Act of 1965 (42 U.S.C. 3001).

In addition to federal legislation, Hawai'i case law supports Native Hawaiian preference programs and adds further support for classifying Hawaiians as a non-racial group. Hawai'i state courts, the Hawai'i Federal District Court, and the Ninth Circuit have all upheld Hawaiian preference programs,[147] giving appropriate deference to Congress's intent and "appl[ying] the *Mancari* approach broadly to cover all native people[.]"[148] Although the Supreme Court in *Rice* declined to do so,[149] both the Hawai'i Federal District Court and the Ninth Circuit in *Rice* followed Hawai'i case law and held otherwise.[150] In recent cases, the Ninth Circuit has recognized that the *Rice* holding is a very "narrow ruling"[151] limited "only to the voting restriction."[152] Whether one believes "Hawaiian" is a racial classification or a political one,[153]

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[147] *See* Ahuna v. Department of Hawaiian Homelands, 64 Haw. 327, 339, 640 P.2d 1161, 1169 (1982) (drawing an analogy between native Hawaiian homesteaders and other native Americans); Naliielua v. State of Hawaii, 795 F. Supp. 1009, 1013 (D. Haw. 1990), *aff'd*, 940 F.2d 1535 (9th Cir. 1991) (finding the clear body of law surrounding preferences given to American Indians applicable to Hawaiians, and that the United States's commitment to the native people of this state, demonstrated through the Admission Act and the Hawaiian Homes Commission Act, 1920, does not create a suspect classification which offends the constitution); Pai 'Ohana v. United States, 875 F. Supp. 680, 697 n.35 (D. Haw. 1995), *aff'd*, 76 F.3d 280 (9th Cir. 1996) (noting that in *Naliielua*, the court analogized Native Americans and Hawaiians). For a more detailed discussion of cases upholding Hawaiian preferences, *see* Van Dyke, *supra* note 128, at 119-26.

[148] Van Dyke, *supra* note 128, at 119.

[149] Rice v. Cayetano, 528 U.S. 495, 518 (2000). The *Rice* majority remarked:

> If Hawai'i's restriction were to be sustained under *Mancari* we would be required to accept some beginning premises not yet established in our case law. Among other postulates, it would be necessary to conclude that Congress, in reciting the purposes for the transfer of lands to the State—and in other enactments such as the Hawaiian Homes Commission Act and the Joint Resolution of 1993 [Apology Resolution]—has determined that native Hawaiians have a status like that of Indians in organized tribes, and that it may, and has, delegated to the State a broad authority to preserve that status.

Id. While the Court declined to determine "whether Congress may treat native Hawaiians as it does the Indian tribes"—as a political group—it did not *preclude* treatment of Hawaiians as such. *Id.*

[150] Rice v. Cayetano, 963 F. Supp. 1547, 1554 (D. Haw. 1997), *rev'd*, 528 U.S. 495 (2000). Chief Judge David Alan Ezra, writing for the District Court of the District of Hawaii, stated:

> [T]here is abundant evidence that the guardian-ward relationship existed, and currently exists, between the federal Government and Native Hawaiians and between the State of Hawaii and Native Hawaiians. As it is the unique guardian-ward relationship that is paramount, not formal recognition, the court finds that *Morton* is equally applicable to Native Hawaiians . . . .

Id.

[151] Carroll v. Nakatani, 342 F.3d 934, 938 (9th Cir. 2003).

[152] Arakaki v. Cayetano, 324 F.3d 1078, 1087 (9th Cir. 2003).

[153] *See* David Waite, *School Admission Suit Hinges on 1866 Act*, HONOLULU ADVERTISER, http://the.honoluluadvertiser.com/article/2003/Aug/25/ln/ln01a.html (Aug. 25, 2003); *Kame-*

most would agree that the definition of "race," especially with respect to Hawaiians, is, at best, vague and inexact. Therefore, the best way to determine whether Hawaiians constitute an impermissible racial classification under § 1981 is to utilize Judge Karlton's test and ask *why* Kamehameha institutes a Hawaiian-preference admissions policy.

2. Kamehameha's preference policy perpetuates indigenous culture

The answer to § 1981's definition of "race" lies in the reasons for Kamehameha's Hawaiian preference policy. Those reasons, which derive from Princess Pauahi's will, are to "improve the capability and well-being of the Native Hawaiian people; to address the under-representation of Native Hawaiians in higher education, professional occupations, and leadership positions; and to help preserve and perpetuate indigenous culture and traditions."[154] These rationales are entirely consistent with § 1981 and the Thirteenth Amendment's pursuit of practical freedom for all citizens.

When Hawai'i was still an independent kingdom, the arrival of Western influences and the spread of the diseases they brought led to a rapid decline in the Hawaiian population.[155] Westerners also implemented their own system of education, which "did not . . . account for the ways in which Hawaiians had been accustomed to learning . . . [n]or did it account for their unique culture or heritage."[156] To address the needs of her people, Princess Pauahi "concluded that the survival and salvation of the Hawaiian people would have to come through education."[157] Thus, in her will, Princess Pauahi established Kamehameha to provide education to make "good and industrious men and

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hameha Schools Should Prepare for Adversity, HONOLULU STAR-BULLETIN, http://starbulletin.com/2003/08/21/editorial/editorials.html (Aug. 21, 2003); Jon M. Van Dyke, *Why Kamehameha Schools Will Prevail in its Effort to Limit Enrollment to Hawaiians Only*, HONOLULU STAR-BULLETIN, http://starbulletin.com/2003/08/24/editorial/special.html (Aug. 24, 2003).

[154] Memorandum in Support of Defendant's Motion for Summary Judgment and in Opposition to Plaintiff's Motion for Summary Judgment with Respect to Declaratory and Injunctive Relief at 64, Mohica-Cummings v. Kamehameha Schs. (D. Haw. Sept. 29, 2003) (Civil No. 03-00441).

[155] Memorandum in Support of Defendant's Motion for Summary Judgment and in Opposition to Plaintiff's Motion for Summary Judgment with Respect to Declaratory and Injunctive Relief at 14, Mohica-Cummings v. Kamehameha Schs. (D. Haw. Sept. 29, 2003) (Civil No. 03-00441).

[156] Memorandum in Support of Defendant's Motion for Summary Judgment and in Opposition to Plaintiff's Motion for Summary Judgment with Respect to Declaratory and Injunctive Relief at 15, Mohica-Cummings v. Kamehameha Schs. (D. Haw. Sept. 29, 2003) (Civil No. 03-00441).

[157] Memorandum in Opposition to Plaintiff's Application for a Temporary Restraining Order, attachment 2 at 5, Mohica-Cummings v. Kamehameha Schs. (D. Haw. Aug. 18, 2003) (Civil No. 03-00441).

women[,]"[158] and generally, for "the social, economic and spiritual advancement of Native Hawaiians through education."[159]

All programs and services must be consistent with the main purpose of the will.[160] Accordingly, Kamehameha's goals and priorities, as stated in its Strategic Plan 2000—2015, include the cultivation, perpetuation, and practice of "Hawaiian culture, values, history, language, oral traditions, literature, and *wahi pana*—significant cultural or historic places[.]"[161] An additional important goal is "the development of leaders who focus on service to others."[162] Kamehameha seeks to achieve those goals through "integrat[ion of] Hawaiian culture, heritage, language and traditions into the educational process . . . [while providing] a first-rate educational experience for Hawaiians."[163]

As discussed above, Kamehameha's main goals are to cultivate industrious men and women and promote Hawaiian culture.[164] No one disputes that these are admirable aims, but Kamehameha cannot effectively accomplish these goals without a Hawaiian preference admissions policy. The preference is an "essential component of [Kamehameha's] ability to achieve its objectives"[165] because it allocates Kamehameha's limited resources to those who need them the most—the Hawaiian children. By granting a preference to Hawaiians in education, Kamehameha promotes the very same social policy that Congress pursues with the NHEA and other Hawaiian entitlement programs.

To better respond to the educational needs of Hawaiians, Kamehameha has developed a research system called Policy Analysis and System Evaluation ("PASE"). PASE has three major functions: "to analyze, develop, and manage policies and procedures that guide [Kamehameha] operations, to conduct studies that determine the impact of [Kamehameha] policies and programs, and to research and inform [Kamehameha] staff and the public

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[158] THE TRUSTEES, KAMEHAMEHA SCHOOLS/BISHOP ESTATE, EXCERPTS FROM THE WILL AND CODICILS OF PRINCESS BERNICE PAUAHI BISHOP AND FACTS ABOUT THE KAMEHAMEHA SCHOOLS/BISHOP ESTATE 3-4 (1976), *also available at* http://www.ksbe.edu/endowment/bpbishop/will/allwill.html (last visited Nov. 26, 2003).

[159] KAMEHAMEHA SCHOOLS, THE WILL OF BERNICE PAUAHI BISHOP (2003).

[160] *See* KAMEHAMEHA SCHOOLS, 2000—2015 STRATEGIC PLAN 21 (2000), *at* http://www.ksbe.edu/pubs/stratplan/SPFNL.pdf (last visited Oct. 26, 2003).

[161] *Id.*

[162] *Id.*

[163] Memorandum in Opposition to Plaintiff's Application for a Temporary Restraining Order, attachment 2 at 20, Mohica-Cummings v. Kamehameha Schs. (D. Haw. Aug. 18, 2003) (Civil No. 03-00441).

[164] *See* KAMEHAMEHA SCHOOLS, 2000—2015 STRATEGIC PLAN 21 (2000), *at* http://www.ksbe.edu/pubs/stratplan/SPFNL.pdf (last visited Oct. 26, 2003).

[165] Memorandum in Opposition to Plaintiff's Application for a Temporary Restraining Order, attachment 2 at 22, Mohica-Cummings v. Kamehameha Schs. (D. Haw. Aug. 18, 2003) (Civil No. 03-00441).

about the well-being and needs of people of Hawaiian ancestry."[166] One PASE study, *Left Behind? The Status of Hawaiian Students in Hawai'i Public Schools*,[167] provides a revealing study of the dismal performance of Hawaiian children in the Hawai'i public school system. This study found that "Hawaiian students rank lowest among all major ethnic groups in the state's public school system by nearly every measure of educational engagement and success."[168] Hawaiian students are more likely to attend lower-quality schools with less-experienced teachers.[169] Hawaiians' standardized test scores are the lowest amongst all ethnic groups, and a disproportionately large percentage of Hawaiian students require special education.[170] More Hawaiian students come from economically disadvantaged backgrounds, and they have one of the lowest high school graduation rates.[171]

Kamehameha's preference policy addresses these problems in a specific, narrowly-tailored way that promotes practical freedom for Hawaiians. Kamehameha does not deprive non-Hawaiians of educational opportunity, because as a private entity, Kamehameha never granted non-Hawaiians an unconditional right to its resources in the first place. By focusing on education, Kamehameha targets the area that will most effectively bring about positive, actual change for Hawaiians. Kamehameha spends $220 million per

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[166] KAMEHAMEHA SCHOOLS, *Kamehameha Schools Policy Analysis and System Evaluation: About PASE, at* http://www.ksbe.edu/services/pase/about.html (last visited Nov. 19, 2003).

[167] Memorandum in Opposition to Plaintiff's Application for a Temporary Restraining Order, attachment 3, Mohica-Cummings v. Kamehameha Schs. (D. Haw. Aug. 18, 2003) (Civil No. 03-00441).

[168] Memorandum in Opposition to Plaintiff's Application for a Temporary Restraining Order, attachment 3 at 2, Mohica-Cummings v. Kamehameha Schs. (D. Haw. Aug. 18, 2003) (Civil No. 03-00441). The finding that Hawaiians lag behind other ethnic groups in education is "contrary to the high rates of literacy and integration of traditional culture and Western education achieved by Native Hawaiians through a Hawaiian language-based public school system established in 1840 by Kamehameha III." 20 U.S.C. § 7902(18) (1994) (current version at 20 U.S.C.A. § 7512(18) (West Supp. 2003)). This is in part due to "their unique cultural situation, such as different learning styles[.]" *Id.* at § 7902(15).

[169] Memorandum in Opposition to Plaintiff's Application for a Temporary Restraining Order, attachment 3 at 2, Mohica-Cummings v. Kamehameha Schs. (D. Haw. Aug. 18, 2003) (Civil No. 03-00441).

[170] Memorandum in Opposition to Plaintiff's Application for a Temporary Restraining Order, attachment 3 at 2, Mohica-Cummings v. Kamehameha Schs. (D. Haw. Aug. 18, 2003) (Civil No. 03-00441).

[171] Memorandum in Opposition to Plaintiff's Application for a Temporary Restraining Order, attachment 3 at 2, Mohica-Cummings v. Kamehameha Schs. (D. Haw. Aug. 18, 2003) (Civil No. 03-00441).

year[172] to provide quality education for 5,500 students.[173] While only 63% of Hawaiians in Hawai'i public schools graduate on time, more than 95% of Kamehameha's students complete high school.[174] One hundred percent of Kamehameha's graduates in 2001 were accepted to two or four-year colleges,[175] and "among [Kamehameha] alumni who attend college, approximately 51% receive at least a bachelor's degree, whereas, of Hawaiian non-Kamehameha graduates, only 38% of those who enrolled in college earned degrees.[176] These numbers illustrate Kamehameha's effectiveness in helping Hawaiians achieve for themselves the opportunity to lead satisfying, successful lives, whatever their definition of "satisfying" or "successful" may be. Education unlocks opportunities for fruitful, fulfilling careers, and this power is the essence of practical freedom.[177] Just as § 1981 was enacted to ensure practical freedom for a disadvantaged people, Kamehameha's preference policy is necessary to uphold Kamehameha "as an institution that would strengthen the self-image and restore the dignity of [Princess Pauahi's] people through education and provide them with the skills necessary to succeed in modern society."[178]

IV. CONCLUSION

Section 1981 is a statute with ambiguous implications, which is further complicated by a unique history of an indigenous peoples' overthrow that conflicts with Western civil rights case law. A flexible interpretation of "race"

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[172] *See* Rick Daysog, *Court Cases Rile Hawaiians*, HONOLULU STAR BULLETIN, Nov. 16, 2003, at A9.

[173] KAMEHAMEHA SCHOOLS, *Kamehameha Schools Legacy of a Princess*, *available at* http://www.ksbe.edu/about/facts.pdf (last visited Nov. 19, 2003). This is the number of students in the Kamehameha system from pre-school through grade 12. *Id.*

[174] Memorandum in Opposition to Plaintiff's Application for a Temporary Restraining Order, attachment 2 at 21, Mohica-Cummings v. Kamehameha Schs. (D. Haw. Aug. 18, 2003) (Civil No. 03-00441).

[175] KAMEHAMEHA SCHOOLS, *Kamehameha Schools Legacy of a Princess*, *at* http://www.ksbe.edu/about/facts.pdf (last visited Nov. 19, 2003).

[176] Memorandum in Opposition to Plaintiff's Application for a Temporary Restraining Order, attachment 2 at 21, Mohica-Cummings v. Kamehameha Schs. (D. Haw. Aug. 18, 2003) (Civil No. 03-00441).

[177] "[T]hose in Hawai'i with a bachelor's degree earn approximately 78% more than non-high-school graduates; those with education beyond the bachelor's degree level earn roughly 179% more than non-high-school graduates." Memorandum in Opposition to Plaintiff's Application for a Temporary Restraining Order, attachment 2 at 21, Mohica-Cummings v. Kamehameha Schs. (D. Haw. Aug. 18, 2003) (Civil No. 03-00441).

[178] Memorandum in Opposition to Plaintiff's Application for a Temporary Restraining Order, attachment 2 at 21, Mohica-Cummings v. Kamehameha Schs. (D. Haw. Aug. 18, 2003) (Civil No. 03-00441).

resolves this conflict by pursuing the common goal of practical freedom. This flexibility allows courts to consider the factual circumstances of each particular case, which is a necessary step to making a fair decision. Though the original intent of Congress may be modified through case law, § 1981's purpose remains intact. The underlying goal of practical freedom was consistent with a sense of justice in the 1800s, and providing disadvantaged individuals with "the skills necessary to succeed in modern society"[179] "surely accords with the prevailing sense of justice today."[180] Judge Alan C. Kay recognized practical freedom's continuing relevance in his November 17, 2003 oral ruling that upheld Kamehameha's admissions policy against a § 1981 challenge.[181] Noting that Kamehameha is a significant resource in meeting Native Hawaiians' educational needs, the court held that § 1981 should be read in harmony with the laws Congress has enacted giving Hawaiians preference to programs that address those needs.[182]

Although *Mohica-Cummings v. Kamehameha* has been settled,[183] *Doe v. Kamehameha* will be appealed in the Ninth Circuit,[184] so the validity of Kamehameha's preference policy remains uncertain. When considering an appeal, higher courts should remember that upholding Kamehameha's admissions policy honors the will of a princess as well as Congress's

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[179] Memorandum in Opposition to Plaintiff's Application for a Temporary Restraining Order, attachment 2 at 21, Mohica-Cummings v. Kamehameha Schs. (D. Haw. Aug. 18, 2003) (Civil No. 03-00441).

[180] Runyon v. McCrary, 427 U.S. 160, 191 (1976) (Stevens, J., concurring).

[181] *See* Order Denying Plaintiff's Motion for Partial Summary Judgment With Respect to Declaratory and Injunctive Relief and Granting Defendants' Counter-Motion for Summary Judgment at 93, Doe v. Kamehameha Schs. (D. Haw. Dec. 8, 2003) (Civil No. 03-00316). Judge Kay ruled from the bench on November 17, 2003 and filed a written order on December 8, 2003.

[182] *See* Order Denying Plaintiff's Motion for Partial Summary Judgment With Respect to Declaratory and Injunctive Relief and Granting Defendants' Counter-Motion for Summary Judgment at 84-86, Doe v. Kamehameha Schs. (D. Haw. Dec. 8, 2003) (Civil No. 03-00316).

[183] After oral arguments in *Mohica-Cummings* on November 18, 2003, Chief Judge David Alan Ezra took the case under advisement. Vicki Viotti, *Judge Postpones Ruling in Second Kamehameha Case*, HONOLULU ADVERTISER, Nov. 19, 2003, *available at* http://the.honolulu advertiser.com/article/2003/Nov/19/ln/ln01a.html. However, Kamehameha settled the case with Mohica-Cummings before Judge Ezra issued a written order. David Waite & Vicki Viotti, *Kamehameha Settles Kaua'i Boy's Lawsuit*, HONOLULU ADVERTISER, Nov. 29, 2003, at A1. Kamehameha has agreed to let Mohica-Cummings attend the school, and the boy's family will drop the lawsuit. Vicki Viotti & Mike Gordon, *Kamehameha Settlement OK'd*, HONOLULU ADVERTISER, Dec. 5, 2003, at B1. Judge Ezra approved the deal, noting that settlement is in Brayden Mohica-Cummings's best interest and "does not interfere with the public interest because legal review of [Kamehameha's] admissions policy will continue" through appeal of *Doe* in the Ninth Circuit. *Id.*

[184] Rick Daysog & Debra Barayuga, *Federal Judge Upholds Hawaiians-Only School*, HONOLULU STAR BULLETIN, Nov. 18, 2003, *available at* http://starbulletin.com/2003/11/18/ news/index1.html.

"commitment . . . to provide a proper foundation for reconciliation between the United States and the Native Hawaiian people."[185] Such reconciliation is long overdue, and will be greatly beneficial to not only the Hawaiian people, but to all the people of Hawai'i as well.

Kara M.L. Young[186]

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[185] Apology Resolution, S.J. Res. 19, 103d Cong., 107 Stat. at 1513 § 4 (1993).

[186] J.D. Candidate 2005, University of Hawai'i, William S. Richardson School of Law. Many thanks to David Paulson, Jennifer Carpenter, and the law review editors for their support and endless patience. Thanks also to Judge David Ezra and his entire staff for invaluable updates and insight. This paper would have been much more difficult without your help. Last but not least, thank you to my family and friends for cheering me on and up throughout this experience.